BEFORE THE WORLD TRADE ORGANIZATION

United States – Certain Measures on Steel and Aluminium Products (WT/DS552)

First Written Submission of Norway

1 MAY 2019

TABLE OF CONTENTS

Page

TABLE OF CASES

Short Title	Full Case Title and Citation
Argentina – Financial Services	Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R and Add.1, adopted 9 May 2016, DSR 2016:II, p. 431
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
Argentina – Footwear (EC)	Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000:II, p. 575
Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
Argentina – Textiles and Apparel	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
Australia – Apples	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985
Chile – Price Band System	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R, DSR 2002:VIII, p. 3127
China – Auto Parts	Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
China – Raw Materials	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, p. 3501
Colombia – Ports of Entry	Panel Report, *Colombia – Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535

Short Title	Full Case Title and Citation
Dominican Republic – Safeguard Measures	Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WT/DS415/R, WT/DS416/R, WT/DS417/R, WT/DS418/R, and Add.1, adopted 22 February 2012, DSR 2012:XIII, p. 6775
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
EC – Bananas III (Article 21.5 – EC)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS27/RW/EEC, 12 April 1999, and Corr.1, unadopted, DSR 1999:II, p. 783
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
EC – Seal Products	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
India – Additional Import Duties	Appellate Body Report, *India – Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/AB/R, adopted 17 November 2008, DSR 2008:XX, p. 8223
India – Quantitative Restrictions	Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R, DSR 1999:V, p. 1799
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201

Short Title	Full Case Title and Citation
Indonesia – Iron or Steel Products	Appellate Body Report, *Indonesia – Safeguard on Certain Iron or Steel Products*, WT/DS490/AB/R, WT/DS496/AB/R, and Add.1, adopted 27 August 2018
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
Japan – Semi-Conductors	GATT Panel Report, *Japan – Trade in Semi-Conductors*, L/6309, adopted 4 May 1988, BISD 35S/116
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
Korea – Dairy	Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R, DSR 2000:I, p. 49
Peru – Agricultural Products	Panel Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/R and Add.1, adopted 31 July 2015, as modified by Appellate Body Report WT/DS457/AB/R, DSR 2015:VII, p. 3567
Russia – Traffic in Transit	Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R and Add.1, circulated to WTO Members 5 April 2019
Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines)	Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines – Recourse to Article 21.5 of the DSU by the Philippines*, WT/DS371/RW and Add.1, circulated to WTO Members 12 November 2018
Turkey – Textiles	Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 19 November 1999, as modified by Appellate Body Report WT/DS34/AB/R, DSR 1999:VI, p. 2363
Ukraine – Passenger Cars	Panel Report, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/R and Add.1, adopted 20 July 2015, DSR 2015:VI, p. 3117
US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – COOL	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745

Short Title	Full Case Title and Citation
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, p. 1403
US – Poultry (China)	Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Shrimp	Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS58/AB/R, DSR 1998:VII, p. 2821
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R,

Short Title	Full Case Title and Citation
	WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
US – Wheat Gluten	Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, adopted 19 January 2001, as modified by Appellate Body Report WT/DS166/AB/R, DSR 2001:III, p. 779

LIST OF ABBREVIATIONS

Abbreviation	Description
AD/CVD	Anti-Dumping/Countervailing duties
BOF	Blast Oxygen Furnace
CSPV	Crystalline Silicon Photovoltaic Cells
DOC	Department of Commerce
DOD	Department of Defense
DSU	Dispute Settlement Understanding
EAF	Electric Arc Furnace
EU	European Union
GATT 1994	General Agreement on Tariffs and Trade 1994
HS	Harmonized Commodity Description and Coding System
HTS	Harmonized Tariff Schedule
MFN	Most Favoured Nation
MT	Metric ton
NAICS	North American Industry Classification System
OAF	Open Hearth Furnace
OECD	Organization for Economic Co-operation and Development
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
SPS Agreement	*Agreement on Sanitary and Phytosanitary Measures*
US	United States
USCBP	United States Customs and Border Protection
USD	US dollar
USITC	US International Trade Commission
VAT	Value Added Tax
WTO	World Trade Organization

LIST OF FIGURES

LIST OF TABLES

I. INTRODUCTION

1. Norway has brought this dispute, along with eight other co-complainants, because of the United States' failure to comply with its obligations under the *Agreement on Safeguards* ("*Safeguards Agreement*") and the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

2. On 8 March 2018, US President Trump issued "Presidential Proclamation 9704" and "Presidential Proclamation 9705", imposing additional tariffs on imported aluminium and steel products respectively, including on imports from Norway ("US aluminium and steel tariffs" or "the tariffs").

3. The Presidential Proclamations 9704 and 9705 rely on findings by the US Secretary of Commerce ("Commerce Secretary") that imports of aluminium and steel products into the United States are "weakening [the United States'] internal economy".[1] The Commerce Secretary's findings are presented in two reports, in which the Commerce Secretary concludes that, "taking into account the close relation of the economic welfare of the [United States] to our national security", aluminium and steel imports "threaten to impair the national security as defined in Section 232 of the Trade Expansion Act of 1962".[2]

4. In Presidential Proclamations 9704 and 9705, President Trump agrees with these findings and, in response, has "decided to adjust the imports of [aluminum/steel] articles" by imposing, respectively, a 25 percent and 10 percent tariff on those products "imported from all countries except Canada and Mexico".[3]

5. Subsequent to the adoption of Presidential Proclamations 9704 and 9705, President Trump issued additional Proclamations. In sum, these instruments increased the duty on steel imports from Turkey to 50 percent;[4] removed the exemptions granted to Canada and

[1] "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", DOC Report, 11 January 2018 ("DOC Steel Report"), **(Exhibit NOR-1)**pp. 26 and 55-57; "The Effects of Imports of Aluminium on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, As Amended", DOC Report, 17 January 2018 ("DOC Aluminium Report"), **(Exhibit NOR-2)**, pp. 5 and 104-106.
[2] DOC Steel Report, **(Exhibit NOR-1)**, p. 5; DOC Aluminium Report, **(Exhibit NOR-2)**, p. 5.
[3] Proclamation No. 9704, 83 Fed. Reg. 11,619, 15 March 2018 ("Proclamation No. 9704"), **(Exhibit NOR-3)**, para. 7; Proclamation No. 9705, 83 Fed. Reg. 11,625, 15 March 2018 ("Proclamation No. 9705"), **(Exhibit NOR-4)**, para. 8.
[4] Proclamation No. 9772, 83 Fed. Reg. 40,429, 15 August 2018 ("Proclamation No. 9772"), **(Exhibit NOR-5)**, paras. 6 and (1).

Mexico;[5] and granted various additional temporary and indefinite exemptions to certain other WTO Members.[6] Permanent exemptions from the steel tariffs were ultimately granted to Argentina, Australia, Brazil and South Korea, and from the aluminium tariffs to Argentina and Australia ("Country Exemptions").[7]

6. Additionally, Proclamations 9704 and 9705 provide for the possibility of certain aluminium and steel products being excluded from the tariffs ("Product Exclusions"), under conditions elaborated further in this submission.

7. Norway has not received an exemption. As of the date of this submission, therefore, Norwegian aluminium and steel exports to the United States are subject to a 25 percent tariff on steel products, and a 10 percent tariff on aluminium products, in excess of the rates set forth in the US schedule of concessions ("US Schedule").[8]

8. Norway is gravely concerned that the United States has adopted measures so evidently inconsistent with fundamental obligations of the rules-based multilateral trading system.

9. The WTO Membership has long understood that there are *specific circumstances* in which Members are entitled to raise trade barriers to protect a domestic industry from import competition. One of these circumstances arises where a domestic industry has been injured by an increase in imports brought about by a Member's WTO obligations. To this end, the Members negotiated the provisions of the *Safeguards Agreement* to allow for such relief

[5] Proclamation No. 9710, 83 Fed. Reg. 13,355, 28 March 2018 ("Proclamation No. 9710"), **(Exhibit NOR-6)**, paras. 4-10 and (1)-(4); Proclamation No. 9711, 83 Fed. Reg. 13,361, 28 March 2018 ("Proclamation No. 9711"), **(Exhibit NOR-7)**, paras. 4-10 and (1)-(4); Proclamation No. 9740, 83 Fed. Reg. 20,683, 7 May 2018 ("Proclamation No. 9740"), **(Exhibit NOR-8)**, paras. 4-7, (1) and (2); Proclamation No. 9758, 83 Fed. Reg. 25,849, 5 June 2018 ("Proclamation No. 9758"), **(Exhibit NOR-9)**, paras. 4-5 and (1), (2) and (4); Proclamation No. 9759, 83 Fed. Reg. 25,857, 5 June 2018 ("Proclamation No. 9759"), **(Exhibit NOR-10)**, paras. 4-5 and (1)-(2).

[6] Proclamation No. 9710, **(Exhibit NOR-6)**, paras. 4-10 and (1); Proclamation No. 9711, **(Exhibit NOR-7)**, paras. 4-10 and (1); Proclamation No. 9739, 83 Fed. Reg. 20,677, 7 May 2018 ("Proclamation No. 9739"), **(Exhibit NOR-11)**, paras. 4-5 and (1); Proclamation No. 9740, **(Exhibit NOR-8)**, paras. 4-6, (1) and (2); Proclamation No. 9758, **(Exhibit NOR-9)**, paras. 4-5 and (1), (2) and (4); Proclamation No. 9759, **(Exhibit NOR-10)**, paras. 4-5 and (1)-(2).

[7] Proclamation No. 9740, **(Exhibit NOR-8)** (permanent steel exemption for South Korea); Proclamation No. 9758, **(Exhibit NOR-9)** (permanent aluminium exemption for Australia and Argentina); Proclamation No. 9759, **(Exhibit NOR-10)** (permanent steel exemption for Australia, Argentina and Brazil).

[8] With regard to Product Exclusions, 367 product exclusion requests for Norwegian aluminium products have been filed as of 26 April 2019, 153 of which were granted and 214 of which are still under consideration. No product exclusion requests regarding Norwegian steel products have been filed to date.

through the imposition of so-called safeguard measures, when certain carefully defined procedures are followed, and substantive conditions are met.

10. When those procedures are followed and the conditions met, a safeguard measure may exceptionally be taken on a temporary basis, even though it would otherwise violate cornerstone principles of the GATT 1994. In this case, the US measures at issue are properly characterised under WTO law as safeguard measures. However, in imposing these tariffs, the United States has failed to respect its obligations under the *Safeguards Agreement*.

11. The Appellate Body has explained that a safeguard measure is "an exceptional remedy, which is not meant to protect the industry of the importing country from unfair or illegal trade practices".[9] To this end, safeguard measures are the only trade policy instrument that can be used by an importing Member to raise barriers against fair trade for the sake of temporarily protecting a domestic industry from import competition.

12. For this reason, the *Safeguards Agreement* imposes strict conditions on the circumstances and manner in which a Member may impose a measure taken for the protection of domestic industry. Without strict adherence to those conditions, the very animating purposes of the multilateral trading system – the reduction of barriers to import competition – would be frustrated.

13. In that regard, the US measures at issue also violate *cornerstone principles* of the GATT 1994. They impose duties on Norwegian imports at levels higher than those provided for in the US Schedule; they involve a consequential difference in the treatment of imports from different WTO Members; and, the United States administers its measures in an unreasonable and partial manner.

II. ROADMAP TO THIS SUBMISSION

14. This submission begins, in Section III, with an overview of the measures at issue: additional *ad valorem* duties on imports of certain aluminium and steel products; the exemption of selected WTO Members (and the agreement of quotas, in place of duties, with certain of those Members); and the exclusion of selected products, from those duties.[10] In Section IV, Norway explains that its claims in this dispute are justiciable under the Dispute

[9] Appellate Body Report, *US – Line Pipe*, para. 257.
[10] Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862), **(Exhibit NOR-12)**.

Settlement Understanding ("DSU"). In Section V, Norway summarises relevant factual background to this dispute.

15. In Section VI, Norway shows that the US measures at issue violate the *Safeguards Agreement*:

- *First*, in Section VI.A, Norway demonstrates that the US measures constitute "safeguard measures" within the meaning of Article 1 of the *Safeguards Agreement*;
- *Second*, in Section VI.B, Norway demonstrates that the US measures violate Articles 2.1, 2.2, 5.1, 11.1(b), 12.1, and 12.2 of the *Safeguards Agreement*.

16. In Section VII, Norway demonstrates that the US measures at issue also violate Articles I:1, II:1 and X:3(a) of the GATT 1994.

17. In Section VIII, Norway concludes with a request for findings.

III. OVERVIEW OF THE MEASURES AT ISSUE

18. The United States has imposed additional tariffs on imported aluminium and steel products through Presidential Proclamations, pursuant to authority conferred in Section 232 of the Trade Expansion Act of 1962 ("Section 232").[11]

19. Section 232 authorises the US Commerce Secretary to undertake an investigation to determine the effects of imports of a particular article of commerce on US "national security".[12] The Commerce Secretary is required to notify "immediately" the US Secretary of Defense ("Defense Secretary") of the initiation of any investigation pursuant to Section 232, and to consult with the Defense Secretary on "the methodological and policy questions raised" in any such investigation.[13] Further, upon the request of the Commerce Secretary, the Defense Secretary must provide "an assessment of the defense requirements of any article that is the subject of an investigation conducted under this section".[14]

20. At the conclusion of the investigation, the Commerce Secretary is required to submit a report to the President. The President is then authorised to negotiate agreements to limit or to restrict imports, or to "take such other actions as the President deems necessary to adjust the

[11] Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862), **(Exhibit NOR-12)**.
[12] Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862), **(Exhibit NOR-12)**.
[13] Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862), **(Exhibit NOR-12)**, (b)(1)(B) and (b)(2)(A)).
[14] Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862), **(Exhibit NOR-12)**, (b)(2)(B)).

imports of such article so that such imports will not threaten to impair the national security".[15]

21. The Commerce Secretary initiated investigations into the effect of imported aluminium and steel on US national security, pursuant to Section 232, on 26 and 19 April 2017, respectively. On those same dates, the Commerce Secretary notified the Defense Secretary of the initiation of these investigations.[16]

22. On 17 and 11 January 2018, the Department of Commerce ("DOC") released two reports (collectively, the "DOC Reports")

- "The Effects of Imports of Aluminum on the National Security" ("DOC Aluminium Report"), recommending, among other measures, a 7.7 percent tariff on imports of aluminium, with the objective of enabling US aluminium production to operate at an average of 80 percent of production capacity.[17]

- "The Effects of Imports of Steel on the National Security" ("DOC Steel Report"), recommending, among other measures, a 24 percent tariff on all steel imports, with the objective of enabling US steel production to operate at an average of 80 percent of production capacity;[18]

23. In each DOC Report, the Commerce Secretary "recognize[s] the close relationship of the economic welfare of the United States to its national security".[19] The DOC Reports "assess whether [aluminum/steel] is being imported 'in such quantities' and 'under such circumstances' as to 'threaten to impair the national security'".[20]

24. The measures at issue implement the DOC Reports' findings. They are: (1) the aluminium and steel tariffs at issue (Section III.A); (2) exemptions to the tariffs granted to certain WTO Members, and the quotas agreed, in place of duties, with certain of those Members (Section III.B); and (3) exclusions to the tariffs granted to certain aluminium and steel products (Section III.C). Norway describes each in turn.

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[15] Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862), **(Exhibit NOR-12)**, (c)(3)(A)(ii).
[16] *See* "The Effects of Imports of Aluminium on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, As Amended", DOC Report, 17 January 2018 ("DOC Aluminium Report"), **(Exhibit NOR-2)**, p. 18; DOC Steel Report, **(Exhibit NOR-1)**, p. 18.
[17] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 107.
[18] DOC Steel Report, **(Exhibit NOR-1)**, p. 59.
[19] DOC Steel Report, **(Exhibit NOR-1)**, p. 2; DOC Aluminium Report, **(Exhibit NOR-2)**, p. 2.
[20] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 2; DOC Steel Report, **(Exhibit NOR-1)**, p. 2.

A. The aluminium and steel tariffs at issue

25. On 8 March 2018, following the DOC's recommendations, President Trump issued Proclamation 9704 (aluminium) and Proclamation 9705 (steel), which imposed, respectively: (1) an additional 10 percent tariff on aluminium products from all countries, except Canada and Mexico, effective 23 March 2018;[21] and (2) an additional 25 percent tariff on steel products from all countries except Canada and Mexico, effective 23 March 2018.[22] These tariffs are in addition to "any other duties, fees, exactions, and charges applicable" to the subject aluminium and steel products.[23] According to the Proclamations, the measure at issue is designed to provide "relief" to US aluminium and steel industries.[24]

26. Each Presidential Proclamation asserts that "Canada and Mexico present a special case" as compared to other WTO Members.[25] To this end, the President determined that it was necessary "to continue ongoing discussions with these countries and to exempt [aluminium/steel] articles imports from these countries from the tariff, at least at this time".[26]

27. Presidential Proclamations 9704 and 9705 further state that any country with which the United States has a "security relationship" can approach the United States to discuss "alternative ways" to address the "threat" posed by the imports of steel from the country concerned, in which case the President may "remove or modify the restriction on steel articles imports from that country and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries".[27] The term "security relationship" is not defined in the Presidential Proclamations.

28. As explained below, the exceptions granted to Canada and Mexico were subsequently removed.

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[21] Proclamation No. 9704, **(Exhibit NOR-3)**, para. (2).
[22] Proclamation No. 9705, **(Exhibit NOR-4)**, para. (2).
[23] Proclamation No. 9705, **(Exhibit NOR-4)**, para. (2); Proclamation No. 9704, **(Exhibit NOR-3)**, para. (2).
[24] Proclamation No. 9705, **(Exhibit NOR-4)**, para. 7; Proclamation No. 9704, **(Exhibit NOR-3)**, para. 7.
[25] The Presidential Proclamations state that Canada and Mexico represent a "special case" on account of "our shared commitment to supporting each other in addressing national security concerns, our shared commitment to addressing global excess capacity for producing steel, the physical proximity of our respective industrial bases, the robust economic integration between our countries, the export of steel articles produced in the United States to Canada and Mexico and the close relation of the economic welfare of the United States to our national security". *See* Proclamation No. 9704, **(Exhibit NOR-3)**, para. (9); Proclamation No. 9705, **(Exhibit NOR-4)**, para. 10.
[26] Proclamation No. 9705, **(Exhibit NOR-4)**, para. 10; Proclamation No. 9704, **(Exhibit NOR-3)**, para. 9.
[27] Proclamation No. 9705, **(Exhibit NOR-4)**, para. 9; Proclamation No. 9704, **(Exhibit NOR-3)**, para. 8.

B. Exceptions to the aluminium and steel tariffs at issue, and quotas, granted to certain WTO Members

29. Subsequent to the adoption of Presidential Proclamations 9704 and 9705, President Trump issued a number of additional proclamations ("Exempting Proclamations"). These measures, in sum, removed the exceptions granted to Canada and Mexico, and granted a series of temporary and permanent exemptions from the tariffs at issue to certain other WTO Members ("Country Exemptions").

30. As of the date of this submission, the United States has granted permanent Country Exemptions from the steel tariffs to Argentina, Australia, Brazil and South Korea; and, Country Exemptions from the aluminium tariffs to Argentina and Australia.

31. For three of these countries – Argentina, Brazil and South Korea – the exemptions were granted in exchange for "agree[ment]" with these countries "on a range of measures" that restrict imports of subject aluminium and/or steel products from the countries in question.[28] Unlike Argentina, Brazil and South Korea, Australia and the US have not agreed on any import restrictions.[29]

32. The "range of measures" includes quotas on imports of aluminium and steel products originating in Argentina, and on imports of steel products originating in Brazil and South Korea. These quotas were agreed between each of these three WTO Members and the United States.[30]

33. The Country Exemptions are set out in the Table 1 below:

[28] Proclamation No. 9740, **(Exhibit NOR-8)**, para. 4; Proclamation No. 9758, **(Exhibit NOR-9)**, para. 5; Proclamation No. 9759, **(Exhibit NOR-10)**, para. 5.
[29] *See* "Section 232 Investigations: Overview and Issues for Congress", Congressional Research Service, 2 April 2019, **(Exhibit NOR-13)**, p. 8. *See also* "Australia rejects fears Trump steel tariff exemption subject to quotas", The Guardian, 2 May 2018, **(Exhibit NOR-14)**.
[30] Proclamation No. 9740, **(Exhibit NOR-8)**, paras. 4, 8 and (2); Proclamation No. 9758, **(Exhibit NOR-9)**, para. (2); Proclamation No. 9759, **(Exhibit NOR-10)**, paras. (2) and (4).

TABLE 1: COUNTRY EXEMPTIONS/QUOTAS FOR THE STEEL AND/OR ALUMINIUM TARIFFS AT ISSUE

Country Exemptions / Quotas		
Country	**Steel**	**Aluminium**
Australia	Exemption; no quota	Exemption; no quota
Argentina	Exemption; quota	Exemption; quota
Brazil	Exemption; quota	No exemption
South Korea	Exemption; quota	No exemption

34. Pursuant to these measures, aluminium and/or steel imports from each of these three countries are subject to product-specific (*i.e.*, per HTS code) "annual aggregate limits" or annual quota levels.[31] The level of the per-product quotas differ for each country, and are set out in the Annexes to the relevant Proclamations.[32] For a number of steel products, the quota is simply "0 kg".[33]

35. The aluminium and/or steel imports from these countries are also subject to a quarterly aggregate limit: each quarter, the subject countries cannot export to the United States: (1) an amount of aluminium products that exceeds 500,000 kg and 30 percent of the annual quota for each country; and/or (2) an amount of steel products that exceeds 500,000 kg and 30 percent of the annual quota for each country.[34]

[31] *See* Proclamation No. 9740, **(Exhibit NOR-8)**, Annex; Proclamation No. 9758, **(Exhibit NOR-9)**, para. (4) and Annex; Proclamation No. 9759, **(Exhibit NOR-10)**, para. (2) and Annex. *See also* U.S. Notes 16(e) and 19(e) of subchapter III, Chapter 99 of the Harmonized Tariff Schedule of the United States, **(Exhibit NOR-15)**.
[32] *See* Proclamation No. 9740, **(Exhibit NOR-8)**, Annex; Proclamation No. 9758, **(Exhibit NOR-9)**, Annex; and Proclamation No. 9759, **(Exhibit NOR-10)**, Annex. Up-to-date information on the quotas, *i.e.*, including on the degree to which they have been filled, is also available at the US Customs and Border Protection website.
[33] *See* Proclamation No. 9740, **(Exhibit NOR-8)**, Annex; and Proclamation No. 9759, **(Exhibit NOR-10)**, Annex.
[34] *See* U.S. Note 16(e) and U.S. Note 19(e) of subchapter III, Chapter 99 of the Harmonized Tariff Schedule of the United States, **(Exhibit NOR-15)**. *See also* Proclamation No. 9758, **(Exhibit NOR-9)**, Annex; and Proclamation No. 9759, **(Exhibit NOR-10)**, para. (3) and Annex.

36. As a result of these quotas, industry commentators have calculated that overall limitations on aluminium and/or steel imports from Argentina, Brazil and South Korea are as follows:

- Argentina's quotas amount to 100 percent of its three-year average of aluminium exports, and 135 percent of its three-year average of steel exports.[35]
- Brazil's quota amounts to 100 percent of its three-year average of semi-finished steel exports and 70 percent of its three-year average of finished steel exports.[36]
- South Korea's quota amounts to 70 percent of its three-year average of steel exports.[37]

C. Exemptions to the aluminium and steel tariffs at issue granted to certain products

37. Presidential Proclamations 9704 and 9705 also provide for the potential exclusion of subject aluminium/steel products from the scope of the measures ("Product Exclusions"). Specifically, these two Proclamations authorise the Commerce Secretary to "provide relief" from the additional duties on the following grounds: (1) the relevant product is not produced in the United States "in a sufficient and reasonably available amount";[38] (2) the relevant product is not produced in the United States in a "satisfactory quality";[39] *or* (3) there are "specific national security-based considerations" to exclude a specific product from the tariffs or the quota.[40]

38. Subsequently, for countries that had received an exemption in return for adopting quotas (*i.e.*, Argentina, Brazil and South Korea), President Trump issued Presidential Proclamations introducing a further product exclusion process. Specifically, a "directly affected party in the United States" may apply for "relief", so that the relevant imports from these Members are "excluded from the applicable quantitative limitation".[41] When the

[35] "Argentina agrees to cap steel at 135 percent of three-year average", World Trade Online, 3 May 2018, **(Exhibit NOR-16)**.
[36] "Brazil says U.S. tariffs and quotas unjust, still open to negotiate", Reuters, 2 June 2018, **(Exhibit NOR-17)**.
[37] "South Korea agrees to open auto market in return for exemption from steel tariffs", The Washington Post, 26 March 2018, **(Exhibit NOR-18)**. *See also* "President Donald J. Trump is Fulfilling His Promise on the United States–Korea Free Trade Agreement and on National Security", White House statement, 24 September 2018, **(Exhibit NOR-19)**.
[38] Interim Final Rule, Fed. Reg. 83, 46,026, 11 September 2018 ("September Interim Final Rule"), **(Exhibit NOR-20)**, pp. 46,058 and 46,062.
[39] September Interim Final Rule, **(Exhibit NOR-20)**, pp. 46058 and 460062.
[40] September Interim Final Rule, **(Exhibit NOR-20)**, pp. 46,058 and 46,062.
[41] Proclamation No. 9776, **(Exhibit NOR-21)**, paras. 3 and (1)-(2) and Proclamation No. 9777, 83 Fed. Reg. 45,025, 4 September 2018 ("Proclamation No. 9777"), **(Exhibit NOR-22)**, paras. 3-4 and (2)-(4).

volume limitation set forth in a country-specific quota, issued pursuant to the Country Exemptions, has been exhausted, a product that benefits from a Product Exclusion may still enter the United States.[42]

39. In Table 2 and Figure 1 below, Norway sets out the various relevant Presidential Proclamations.

TABLE 2: OVERVIEW OF THE PRESIDENTIAL PROCLAMATIONS IMPOSING THE MEASURES AT ISSUE

OVERVIEW OF THE PRESIDENTIAL PROCLAMATIONS			
Date	**Proclamation**	**Steel**	**Aluminium**
8 March 2018	9704[43]		**Imposes aluminium tariffs at issue on all WTO Members except Canada and Mexico.** **Product exclusion** for products not produced in the US in a satisfactory quantity or quality; or based on national security considerations.
	9705[44]	**Imposes steel tariffs at issue on all WTO Members except Canada and Mexico.** **Product exclusion** for products not produced in the US in a satisfactory quantity or quality; or based on national security considerations.[45]	
22 March 2018	9710[46]		Temporary exemption: Argentina, Australia, Brazil, Canada, Mexico, South Korea and the EU (until 1 May 2018).

[42] *See* Proclamation No. 9776, **(Exhibit NOR-21)**, para. (1); Proclamation No. 9777, **(Exhibit NOR-22)**, para. (1). The Secretary of Commerce is also authorised to grant relief from quota through a second, separate exclusion process limited to steel products, based on the existence of a contract that pre-dates March 8, 2018. *See* Proclamation No. 9777, **(Exhibit NOR-22)**, paras. 4 and (2).
[43] Proclamation No. 9704, **(Exhibit NOR-3)**, paras. 7, 9 and (2).
[44] Proclamation No. 9705, **(Exhibit NOR-4)**, paras. 8, 10 and (2).
[45] Proclamation No. 9705, **(Exhibit NOR-4)**, paras. 4 and (3).
[46] Proclamation No. 9710, **(Exhibit NOR-6)**, paras. 4-9 and (1).

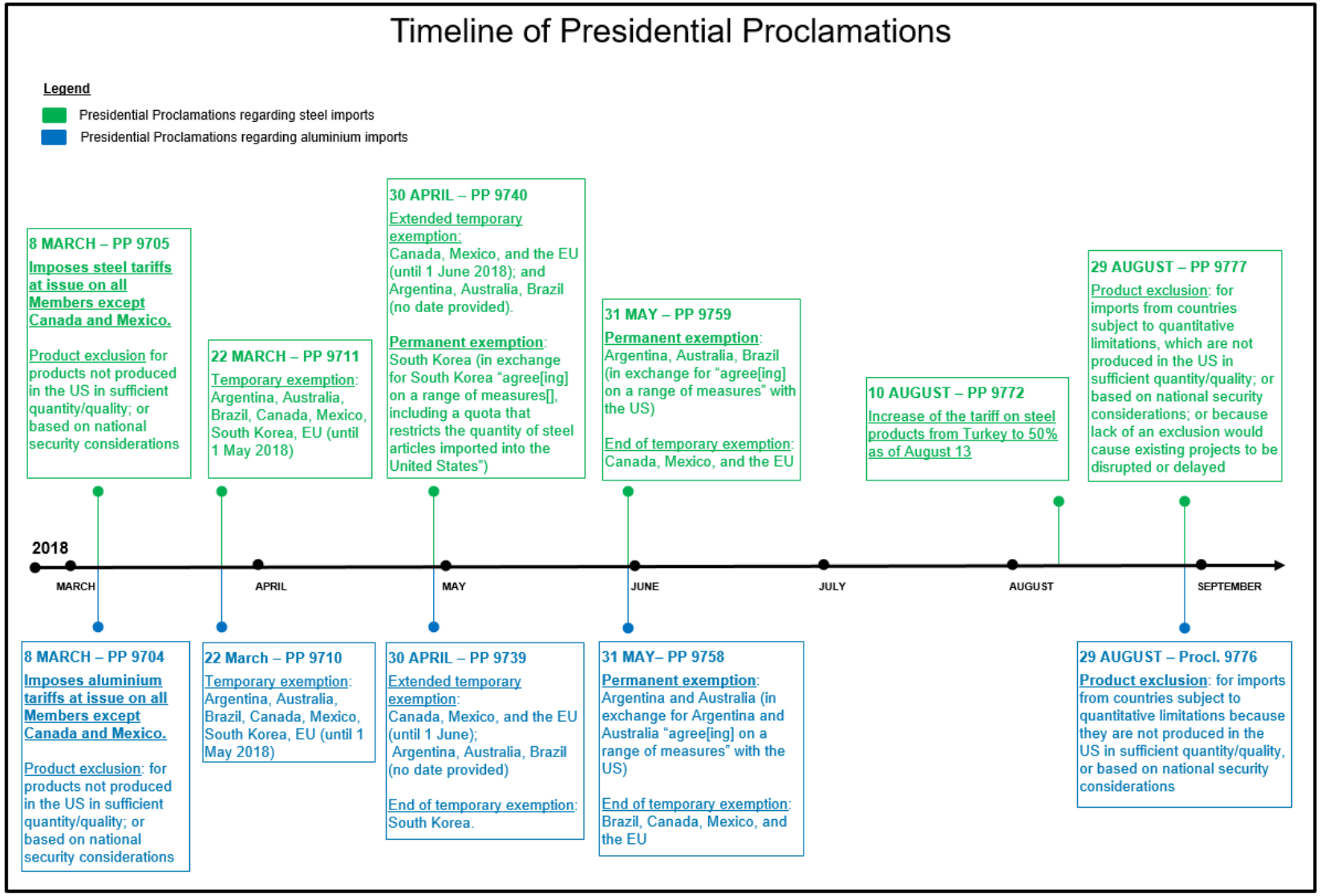
OVERVIEW OF THE PRESIDENTIAL PROCLAMATIONS			
Date	**Proclamation**	**Steel**	**Aluminium**
	9711[47]	Temporary exemption: Argentina, Australia, Brazil, Canada, Mexico, South Korea and the EU (until 1 May 2018).	
30 April 2018	9739[48]		Extends temporary exemption: Canada, Mexico and the EU (until 1 June 2018); and Argentina, Australia and Brazil (no date provided). End of temporary exemption: South Korea.
	9740[49]	Extends temporary exemption: Canada, Mexico, EU (until 1 June 2018); and Argentina, Australia and Brazil (no date provided). **Permanent exemption**: South Korea (in exchange for South Korea "agree[ing] on a range of measures[], including a quota that restricts the quantity of steel articles imported into the United States")	
31 May 2018	9758[50]		**Permanent exemption**: Argentina and Australia (in exchange for Argentina and Australia "agree[ing] on a range of measures" with the US); End of temporary exemption: Brazil, Canada, Mexico and the EU.
	9759[51]	**Permanent exemption:** Argentina, Australia and Brazil (in exchange for "agree[ing] on a range of measures" with the US[52]);	

[47] Proclamation No. 9711, **(Exhibit NOR-7)**, paras. 4-10 and (1)-(4).
[48] Proclamation No. 9739, **(Exhibit NOR-11)**, paras. 3-6 and (1)-(2).
[49] Proclamation No. 9740, **(Exhibit NOR-8)**, paras. 4-7 and (1)-(3).
[50] Proclamation No. 9758, **(Exhibit NOR-9)**, paras. 3-5 and (1)-(4).
[51] Proclamation No. 9759, **(Exhibit NOR-10)**, paras. 5 and (1)-(2).
[52] Proclamation No. 9759, **(Exhibit NOR-10)**, para. 5.

OVERVIEW OF THE PRESIDENTIAL PROCLAMATIONS			
Date	**Proclamation**	**Steel**	**Aluminium**
		End of temporary exemption: Canada, Mexico, and the EU.	
10 August 2018	9772[53]	Increases the *ad valorem* tariff on steel products from Turkey to 50 percent.	
29 August 2018	9776[54]		**Product exclusion**: for aluminium products not produced in the US in a satisfactory quality or quantity; or based on national security considerations.
	9777[55]	**Product exclusion**: for steel products from countries subject to quantitative limitations, which are not produced in the US in a satisfactory quality or quantity; or based on national security considerations; or because lack of an exclusion would cause existing projects to be disrupted or delayed.	

[53] Proclamation No. 9772, **(Exhibit NOR-5)**, paras. 6 and (1).
[54] Proclamation No. 9776, **(Exhibit NOR-21)**, paras. 3 and (1)-(3).
[55] Proclamation No. 9777, **(Exhibit NOR-22)**, paras. 3-4 and (1)-(4).

FIGURE 1: TIMELINE OF COUNTRY EXEMPTIONS AND PRODUCT EXCLUSIONS



IV. NORWAY'S CLAIMS ARE JUSTICIABLE UNDER THE DSU

40. The matter before this Panel comprises Norway's claims under the *Safeguards Agreement* and the GATT 1994 against the US measures at issue.[56] The United States has suggested that this matter is "not subject to review by a WTO panel" because its tariffs are adopted for reasons related to national security.[57] At the outset, Norway explains that this Panel can – and must – adjudicate the matter before it. This position is supported by the treaty text and existing WTO jurisprudence on the justiciability of Article XXI.[58]

41. Article 1.1 of the Dispute Settlement Understanding ("DSU") provides in relevant part:

> The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the "covered agreements").[59]

42. In other words, under the DSU, the Members have agreed that the WTO dispute settlement mechanism, as set forth in that Understanding, applies to any dispute brought under the "covered agreements".

43. Norway seeks adjudication of the present matter "pursuant to the consultation and dispute settlement provisions" of the *Safeguards Agreement* and the GATT 1994, both of which are covered agreements listed in Appendix 1 of the DSU.[60] The resolution of this dispute is, therefore, properly subject to the dispute settlement mechanism established in the DSU.

44. The core features of the DSU's rules and procedures are well known. Under Article 11 of the DSU, the Panel is under a legal obligation to make an "objective assessment" of the matter before it, following procedures that respect fully the due process rights of Norway and the United States. In so doing, under Article 7.2 of the DSU, the Panel "shall address" any relevant legal provisions "cited by the parties to the dispute", including Article XXI of the GATT 1994, should the United States invoke that provision in its submissions to the Panel.

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[56] *See* Norway's request for the establishment of a panel, WT/DS552/10. *See* Article XXII of the GATT 1994 entitled "Consultation"; Article XXIII of the GATT 1994 entitled "Nullification and Impairment"; and Article 14 of the *Safeguards Agreement*, entitled "Dispute Settlement".
[57] Statements by the United States at the Meeting of the WTO Dispute Settlement Body, 21 November 2018, **(Exhibit NOR-23)**, pp. 15, 34 and 36.
[58] Panel Report, *Russia – Measures Concerning Traffic in Transit*, addressed below at paras. 52-53.
[59] Article 1.1 of the DSU. Emphasis added.
[60] *See* Norway's request for the establishment of a panel, WT/DS552/10.

45. In addressing treaty provisions "cited by the parties", Article 3.2 of the DSU requires that the Panel adhere to "the customary rules of interpretation of public international law", which are set forth in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*.[61] In so doing, the Panel must take care to ensure, under Article 3.2 of the DSU, that its findings do not add to, or diminish, the rights and obligations of either Norway or the United States.

46. From statements made to the Dispute Settlement Body, the United States appears to consider that the usual rules and procedures set forth in the DSU do not apply, or apply differently, in disputes in which a respondent invokes Article XXI of the GATT 1994.

47. Although Norway appreciates the sensitivities surrounding this provision, Norway can see no basis for the United States' apparent position. Nothing in the GATT 1994 or the DSU suggests that different – or, indeed, no – dispute settlement rules and procedures apply when a respondent invokes Article XXI of the GATT 1994.

48. In that respect, Article XXI forms an integral part of the GATT 1994, which is listed in Appendix 1 of the DSU as a covered agreement. Thus, in principle, any disputes brought under the GATT 1994 are subject to the usual WTO dispute settlement mechanism set forth in the DSU.

49. Further, no special provision is made for the interpretation or application of Article XXI of the GATT 1994. Indeed, although the Members have identified a series of special provisions that prevail over the DSU, they have not identified Article XXI of the GATT 1994 among them. Specifically, Article 1.2 of the DSU provides that the rules and procedures in the DSU apply subject to the "special or additional rules and procedures" set forth in Appendix 2 of the DSU.[62] However, Article XXI of the GATT 1994 is not identified as a special provision that trumps the DSU.

50. As a result, the Members have decided that the usual rules and procedures, set forth in the DSU, apply in disputes in which a respondent invokes Article XXI of the GATT 1994.

51. Accordingly, if the United States decides to invoke Article XXI to defend the measures at issue, the Panel "shall address" this provision through an "objective assessment" of the issues raised by United States' claim of defence, consistent with Articles 7.2 and 11 of the DSU. In so doing, the Panel must interpret the words of Article XXI using the usual rules

[61] *See* Appellate Body Report, *US – Gasoline*, p. 17; Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 10.
[62] Appellate Body Report, *Guatemala – Cement I*, para. 65. *See also* Appellate Body Report, *US – FSC*, para. 159.

of interpretation, set forth in Article 3.2 of the DSU, that apply in a like manner to all other provisions of the covered agreements.

52. Finally, Norway notes that the reasoning proposed above is supported by the recent panel report in *Russia – Measures Concerning Traffic in Transit*, the first panel report to address the justiciability of Article XXI of the GATT 1994. In that dispute, Russia invoked Article XXI to justify its measures, and argued that the invocation of Article XXI rendered the matter non-justiciable by the panel.[63] The panel disagreed, holding that disputes in which Article XXI is invoked remain justiciable under WTO dispute settlement rules.[64]

53. Norway now turns to its claims regarding the US measures at issue under the *Safeguards Agreement* and the GATT 1994.

V. FACTUAL BACKGROUND TO NORWAY'S CLAIMS

54. As factual background to its claims, Norway *first* summarises the DOC's findings in its Reports. *Second*, Norway briefly explains the response issued by the US Department of Defense to the DOC's findings. *Third*, Norway sets out the product scope of the US measures at issue.

A. Summary of the DOC's findings

55. In the DOC Reports, the US Commerce Secretary recommended the aluminium and steel tariffs as a necessary response to the DOC Reports' findings that aluminium and steel imports to the United States are "weakening [the United States'] internal economy", and thus threaten to "impair the national security".[65] US President Trump imposed the aluminium and steel tariffs at issue in response to these recommendations.

56. In this section, Norway summarises the findings of *first* the DOC Aluminium Report; and *second* the DOC Steel Report.

[63] Panel Report, *Russia – Measures Concerning Traffic in Transit*, para. 7.57.
[64] The panel recalled its establishment on 21 March 2017, in accordance with Article 6, "with the standard terms of reference as provided in Article 7.1 of the DSU". The panel explained that "Article 7.2 of the DSU requires the Panel to address the relevant provisions in any covered agreements cited by the parties to the dispute". The panel concluded that "[g]iven the absence in the DSU of any special or additional rules of procedure applying to disputes involving Article XXI of the GATT 1994, Russia's invocation of Article XXI(b)(iii) is within the Panel's terms of reference for the purposes of the DSU". *See* Panel Report, *Russia – Measures Concerning Traffic in Transit*, paras. 7.55-7.56.
[65] DOC Steel Report, **(Exhibit NOR-1)**, p. 5; DOC Aluminium Report, **(Exhibit NOR-2)**, pp. 5 and 104.

1. Summary of the DOC Aluminium Report's findings

57. The DOC Aluminium Report assesses the impact of increased imports of aluminium products on the US aluminium industry. It does so using a variety of reference periods: in some cases, from 1970-2016; in others, from 2011-2017. Generally, the DOC's analysis is focused on the period 2011-2017. The DOC concludes that aluminium imports are threatening the economic welfare of the US aluminium industry, and threaten to impair "national security".[66]

58. At the outset, the DOC Aluminium Report provides a background on the aluminium industry. The Report explains that "the industry can be divided into three basic segments". These are: *first*, unwrought aluminium produced from smelting, *i.e.*, produced from raw materials (primary aluminium). *Second*, unwrought aluminium produced from recycled feedstock (secondary aluminium). *Third*, wrought products, which are manufactured from unwrought aluminium, however it is produced (downstream products). The DOC explains that secondary aluminium "is not the focus" of the Report.[67]

59. Following this explanation, the DOC Aluminium Report presents its findings in the following seven sections.[68]

60. Section A addresses the importance of aluminium articles to the US "national security", finding that downstream aluminium products are required for US "national defense" and for "U.S. critical infrastructure".[69] This section sets out the multiple uses for aluminium in, for example, weapons and aircraft manufacturing.

61. Section B contends that domestic aluminium is essential to "national security".[70] This section repeats the previous section's findings as to the uses of aluminium in national defense and critical infrastructure. It then explains that "to ensure U.S. national security response capability, the nation must have sufficient domestic aluminum production capacity to meet most commercial demand and to fulfil DoD contractor and critical infrastructure requirements".[71]

[66] DOC Aluminium Report, **(Exhibit NOR-2)**, pp. 5 and 104-106.
[67] DOC Aluminium Report, **(Exhibit NOR-2)**, pp. 21-22.
[68] A number of the findings in the DOC Steel Report which are presented under a single section, are presented in the DOC Aluminium Report in separate sections.
[69] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 23.
[70] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 39.
[71] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 40.

62. The remaining five sections of the DOC Aluminium Report address the impact of aluminium imports on the economic welfare of the US aluminium industry.

63. Section C finds that "domestic aluminum production capacity is declining".[72] It makes the following factual assertions (which are taken up further in the submission below):

- US primary aluminium production capacity is declining due to increased imports of primary aluminium, lower primary aluminium prices, and the "relatively high cost" of US primary production. As a result, a number of US primary aluminium smelters have shut down since 2012;[73]
- Canadian and US defense industrial bases are integrated, and Canada is the third largest producer of primary aluminium in the world. Hence, "Canadian primary aluminum production is important to the U.S. aluminum industry";[74]
- US secondary aluminium products account for a substantial portion of the total supply of aluminium in the United States; however, there is insufficient US secondary aluminium available to meet growing domestic demand for aluminium;[75]
- Downstream aluminium production is the largest segment of the overall aluminium industry in the United States, and is second only to China; US downstream aluminium production has either increased, stayed flat, or decreased, depending on the specific product. And, US downstream aluminium production is put at risk by "unfairly priced imports".[76]

64. Section D finds that "domestic production [of aluminium] is well below demand".[77] Section D asserts that, while US demand for, and consumption of, aluminium has steadily increased, domestic production has fallen: "U.S. import reliance increased because domestic primary aluminum production decreased, so U.S. manufacturers by necessity filled their materials needs through imports".[78]

65. Section E finds that "U.S. imports of aluminum are increasing".[79] Section E assesses increased imports on the basis of the following product categories: aluminium imports in aggregate; unwrought aluminium; bars, rods and profiles; plate, sheet and strip; foil; pipes

[72] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 40.
[73] DOC Aluminium Report, **(Exhibit NOR-2)**, pp. 40-48.
[74] DOC Aluminium Report, **(Exhibit NOR-2)**, pp. 51-52.
[75] DOC Aluminium Report, **(Exhibit NOR-2)**, pp. 49-50.
[76] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 57.
[77] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 59.
[78] DOC Aluminium Report, **(Exhibit NOR-2)**, pp. 51-52.
[78] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 62.
[78] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 62.
[79] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 63.

and tubes; and castings and forgings. Section E concludes, for each category, that imports have increased between 2013 and 2017.[80]

66. Sections F and G address the ratio of imports to exports of aluminium.[81] In sum, the "U.S. trade deficit is particularly pronounced in the primary (unwrought) aluminum industry segment", whereas for downstream aluminium products, the "U.S. trade balance varies" by product.[82]

67. Section H addresses "the impact of imports on the welfare of the U.S. aluminum industry".[83] This section addresses the following four points:

- The US primary aluminium sector has seen "precipitous" decline in employment from 2013-2017 (Section H.1);
- US aluminium companies are experiencing poor financial performance: "[a]s a result of adverse market conditions, in 2017, there are only two major players remaining in the domestic primary aluminum industry" (Section H.2);
- Companies with US smelting operations are unable to invest in research and development (Section H.3);
- Capital investments in the US aluminium industry have decreased (Section H.4);
- A "sharp drop" in aluminium prices has had "a devastating effect" on the US primary aluminium industry, causing a number of smelters to temporarily or permanently halt operations from 2014 – 2016 (Section H.5). [84]

68. On the basis of these findings, the DOC Aluminium Report concludes that "the present quantities and circumstance of aluminum imports … are 'weakening our internal economy'",[85] and it is thus necessary to reduce imports to a level that will "provide the opportunity for U.S. primary aluminum producers to restart idled capacity".[86] The Report also concludes that "[a] quota or tariff on downstream products is also necessary" because "downstream companies [also] face increased import penetration in many aluminum product sectors".[87]

[80] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 63-75.
[81] DOC Aluminium Report, **(Exhibit NOR-2)**, pp. 75 and 84.
[82] DOC Aluminium Report, **(Exhibit NOR-2)**, pp. 86 and 88.
[83] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 89.
[84] DOC Aluminium Report, **(Exhibit NOR-2)**, pp. 89-103.
[85] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 104.
[86] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 104.
[87] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 104.

2. Summary of the DOC Steel Report's findings

69. The DOC Steel Report assesses the impact of increased imports on the US domestic steel industry. Like the DOC Aluminium Report, it does so using a variety of reference periods: in some cases, from 1975-2016; in others, from 2011-2017. Generally, the DOC's analysis is also focused on the period 2011-2017.

70. The investigation covers two categories of product: (1) semi-finished products; and (2) finished products. The DOC Report divides the finished products into four sub-categories: (1) carbon and alloy flat products; (2) carbon and alloy long products; (3) carbon and alloy pipe and tube products; and (4) stainless products.[88]

71. The Report concludes that steel imports are "substantially impact[ing]" the "economic welfare" of the US steel industry, and threaten to impair "national security".[89] The DOC Steel Report addresses the same factors as the DOC Aluminium Report, but presents these findings in four sections.

72. Section A asserts the importance of steel articles to the US "national security", finding that steel articles are "critical to the nation's overall defense objectives", and are "needed to satisfy requirements" for critical infrastructure.[90]

73. In Section A.3, the Report contends that domestic steel production is essential for "national security". The Report asserts that "the history of U.S. Government actions to ensure the continued viability of the U.S. steel industry" demonstrates that "there has been consensus that domestic steel production is vital to national security".[91] The section concludes by noting that "domestic steel production depends on a healthy and competitive U.S. [steel] industry", and reiterates the importance of steel articles for the "critical industries" sector.[92]

74. The remaining three sections of the Report address the impact of steel imports on the economic welfare of the US steel industry.

75. Section B finds that "imports in such quantities as are presently found adversely impact the economic welfare of the U.S. steel industry".[93] This conclusion is based on an

[88] DOC Steel Report, **(Exhibit NOR-1)**, footnote 22, p. 17.
[89] DOC Steel Report, **(Exhibit NOR-1)**, pp. 55-57.
[90] DOC Steel Report, **(Exhibit NOR-1)**, p. 23.
[91] DOC Steel Report, **(Exhibit NOR-1)**, p. 24.
[92] DOC Steel Report, **(Exhibit NOR-1)**, pp. 25-27.
[93] DOC Steel Report, **(Exhibit NOR-1)**, p. 27.

assessment of a variety of factors, including, *inter alia*: an increase in steel imports (Section B.1); the high market share of imports (Section B.2); a high import-to-export ratio (Section B.3); relatively high prices for domestically-produced steel (Section B.4); the closure of US steel mills (Section B.5); and declining unemployment in the US steel industry (Section B.6).[94]

76. Section C finds that "displacement of steel by excessive quantities of imports has the serious effect of weakening [the US] internal economy".[95] This section asserts that US steel production capacity is "stagnant", that production is "well below demand", and that current utilisation rates "are well below economically viable levels".[96] This section concludes that "declining steel production facilities limits capacity available for a national emergency".[97]

77. Section D finds that "global excess steel capacity is a circumstance that contributes to the weakening of the domestic economy".[98] This section asserts that "global excess steel capacity" increases import competition to the US, "further weaken[ing] the internal economy".[99]

78. On the basis of these findings, the DOC Steel Report concludes that "[i]t is evident that the U.S. steel industry is being substantially impacted by the current levels of imported steel", and recommends that "the President take corrective action pursuant to the authority granted by Section 232".[100]

B. US Department of Defense response to the DOC's findings

79. To recall, Section 232 required the Commerce Secretary to notify "immediately" the Defense Secretary of the initiation of the investigation, and to consult with the Defense Secretary on the "methodological and policy questions raised" in the investigation.[101]

80. To this end, in February 2018, the US Department of Defense ("DOD") released a memorandum ("DOD Memorandum"), which presented "the consolidated position from the

[94] DOC Steel Report, **(Exhibit NOR-1)**, pp. 27-36.
[95] DOC Steel Report, **(Exhibit NOR-1)**, p. 41.
[96] DOC Steel Report, **(Exhibit NOR-1)**, pp. 41-49.
[97] DOC Steel Report, **(Exhibit NOR-1)**, p. 49.
[98] DOC Steel Report, **(Exhibit NOR-1)**, p. 51.
[99] DOC Steel Report, **(Exhibit NOR-1)**, p. 53.
[100] DOC Steel Report, **(Exhibit NOR-1)**, p. 57.
[101] Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862), **(Exhibit NOR-12)**, (b)(1)(B) and (b)(2)(A)).

DOD", in response to the DOC's Section 232 investigation into aluminium and steel imports.[102]

81. The DOD Memorandum explains that:

> The U.S. military requirements for steel and aluminum each only represent about three percent of U.S. production. Therefore, the DOD does not believe that the findings in the reports impact the ability of DOD programs to acquire the steel or aluminum necessary to meet national defense requirements.[103]

82. The DOD Memorandum also explains that "the DOD continues to be concerned about the negative impact on our key allies regarding the recommended options within the reports".[104]

83. Notwithstanding the DOD's views, President Trump proceeded, on 8 March 2018, to issue Presidential Proclamations 9704 and 9705 imposing the aluminium and steel tariffs.

C. Product scope of the measures at issue

84. Following the DOC's recommendations, the United States imposed the tariffs at issue on the aluminium and steel products subject to the DOC's investigation.

85. To this end, the aluminium tariffs apply to a wide range of aluminium products, as defined in the US Harmonized Tariff Schedule ("HTSUS"):[105]

- All unwrought aluminium products falling under HTS 7601, which includes primary and secondary unwrought aluminium;

  As the World Customs Organization's explanatory notes[106] confirm, HS 7601 covers unwrought aluminium "obtained by casting electrolytic aluminium" (*i.e.*, primary); *or* "by remelting metal waste or scrap" (*i.e.*, secondary).[107] The scope of HS 7601 is confirmed by a number of rulings of the US Customs and Border Protection.[108]

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[102] Memorandum for Secretary of Commerce, "Response to Steel and Aluminum Policy Recommendations", Secretary of Defense, **(Exhibit NOR-24)**.
[103] Memorandum for Secretary of Commerce, "Response to Steel and Aluminum Policy Recommendations", Secretary of Defense, **(Exhibit NOR-24)**.
[104] Memorandum for Secretary of Commerce, "Response to Steel and Aluminum Policy Recommendations", Secretary of Defense, **(Exhibit NOR-24)**.
[105] *See* Proclamation No. 9704, **(Exhibit NOR-3)**, para. (1) and Annex. The product scope of the DOC's investigation is provided at p. 20 of the DOC Aluminium Report.
[106] Explanatory notes comment and clarify the scope of each heading and subheading by providing, *inter alia*, a list of main included or excluded products and guidance for product identification. *See* World Customs Organization, Guide to Explanatory Notes, **(Exhibit NOR-25)**.
[107] Explanatory Note to HS 7601, World Customs Organization, **(Exhibit NOR-26)**.
[108] The United States Customs and Border Protection rulings consistently classify recycled, *i.e.*, secondary unwrought aluminium products, as falling under HTS 7601. *See, e.g.*, USCBP Ruling N300053, 4 September 2018, **(Exhibit NOR-27)** (addressing "alloyed aluminum remelt scrap ingots" under HTS 7601); USCBP

- All downstream aluminium products falling under HTS 7604 (bars, rods and profiles); HTS 7605 (wire); HTS 7606-7607 (flat-rolled products); HTS 7608-7609 (extruded products); and HTS 7616.99.51.

86. Together, these HTS codes cover all industry segments: (1) primary unwrought aluminium products; (2) secondary unwrought aluminium products; and (3) downstream wrought aluminium products.

87. The steel tariffs apply to a similarly broad scope of steel products as defined in the HTS:[109]

- All carbon and alloy semi-finished steel products (HTS 7206.10; HTS 7206.90; HTS 7207.11; HTS 7207.12; HTS 7207.19; HTS 7207.20; HTS 7224.10; HTS 7224.90);

- All carbon and alloy finished steel products falling under the following categories: (1) flat-rolled products (HTS 7208-7212 and 7225-7226); (2) long products, including bars, rods and rails (HTS 7213-7215, 7227-7228, and 7216, except subheadings 7216.61.00, 7216.69.00 and 7216.91.00; 7217; 7229; 7301.10.00; 7302.10; 7302.40.00; 7302.90.00); (3) tube and pipe products (HTS 7304-7306); and (4) stainless steel products (HTS 7218-7223).

88. Thus, the steel tariffs cover both semi-finished and finished steel products.

VI. THE MEASURES AT ISSUE ARE INCONSISTENT WITH THE *SAFEGUARDS AGREEMENT*

89. This Section will address Norway's claims under the *Safeguards Agreement*. *First*, Norway demonstrates that the measures at issue are subject to the United States' obligations in the *Safeguards Agreement*. *Second*, Norway sets out its legal claims that the measures at issue are inconsistent with Articles 2.1, 2.2, 5.1, 11.1(b), 12.1, and 12.2 of the *Safeguards Agreement*.

Ruling NYC83128, 9 January 1998, **(Exhibit NOR-28)** (addressing aluminium alloy sows "made from 830 scrap aluminum which is melted and poured into sow moulds" under HTS 7601); USCBP Ruling N301439, 21 November 2018, **(Exhibit NOR-29)** (addressing billets made from "aluminium alloy scrap" under HTS 7601). As noted above, the product scope of the investigation is set out at p. 20 of the DOC Aluminium Report, which correctly states that HTS 7901 covers "unwrought aluminum" generally. However, at p. 22, the DOC Aluminium Report suggests that secondary unwrought aluminium falls under HTS 7602, which is not subject to the tariffs, and not HTS 7601. However, HTS 7602 covers "aluminum waste and scrap", which is the input product for secondary aluminium; HTS 7602 does not cover secondary unwrought aluminium which is produced through the recycling of aluminium waste and scrap. In other words, waste and scrap aluminium fall under HTS 7602; however, once they are recycled into secondary unwrought aluminium, the product falls under HTS 7601. *See also* Explanatory Note to HS 7602, World Customs Organization, **(Exhibit NOR-30)** (confirming that HS 7602 does not cover "ingots or similar unwrought forms, cast from remelted aluminium waste and scrap", because these products fall under HS 7601). *See also* USCBP Ruling NY808064, 21 April 1995, **(Exhibit NOR-31)**, which explains that aluminium imported *as scrap* falls under HS 7602.

[109] *See* Proclamation No. 9705, **(Exhibit NOR-4)**, para. (1) and Annex.

A. The *Safeguards Agreement* applies to the measures at issue

90. In this Section, Norway demonstrates that the measures at issue are subject to the United States' obligations in the *Safeguards Agreement*, because they constitute "safeguard measures" within the meaning of Article 1 of that *Agreement*. Below, Norway *first* explains that domestic law characterisations of a measure do not determine which WTO obligations apply to that measure. *Second*, Norway sets out the legal standard governing the applicability of the *Safeguards Agreement* to a measure. *Third*, Norway explains why the US measures at issue constitute "safeguard measures".

1. Legal standard governing the applicability of WTO obligations

91. In communications to the Committee on Safeguards, the United States has asserted that the aluminium and steel tariffs are "not safeguard measures" and are, thus, not subject to the obligations in the *Safeguards Agreement*.[110] By way of explanation, the United States notes that, in imposing the tariffs, 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".[111]

92. However, it is well-established that municipal law classifications are not determinative of legal questions raised in WTO dispute settlement proceedings, in particular how a measure is characterised under WTO law, including which WTO obligations apply to a measure. As the Appellate Body has explained, "the manner in which the municipal law of a WTO Member classifies an item cannot, in itself, be determinative of the interpretation of provisions of the WTO covered agreements".[112] Instead, the characterisation of a measure under WTO law must be based on the measure's "content and substance", and "not merely on its form or nomenclature".[113]

93. It is not uncommon for a respondent to assert, based on domestic law classifications, that a measure is not subject to particular WTO obligations. In that event, as the panel in *Dominican Republic – Safeguards* has explained, "the determination on applicability [of the provisions of the covered agreements to the challenged measures] must be a prior step to the

[110] Communication from the United States, 4 April 2018, G/SG/168 (internal citations omitted).
[111] Communication from the United States, 4 April 2018, G/SG/168 (internal citations omitted).
[112] *See* Appellate Body Reports, *US – Softwood Lumber IV*, para. 65; *China – Measures Affecting Automobile Parts*, footnote 244.
[113] *See* Appellate Body Report, *US – Continued Zeroing*, footnote 87.

analysis of whether the impugned measures are consistent with the obligations contained in the cited provision[s]".[114]

94. This "prior step" of determining the applicability of the relevant covered agreements is one frequently faced by panels and the Appellate Body:

- In *US – 1916 Act*, the United States argued that the measure was not subject to the obligations in the *Anti-Dumping Agreement*, because it did not constitute "specific action against dumping". The Appellate Body disagreed on the basis that, notwithstanding its domestic legal characterisation, the "constituent elements of dumping" were present in the measure;[115]

- In *Australia – Apples*, the Appellate Body found that whether a measure constitutes an SPS measure within the meaning of Annex 1(a) of the *SPS Agreement* "must be ascertained not only from the objectives of the measure as expressed by the responding party, but also from the text and structure of the relevant measure, its surrounding regulatory context, and the way in which it is designed and applied";[116]

- In *EC – Seal Products*, the Appellate Body "emphasized that a determination of whether a measure constitutes a technical regulation 'must be made in the light of the characteristics of the measure at issue and the circumstances of the case'". The Appellate Body found that "[i]n determining whether a measure is a technical regulation, a panel must therefore carefully examine the design and operation of the measure while seeking to identify its 'integral and essential' aspects";[117] and,

- In *Thailand – Cigarettes (Article 21.5 – Philippines)*, Thailand argued that criminal charges alleging underpayment of customs duties was not subject to the obligations in the *Customs Valuation Agreement*, because the measure was criminal in nature. The panel disagreed, finding that notwithstanding its domestic legal characterisation, the measure contained the constituent elements of "customs valuation".[118] The panel made it assessment based on the text of the measure and its surrounding domestic legal framework.[119]

95. In each instance, a respondent's characterisation of the measure at issue was not determinative of the applicable WTO obligations. Instead, the assessment was based on the content and substance of the measure, clarified according to: the text and structure of the

[114] Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.58, referring to Appellate Body Report, *China – Auto Parts*, para. 139; Appellate Body Report, *Canada – Autos*, para. 151; and Appellate Body Report, *US – Shrimp*, para. 119.
[115] Appellate Body Report, *US – 1916 Act*, para. 130.
[116] Appellate Body Report, *Australia – Apples*, para. 173.
[117] Appellate Body Reports, *EC – Seal Products*, para. 5.19, citing Appellate Body Report, *EC – Asbestos*, para. 72. Emphasis added.
[118] Panel Report, *Thailand – Cigarettes (Philippines – Article 21.5)*, paras. 7.673-7.683.
[119] Panel Report, *Thailand – Cigarettes (Philippines – Article 21.5)*, paras. 7.619-7.683.

measure; the surrounding regulatory context; the domestic legal framework in which the measure is adopted; and the design and application of the measure.

96. In sum, if a measure is, in "content and substance", a "safeguard measure", a Member cannot exclude the application of the *Safeguards Agreement* by characterising the measure as something *other than* a "safeguard measure" under its own domestic law. Otherwise, the Member's own characterisation of the measure would be determinative of the WTO obligations applicable to the measure. In short, a Member would be able to decide for itself which WTO obligations apply to its measures.

97. Instead, a panel must decide whether a covered agreement – here the *Safeguards Agreement* – applies to a measure using the substantive criteria in WTO law. *First*, a panel must ascertain the legal standard in the agreement governing the applicability of the agreement. *Second*, a panel must assess the facts, in particular the nature and character of the measures at issue, and apply the legal standard to the relevant facts. Below, Norway addresses each point in turn.

2. Legal standard governing the applicability of the *Safeguards Agreement*

98. Article 1 of the *Safeguards Agreement* provides that "this Agreement establishes rules for the application of the safeguard measures which shall be understood to mean *those provided for in Article XIX of the GATT 1994*".[120]

99. Norway, therefore, turns first to Article XIX to establish the scope of application of the *Safeguards Agreement*. Article XIX provides:

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

100. As the Appellate Body observed in *Indonesia – Safeguards*, Article XIX is not styled as a definitional provision: "Article XIX:1(a) does not expressly define the scope of measures

[120] Emphasis added.

that fall under the WTO safeguard disciplines".[121] Instead, Article XIX serves to impose obligations on the adoption of safeguard measures. These obligations are considerably developed in the *Safeguards Agreement.*

101. Given the nature of Article XIX, the Appellate Body cautioned against conflating the factors that properly define a safeguard measure (and, hence, the applicability of the *Safeguards Agreement*), with those that govern the WTO-consistency of such measures:

> [I]t is important to distinguish between the features that determine whether a measure can be properly characterised as a safeguard measure from the conditions that must be met in order for the measure to be consistent with the Agreement on Safeguards and the GATT 1994. Put differently, it would be improper to conflate factors pertaining to the legal characterization of a measure for purposes of determining the *applicability* of the WTO safeguard disciplines with the substantive conditions and procedural requirements that determine the WTO-*consistency* of a safeguard measure.[122]

102. The Appellate Body's distinction is "important" indeed: a measure may be properly regarded as a safeguard, even though it does not meet the WTO obligations governing safeguard measures. Indeed, if this were not the case, a measure could, by definition, be subject to WTO safeguard obligations solely if it complied with those obligations and, correspondingly, there could, by definition, never be a WTO-inconsistent safeguard measure. The Appellate Body rightly rejected this approach.

103. Although the provisions of Article XIX are not definitional, the Appellate Body found that they shed light on the character of a safeguard measure. The Appellate Body found that the types of measures "provided for" in Article XIX are those "designed to secure a specific *objective*, namely preventing or remedying serious injury to the Member's domestic industry".[123] To be a safeguard measure, therefore, a challenged measure must have "a demonstrable link to the objective of preventing or remedying injury".[124]

104. Connected to this objective, the Appellate Body also identified two "constituent features" of a "safeguard measure": (1) it must suspend/withdraw a GATT 1994

[121] Appellate Body Report, *Indonesia – Safeguards*, para. 5.57. Article XIX of the GATT 1994 may be contrasted with truly definitional treaty provisions, such as Article 1.1 of the *SCM Agreement* or paragraph 1 of Annex A of the *SPS Agreement*, whose function is limited exclusively to setting forth the required features of a particular type of measure, without imposing any obligations on the measure in question.
[122] Appellate Body Report, *Indonesia – Safeguards*, para. 5.57.
[123] Appellate Body Report, *Indonesia – Safeguards*, para. 5.56.
[124] Appellate Body Report, *Indonesia – Safeguards*, para. 5.56.

obligation/concession; and (2) it must be designed to prevent or remedy serious injury to a domestic industry caused or threatened by increased imports.[125]

105. The Appellate Body found that its view that the application of the *Safeguards Agreement* turns on the "objective" of the measure was "buttressed" by the *preamble* to the *Agreement*, which stresses "the importance of structural adjustment", and reiterates "the need to enhance rather than limit competition in international markets".[126]

106. Article 12.1 of the *Safeguards Agreement* further confirms the Appellate Body's interpretation. This provision identifies certain acts, by an importing Member, that trigger the application of notification obligations in the *Safeguards Agreement*. These include the following acts: (1) "initiating an investigatory process relating to serious injury or threat thereof" to a domestic industry, "and the reasons for it"; and (2) "making a finding of serious injury of threat thereof caused by increased imports". These notification obligations underscore the critical role in safeguards actions of a finding of serious injury to a domestic industry, caused by imports.

3. The measures at issue are "safeguard measures" under Article 1 of the *Safeguards Agreement*

107. In this subsection, Norway demonstrates that the steel and aluminium tariffs at issue are "safeguard measures" because they present these two "constituent features": (1) they suspend, in whole or in part, a GATT 1994 obligation; *and* (2) they are designed to protect the domestic industry from injury caused or threatened by increased imports of the relevant aluminium and steel products.

a. The aluminium and steel tariffs at issue suspend a GATT 1994 obligation

108. With respect to the first "constituent feature", the aluminium and steel tariffs suspend the obligations in Article II:1(a) and (b) of the GATT 1994, for the reasons explained in Section I.A below.

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[125] Appellate Body Report, *Indonesia – Safeguards*, para. 5.60. In this regard, the Appellate Body's reasoning is similar to the Appellate Body's and panel's reasoning in *US – 1916 Act* and *Thailand – Cigarettes (Philippines – Article 21.5)*, respectively. In both disputes, the Appellate Body and panel found that the measures at issue contained the "constituent elements" of conducted regulated by WTO obligations (dumping and customs valuation respectively). This meant that the relevant WTO obligations applied, notwithstanding that the measures contained another element that is not regulated by WTO obligations (in both cases, the criminal element of "intent").

[126] Appellate Body Report, *Indonesia – Safeguards*, footnote 189.

109. In sum, Article II:1(a) requires that an importing Member accord to imported products treatment that is no less favourable than that provided in the Member's Schedule. Article II:1(b) (first sentence) prohibits a Member from imposing "ordinary customs duties" at a rate that exceeds the bound rate to which the importing Member committed in its schedule of concessions in respect of a given product. Article II:1(b) (second sentence) prohibits a Member from imposing any "other duties and charges" on or in connection with imports.

110. The tariffs at issue constitute "ordinary customs duties" which exceed the bound rates set out in the US Schedule.[127] Alternatively, the tariffs at issue constitute "other duties and charges" which are inconsistent with Article II:1(b) (second sentence).[128] In sum, the aluminium and steel tariffs suspend, in whole, the obligations in Article II of the GATT 1994.

b. The aluminium and steel tariffs at issue are designed to protect the domestic industry from injury caused or threatened by increased imports of the subject steel and aluminium products

111. The second "constituent feature" of a safeguard measure comprises three elements: (1) the imposing Member finds an increase in imports; (2) that causes or threatens serious injury to the domestic industry; *and* (3) the measure is imposed with the objective of remedying that serious injury.

112. Below, Norway demonstrates that the aluminium and steel tariffs present these three elements. This demonstration is based on the findings in the DOC Reports, and confirmed by contemporaneous statements of President Trump and other US officials.

i. The United States determined that there were "increased imports" of aluminium and steel products

113. In this Section, Norway shows that, in the DOC Reports, the United States purports to identify an increase in aluminium and steel imports. Norway *first* addresses the DOC Aluminium Report; and *second*, the DOC Steel Report.

114. Section E of the DOC Aluminium Report is titled "*U.S. imports of aluminum are increasing*". Section E.1 addresses aluminium imports in aggregate, and finds, with accompanying data tables, that:

[127] *See* Section I.A below.
[128] *See* Section I.A below.

- "Overall, U.S. imports of the aluminum categories subject to this investigation combined … were valued at [USD] 13.0 billion in 2016 -- a 15 percent increase over 2013 import levels";[129]

- "For the first ten months of 2017, imports are up 30 percent on a value basis compared to the same period in 2016";[130]

- "By weight, U.S. imports in these aluminum categories were 5.9 million metric tons in 2016, up 34 percent from 4.4 million metric tons in 2013";[131]

- "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 consistent increase year over year".[132]

115. The remaining sub-sections of Section E address aluminium imports on a product-specific basis, finding that:

- "U.S. imports of unwrought aluminum have increased dramatically in recent years -- nearly 40 percent by weight since 2014";[133]

- "For aluminum bars, rods and profiles … [b]y weight there was a slight increase in import levels in 2016 over 2015 levels";[134]

- "On a weight basis, imports [of aluminium plates, sheets and strip] were essentially unchanged in 2016 compared to 2015 levels, but data for the first 10 months of 2017 show a nearly 20 percent increase over the same period in 2017";[135]

- "Unlike other sectors, imports [of aluminium pipes and tubes] were down slightly in this category in 2016, but are growing in 2017 due to increases in imports from Mexico";[136]

- "Overall, imports [of aluminium castings and forgings] are up 11 percent in 2017 (January-October) compared with 2016.[137]

- The "sharp fall in aluminium prices" in the US is due to the fact that aluminium "imports into the United States surged" between 2013-2016. [138]

- "Imports of downstream aluminum products are surging";[139]

[129] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 63.
[130] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 63.
[131] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 64.
[132] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 64.
[133] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 70.
[134] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 71.
[135] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 72.
[136] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 74.
[137] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 75.
[138] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 92. Emphasis added.
[139] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 105.

116. The executive summary of the DOC Aluminium Report states that:

- "In 2016, the United States imported five times as much primary aluminum on a tonnage basis as it produced; the import penetration level was about 90 percent, up from 66 percent in 2012".[140]

- "U.S. imports in the aluminum categories subject to this investigation totalled 5.9 million metric tons in 2016, up 34 percent from 4.4 million metric tons in 2013";[141]

- "In the first 10 months of 2017, aluminum imports rose 18 percent above 2016 levels on a tonnage basis";[142]

- "In the downstream aluminum sectors of bars, rods, plates, sheets, foil, wire, tubes and pipes, imports rose 33 percent from 1.2 million metric tons in 2013 to 1.6 million metric tons in 2016".[143]

117. Section B.1 of the DOC Steel Report is titled "*Imports of Steel Products Continue to Increase*". In this Section, the Report finds that:

> Total U.S. imports rose from 25.9 million metric tons in 2011, peaking at 40.2 million metric tons in 2014 at the height of the shale hydrocarbon drilling boom. For 2017 (first ten months) imports are increasing at a double-digit rate over 2016, pushing finished steel imports consistently over 30 percent of U.S. consumption.[144]

118. Section B.2 of the DOC Steel Report addresses "*High Import Penetration*" of steel products in the US market, which refers to the market share of imports relative to domestic products. This Section finds that "in contrast [to 2001], where imports of semi-finished steel represented approximately 7 percent of domestic consumption, imports of finished steel products … currently represent over 25 percent of U.S. consumption".[145]

119. In its conclusion, the DOC Steel Report notes that "[t]his overhang of [global] excess capacity means that U.S. steel producers, for the foreseeable future, will face increasing competition from imported steel as other countries export more steel to the United States to bolster their own economic objectives".[146] Likewise, it states that "[s]teel producers in the United States are facing widespread harm from mounting imports"; and that the adverse

[140] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 3.
[141] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 4.
[142] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 4.
[143] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 4.
[144] DOC Steel Report, **(Exhibit NOR-1)**, p. 27.
[145] DOC Steel Report, **(Exhibit NOR-1)**, p. 29.
[146] DOC Steel Report, **(Exhibit NOR-1)**, p. 55. Emphasis added.

impact from steel imports on the US steel industry "has been further exacerbated by the 22 percent surge in imports thus far in 2017 compared with 2016".[147]

120. Similarly, the executive summary of the DOC Steel Report states that "notwithstanding numerous anti-dumping and countervailing duty orders, which are limited in scope, imports of most types of steel continue to increase",[148] and "import penetration levels for flat, semi-finished, stainless, long and pipe and tube products continue on an upward trend above 30 percent of domestic consumption".[149]

121. Both the DOC Aluminium Report and the DOC Steel Report conclude that findings on the increased "level of imports" support recommending action under Section 232.[150]

122. This conclusion – that action is required to provide relief against surges in imports – is underscored in the Presidential Proclamations, *i.e.*, the instruments implementing the DOC's recommendations. The Presidential Proclamations explain that President Trump is taking action to limit the "increased level of imports", "high level of imports", or "surges" of imports.[151]

123. The Presidential Proclamations also explain that, to this end, President Trump has adopted the tariffs in order to "reduce imports";[152] *and* that the Commerce Secretary is directed to "*monitor imports* of steel articles and inform [President Trump] of any circumstances that in the Secretary's opinion might *indicate the need for further* action under section 232 with respect to such imports".[153]

124. In sum, the United States determined that there were increased imports of steel and aluminium products into the United States.

ii. The United States determined that there was "serious injury" to the domestic aluminium and steel industries, caused by increased imports

125. The second element of a safeguard measure is that the measure is based on findings that the increased imports – addressed in the first element – are causing serious injury to the

[147] DOC Steel Report, **(Exhibit NOR-1)**, pp. 56-57. Emphasis added.
[148] DOC Steel Report, **(Exhibit NOR-1)**, p. 3.
[149] DOC Steel Report, **(Exhibit NOR-1)**, p. 4.
[150] DOC Steel Report, **(Exhibit NOR-1)**, p. 5; DOC Aluminium Report, **(Exhibit NOR-2)**, p. 5.
[151] Proclamation No. 9704, **(Exhibit NOR-3)**, para. 7; Proclamation No. 9705, **(Exhibit NOR-4)**, paras. 3 and 8; Proclamation No. 9758, **(Exhibit NOR-9)**, para. 5; Proclamation No. 9759, **(Exhibit NOR-10)**, para. 5
[152] Proclamation No. 9704, **(Exhibit NOR-3)**, para. 3; Proclamation No. 9705, **(Exhibit NOR-4)**, para. 4. Emphasis added.
[153] Proclamation No. 9772, **(Exhibit NOR-5)**, para. 3. Emphasis added.

domestic industry. As this second element focuses on "serious injury", we begin by setting out how this term is understood in substance, and what factors are indicative of injury.

126. Article 4.1 of the *Safeguards Agreement* defines "serious injury" as "significant overall impairment in the position of the domestic industry". "Impairment" has been defined by the Appellate Body as "prejudicial effects".[154] The Appellate Body has also explained that "it is only when the *overall position* of the domestic industry is evaluated, in light of all the relevant factors having a bearing on the situation of that industry, that it can be determined whether there is 'significant overall impairment' in the position of that industry".[155]

127. Article 4.2(a) lists a series of factors that are indicative of injury. They are: the share of the domestic market taken by increased imports (import penetration), changes in the level of domestic sales, production, productivity, capacity utilisation, profits and losses, and employment.

128. Conceptually, therefore, a safeguards investigation assesses the economic health of the domestic industry. An injured state arises when the economic health of the industry is "impair[ed]" or has suffered "prejudicial effects", in its "overall position", in light of certain injury factors. The DOC Reports engage in precisely this exercise, to assess whether the domestic aluminium and steel industries are injured.

129. *First*, the DOC Reports purport to make findings regarding impairment in the overall position of the US aluminium and steel industries. Section H of the DOC Aluminium Report is titled "*Impact of Imports on the Welfare of the U.S. Aluminum Industry*", and refers repeatedly throughout to the impact of imports on the "U.S." or "domestic aluminum production" and the "U.S." or "domestic aluminum industry".[156] The Report concludes that imports have "adversely impact[ed] the economic welfare of the U.S. aluminum industry".[157]

130. Similarly, Section B of the DOC Steel Report is titled "*Imports in Such Quantities as are Presently Found Adversely Impact the Economic Welfare of the U.S. Steel Industry"*. Throughout, the DOC Steel Report refers repeatedly to the impact of imports on "U.S." or

[154] Appellate Body Report, *US – Lamb*, para. 86.
[155] Appellate Body Report, *Argentina – Footwear*, para. 139.
[156] DOC Aluminium Report, **(Exhibit NOR-2)**, pp. 4, 16, 41, 47, 50, 55 and 56.
[157] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 2.

"domestic steel production" and the "U.S." or "domestic steel industry".[158] The Report concludes that imports have an adverse impact on "the domestic steel industry".[159]

131. *Second*, the DOC Reports purport to examine the economic welfare of the domestic industries by reference to a series of injury factors that are typically associated with a serious injury finding under Article 4.2(a) of the *Safeguards Agreement*. These are, to recall: the share of the domestic market taken by increased imports (import penetration), changes in the level of domestic sales, production, productivity, capacity utilisation, profits and losses, and employment. The DOC Reports also refer to an additional relevant factor not listed in Article 4.2(a) (capital expenditure).[160] In the table below, Norway shows, using selected quotes, that the DOC Reports purport to find "serious injury" by reference to these factors.

TABLE 3: SERIOUS INJURY FACTORS CONSIDERED IN THE DOC REPORTS

Injury factor	DOC Steel Report	DOC Aluminium Report
Production and productivity	From 2011-2017, "domestic steel production supplied only 70 percent of the average demand, even though available U.S. domestic steel production capacity during the period could have, on average, supplied up to 100 percent of demand".[161] "U.S. steel production capacity has remained stagnant … for more than a decade".[162] "Multiple U.S. facilities remain idled: there are four idled basic oxygen furnace facilities … representing almost one third of the remaining basic oxygen furnace facilities in the United States".[163]	"Since 2012, six smelters with a combined 3,500 workers have been permanently shut down, totalling 1.13 million tons in lost production capacity per year".[164] "U.S. primary aluminum production in 2016 was about half of what it was in 2015, and output further declined in 2017".[165] "Domestic production [of primary aluminium] is well below demand".[166] "Since 2000, there has been a steep decline in US [primary aluminium production]. It corresponds with a

[158] DOC Steel Report, **(Exhibit NOR-1)**, pp. 5, 9, 15, 40, 104, and p. 1 to Annex E.
[159] DOC Steel Report, **(Exhibit NOR-1)**, p. 55.
[160] The factors in Article 4.2(a) are, by its terms, not exhaustive; they represent the *minimum* factors that an authority must address in determining injury. *See* Panel Report, *Argentina – Footwear (EC)*, para. 8.206.
[161] DOC Steel Report, **(Exhibit NOR-1)**, p. 47.
[162] DOC Steel Report, **(Exhibit NOR-1)**, p. 41.
[163] DOC Steel Report, **(Exhibit NOR-1)**, pp. 34-35.
[164] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 3.
[165] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 3.
[166] DOC Aluminium Report, **(Exhibit NOR-2)**, Section D.

Injury factor	DOC Steel Report	DOC Aluminium Report
		large increase in U.S. imports of primary aluminum".[167]
Level of domestic sales	"[T]he import penetration level [of finished and semi-finished steel products] has been above 30 percent for the first ten months of 2017".[168] "Domestic steel" has been "displaced" by "excessive quantities of imports".[169] "Despite efforts to level the playing field through [anti-dumping and countervailing duty orders], there are numerous examples of U.S. steel producers being unable to fairly compete with foreign suppliers".[170]	In 2016, "the import penetration level was about 90 percent, up from 66 percent in 2012".[171]
Capacity utilisation	"[Capacity] utilization rates are well below economically viable levels".[172] "Overall, steel mill production capacity utilization has declined from 87 percent in 1998, to 81.4 percent in 2008, to 69.4 percent in 2016".[173]	US aluminium smelters are "now producing at 43 percent of capacity".[174]
Financial performance	"Many U.S. steel mills have been driven out of business due to declining steel prices, global overcapacity, and unfairly traded steel".[175]	"There are only two major players remaining in the domestic primary aluminum industry", because the remainder have declared bankruptcy or exited the market".[178]

[167] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 41.
[168] DOC Steel Report, **(Exhibit NOR-1)**, p. 29. *See also* Section B.2 of the DOC Steel Report.
[169] DOC Steel Report, **(Exhibit NOR-1)**, Section C.
[170] DOC Steel Report, **(Exhibit NOR-1)**, p. 36.
[171] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 3.
[172] DOC Steel Report, **(Exhibit NOR-1)**, p. 47.
[173] DOC Steel Report, **(Exhibit NOR-1)**, p. 47.
[174] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 3.
[175] DOC Steel Report, **(Exhibit NOR-1)**, p. 33.
[178] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 91.

Injury factor	DOC Steel Report	DOC Aluminium Report
	"Rising levels of imports of steel continue to weaken the U.S. steel industry's financial health".[176] "Foreign competition and the displacement of domestic steel by excessive imports … caused the domestic steel industry as a whole to operate on average with negative net income since 2009".[177]	"In 2016, three remaining primary aluminum companies reported operating losses totalling [USD] 912 million".[179] "Financial performance of upstream aluminum companies was particularly poor between 2013 and 2016, when aluminum prices began to fall sharply".[180]
Employment	The trend of employment in the steel industry is "dramatically downward".[181] The "closures of [steel mills] had a significant impact on the U.S. industrial workforce and local economies".[182]	"The loss of jobs in the primary aluminum sector has been precipitous between 2013 and 2016, falling 58 percent".[183]
Capital expenditure	"The ability of U.S. manufacturers of iron and steel products to fund capital expenditures … has been limited by falling revenue and reduced profits".[184]	"Data for 2016 would likely show a decline in capital expenditures by the primary aluminum sector".[185]

132. In sum, the evidence demonstrates that the United States considered whether the aluminium and steel industries suffered "serious injury", and purported to find that imports had, indeed, increased.

[176] DOC Steel Report, **(Exhibit NOR-1)**, p. 37.
[177] DOC Steel Report, **(Exhibit NOR-1)**, p. 4.
[179] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 92.
[180] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 92.
[181] DOC Steel Report, **(Exhibit NOR-1)**, p. 35.
[182] DOC Steel Report, **(Exhibit NOR-1)**, p. 33.
[183] DOC Aluminium Report, **(Exhibit NOR-2)**, pp. 3 and 89.
[184] DOC Steel Report, **(Exhibit NOR-1)**, p. 40.
[185] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 98.

iii. The United States imposed the aluminium and steel tariffs at issue with the objective of remedying serious injury caused by increased imports

133. Both DOC Reports demonstrate that, having found serious injury caused by increased imports, the United States adopted the aluminium and steel tariffs with the objective of remedying that serious injury.

134. In Section VIII, "Recommendations", the DOC Aluminium Report recommends measures to remedy the serious injury caused by increased steel imports. The Report states that a tariff to "adjust[] the level" of aluminium imports "would be designed … to enable U.S. aluminum producers to utilize an average of 80 percent of their production capacity", and "should be sufficient to enable U.S. aluminum producers to operate profitably under current market prices for aluminum and will allow them to reopen idled capacity".[186]

135. The Report's executive summary concludes that "to remove the threat of impairment, it is necessary to reduce imports to a level that will provide the opportunity for U.S. primary aluminum producers to restart idled capacity".[187] It also suggests that the aluminium tariffs "must be in effect for a duration sufficient to allow necessary time and assurances to stabilize the U.S. industry".[188]

136. In Section VI, "Recommendations", the DOC Steel Report recommends measures to remedy the serious injury caused by increased steel imports. Specifically, the DOC proposes "recommendations to ensure sustainable capacity utilization and financial health".[189] The Report states "adjusting the level of imports through quotas or tariffs … 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".[190]

137. The Report's executive summary concludes that "the only effective means of removing the threat of impairment is to reduce imports to a level that should, in combination with good management, enable U.S. steel mills to operate at 80 percent or more their rated production capacity".[191]

[186] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 107.
[187] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 5.
[188] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 7.
[189] DOC Steel Report, **(Exhibit NOR-1)**, p. 59.
[190] DOC Steel Report, **(Exhibit NOR-1)**, p. 58.
[191] DOC Steel Report, **(Exhibit NOR-1)**, p. 5.

138. The explicitly stated objective of the aluminium and steel tariffs in the DOC Reports is confirmed by contemporaneous statements of President Trump, Commerce Secretary Wilbur Ross and White House National Trade Council Director Peter Navarro.

139. For example, during the Commerce Secretary's investigation into the imports of aluminium and steel products, President Trump stated:

- "Really great numbers on jobs & the economy! Things are starting to kick in now, and we have just begun! Don't like steel & aluminum dumping!".[192]

140. In the period immediately surrounding the announcement of the tariffs, the President made the following statements:

- "To protect our Country, we must protect American Steel! #AMERICA FIRST";[193]

- "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!";[194]

- "Our Steel and Aluminum industries (and many others) have been decimated by decades of unfair trade and bad policy with countries from around the world. We must not let our country, companies and workers be taken advantage of any longer. We want free, fair and SMART TRADE!";[195]

- "We are on the losing side of almost all trade deals. Our friends and enemies have taken advantage of the U.S. for many years. Our Steel and Aluminum industries are dead. Sorry, it's time for a change! MAKE AMERICA GREAT AGAIN!";[196]

- "Looking forward to 3:30 P.M. meeting today at the White House. We have to protect & build our Steel and Aluminum Industries while at the same time showing great flexibility and cooperation toward those that are real friends and treat us fairly on both trade and the military".[197]

141. Following the imposition of the tariffs, President Trump stated:

- "I am a Tariff Man. When people or countries come in to raid the great wealth of our Nation, I want them to pay for the privilege of doing so. It will always be the best way to max out our economic power. We are right now taking in $billions in Tariffs. MAKE AMERICA RICH AGAIN";[198]

- "The United States Treasury has taken in MANY billions of dollars from the Tariffs we are charging China and other countries that have not treated us fairly.

[192] Tweet by President Trump, 3 July 2017, **(Exhibit NOR-32)**.
[193] Tweet by President Trump, 5 March 2018, **(Exhibit NOR-33)**.
[194] Tweet by President Trump, 2 March 2018, **(Exhibit NOR-34)**.
[195] Tweet by President Trump, 1 March 2018, **(Exhibit NOR-35)**.
[196] Tweet by President Trump, 4 March 2018, **(Exhibit NOR-36)**.
[197] Tweet by President Trump, 8 March 2018, **(Exhibit NOR-37)**.
[198] Tweet by President Trump, 4 December 2018, **(Exhibit NOR-38)**.

In the meantime we are doing well in various Trade Negotiations currently going on. At some point this had to be done!";[199]

- 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.".[200]

142. Additionally, at a press conference announcing the aluminium and steel tariffs, the US President stated:

- "[Aluminium and steel] will have protection for the first time in a long while, and you're going to regrow your industries";[201]

- "We'll be imposing tariffs on steel imports, and tariffs on aluminum imports. And you're going to see a lot of good things happen. You're going to see expansions of the companies";[202]

- "[The domestic aluminium and steel industries] will immediately be expanding if we give you that level playing field, if we give you that help. And you're going to hire more workers, and your workers are going to be very happy";[203]

- "So we'll probably see you sometime next week. We'll be signing it. And you will have protection for the first time in a long while, and you're going to regrow your industries;"[204]

- "We're going to take care of the situation, okay? So steel and aluminum will see a lot of good things happen. We're going to have new jobs popping up. We going to have much more vibrant companies".[205]

143. Commerce Secretary Wilbur Ross has described the aluminium and steel tariffs in similar terms to President Trump, confirming that they have a protectionist objective:

- "The President has put in place tariffs and quotas that are enabling American steel and aluminum industries to get back on their feet";[206]

[199] Tweet by President Trump, 3 January 2019, **(Exhibit NOR-39)**.
[200] Tweet by President Trump, 28 January 2019, **(Exhibit NOR-40)**.
[201] Remarks by President Trump in Listening Session with Representatives from the Steel and Aluminum Industry, 1 March 2018, **(Exhibit NOR-41)**.
[202] Remarks by President Trump in Listening Session with Representatives from the Steel and Aluminum Industry, 1 March 2018, **(Exhibit NOR-41)**.
[203] Remarks by President Trump in Listening Session with Representatives from the Steel and Aluminum Industry, 1 March 2018, **(Exhibit NOR-41)**.
[204] Remarks by President Trump in Listening Session with Representatives from the Steel and Aluminum Industry, 1 March 2018, **(Exhibit NOR-41)**.
[205] Remarks by President Trump in Listening Session with Representatives from the Steel and Aluminum Industry, 1 March 2018, **(Exhibit NOR-41)**.
[206] "Leveling the playing field for American workers", CNBC, 5 October 2018, **(Exhibit NOR-42)**.

- "The remarkable revitalization of America's metal industries would not be happening without President Trump's Section 232 tariffs".[207]

144. The Trump White House also published a fact sheet titled "President Donald J. Trump: Standing up to Unfair Steel Trade Practices". The fact sheet explains that "as imports of steel to the United States continue to rise, an examination of foreign practices is urgently needed", and that President Trump has "[kept] his promise to the American people" to "scrutinise U.S. steel imports and seek a revitalization of the American steel industry".[208]

145. In the same vein, White House National Trade Council Director Peter Navarro stated that "all we are trying to do here with the Section 232 tariffs is to provide our domestic industries an opportunity to earn a decent rate of return and invest in this country".[209]

146. In sum, the evidence demonstrates that the United States imposed the aluminium and steel tariffs at issue with the objective of remedying serious injury caused by increased imports.

c. Parallelism between the DOC Reports and previous US trade remedy investigations

147. The assessment in the DOC Reports of serious injury to US industries, caused by increased imports, bears considerable parallels to the assessment by US authorities of these same issues in other safeguard investigations.

148. For example, the United States recently imposed a safeguard on solar cells from China. In assessing whether the domestic solar cells industry suffered serious injury, the DOC considered exactly the same factors:

- *Imports' market share/changes in the level of sales*: "The domestic industry's market share fell from a period high of *** percent in 2012 to *** percent in 2013 … decreased to *** percent in 2015 and a period low of *** percent in 2016";[210]

- *Decreased production/productivity levels*: "Whether there has been significant idling of U.S. productive facilities in terms of plant closures and/or underutilization of productive capacity";[211]

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[207] "US Commerce Secretary defends steel, aluminium tariffs; points to China", S&P Global, 19 July 2018, **(Exhibit NOR-43)**.
[208] "President Donald J. Trump: Standing up to Unfair Steel Trade Practices", the White House Fact Sheets, 20 April 2017, **(Exhibit NOR-44)**. *See also* DOC Steel Report, **(Exhibit NOR-1)**, p. 18.
[209] "President Donald J. Trump: Standing up to Unfair Steel Trade Practices", the White House Fact Sheets, 20 April 2017, **(Exhibit NOR-44)**. *See also* DOC Steel Report, **(Exhibit NOR-1)**, p. 18.
[210] Crystalline Silicon Photovoltaic Cells, USTC investigation, November 2017, **(Exhibit NOR-45)**, p. 37. (Redaction original).
[211] Crystalline Silicon Photovoltaic Cells, USTC investigation, November 2017, **(Exhibit NOR-45)**, p. 31.

- *Decreased capacity utilisation*: "The domestic industry's capacity and production levels did not increase along with demand growth, and its capacity utilization for CSPV and CSPV modules remained low";[212]

- *Poor financial performance*: "Despite extremely favourable demand conditions, the domestic industry also experienced net losses throughout this period";[213]

- *Declining employment*: "Whether there has been significant unemployment or underemployment in the domestic industry. The substantial number of facility closures described above resulted in extensive layoffs";[214]

- *Inability to fund capital expenditures*: Domestic producers are unable to "generate adequate capital to finance the modernization of their domestic plants and equipment";[215]

149. Thus, the DOC's aluminium and steel investigations examined the same set of injury factors as were examined in the solar cells safeguard investigation, including the same additional discretionary factors, *i.e.*, producers' "inability to fund capital expenditures".

150. Indeed, this parallelism is unsurprising: at the press conference announcing the aluminium and steel tariffs, President Trump explicitly likened the aluminium and steel measures to the safeguards on solar cells from China:

> A couple of months ago we put tariffs on washing machines coming into the country, because they were dumping the machines all over the place and we had lost our manufacturing abilities for washing machines … same thing with solar panels … and now, the two are doing much better … So, a lot of good things could happen.[216]

151. Further, the DOC itself highlights that its investigation into injury caused to US industries by increased imports addresses trade concerns traditionally addressed by US trade-remedies measures.

152. The DOC Aluminium Report contains Appendix D, which summarises previous "trade actions" taken by the US, related to aluminium. Appendix D explains that these actions are of limited assistance because any resulting duties "will not be applicable to the broader aluminum industry", and "are easily avoidable by means of transhipment".[217]

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[212] Crystalline Silicon Photovoltaic Cells, USTC investigation, November 2017, **(Exhibit NOR-45)**, p. 38.
[213] Crystalline Silicon Photovoltaic Cells, USTC investigation, November 2017, **(Exhibit NOR-45)**, p. 34.
[214] Crystalline Silicon Photovoltaic Cells, USTC investigation, November 2017, **(Exhibit NOR-45)**, p. 33.
[215] Crystalline Silicon Photovoltaic Cells, USTC investigation, November 2017, **(Exhibit NOR-45)**, p. 35.
[216] Remarks by President Trump in Listening Session with Representatives from the Steel and Aluminum Industry, 1 March 2018, **(Exhibit NOR-41)**.
[217] DOC Aluminium Report, **(Exhibit NOR-2)**, Appendix D, p. 2.

153. A DOC publication titled "Frequently Asked Questions" relating to the aluminium tariffs at issue asks "why has the Secretary of Commerce initiated a Section 232 on aluminum?". The DOC's answer is that: "given their specific nature", existing or potential antidumping and countervailing duty orders "may not substantially alleviate the negative effects that unfairly traded imports have had on the United States aluminum industry as a whole".[218]

154. The DOC Steel Report also asserts that the recommended aluminium and steel tariffs are needed to address concerns arising from perceived shortcomings with trade remedies measures. Section B.7 explains that the "problem confronting the U.S. steel industry" is illustrated by the "number of U.S. antidumping and countervailing duty measures in effect". The Report explains that the "problem" cannot be addressed with trade remedies measures because "it could take years to identify and investigate every instance of unfairly trade steel", and the "U.S. industry has already spend hundreds of millions of dollars in recent years on AD/CVD cases".[219]

155. In a corresponding "Frequently Asked Questions" publication, relating to the steel tariffs at issue, the DOC explains that it has recommended the tariffs because the "U.S. Government [has] attempt[ed] to address foreign government subsidies and other unfair practices" through trade remedies measures, but these have had "little practical effect".[220]

d. Conclusion

156. In sum, the aluminium and steel tariffs at issue meet the two "constituent features" of a safeguard measure. *First*, for the reasons discussed in Section I.A below, the aluminium and steel tariffs suspend the obligation in Article II of the GATT 1994, by imposing tariffs in excess of the US bound rates. *Second*, the aluminium and tariffs are designed to protect the US aluminium industries from injury caused or threatened by increased imports of the relevant aluminium and steel products. The DOC Reports, and contemporaneous statements made by President Trump and other US officials, demonstrate that the United States: (1) considered whether there were increased imports of aluminium and steel products; (2) considered whether there was "serious injury" to the domestic aluminium and steel industries;

[218] "Frequently Asked Questions: Section 232 Investigations: The Effect of Aluminum Imports on the National Security", Department of Commerce, **(Exhibit NOR-46)**.
[219] DOC Steel Report, **(Exhibit NOR-1)**, pp. 28-29.
[220] "Frequently Asked Questions Section 232 Investigations: The Effect of Steel Imports on the National Security", Department of Commerce, **(Exhibit NOR-47)**.

and (3) imposed the aluminium and steel tariffs with the objective of remedying the alleged serious injury.

B. The measures at issue are inconsistent with the *Safeguards Agreement*

157. This section sets out Norway's claims under the *Safeguards Agreement*. At the outset, Norway recalls the distinction between "the legal characterization of a measure for purposes of determining the *applicability* of the WTO safeguard disciplines", on the one hand, and "the substantive conditions and procedural requirements that determine the WTO-*consistency* of a safeguard measure", on the other.[221] As the Appellate Body has explained, these inquiries are *different*, and should not be "conflated".[222]

158. The *former* inquiry – whether the *Safeguards Agreement* applies to the measures at issue – is addressed in Section VI.A, above. The *latter* inquiry – whether the measures at issue are *consistent* with the *Safeguards Agreement* – is addressed below.

159. In this Section, Norway *first* sets out the standard of review under the *Safeguards Agreement*. Norway explains that there is an established line of jurisprudence to the effect that, if the competent authority does not provide a reasoned and adequate explanation of its conclusion that the conditions for imposing a safeguard have been met, then a panel has "no option" but to find a violation. *Second*, Norway demonstrates that the US aluminium and steel measures are inconsistent with Articles 2.1, 2.2, 5.1, 11.1(b), 12.1 and 12.2 of the *Safeguards Agreement*.

1. Standard of review under the *Safeguards Agreement*

160. Article 11 of the DSU sets out the appropriate standard of review under the WTO covered agreements. Article 11 requires a panel 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".

161. It is well accepted that, in any given dispute, "the proper standard of review to be applied by a panel must also be understood in the light of the specific obligations of the relevant agreements that are at issue in the case".[223] Thus, in this dispute, the standard of

[221] Appellate Body Report, *Indonesia – Safeguards*, para. 5.57.
[222] Appellate Body Report, *Indonesia – Safeguards*, para. 5.57.
[223] Appellate Body Report, *Softwood Lumber VI (Article 21.5 – Canada)*, para. 92; *see also* Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 184.

review required under Article 11 of the DSU must be understood in light of the specific obligations in the *Safeguards Agreement*.

162. In *US – Lamb*, the Appellate Body explained that an "objective assessment" of a claim under the *Safeguards Agreement* contains "two elements": "First, a panel must review whether competent authorities have evaluated *all relevant factors*, and, second, a panel must review whether the authorities have provided a *reasoned and adequate explanation* of how the facts support their determination".[224]

163. With regard to the authorities' evaluation of all relevant factors, the Appellate Body explained further that an evaluation of "all relevant factors" is not a mere "check list".[225] A panel must assess whether the competent authorities have conducted a substantive evaluation of "the *'bearing'* or the *'influence'* or '*effect*' that the relevant factors have on the 'situation of [the] domestic industry'".[226]

164. With regard to the authorities' explanation of how the facts support the determinations, the Appellate Body explained that, "although panels are not entitled to conduct a *de novo* review of the evidence", panels also cannot "simply *accept* the conclusions of the competent authorities".[227] To the contrary, "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 light of the facts before the panel".[228]

165. In *US – Steel Safeguards*, the Appellate Body confirmed its findings that "[if] a panel concludes that competent authorities, in a particular case, have not provided a reasoned or adequate explanation for their determination", then the panel has "reached a conclusion that the determination is inconsistent with the specific requirements of [the relevant provision] of the *Agreement on Safeguards*".[229]

166. Thus, the Appellate Body confirmed that the failure of an authority to provide the requisite explanation constitutes a violation of the *Safeguards Agreement* in and of itself.

[224] Appellate Body Report, *US – Lamb*, para. 103. Emphasis original.
[225] Appellate Body Report, *US – Lamb*, para. 104. Emphasis original.
[226] Appellate Body Report, *US – Lamb*, para. 104, citing *US – Wheat Gluten*, footnote 19 to para. 71.
[227] Appellate Body Report, *US – Lamb*, para. 106.
[228] Appellate Body Report, *US – Lamb*, para. 106.
[229] Appellate Body Report, *US – Steel Safeguards*, para. 302, citing Appellate Body Report, *US – Lamb*, para. 107.

This is because "it is the *explanation* given by the competent authority for its determination that alone enables panels to determine whether there has been compliance".[230]

167. In other words, the issue is not whether the competent authorities "performed the appropriate analysis correctly".[231] Rather, if the 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".[232] In such a situation, "the panel has no option but to find that the competent authority has not performed the analysis correctly".[233]

2. Claims under the *Safeguards Agreement*

a. The measures at issue are inconsistent with Article 2.1 of the Safeguards Agreement

168. In this sub-section, Norway *first* sets out the legal standard under Article 2.1 of the *Safeguards Agreement*. *Second*, Norway explains that the measures at issue violate Article 2.1, because the United States has failed to provide a reasoned and adequate explanation that the conditions for imposing a safeguard measure are met.

i. Legal standard

169. Article 2.1 of the *Safeguards Agreement* provides the following:[234]

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

170. Article 2.1 establishes the circumstances under which a Member has the "right" to impose a safeguard. In the Appellate Body's words, "[f]or this right to exist", the imposing WTO Member "must have determined, as required by Article 2.1 of the *Agreement on Safeguards* and pursuant to the provisions of Articles 3 and 4 of the *Agreement on Safeguards*, that a product is being imported into its territory in such increased quantities and

[230] Appellate Body Report, *US – Steel Safeguards*, para. 303. Emphasis original.
[231] Appellate Body Report, *US – Steel Safeguards*, para. 303.
[232] Appellate Body Report, *US – Steel Safeguards*, para. 303.
[233] Appellate Body Report, *US – Steel Safeguards*, para. 303.
[234] Emphasis added.

under such conditions as to cause or threaten to cause serious injury to the domestic industry".[235]

171. Article 2.1 refers to "provisions set out below". These provisions include, *inter alia*, Article 4 of the *Safeguards Agreement*. To this end, the Appellate Body has explained that Article 2.1 "sets forth the conditions for the application of a 'safeguard measure'", and Article 4 "sets forth the operational requirements for determining whether the conditions in Article 2.1 exist".[236] The textual relationship between Articles 2.1 and 4 means that a violation of one necessarily entails a violation of the other.[237]

172. As explained in Section VI.B.1 above, to comply with Article 2.1 of the *Safeguards Agreement*, the imposing Member must provide a reasoned and adequate explanation as to how its determinations meet the various obligations set out in these provisions. Below, Norway provides a brief summary of each of the requirements under Article 2.1.

173. *First*, the imposing Member must properly demonstrate the existence of an increase in imports; *second*, the imposing Member must properly demonstrate the existence of serious injury; and, *third*, the imposing Member must properly determine a causal connection between increased imports and injury.

(1) The imposing Member must properly demonstrate the existence of an increase in imports

174. To permissibly impose a safeguard measure, an imposing Member must properly demonstrate the existence of an increase in imports. The increase in imports can be: (1) an *absolute* increase (*i.e.*, an increase by tonnes or units of the imported product); *or* (2) a *relative* increase (*i.e.*, an increase of imports relative to domestic production).

175. Panels and the Appellate Body have explained that the authority must demonstrate, through a "reasoned and adequate explanation"[238], that there was an increase in imports during the period of investigation that is "sudden enough, sharp enough, and significant enough" to cause serious injury.[239]

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[235] Appellate Body Report, *US – Line Pipe*, para. 84.
[236] Panel Report, *Argentina – Footwear (EC)*, para. 8.140.
[237] *See* Appellate Body Report, *US – Lamb*, para. 96; Panel Report, *Korea – Dairy*, para. 7.53; Panel Report, *Argentina – Footwear (EC)*, paras. 8.279-8.280; Panel Report, *US – Wheat Gluten*, paras. 9.1-9.2.
[238] *See* Section VI.B.1 above.
[239] Appellate Body Report, *Argentina – Footwear*, para. 131; *see also* Panel Report, *Ukraine – Passenger Cars*, paras. 7.147-7.148 and Panel Report, *US – Wheat Gluten*, para. 8.31-8.33.

176. Further, by its terms, Article 4.2(a) requires the authority to consider the "rate and amount of the increase in imports". This means that the authority cannot establish an increase in imports "through a simple mathematic comparison of data", *i.e.*, by comparing imports in one year against imports in another year.[240] A point-to-point analysis risks masking important intervening events that may be relevant to the determination whether an increase in imports is "sudden enough, sharp enough, and significant enough" to cause serious injury.

177. Thus, instead of a point-to-point analysis, the authority must *evaluate* (and *explain*) the significance of intervening *trends* of imports – including their "speed and direction" – over the period of investigation.[241] This evaluation is "unavoidable when making a determination of whether there has been an increase in imports 'in such quantities' in the sense of Article 2.1".[242]

(2) The imposing Member must properly demonstrate the existence of "serious injury" to the "domestic industry"

178. The imposing Member must also establish the existence of serious injury (or threat thereof) to the "domestic industry". This entails two steps: (1) defining the "domestic industry"; and (2) establishing "serious injury" (or threat thereof) to that industry.

179. *First*, Article 4.1(c) defines "domestic industry" as "the producers as a whole of the like or directly competitive products" *or* "those whose collective output of the like or directly competitive product constitutes a major proportion of the total domestic production of those products".

180. Thus, the "domestic industry" is comprised of "producers" of products that are like or compete directly with the subject imported products. To this end, in *US – Lamb*, the Appellate Body explained 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".[243]

181. As a result, there must be parallelism between the imported products covered by a safeguard measure, on the one hand, and the domestic products produced by the injured

[240] *See* Panel Report, *Ukraine – Passenger Cars*, para. 7.132; Panel Report, *Argentina – Footwear*, para. 8.159, and Appellate Body Report, *Argentina – Footwear*, para. 129.
[241] Panel Report, *Argentina – Footwear*, paras. 8.159.
[242] Panel Report, *Argentina – Footwear*, paras. 8.161.
[243] Appellate Body Report, *US – Lamb*, para. 86.

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

182. In *US – Lamb*, the Appellate Body also emphasised that, although the authority need not have information regarding every domestic producer, "the data before the competent authorities must be sufficiently representative to give a true picture of the 'domestic industry'".[244]

183. Jurisprudence under the *Anti-Dumping Agreement* is also instructive in this regard. In *US – Hot-Rolled Steel*, the Appellate Body noted 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 the industry as a whole".[245] Otherwise, the authority's explanation "may give a misleading impression of the data relating to the industry as a whole", and the authorities may "fail properly to appreciate the economic relationship between that part of the industry and the other parts of the industry".[246]

184. At the very least, the Appellate Body explained, "investigating authorities should provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry".[247]

185. *Second*, Article 4.1(c) defines "serious injury" as a "significant overall impairment in the position of a domestic industry". Thus, the scope of the injury assessment is determined by – and co-extensive with – the scope of the domestic industry. Again, there must be parallelism between the scope of imported and domestic products at issue.

186. If the authority's serious injury assessment does not fully take account of the domestic industry, in all of its parts, the required parallelism is broken, and the serious injury determination is inherently flawed.

187. The "serious injury" standard is "very strict and rigorous",[248] which the Appellate Body has explained is consistent with the "object and purpose" of the *Safeguards Agreement*, which provides for *limited* circumstances in which Members may adopt protectionist

[244] Appellate Body Report, *US – Lamb*, para. 132.
[245] Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.
[246] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 204-205.
[247] Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.
[248] Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.312.

measures, involving tariffs possibly in excess of bound rates or otherwise prohibited quantitative restrictions.[249]

188. Article 4.2(a) lists a series of factors that the authority must take into account when assessing "serious injury": the share of the domestic market taken by increased imports (import penetration); and changes in the level of domestic sales, production productivity, capacity, utilisation, profits and losses, and employment.

189. As explained above, the authority must substantively *evaluate* – and *explain* – the *influence* or *effect* of each of the relevant factors, and not merely engage in a "box-ticking" exercise.

(3) The imposing Member must properly demonstrate a causal connection between increased imports and injury

190. Under Article 4.2(b) of the *Safeguards Agreement*, the imposing Member must also demonstrate "the existence of a causal link between imports of the product concerned and serious injury or threat thereof". Further, Article 4.2(b) requires that "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".

191. Thus, Article 4.2(b) requires two steps: (1) demonstrating the causal link between increased imports and serious injury (or threat thereof); and (2) identifying any injury caused by factors other than the increased imports, and not attributing this injury to the increased imports.[250]

192. While the authority need not demonstrate that imports *alone* caused the serious injury,[251] it must establish "a genuine and substantial relationship of cause and effect" between increased imports and serious injury (or threat thereof).[252]

193. With regard to "non-attribution factors", the Appellate Body has clarified that, "[i]n a situation where *several factors* are causing injury 'at the same time', a final determination about the injurious effects caused by *increased imports* can only be made if all the

[249] Appellate Body Report, *US – Lamb*, para. 124.
[250] *See* Appellate Body Report, *US – Line Pipe*, para. 208.
[251] Appellate Body Report, *US – Wheat Gluten*, para. 69.
[252] Appellate Body Report, *US – Wheat Gluten*, para. 69; *see also* Appellate Body Report, *US – Lamb*, para. 179.

differential causal factors are distinguished and separated".[253] Should an authority fail to do so:

> [a]ny conclusion based exclusively on an assessment of only one of the causal factors – increased imports – rests on an uncertain foundation, because it *assumes* that the other causal factors are *not* causing the injury which has been ascribed to imports.[254]

194. The Appellate Body explained that "the non-attribution language in Article 4.2(b)" requires "that the competent authorities assess appropriately the injurious effects of the other factors, so that those effects may be disentangled from the injurious effects of the increased imports".[255] In this way, "the final determination rests, properly, on the genuine and substantial relationship of cause and effect between increased imports and serious injury".[256]

ii. The DOC fails properly to determine that the conditions in Article 2.1 for imposing a safeguard are present

195. In this Section, Norway shows that the DOC has failed to demonstrate, through a reasoned and adequate explanation, that the conditions for imposing a safeguard measure under Article 2.1 are met.

196. Norway addresses three issues: *First*, the DOC fails to properly demonstrate the existence of "increased imports"; *second*, the DOC fails to properly demonstrate the existence of "serious injury" to the "domestic industry; *third*, the DOC fails to properly demonstrate a causal connection between increased imports and injury.

(1) The DOC fails properly to demonstrate the existence of an increase in imports

197. To recall, when assessing an increase in imports, the Appellate Body has explained that, under Articles 2.1 and 4.2(c), "not just *any* increased quantities of imports will suffice".[257] The imposing Member must explain why the increase is "sudden enough, sharp enough, and significant enough", to have caused serious injury to the domestic industry producing the imported products subject to the safeguard measure.

198. The DOC fails to do so. As regards aluminium, to recall, the tariffs at issue cover three groups of aluminium products: (1) primary aluminium products; (2) secondary

[253] Appellate Body Report, *US – Lamb*, para. 179. Emphasis added.
[254] Appellate Body Report, *US – Lamb*, para. 179.
[255] Appellate Body Report, *US – Lamb*, para. 179.
[256] Appellate Body Report, *US – Lamb*, para. 179.
[257] Appellate Body Report, *Argentina – Footwear*, para. 131.

aluminium products; and (3) downstream aluminium products. As we explore below,[258] these groups of products are produced, in the United States, by different industry segments, comprising different groups of producers, using different production techniques, facing different competitive situations.

199. As a result, under Article 2.1, to evaluate adequately whether "increased imports" have occurred "in such quantities" as to cause serious injury to the domestic industry as a whole, an authority must address the different situations facing the different industry segments, including the rate and significance of any increase in import levels (*i.e.*, "sudden", "sharp", "significant") that each group faces.

200. The DOC fails to conduct such an analysis. It shows increased imports solely with respect to two of the three groups of subject aluminium products, specifically primary aluminium and downstream aluminium products.[259] However, the DOC fails to provide any explanation at all regarding imports of secondary aluminium.

201. The contrast between the DOC's treatment of imports of primary and secondary aluminium is marked. For primary aluminium, the DOC provides disaggregated import data for imports from 2013-2016,[260] and an explanation of that data.[261] In so doing, the DOC expressly limits its analysis to primary aluminium, to the exclusion of secondary aluminium. The DOC Report is explicit about its limited consideration of secondary aluminium, stating that secondary aluminium "is not the focus of this report".[262]

202. As we shall see below, the DOC's failure to evaluate imports of secondary aluminium is consistent with the lopsided approach it takes to serious injury, with the DOC giving little-to-no consideration of injury to the secondary aluminium segment of the US industry, even though it is the world's leading producer of secondary aluminium. The DOC's approach reflects its undue focus on serious injury to US producers of primary aluminium, explored further below.[263]

[258] *See* Section **Error! Reference source not found.**.
[259] DOC Aluminium Report, **(Exhibit NOR-2)**, pp. 70-75.
[260] DOC Aluminium Report, **(Exhibit NOR-2)**, Table 20, p. 70.
[261] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 70.
[262] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 22.
[263] *See* Section VI.B.2.a.ii(2).

203. As regards steel, the tariffs at issue also apply to different groups of products that are produced, in the United States, by different industry segments, comprising different groups of producers, using different production techniques, facing different competitive situations.

204. Thus, as with aluminium, an evaluation of increased imports must take into account the rate and significance of any increase in imports of the different groups of steel products to enable an assessment of whether the domestic industry as a whole, taking account of its different segments, has been seriously injured by increased imports.

205. The DOC's analysis of steel consists of an endpoint-to-endpoint comparison, from 2011 to 2017, of all subject steel imports, with no evaluation at all of imports of the different groups of steel products. There are two shortcomings in this analysis.

206. *First*, even with respect to an aggregate evaluation of all subject steel imports, an endpoint-to-endpoint comparison is deficient. Any such analysis must be accompanied by a consideration of intervening trends. It is well-established that an evaluation of trends is an important part of assessing the rate and significance of increased imports, in determining whether imports have increased "in such quantities" as to cause domestic producers serious injury.

207. *Second*, as with aluminium imports, to evaluate whether "increased imports" are causing serious injury to the domestic industry, the DOC was required to address the rate and significance of any increased imports of the different groups of steel products subject to the measures at issue. The DOC fails to do so: it gives aggregate data for all steel products, with no data or explanation for imports of the different groups of steel products at issue.

208. In sum, the DOC Reports for aluminium and steel fail to demonstrate any increase in imports of the products that is "sudden enough, sharp enough, and significant enough", to have caused serious injury to the domestic industry producing those imported products.

(2) The DOC fails properly to demonstrate the existence of "serious injury" to the "domestic industry"

209. In this Section, Norway demonstrates that the DOC Aluminium Report, and the DOC Steel Report, fail to demonstrate properly the existence of injury to the relevant domestic aluminium and steel industries. Both DOC Reports suffer from the same flaw: the DOC focuses overwhelmingly on a single segment of the domestic industry, and fails to adequately take into account the position of other segments of the industry. In other words, the DOC

based its assessment on a subset of domestic producers, rather than domestic producers collectively.

210. Below, Norway *first*, summarises the legal standard governing the DOC's injury determination; *second*, addresses the shortcomings in the DOC Aluminium Report; and *third*, summarises the shortcomings in the DOC Steel Report.

(a) Summary of the legal standard

211. Above,[264] Norway explained the legal standard governing an authority's determination of injury, under Articles 2 and 4 of the *Safeguards Agreement*. In sum, the authority must show serious injury to the "domestic industry". Under Article 4.1(c), the scope of the "domestic industry" is derived from the scope of the imported products at issue. The "domestic industry" comprises domestic producers of products that are like or directly competitive with the imported products at issue. Although an authority need not examine each and every domestic producer, it must assess, at least, a representative group.

212. Where a domestic industry is comprised of different producer segments, as is the case in the US aluminium and steel industries, an authority's injury determination cannot focus on one segment, without also examining "the other parts that make up the industry", as well as "the industry as a whole".[265] The Appellate Body has explained that, in principle, focusing on one industry segment would be in error for two reasons.

213. *First*, an approach that focuses on one segment "may give a misleading impression of the data relating to the industry as a whole".[266] If, for example, "some parts of the industry are performing well, while others are performing poorly", then "examining *only* the poorly performing parts, even if coupled with an examination of the whole industry" would be misleading. The "positive developments in other parts of the industry" would be "overlook[ed]".[267]

214. *Second*, under an approach that focuses on just one segment, "the investigating authorities may fail properly to appreciate the economic relationship between [the examined segment of the industry] and other parts of the industry, or between one or more of those parts and the whole industry".[268] For example, one part of the industry might be doing

[264] *See* Section VI.B.2.a.i(2).
[265] Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.
[266] Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.
[267] Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.
[268] Appellate Body Report, *US – Hot-Rolled Steel*, para. 205.

poorly, and another doing well, while an overall assessment suggests the industry is in mild recession.[269] Without an industry-wide analysis, that places equal weight on the different segments, the investigating authorities cannot reach conclusions regarding the industry generally.

215. These considerations are apt to this dispute. As Norway explains below, for both aluminium and steel, the DOC focuses on one segment of the domestic industry, and neglects the other segments. In so doing, the DOC presents a "misleading impression of the data" relating to the domestic industry, and "fails to properly appreciate the economic relationship" between the segments of the industry.[270]

(b) DOC Aluminium Report

216. In this Section, Norway *first* sets out relevant facts regarding the aluminium industry; and *second*, demonstrates that the DOC Aluminium Report fails to provide a proper evaluation of possible injury to the domestic aluminium industry.

(i) Factual background to the aluminium industry

217. This section provides an overview of the US aluminium industry. In presenting these facts, Norway draws on an assessment of the aluminium industries in the United States and other producing countries that was prepared by the US International Trade Commission in 2017, shortly before the DOC launched its own investigation ("USITC Report"). This 650-page report provides an extremely thorough assessment of global aluminium production, with a particular focus on the drivers of developments in the different segments of the US industry. The report was available to, and cited repeatedly by, the DOC in its own report.

218. Aluminium is an "elemental material", meaning that "the basic properties of aluminum do not change with mechanical or physical processing".[271] This has consequences for the production of aluminium. According to the US Aluminium Association (also cited repeatedly by the DOC), once produced from raw materials, aluminium can be "recycled repeatedly without any loss in quality and reused in the manufacture of consumer and industrial products".[272]

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[269] Appellate Body Report, *US – Hot-Rolled Steel*, para. 205.
[270] Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.
[271] "Aluminum: The Element of Sustainability" , the Aluminum Association, September 2011, **(Exhibit NOR-48)**, p. 2.
[272] "Aluminum: The Element of Sustainability" , the Aluminum Association, September 2011, **(Exhibit NOR-48)**, p. 19.

219. The unprocessed or "unwrought" form of aluminium can be produced in two ways:

220. *First*, so-called "primary" unwrought aluminium can be produced by converting raw materials into aluminium ("primary aluminium"). The process begins with the mining of bauxite ore, which is converted, using electrolytic smelting, into molten aluminium metal.[273] Primary aluminium production has high fixed costs because it is extremely energy intensive.[274] The process also requires non-stop production cycles; as a result, during periods of weak demand or low prices, firms may choose to shut down production capacity altogether to save energy costs, rather than run at reduced capacity.[275]

221. *Second*, so-called "secondary" aluminium can be produced by melting recycled aluminium scrap ("secondary aluminium").[276] Given the elemental properties of aluminium, this process of "[r]ecycling an aluminum product … will generate a piece of metal with *exactly the same properties* as the metal used to manufacture the recycled product".[277] In other words, "[t]here is no functional difference between primary and secondary aluminum".[278] They have "the same physical properties" and both "can be manufactured into semi-fabricated or final products".[279] Secondary aluminium production requires 90 percent less energy than production of primary aluminium.[280] The main input costs are, rather, sourcing aluminium scrap.

222. Finally, primary and secondary unwrought aluminium products can be processed, essentially through mechanical working, into downstream "wrought" aluminium products ("downstream products"). There are a variety of downstream aluminium products, falling into three product sectors: flat-rolled products (plates, sheets, strip and foil); extruded products (bars, rods, profiles, tubes and pipes); and wire.

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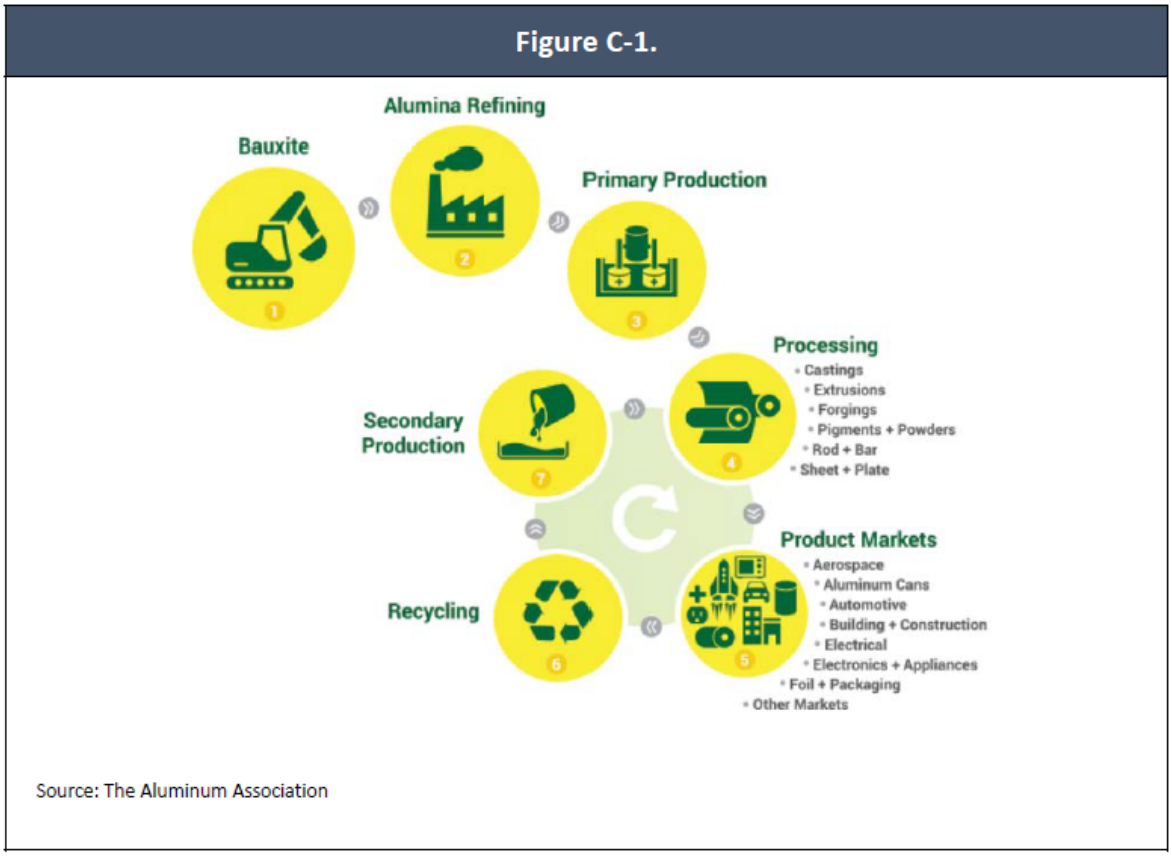
[273] "Aluminum: Competitive Conditions Affecting the U.S: Industry", United States International Trade Commission, June 2017 ("USITC Aluminum Report"), **(Exhibit NOR-51)**, p. 51.
[274] USITC Aluminum Report, **(Exhibit NOR-51)**, p. 52.
[275] USITC Aluminum Report, **(Exhibit NOR-49)**, p. 52.
[276] USITC Aluminum Report, **(Exhibit NOR-49)**, p. 52.
[277] "Aluminum: The Element of Sustainability" , the Aluminum Association, September 2011, **(Exhibit NOR-48)**, p. 46. Emphasis added.
[278] "Aluminum: The Element of Sustainability" , the Aluminum Association, September 2011, **(Exhibit NOR-48)**, p. 29.
[279] "Aluminum: The Element of Sustainability" , the Aluminum Association, September 2011, **(Exhibit NOR-48)**, pp. 27 and 29.
[280] USITC Aluminum Report, **(Exhibit NOR-49)**, p. 52.

FIGURE 2: PRODUCTION PROCESS FOR PRIMARY, SECONDARY, AND DOWNSTREAM ALUMINIUM PRODUCTS[281]



223. The US aluminium tariffs apply to all imported unwrought and wrought aluminium products. In other words, they apply to all three aluminium product categories: primary unwrought aluminium, secondary unwrought aluminium, and downstream wrought products.[282]

224. In terms of US producers of these three aluminium products, the DOC Aluminium Report describes three "major segments"[283] of the industry: (1) producers of primary aluminium products; (2) producers of secondary aluminium products; and (3) producers of downstream aluminium products.

225. As the USITC Report explains, the three industry segments are affected by different competitive conditions. For primary aluminium producers, the chief determinant of competitiveness is energy costs. Thus, producers from countries with abundant, low-cost

[281] *See* DOC Aluminium Report, **(Exhibit NOR-2)**, Appendix E.
[282] *See* above Section V.C.
[283] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 21.

energy sources have a significant competitive advantage.[284] For secondary aluminium producers, competitiveness is driven by access to cheap and reliable scrap supplies.

226. For producers of downstream aluminium products, competitiveness is driven by: access to unwrought aluminium, in particular lower-cost recycled aluminium; coordination with developed end-use markets; and the technical capability to produce high-value-added, differentiated products.[285]

227. The USITC Report explains that different competitive conditions in Canada and the United States have led to the development of an integrated North American (Canada/United States) aluminium market, with the two countries developing industry segments in the areas where they enjoy comparative advantage.

228. The USITC Report narrates that Canada has abundant and cheap hydroelectric power, and "has therefore focused its resources and technical capabilities on the energy-intensive primary unwrought aluminum segment".[286] As a result, Canada has developed a competitive primary aluminium industry segment.

229. The extent of integration in the Canadian and US markets led the DOC Aluminium Report to discuss "Canadian primary aluminum capacity" in the segment of the Report addressing "domestic aluminium capacity". The DOC itself explains that "Canadian primary aluminum production is important to the U.S. aluminum industry".[287] And, the DOC even presents some of its data as aggregated North American data, *i.e.*, without breaking down the data between US and Canadian producers.[288]

230. In contrast to Canada, the United States has high energy costs, which makes production of primary aluminium less competitive. However, US producers have access to a uniquely well-established aluminium recycling infrastructure, from well-developed aerospace and automobile end-use markets, and from advanced technical capabilities.[289] The United States has, therefore, "intensified its focus on secondary and wrought production in an increasingly integrated North American Market".[290]

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[284] USITC Aluminum Report, **(Exhibit NOR-49)**, p. 70.
[285] USITC Aluminum Report, **(Exhibit NOR-49)**, p. 35.
[286] USITC Aluminum Report, **(Exhibit NOR-49)**, p. 185. *See also* p. 205.
[287] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 52.
[288] DOC Aluminium Report, **(Exhibit NOR-2)**, Table 14, which "reports for North America – including Canada and the United States". *See* note to Table 15, p. 63.
[289] USITC Aluminum Report, **(Exhibit NOR-49)**, pp. 131-148. *See also* Aluminum Recycling in the United States in 2000, U.S. Department of the Interior and U.S. Geological Survey, **(Exhibit NOR-50)**.
[290] USITC Aluminum Report, **(Exhibit NOR-49)**, p. 185. *See also* pp. 120-121.

231. In fact, the United States has successfully developed highly competitive segments producing secondary aluminium and downstream products: the United States is the world's leading producer of secondary aluminium, and the world's second leading producer of downstream products.[291]

232. Producers of secondary aluminium and downstream products are the two largest segments of the US aluminium industry, and both segments are thriving.[292] It is worth elaborating on these factors using information from the USITC Report.

233. For secondary aluminium, production capacity, and production, both enjoyed growth between 2011 and 2015 (13 percent and 5 percent respectively).[293] Further, US secondary producers saw their share of sales of unwrought aluminium grow by 6 percent in the same period.[294]

234. Secondary aluminium makes up the large majority of total US unwrought aluminium production (*i.e.*, primary and secondary aluminium combined). Indeed, the USITC found that secondary aluminium's share of unwrought production has been steadily growing, and now accounts for 84 percent of the US production of unwrought aluminium.[295]

TABLE 4: PRIMARY AND SECONDARY ALUMINIUM – SHARE OF UNWROUGHT PRODUCTION[296]

	2011	**2012**	**2013**	**2014**	**2015**
Smelted	21%	21%	19%	17%	16%
Recycled	79%	79%	81%	83%	84%

[291] USITC Aluminum Report, **(Exhibit NOR-49)**, pp. 137 and 142.
[292] USITC Aluminum Report, **(Exhibit NOR-49)**, pp. 129-130.
[293] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 50, citing USITC Aluminum Report, **(Exhibit NOR-49)**, p. 151.
[294] USITC Aluminum Report, **(Exhibit NOR-49)**, p. 152.
[295] Calculated based on data provided at Tables 4.8 and 4.9 of the USITC Aluminum Report **(Exhibit NOR-51)**. The DOC states that secondary aluminium production makes up 64 percent of the US market. The DOC's figure appears to include *only* secondary aluminium produced from used, rather than new scrap, and from excluding captive producers. According to the USITC's figures (Tables 4.8 and 4.9 of the USITC Report), which include secondary production from used *and* new scrap, as well as captive producers, the share of secondary production is 84 percent.
[296] Source: USITC Aluminum Report, **(Exhibit NOR-51)** data provided at Tables 4.8 and 4.9.

235. Similarly, US downstream industry "continued to expand" in the 2011-2015 period, as the United States was "one of the world's best and most technically advanced producers".[297] Capital investments by US downstream producers rose by 65 percent from 2011-2015.[298]

236. By way of example, the USITC Report describes the shift in the production activities of Alcoa, the biggest US aluminium producer. As a vertically integrated producer, Alcoa produces primary, secondary and downstream aluminium products. In recent years, Alcoa's US operations have reduced primary aluminium production, increased secondary aluminium production, and invested in technology to produce higher value-added downstream products.[299]

237. The integrated character of the Canadian and US aluminium markets also has implications for sales. At the time of the USITC Report, the United States is the largest export market for Canadian primary aluminium, and Canada is the largest export market for US downstream products.[300] A number of major, vertically integrated aluminium producers, including Alcoa (the largest in the United States) maintain integrated operations across both countries.[301]

(ii) The DOC Aluminium Report fails to properly evaluate injury to the US aluminium industry as a whole

238. Under Article 2.1 of the *Safeguards Agreement*, the DOC was required to determine that the "domestic industry" has suffered serious injury. As part of the context, Article 4.2(c) of the *Agreement* provides that the "domestic industry" comprises producers of domestic products that are "like or directly competitive" with the imported products subject to the safeguard measure.

239. To recall, the aluminium tariffs apply to: (1) primary unwrought aluminium products; (2) secondary unwrought aluminium products; and (3) downstream wrought aluminium products.

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[297] USITC Aluminum Report, **(Exhibit NOR-49)**, pp. 142-143. Flat-rolled products are the largest sector of US production, accounting for 62 percent of total downstream aluminium production in 2015; extruded products accounted for 32 percent; and, wire products accounted for 6 percent. *See* "Aluminum: Competitive Conditions Affecting the U.S: Industry", United States International Trade Commission, June 2017 ("USITC Aluminum Report"), **(Exhibit NOR-49)**, p. 151.
[298] USITC Aluminum Report, **(Exhibit NOR-49)**, p. 146.
[299] USITC Aluminum Report, **(Exhibit NOR-51)**, p. 135.
[300] USITC Aluminum Report, **(Exhibit NOR-51)**, p. 185.
[301] USITC Aluminum Report **(Exhibit NOR-51)**, pp. 136, 143, 158, 185, and 197.

240. Domestic and imported products falling within each of these three groups are indistinguishable but for their origin. The respective products within each of these categories are, therefore, "like" each other. Further, primary and secondary unwrought aluminium products are physically and functionally the same and, hence, "like" each other, irrespective of the method of production. As a result, the US "domestic industry" comprises three segments: US primary aluminium producers; US secondary aluminium producers; and US producers of downstream products.

241. Consistent with the legal standard described in Section VI.B.1 above, the DOC was required to provide a reasoned and adequate explanation that the US aluminium industry *as a whole* has suffered injury, taking into account the economic position of *all three industry segments*.

242. However, the DOC's injury assessment focuses on a single segment of the industry: US primary aluminium producers. The DOC's assessment largely ignores the economic position of the other two industry segments: US secondary aluminium producers and US downstream producers. As already mentioned, the DOC Report is explicit about its limited consideration of secondary aluminium, which it says "is not the focus of this report".[302] This is notwithstanding the DOC's admission that secondary aluminium producers make up "fundamentally a different industry sector", subject to different competitive conditions, and thus requiring its own, considered, assessment.[303]

243. The table below depicts how the DOC Report assesses injury factors in relation to the three different aluminium industry segments. The green colour shows when an injury factor is explained by the DOC; the orange colour shows when an injury factor is not explained; and the red colour shows when it is simply not addressed. As the table shows, the DOC Report provides an explanation of injury to the US producers of primary aluminium, but not for US producers of secondary aluminium or downstream products.

[302] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 22.
[303] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 22.

TABLE 5: INJURY FACTORS PER SEGMENT OF THE US ALUMINIUM INDUSTRY

INJURY FACTORS	UNWROUGHT ALUMINIUM PRODUCERS		DOWNSTREAM ALUMINIUM PRODUCERS
	PRIMARY ALUMINIUM	SECONDARY ALUMINIUM	
Production and productivity	Data explained	Data not explained	Data not explained
Level of domestic sales	Data explained	Data not explained	Not addressed
Capacity utilisation	Data explained	Not addressed	Data not explained
Financial performance	Data explained	Not addressed	Data not explained
Employment	Data explained	Data not explained	Data not explained
Capital expenditure	Data not explained	Data not explained	Data not explained

244. The DOC's decision to focus on US primary producers, at the expense of US secondary and downstream producers, is consequential. As just noted, US producers in these latter two industry segments are globally competitive leaders; they are economically successful; and they make up the largest parts of the US aluminium industry.

245. The DOC errs in focusing on a single, poorly performing segment of the industry – the primary unwrought aluminium segment – without providing equivalent data or explanation that addresses the differing situations of the other two industry segments (secondary unwrought aluminium and downstream wrought aluminium)

246. By focusing its injury determination on one segment of the domestic industry, at the expense of the other two segments, the DOC fails to provide a reasoned and adequate explanation for its conclusion that the domestic industry as a whole is injured. The United States has, therefore, acted inconsistently with Article 2.1 of the *Safeguards Agreement*.

247. Below, Norway provides further detail concerning the DOC's failure to explain that the domestic industry as a whole is injured, by reference to each of the relevant injury factors addressed in its Report.

a) Production and productivity

248. When assessing whether the domestic industry has seen a decrease in production and productivity, the DOC only explains how the data in relation to producers of primary

aluminium supports its injury finding. Specifically, for producers of primary aluminium, the DOC presents a variety of data showing a decline in production.[304]

249. For producers of secondary aluminium – which, to recall, accounts for 84 percent of total US unwrought production[305] – the DOC confines its analysis to noting that the USITC found that this segment's production levels **increased** by 13.4 percent, and its production capacity **increased** by 5.6 percent over the same period.[306] The DOC does not explain how it took this positive economic performance into account in its serious injury findings.

250. For downstream aluminium, in **Table 13**, the DOC presents production data for each category of downstream product: flat-rolled products; extruded products; and wire. *First*, the DOC describes the production rates of flat-rolled products as "essentially flat" between 2012-2015. In fact, Table 13 shows that production **increased** by 2 percent.[307] The DOC provides no explanation of how it took this positive economic performance into account in its serious injury finding. This is especially problematic, since flat-rolled products account for almost two-thirds of all US downstream production;[308] and downstream production is the largest of the three industry segments.[309]

251. *Second*, the DOC acknowledges that extruded aluminium products – which account for almost one-third of US downstream production[310] – experienced "growth" from 2012-2015. **Table 13** shows that production **increased** by 13 percent during this period.[311] Once again, the DOC provides no explanation of how it took this positive economic performance into account in its serious injury findings.

252. *Third*, wire and cable products are the *only* category of downstream products for which the DOC attempts to demonstrate a decline in production. The DOC cites to USITC figures showing a decline of 23 percent "wire and cable" production.[312] However, US production of these products makes a small fraction of US downstream production,

[304] Specifically, the DOC shows a decline in production from 2.070 million metric tons in 2012, to 1.587 million metric tons in 2015. *See* DOC Aluminium Report, **(Exhibit NOR-2)**, Table 9.
[305] *See* footnote 295 above.
[306] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 50, citing USITC Aluminum Report, **(Exhibit NOR-49)**, p. 151.
[307] Certain data presented in the USITC Aluminum Report indicates that US production of flat-rolled products increased by 6 percent. *See* USITC Aluminum Report, **(Exhibit NOR-49)**, p. 152.
[308] USITC Aluminum Report, **(Exhibit NOR-51)**, p. 151.
[309] USITC Aluminum Report, **(Exhibit NOR-49)**, p. 131.
[310] USITC Aluminum Report, **(Exhibit NOR-49)**, p. 151.
[311] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 54.
[312] DOC Aluminium Report, **(Exhibit NOR-2)**, Table 13, p. 54.

accounting for just 6 percent according to the USITC.[313] The DOC does not explain how an isolated decrease in production of a small minority of downstream products indicates that the US downstream aluminium segment – let alone the aluminium industry *as a whole* – is experiencing a decline in production and productivity.

253. The DOC also presents **Table 14**, which contains 2012-2015 data on production and production capacity (as well as capacity utilisation) for wrought aluminium producers, for each product segment. However, curiously, the DOC appears to have included aggregated data for both US *and Canadian* producers.[314] The DOC does not explain why it takes this approach, or provide any break-down of the data per-country. This renders the data useless for the purposes of assessing injury to *US* wrought producers.

254. In any event, the data in **Table 14** shows that, for the majority of downstream products, production and production capacity increased between 2012-2015.[315]

255. In sum, the DOC data shows that the two largest segments of the aluminium industry (US producers of secondary and downstream products) have experienced **increased** production and production capacity. The DOC provides no explanation whatsoever of how it took this data into account when concluding that the US aluminium industry is injured.

b) Domestic sales

256. When assessing whether the US aluminium industry has seen a decline in the domestic sales levels, the DOC explains only the position of US primary aluminium producers. The DOC explains that imported primary aluminium has taken an increased share of domestic sales: "the import penetration level [of primary aluminium] was about 90 percent, up from 66 percent in 2012".[316]

257. With respect to secondary aluminium, the US only presents *aggregated* data on the share of domestic sales taken by *all* US-produced unwrought aluminium, *i.e.*, primary and secondary together.[317] In other words, a single figure is given for the share of domestic sales of US primary and secondary aluminium together, for each year. This aggregate data masks

[313] USITC Aluminum Report, **(Exhibit NOR-49)**, p. 151.
[314] This is not evident from the terms of Table 14 itself. However, in the note to Table 16, the DOC explains that "consumption figures in this table are slightly lower than those for Table 14, which reports for North America – including Canada and the United States. *See* DOC Aluminium Report, **(Exhibit NOR-2)**, Table 16, p. 63.
[315] DOC Aluminium Report, **(Exhibit NOR-2)**, Table 14, p. 56.
[316] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 3.
[317] DOC Aluminium Report, **(Exhibit NOR-2)**, Table 16, p. 63.

the respective performance of the primary and secondary segments. Further, the DOC provides no explanation of the data with respect to secondary producers.

258. The DOC presents no data at all on the share of domestic sales taken by US downstream producers. Thus, with respect to the largest industry segment, the DOC entirely fails to address this injury factor.

259. In sum, the DOC wholly fails to account for this aspect of the economic position of two parts of the domestic industry in concluding that the industry is seriously injured.

c) Capacity utilisation

260. When assessing capacity utilisation levels of the US aluminium industry, the DOC, again, addresses solely the position of US primary aluminium producers. The DOC presents a variety of data, and explains that "U.S. smelters [of primary aluminium] are now producing at 43 percent of capacity".[318]

261. The DOC presents no data at all on capacity utilisation levels of US secondary aluminium producers, which, to recall, account for 84 percent of total US unwrought aluminium production.[319]

262. With respect to US wrought aluminium producers, the DOC presents **Table 14**, which contains data on capacity utilisation between 2012-2015. As noted earlier, this data is useless for assessing injury to the US industry, because it is aggregated with data from Canadian producers. In any event, based on this data, capacity utilisation has *increased* for *every single wrought product sector*. The DOC also presents **Table 13**, showing a 2 percent decrease in capacity utilisation for one wrought product sector (flat-rolled products). Table 13 presents no capacity utilisation data for any other wrought product sector; the DOC does not explain why.

263. The DOC provides no explanation whatsoever of how it took this data into account when concluding that the US aluminium industry is injured.

264. In sum, the DOC wholly fails to account for this aspect of the economic position of these parts of the domestic industry in concluding that the industry is seriously injured.

[318] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 3.
[319] *See* footnote 295 above.

d) Financial performance

265. When assessing whether the US aluminium industry has seen poor financial performance, the DOC explains data solely in relation to producers of primary aluminium. In Table 41, the DOC presents data showing reductions in, *inter alia*, sales revenue and net income for three companies currently operating primary aluminium smelter facilities in the United States.[320]

266. The DOC presents no data at all on the financial performance of secondary aluminium producers. As a result, the DOC wholly fails to account for this aspect of the economic position of US aluminium industry in concluding that the industry as a whole is seriously injured.

267. With respect to producers of downstream products, the DOC does identify some data relating to financial performance. Specifically, the DOC explains that this segment has "experienced modest job **growth** across a range of industrial sectors between 2013 and 2016 based on increased demand for their products", and that downstream producers "**have made investments** in capital equipment".[321] However, the DOC fails to explain how it took this positive economic performance into account in concluding that the US aluminium industry suffers serious injury.

e) Employment

268. In **Table 39**, The DOC presents data that shows falling employment rates for producers of primary aluminium from 2013-2016.[322] The DOC explains that "[t]he loss of jobs in the primary aluminium sector has been precipitous between 2013 and 2016, falling 58 percent as several smelters were either permanently shut down or temporarily idled".[323]

269. However, **Table 39** also shows a 2 percent **increase** in employment for producers of secondary aluminium, and a 29 percent **increase** in employment for producers of downstream products. In fact, **Table 39** shows that, across all three industry segments, employment has **increased** by 3 percent. In other words, the DOC's data shows that increases in employment

[320] These are two US companies, Alcoa and Century Aluminum, and one Canadian company, Noranda Aluminum. *See* DOC DOC Aluminium Report, **(Exhibit NOR-2)**, pp. 91-92.
[321] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 94.
[322] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 90.
[323] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 89.

in the secondary and downstream sectors have more than compensated for decreases in the primary sector, leading to an improvement in the overall economic position of the industry.

270. The DOC fails to explain how it took into account the positive economic performance in finding that the US aluminium industry is seriously injured.

f) Capital expenditure

271. In **Table 42**, the DOC shows a slight **increase** in capital expenditure by primary aluminium producers from 2013-2015. The DOC seems to disregard this data in favour of its projections for 2016. It states that "data for 2016 would likely show a decline in capital expenditures by the primary aluminium sector".[324] The DOC does not, however, explain the factual basis for its projection of a decline in capital expenditure in 2016. In evaluating the position of this segment, the DOC also fails to explain how it reconciles its projections for 2016 with the increased expenditures observed in the three previous years.

272. **Table 42** also shows that capital expenditures by producers of secondary aluminium and downstream products **increased** from 2013-2015. Indeed, for downstream producers, the DOC acknowledges that the USITC data shows that "capital spending rose by 65 percent between 2011 and 2015".[325] The DOC makes no projections for capital spending by these two segments in 2016. The DOC also does not explain how it took into account the positive economic performance of these two industry segments in finding that the aluminium industry has seen a decrease in capital expenditures, and is seriously injured.

(iii) Conclusion

273. The Appellate Body has explained that, when an industry is segmented, it is important for an authority to assess injury to the industry as a whole in light of the performance of its different segments, and of the relationship between the segments. As the Appellate Body observed, a lopsided evaluation "may give a misleading impression of the data relating to the industry as a whole",[326] for example, where "some parts of the industry are performing well, while others are performing poorly".[327] Such a lopsided evaluation "highlight[s] the negative data in the poorly performing part [of the industry]", while the "positive developments in

[324] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 98.
[325] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 97.
[326] Appellate Body Report, *US – Hot Rolled Steel*, para. 204.
[327] Appellate Body Report, *US – Hot Rolled Steel*, para. 204.

other parts of the industry" are "overlook[ed]",[328] and fails to "appreciate the economic relationship" between the different segments.

274. These words aptly describe the DOC Aluminium Report. The DOC provides a lopsided assessment that focuses almost exclusively on a single, poorly performing, segment of the industry – primary unwrought aluminium producers. The DOC does not provide equivalent data or explanation to address the situation of the other two industry segments (secondary unwrought and downstream wrought aluminium producers), which are performing well. The DOC fails, therefore, to evaluate properly serious injury to the US aluminium industry.

(c) DOC Steel Report

275. The DOC Steel Report suffers from similar flaws to those found in the DOC Aluminium Report. The DOC focuses on a single segment of the industry, largely ignoring two other segments of the industry. As a result, the DOC violates Articles 2.1 of the *Safeguards Agreement*, by failing to provide a reasoned and adequate explanation showing that the US steel industry *as a whole* is seriously injured.

276. In this Section, Norway *first* sets out relevant facts regarding the steel industry and, *second*, demonstrates that the DOC Steel Report fails to provide a proper evaluation of injury to the US steel industry.

(i) Factual background to the steel industry

277. Steel is an alloy of iron and carbon, the base metal being iron. Due to its durability and high tensile strength, steel is the world's most widely used material in engineering and construction.[329] The DOC's investigation into the steel industry covers two categories of steel products: (1) semi-finished steel products; and (2) finished steel products.

278. Semi-finished steel is an upstream product that is subsequently converted, through additional manufacturing processes, into finished steel products. Semi-finished steel can be produced using two different production methods: (1) "basic" or "blast oxygen furnace" production ("semi-finished BOF steel"); or (2) "electric arc furnace" production ("semi-

[328] Appellate Body Report, *US – Hot Rolled Steel*, para. 204.
[329] "About Steel", World Steel Association fact sheet, **(Exhibit NOR-51)**.

finished EAF steel").[330] Although the production processes differ, the semi-finished steel products that result from the two processes are physically and functionally the same.

279. The BOF process reflects the traditional approach to steelmaking. In the BOF process, the inputs are predominantly primary materials: iron ore, coking coal, and limestone.[331] The BOF process uses extremely high temperatures, reaching up to 1600-1650°C, to transform these materials into steel. These temperatures must be maintained for many hours, without interruption. The high temperatures convert iron ore into pig iron, and then convert pig iron into liquid steel. BOF production costs are high because of the use of costly primary materials and the need to maintain high temperatures.[332]

280. By comparison, the EAF process is innovative and cheaper, using technology pioneered in the United States in relatively recent years to allow for the re-use of scrap steel.[333] An EAF mill (or "mini-mill") relies on steel scrap as the predominant input product (over iron ore), and uses electricity (rather than coal) to re-melt the scrap into liquid steel.[334]

281. EAF production offers several advantages over BOF production. Unlike BOF production, the EAF process can be stopped and restarted quickly and easily, allowing for intermittent use (*e.g.*, for fewer shifts).[335] This flexibility is a particular advantage when global prices and demand are volatile. EAF production also uses 75 percent less energy than BOF production, with lower environmental impact.[336] Further, whereas the main inputs for the BOF process (iron-ore and coking coal) are difficult to secure and costly, the main input for the EAF process (recycled scrap steel) is increasingly available in the United States at

[330] *See* Steel making process, diagram, Arcelor Mittel, **(Exhibit NOR-52)**. There is a third type of semi-finished steel production, the "open hearth furnace" (OAF). OAF production is very energy intensive, and now only makes up 0.4 percent of global steel production. *See* "About Steel", World Steel Association fact sheet, **(Exhibit NOR-51)**.
[331] "About Steel", World Steel Association fact sheet, **(Exhibit NOR-51)**. For a more detailed explanation of the BOF production process, *see* United States Geological Survey, Mineral Commodity Profile – Iron and Steel, 2005, **(Exhibit NOR-53)**, pp. 7-9.
[332] United States Geological Survey, Mineral Commodity Profile – Iron and Steel, 2005, **(Exhibit NOR-53)**, pp. 7-9.
[333] "The White Book of Steel", World Steel Association, 2012 World Steel Association publication, **(Exhibit NOR-54)**, pp. 24, 29-31.
[334] "About Steel", World Steel Association fact sheet, **(Exhibit NOR-51)**; "The White Book of Steel", World Steel Association, 2012 World Steel Association publication, **(Exhibit NOR-54)**, p. 2.
[335] United States Geological Survey, Mineral Commodity Profile – Iron and Steel, 2005, **(Exhibit NOR-53)**, p. 32.
[336] United States Geological Survey, Iron and Steel Yearbook, 2000, **(Exhibit NOR-55)**, pp. 40.3-40.4.

lower prices. For these reasons, EAF production has much lower production cost than BOF production, at USD 300 per tonne as compared with USD 1,000 of semi-finished steel.[337]

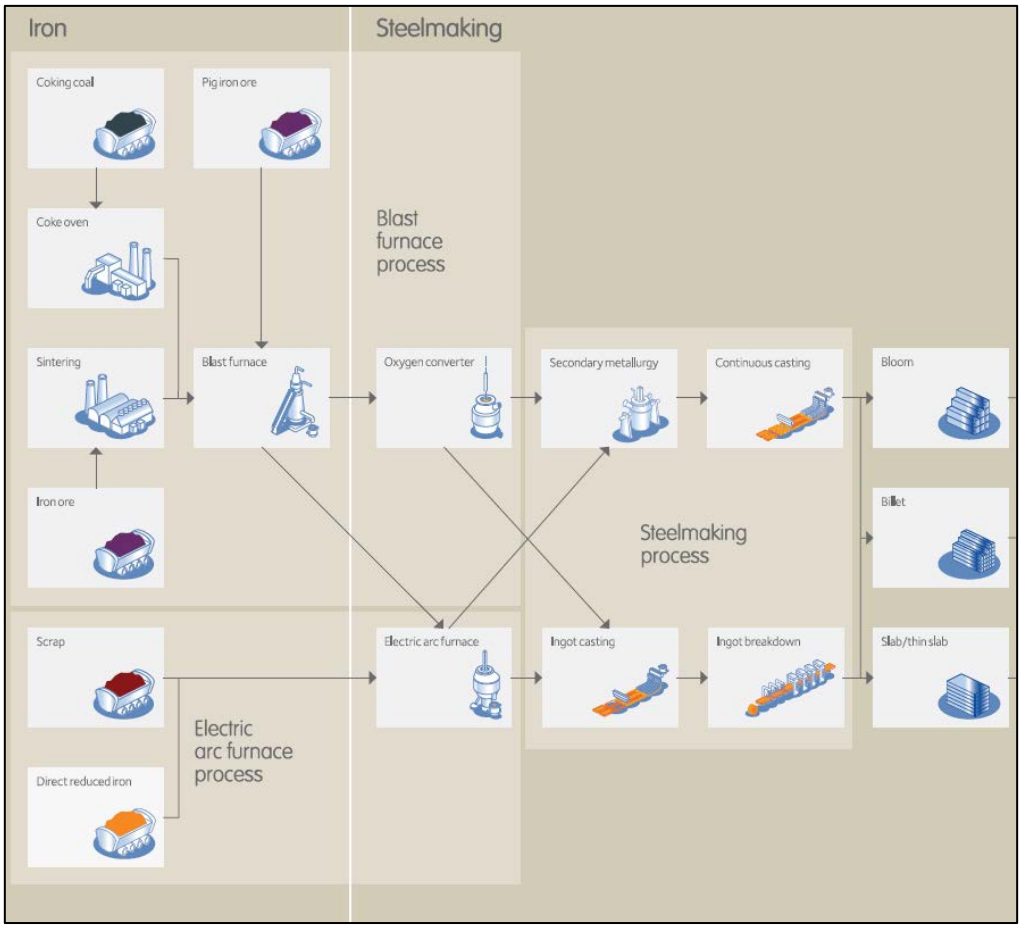
282. Industry experts summarise the comparative advantage of EAF production as follows: mini-mills "cost less to build and operate, are more flexible in satisfying customer requirements, and satisfy the growing demand for recycling".[338] According to the OECD, "the entry of [EAF] mini-mills [in the United States] accelerated the decline of integrated mills [*i.e.*, BOF] much more than imports".[339]

283. This shift in US semi-finished steel production to the EAF process is predicted to continue: "U.S. steelmakers are increasingly reluctant to make long-term maintenance expenditures on blast furnaces" because "the EAF is more energy efficient and pollution free"; "blast furnaces will continue to face closure because of environmental restrictions".[340]

284. Figure 3 shows the BOF and EAF production process, from which three types of semi-finished products are manufactured: "bloom", "billet" and "slab/thin slab". These semi-finished products are subsequently manufactured into finished products.

[337] United States Geological Survey, Mineral Commodity Profile – Iron and Steel, 2005, **(Exhibit NOR-53)**, pp. 7-9.
[338] United States Geological Survey, Iron and Steel Yearbook, 2000, **(Exhibit NOR-55)**, pp. 40.3-40.4; United States Geological Survey, Mineral Commodity Profile – Iron and Steel, 2005, **(Exhibit NOR-53)**, pp. 9, 19-20 and 32.
[339] "Impacts of energy market developments on the steel industry", presentation delivered at the 74th Session of the OECD Steel Committee, 1-2 July 2013, **(Exhibit NOR-56)**.
[340] United States Geological Survey, Iron and Steel Yearbook, 2000, **(Exhibit NOR-55)**, pp. 40.3-40.4. *See also* "Losing strength US steel industry analysis", White & Case, 16 April 2016, **(Exhibit NOR-57)**.

FIGURE 3 : THE SEMI-FINISHED STEELMAKING PROCESS (BOF AND EAF PRODUCTION)[341]



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

[341] *See* Steel making process, diagram, Arcelor Mittel, **(Exhibit NOR-52)**.

FIGURE 4: THE FINISHED STEELMAKING PROCESS

286. The DOC Report identifies four categories of finished steel products: [342]

- (1) Carbon and alloy flat products (61 HTS codes). Flat products are rolled products of varying dimension and thickness, used for large welded pipes, ship building and construction.[343]

- (2) Carbon and alloy long products (9 HTS codes). Long products include wire, rod, rail and bars, and are used in all industrial sectors, particularly construction and engineering.[344]

- (3) Carbon and alloy pipe and tube products. (27 HTS codes);

- (4) Stainless products (36 HTS codes). Stainless products are distinguished from carbon steel by the chromium and nickel content; stainless steel is more rust resistant and has enhanced density, heat capacity and strength.[345]

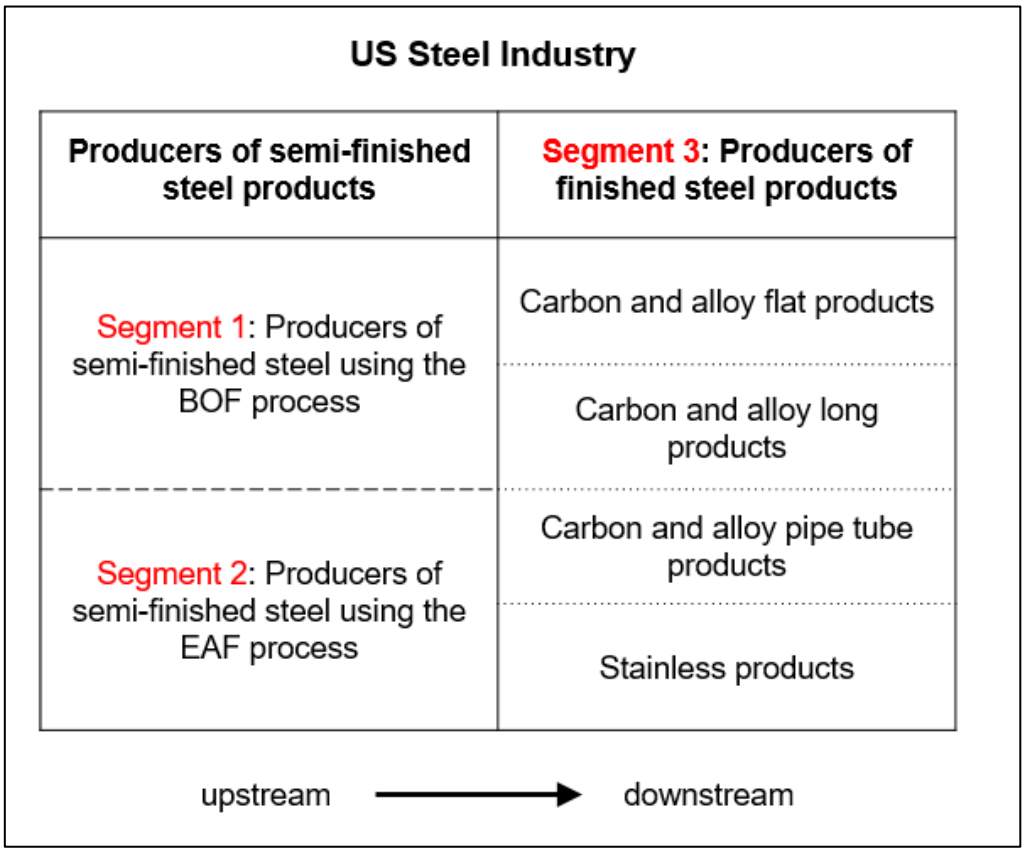
287. The US steel tariffs apply to all types of semi-finished and finished steel products. In terms of US producers of these steel products, the DOC Steel Report identifies three major

[342] DOC Steel Report, **(Exhibit NOR-1)**, footnote 22, p. 17.
[343] A Guide to the Language of Steel, **(Exhibit NOR-58)**.
[344] A Guide to the Language of Steel, **(Exhibit NOR-58)**.
[345] A Guide to the Language of Steel, **(Exhibit NOR-58)**.

domestic industry segments: (1) producers of semi-finished BOF steel; (2) producers of semi-finished EAF steel; and (3) producers of finished steel products.

288. Figure 5 below shows the three segments of the US steel industry.

FIGURE 5: THE US STEEL INDUSTRY, BY SEGMENT



289. In terms of semi-finished steel, the BOF segment dominates global production, accounting for 75 percent of semi-finished output in 2016.[346] However, the situation is different in the United States, which led the technological developments that allowed for EAF production to begin there in the 1960s. Specifically, the US company Nucor led innovations in EAF technology and remains a global industry leader.[347]

290. As described above, in the United States, EAF production enjoys several advantages as compared with BOF production, in particular, lower costs to build a facility, more accessible inputs, lower production costs, greater production flexibility, and fewer

[346] "World Steel in Figures 2017" , World Steel Association, **(Exhibit NOR-59)**.
[347] "The White Book of Steel", World Steel Association, 2012 World Steel Association publication, **(Exhibit NOR-54)**, p. 30; "Losing strength US steel industry analysis", White & Case, 16 April 2016, **(Exhibit NOR-57)**; DOC Steel Report, **(Exhibit NOR-1)**, note to Figure 9 and footnote 56.

environmental restrictions. As a result, as shown in Table 6, in the United States, the EAF process now dominates the production of semi-finished steel.[348]

TABLE 6: EAF AND BOF PRODUCTION – SHARE OF US SEMI-FINISHED STEEL PRODUCTION[349]

	2012	2013	2014	2015	2016	2017
BOF	40%	39%	38%	37%	33%	32%
EAF	60%	61%	62%	63%	67%	68%

291. Although the United States is ahead of the global curve in shifting to EAF production, it is a "commonly held view" among industry experts that the EAF process will become the world's "primary steel production method", as technological capacity develops.[350]

(ii) The DOC Steel Report fails to properly evaluate injury to the US steel industry as a whole

292. Under Article 2.1 of the *Safeguards Agreement*, the DOC was required to determine that the "domestic [steel] industry has suffered serious injury. The "domestic industry" comprises producers of domestic products that are "like or directly competitive" with the imported products subject to the safeguard.

293. The steel tariffs apply to the following steel products: (1) semi-finished BOF steel; (2) semi-finished EAF steel; and (3) finished steel products. Domestic and imported products falling within each of these three categories are indistinguishable, but for origin. The respective products within each of these categories are, therefore, "like" each other. Further, all semi-finished steel products are physically and functionally the same and, hence, "like" each other, irrespective of the method of production. As a result, the US "domestic industry"

[348] "The White Book of Steel", World Steel Association, 2012 World Steel Association publication, **(Exhibit NOR-54)**, pp. 24, 29-31.
[349] Percentage from 2011-2016 calculated from data provided in "World Steel in Figures 2017" , World Steel Association, **(Exhibit NOR-59)**, Figure 16. Percentage from 2017 calculated from data provided in "World Steel in Figures 2018", World Steel Association, **(Exhibit NOR-60)**. *See also* American Metal Markets, DRI & Mini-mills, DRI & Mini-mills Conference, **(Exhibit NOR-61)** p. 9.
[350] United States Geological Survey, Iron and Steel Yearbook, 2000, **(Exhibit NOR-55)**, pp. 40.3; United States Geological Survey, Mineral Commodity Profile – Iron and Steel, 2005, **(Exhibit NOR-53)**, p. 32; American Metal Markets, DRI & Mini-mills, DRI & Mini-mills Conference, **(Exhibit NOR-61)**, pp. 5 and 7.

comprises three segments: US producers of semi-finished BOF steel products; US producers of semi-finished EAF steel products; and US producers of finished steel products.

294. Consistent with the legal standard described above,[351] the DOC was required to provide a reasoned and adequate explanation that the US steel industry *as a whole* has suffered injury, taking into account the economic position of *all three industry segments*.

295. However, the DOC's injury assessment focuses overwhelmingly – albeit still inadequately – on a single segment of the industry: domestic semi-finished BOF producers. The DOC's assessment largely ignores the economic position of the other two industry segments: domestic semi-finished EAF producers, and finished producers.

296. The table below depicts how the DOC Report assesses injury factors in relation to the three different steel industry segments. The green colour shows when an injury factor is explained by the DOC; the orange colour shows when an injury factor is not explained; and the red colour shows when it is simply not addressed. As the table shows, the DOC provides an incomplete explanation of injury to the US semi-finished BOF producers, and largely ignores US semi-finished EAF producers or downstream producers.

TABLE 7: INJURY FACTORS PER SEGMENT OF THE US STEEL INDUSTRY

Injury Factors	**Semi-finished producers**		**Finished**
	BOF	**EAF**	
Production and productivity	Data explained	Data not explained	Not addressed
Level of domestic sales	Data not addressed	Data not explained	Data not explained
Capacity utilisation	Data not explained	Data not explained	Not addressed
Financial performance	Data not explained	Data not explained	Data not explained
Employment	Data not explained	Data not explained	Data not explained
Capital expenditure	Data not explained	Data not explained	Data not explained

297. In assessing each of the injury factors, the DOC makes one or more of the following errors: (1) the DOC focuses on a single, poorly performing segment of the industry – the

[351] *See* Section VI.B.2.a.i above.

BOF segment, without providing equivalent data or explanation that addresses the differing situations of the other two industry segments (the semi-finished EAF steel and finished steel segments); (2) the DOC uses aggregate data that masks differences in the economic performance of the different industry segments, without adequate consideration of the performance of the segments in question; and (3) the DOC provides selective aggregate data that is not representative.

298. Below, Norway provides further detail concerning the DOC's failure to explain that the domestic industry as a whole is injured, by reference to each of the relevant injury factors addressed in its Report.

a) Production and productivity

299. When assessing whether the US aluminium industry has seen a decrease in production and productivity, the DOC explains only how the data supports an injury finding in relation to semi-finished BOF producers.

300. On semi-finished production, the DOC *first* presents a variety of data on *semi-finished steel production capacity and production*, in Figures 11, 15, and 16.[352]

301. **Figure 11** presents aggregated data for EAF and BOF on production capacity for the period 1995-2017. In other words, a single figure is given for EAF and BOF production capacity together, for each year. This aggregate data masks the respective performance of the EAF and BOF segments. Further, in its explanation of this aggregate data, the DOC addresses solely the BOF segment, without mentioning the EAF segment. The DOC states that "[t]he present situation with respect to *basic oxygen furnace* production is significantly worse than the situation [in 2001]".[353]

302. In **Figure 15**, the DOC presents further data on US semi-finished steel production capacity, and also actual production, this time for the period 2011-2017, again without distinguishing between EAF and BOF production. These data show that, when assessed in aggregate, EAF and BOF production capacity and production have declined. The DOC uses the data to reach a much broader conclusion: US production of "steel products" generally has declined.[354] However, the DOC does not distinguish, in its explanation or conclusion, between the semi-finished BOF and EAF steel products, let alone finished steel products.

[352] DOC Steel Report, **(Exhibit NOR-1)**, pp. 41-48.
[353] DOC Steel Report, **(Exhibit NOR-1)**, p. 43. Emphasis added.
[354] DOC Steel Report, **(Exhibit NOR-1)**, pp. 46-47.

303. In **Figure 16**, the DOC considers disaggregated data on actual production of semi-finished BOF and EAF steel between 1998-2016, but provides no disaggregated data on production capacity. The DOC's disaggregated production data shows that the BOF segment alone suffered a decline in production. Indeed, between 2000-2016, EAF production **increased**. The DOC does not explain why it provides only aggregated data for production capacity, but disaggregated data for production. Nor does the DOC explain how it took into account the growth in production of the EAF segment.

304. In that respect, the growth in EAF production appears to be important to the industry as a whole. EAF production is shown to be consistently much *higher* than BOF production, and is replacing BOF production over time. Indeed, the *decrease* in BOF production is almost equal to the *increase* in EAF production. This also shows that an important part of the decline in domestic BOF production is due to a switch to domestic EAF production. Again, the DOC does not explain how it took the switch from domestic BOF to EAF production into account.

305. *Second*, the DOC presents data on the *total number of semi-finished BOF and EAF facilities* in the United States, in five-year increments from 1975 to 2016. The data shows that, in 2000, there were just over four times as many EAF as BOF facilities. By 2016, there were almost six times as many domestic EAF as BOF facilities. The data, therefore, shows the long-standing and continuing shift to EAF production. The DOC does not explain this trend in the evolution of US semi-finished steel production, nor its significance for the US steel industry as a whole.

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

307. In addressing this data, the DOC comments exclusively on the BOF segment, for which it says only that "the number of basic oxygen furnace facilities and units has declined precipitously since 1999".[355] The DOC gives no explanation whatsoever of the data as regards the EAF segment.

308. The paucity of the DOC's explanation is problematic. A reduction in the *number* of production facilities does not necessarily indicate that a segment is suffering poor economic performance. This is especially so when the percentage decline is small over time, as it is for

[355] DOC Steel Report, **(Exhibit NOR-1)**, p. 43.

the EAF segment (15 percent decline in 16 years). A decline in the total number of production facilities could be accounted for by the closure of smaller, inefficient facilities, and investment in fewer larger facilities. In that respect, although the absolute number of EAF facilities *declined*, the DOC's actual production data shows that EAF production *increased* from 2000-2016.

309. As regards US finished steel producers, the DOC Report does not present or explain any data for the segment.[356] Instead, it refers to one anecdotal instance of the closure of a single facility ("ArcelorMittal has announced the closure of its plate rolling mill in Conshohocken").[357] The closure of one facility does not, though, provide any indication of production and productivity for the industry segment.

310. In sum, for the data provided on semi-finished steel products, the DOC focuses on a particular segment of production, *i.e.*, BOF production, without providing an equivalent explanation of equivalent data for EAF production. On finished products, the DOC provides no data or explanation of production and productivity, failing altogether to take this aspect of the economic position of the US steel industry into account.

b) Domestic sales

311. When assessing whether the domestic steel industry has seen a decline in domestic sales levels, the DOC fails to provide any explanation of how it took into account the situation of the semi-finished steel EAF and BOF segments. The DOC, therefore, fails to account for the position of semi-finished steel producers altogether.

312. On finished steel production, the DOC shows "import penetration", which refers to the share of imports in total domestic sales. **Figure 3** shows that this share rose from 22 percent in 2011, to 29 percent in 2015, fell to 25 percent in 2016, then rose slightly to 27 percent in 2017. Thus, domestic sales remained at levels exceeding 70 percent. The DOC provides no explanation of how this trend in the share of imports, and the sustained high levels of domestic sales, supports its injury determination.

313. The DOC also mentions two types of finished products in particular – steel and pipe tube. It notes that "import penetration" for these products "was 74 percent in 2016 and

[356] The DOC presents Figure 15, which refers to the "U.S. Steel Market", and "U.S. Annual Production". This data does not include finished steel production; the production figures in Figure 15 are identical to the production figures in Figure 16, which contains only BOF and EAF (i.e. semi-finished) production data.
[357] DOC Steel Report, **(Exhibit NOR-1)**, p. 33.

further increased in 2017".[358] However, the DOC fails to assess changes in market share for these two types of finished steel product in any of the other years subject to its assessment. It also fails to provide the same information with respect to any other finished products.

314. In sum, the DOC fails to address the position of BOF and EAF semi-finished steel production altogether; *and* it fails to explain how the data on finished steel production supports its injury determination.

c) Capacity utilisation

315. When assessing whether the domestic industry has seen changes in capacity utilisation levels, the DOC presents only aggregated data in relation to the semi-finished BOF and EAF segments and entirely fails to examine the different situations of the EAF and BOF segments. The DOC presents no data at all in respect of finished steel capacity utilisation, failing to address this segment altogether.

316. With respect to semi-finished production, **Figure 16** provides *aggregated* capacity utilisation rates for EAF and BOF production. As discussed, the same figure also shows disaggregated production data, by volume, for EAF and BOF production from 1998-2016. The DOC does not explain why, in the same figure, it provided disaggregated production data for the two segments, but aggregated capacity utilisation data, which masks performance differences between the two segments.

317. Using aggregated capacity utilisation data, the DOC concludes that the capacity utilisation of US semi-finished steel producers is declining. However, the DOC fails to consider the relative situation of the EAF and BOF segments, which moved in different directions.

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

d) Financial performance

319. In assessing whether the US industry has seen a decline in financial performance, the DOC presents data for a selection of steel producing companies. In **Figures 8** and **9**, it

[358] DOC Steel Report, **(Exhibit NOR-1)**, p. 29.

provides income data for one group of six companies, and then financial performance and debt data for a second group of six companies, with some overlap between the two groups.

320. The DOC fails to explain: why it provided financial performance data just for a selection of companies; why it selected different companies in the two groups; how it selected the companies in each group; and which steel product(s) the selected companies produce.

321. Beyond providing data for two different groups of selected companies, the DOC does not present any representative data showing, in a systematic way, the financial performance of either the industry as a whole or the three industry segments, which face quite different competitive forces.

322. In that respect, the DOC's failure to present data on financial performance for each segment is surprising, because the DOC recognises that semi-finished EAF producers are faring better than semi-finished BOF producers. In particular, the DOC expressly acknowledges the competitive advantages of EAF producers enjoy over BOF producers and that, as a result, semi-finished EAF producers are "**likely more profitable** than large BOF producers".[359]

323. Despite recognising that the industry segments face different competitive forces, that lead to different financial performance, the DOC does not provide any data or explanation to account for the differences.

e) Employment

324. In assessing whether the US steel industry has seen a decline in employment levels, the DOC, again, presents aggregated data, with no separate data for any industry segment. The DOC does not confirm whether the aggregated data is fully representative of all three segments of the industry. The DOC also does not explain why it provides only aggregate data, when it provides disaggregated data for other injury factors.

325. In **Figure 7** the DOC provides aggregate data for a 20-year period, covering 1997-2017. In the first decade of this period, aggregate employment rates declined sharply. However, in more recent years, from 2011, the rates are essentially flat. The DOC does not

[359] DOC Steel Report, **(Exhibit NOR-1)**, Note to Figure 9, p. 39.

explain how this data supports its injury finding. In particular, it fails to explain the significance of stable employment in the most recent 6-year period.

326. The DOC also provides no data or explanation that addresses the differing situations of the three industry segments. The DOC's omission, once again, masks the respective performance, this time, of all three industry segments. As we have seen, semi-finished BOF and EAF producers have experienced different economic trajectories. As a result of competitive advantages, the EAF segment has grown at the expense of the BOF segment. However, there is no accounting for such differences between the segments in the DOC's explanation.

f) Capital expenditure

327. The DOC presents aggregate data, purportedly for the whole steel industry, that shows declining annual capital expenditures.[360] However, the DOC does not explain whether and how this data is representative of the industry. Further, this aggregate data, again, masks the respective performance of the three industry segments.

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

(iii) Conclusion

329. The Appellate Body has explained that, when an industry is segmented, it is important for an authority to assess injury as a whole in light of the performance of the different segments, and of the relationship between the segments. As the Appellate Body observed, a lopsided evaluation "may give a misleading impression of the data relating to the industry as a whole",[361] for example, where "some parts of the industry are performing well, while others are performing poorly".[362] Such a lopsided evaluation "highlight[s] the negative data in the

[360] Figure 10 of the DOC Steel Report includes data for "NAICS Codes 3311 and 3312 combined". NAICS is a product-classification system; Norway understands that, together, codes 3311 and 3312 cover both semi-finished and finished steel production. *See* NAICS Code 3311, **(Exhibit NOR-62)**, and NAICS Code 3312, **(Exhibit NOR-63)** .
[361] Appellate Body Report, *US – Hot Rolled Steel*, para. 204.
[362] Appellate Body Report, *US – Hot Rolled Steel*, para. 204.

poorly performing part [of the industry]", while the "positive developments in other parts of the industry" are "overlook[ed]".[363]

330. These words aptly describe the DOC Steel Report, for the following two reasons. *First*, the DOC provides a lopsided assessment that focuses almost exclusively on a single, poorly performing segments of the industry – semi-finished BOF production. The DOC does not provide equivalent data or explanation that addresses the situation of the other two industry segments (semi-finished EAF steel and finished steel segments). The DOC fails, therefore, to evaluate properly serious injury to the US steel industry.

331. *Second*, at times, the DOC chooses to address the US steel industry on an aggregate basis, using aggregate data, without consideration of the different industry segments. Sometimes the DOC conflates the semi-finished EAF and BOF steel segments, and other times it conflates all three industry segments. The DOC fails to explain why it sometimes provides disaggregated data and other times provides only aggregated data. Whatever the DOC's reasons, the provision of aggregated data serves to mask differences in the economic performance of the respective industry segments. The DOC's approach necessarily fails to "appreciate the economic relationship" between the different segments.[364]

332. In addition, sometimes the DOC's purportedly aggregate data for the industry is not even representative of the industry, but is selectively picked to cover a subset of industry participants – seemingly drawn from different industry segments. The DOC fails to explain why it resorts to such selective data or how it made its selections. In any event, whatever the reasons, selective data cannot provide a reliable basis for an injury determination.

333. As a result of these shortcomings, the DOC creates a "misleading impression of the data relating to the industry as a whole", and fails to provide a proper explanation for the its conclusion that the US steel industry is injured.

(3) The DOC fails properly to demonstrate a causal connection between increased imports and injury

334. To the extent that the DOC finds injury to the US aluminium and steel industries, it asserts that this injury is caused by increased imports.[365] However, both DOC Reports fail

[363] Appellate Body Report, *US – Hot Rolled Steel*, para. 204.
[364] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 204-205.
[365] *See* DOC Steel Report, **(Exhibit NOR-1)**, pp. 5, 8, 39, 41, 62, 91, 99, 102, and 104-106; DOC Aluminium Report, **(Exhibit NOR-2)**, pp. 4, 16, 27, 29, 30, 32, 33, 36, 51, 53-54, and 55-57.

properly to determine the existence of a causal link between aluminium and steel imports, and the alleged serious injury.

335. To recall, under Article 4.2(b) of the *Safeguards Agreement*, the DOC is required to identify any injury caused by factors other than increased imports, and ensure that the injury caused by these other factors is not attributed to increased imports. In so doing, the authority must "distinguish" and "separate" the differential factors contributing to injury.[366]

336. Below, Norway shows that the DOC failed to comply with its obligation to ensure that injury caused by factors other than increased imports is not attributed to those imports. Norway addresses, *first*, the DOC Aluminium Report and, *second*, the DOC Steel Report.

(a) The DOC Aluminium Report

337. The DOC fails to show injury to the industry as a whole, failing to assess the different industry segments and their inter-relationship. As outlined above, the DOC focuses its assessment of injury to the US aluminium industry on just one segment of that industry, namely US producers of primary aluminium. It neglects the two largest segments of the US aluminium industry – producers of secondary aluminium and downstream products.

338. In terms of causation, the DOC necessarily takes the same approach. Absent a proper assessment of injury to US producers of secondary aluminium and downstream products, or to the US aluminium industry as a whole, the DOC cannot engage in any proper examination of potential causes of unidentified injury to these two industry segments or to the industry as a whole.

339. Absent a causation examination relating to the industry as a whole, taking proper account of the three industry segments, the DOC fails to comply with Article 4.2(b) of the *Safeguards Agreement*.

340. Even with respect to US producers of primary aluminium, the DOC's examination of the causes of injury falls far short of the requirements of Article 4.2(b) of the *Safeguards Agreement*.

341. The DOC concludes that US producers of primary aluminium are injured, and attributes this injury to increased imports of primary aluminium. However, the evidence

[366] Appellate Body Report, *US – Lamb*, para. 179.

before the DOC indicates that the decline of US producers of primary aluminium is attributable, at least in part, to two factors *other than* increased imports.

342. *First*, the USITC Report explains that US producers are at a competitive disadvantage in primary aluminium production. The USITC finds that the "chief determinant of competitiveness" in primary aluminium production is "electricity costs".[367] The USITC finds that the United States has "relatively high electricity rates", which it explains "has contributed to the United States' loss of competitiveness in this segment in recent years".[368]

343. The DOC acknowledges that high US electricity costs are a contributing factor – indeed, a "main reason"– for the decline of the US primary aluminium segment. Specifically, the DOC states 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 … [b]ecause aluminum production is highly energy intensive".[369]

344. However, the DOC fails to explain the extent to which the decline in US primary aluminium production is attributable to the high costs of US production, as opposed to increased imports. It could be, for example, that US primary aluminium production declined due to its high production costs, leading unwrought aluminium consumers to switch to imported primary aluminium. In other words, the increase in imports is a *consequence* of declining US primary production, and not its *cause*. Indeed, the DOC itself implies just this, stating that: "U.S. import reliance increased <u>because</u> domestic primary aluminum production decreased, so U.S. manufacturers <u>by necessity</u> filled their materials needs through imports".[370]

345. By failing to "disentangle" the causal effects of the high costs of US production from those of increased imports, the DOC has failed to ensure that the causal effects of the former are not improperly attributed to the latter.

346. *Second*, the DOC fails to account for the causal effects of the growth of US secondary aluminium production. While the United States has high energy costs that prejudice the competitiveness of primary aluminium production, its producers have access to cheap and reliable supplies of recycled aluminium that allow globally competitive production of secondary aluminium.

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[367] USITC Aluminum Report, **(Exhibit NOR-49)**, pp. 29 and 35.
[368] USITC Aluminum Report, **(Exhibit NOR-49)**, p. 37.
[369] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 41.
[370] DOC Aluminium Report, **(Exhibit NOR-2)**, p. 62. Emphasis added.

347. The DOC's evidence shows that the decline in US primary production has been coupled with strong growth in US secondary production, which has contributed – by design – to the decline in primary production. In particular, US aluminium producers have themselves decided to switch their production activities from primary to secondary production. In other words, as explained below, USITC data suggests that US producers have led a supply-side decline in one industry segment, by switching their production activities to another segment that is more profitable.

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

TABLE 8: CHANGES IN PRODUCTION (1,000 MT) OF US PRIMARY AND SECONDARY ALUMINIUM PER-YEAR BASED ON USITC DATA[371]

	2011	2012	2013	2014	2015
Primary production	1,986	2,070	1,948	1,718	1,587
Secondary production	7,573	7,933	8,069	8,295	8,587
Total production	**9,541**	**10,003**	**10,015**	**10,013**	**10,174**

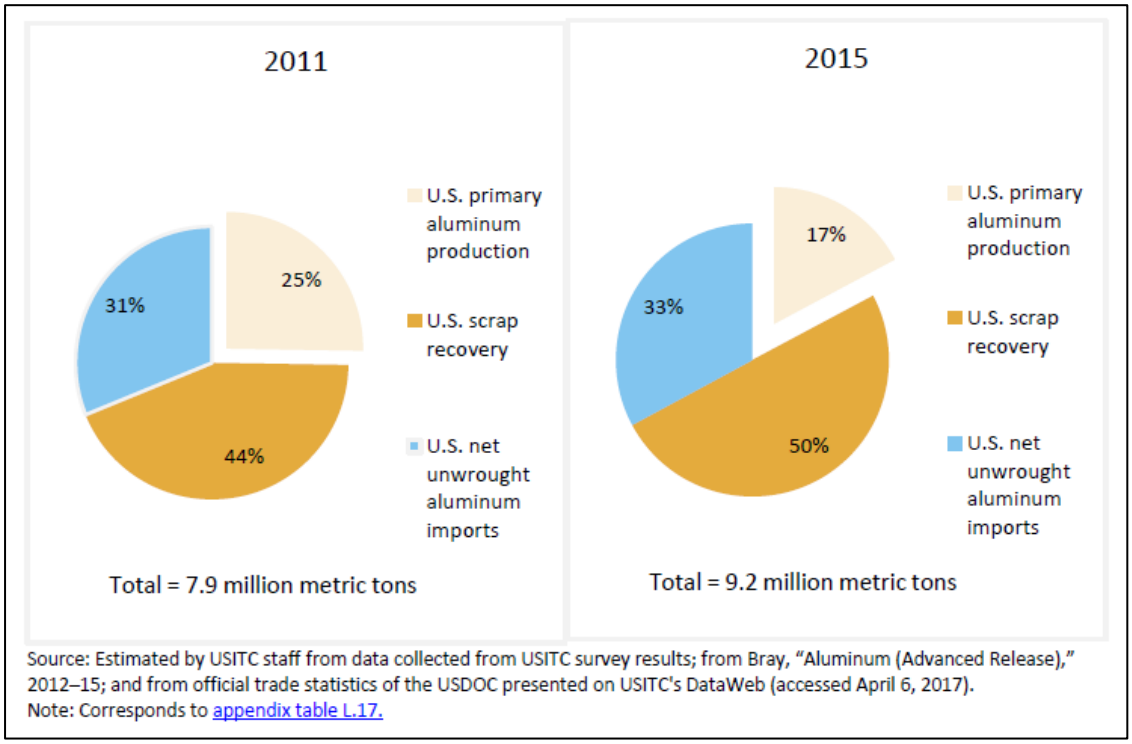
349. Thus, during each year in which US primary aluminium production decreased, US secondary aluminium increased to a greater extent. Indeed, when US primary and secondary aluminium production are combined, overall US production of unwrought aluminium has increased by six percent from 2011-2015.[372]

350. Further, the USITC data shows that, at the same time as US production has switched from primary to secondary aluminium, US consumption has switched in the same direction. In fact, not only has the market share lost by US primary aluminium been taken by US secondary aluminium, consumers are switching to *domestic* secondary aluminium *at a greater rate* than they are switching to imported products of either kind.

[371] *See* USITC Aluminum Report, **(Exhibit NOR-49)**, Tables 4.8 and 4.9.
[372] USITC Aluminum Report, **(Exhibit NOR-49)**, p. 154.

351. Figure 4.4 in the USITC Aluminum Report, reproduced below as **Figure 6**, shows that US-produced primary unwrought aluminium's share of US unwrought consumption declined by 8 percent (from 25 to 17 percent) from 2011-2015. However, over the same period, US-produced secondary unwrought aluminium's share *increased* by 6 percent (from 44 to 50 percent). The market share of imports increased by only 2 percent (from 31 to 33 percent).

FIGURE 6: US UNWROUGHT ALUMINIUM CONSUMPTION IN 2011 AND 2015[373]



Source: Estimated by USITC staff from data collected from USITC survey results; from Bray, "Aluminum (Advanced Release)," 2012–15; and from official trade statistics of the USDOC presented on USITC's DataWeb (accessed April 6, 2017).
Note: Corresponds to appendix table L.17.

352. Thus, an important part of the decline in the market position of US primary production is, therefore, attributable to the US industry's own switch to production of secondary aluminium. US producers have, in short, cannibalised the US primary aluminium market by developing the US secondary aluminium market.

353. When concluding that increased imports caused injury to US producers of primary aluminum, the DOC does not explain how it took into account the switch by US producers and consumers to secondary aluminium production and the impact that switch had on the decline of US primary aluminium production.

[373] In the key to Table 4.4, secondary aluminium is referred to as "scrap recovery". *See* USITC Aluminum Report, **(Exhibit NOR-49)**, Figure 4.4.

354. By failing to examine the impact of different causal factors identified, disentangling their causal effects from those of increased imports, the DOC has failed to conduct a proper causation examination. Instead, the DOC risks attributing, to increased imports, injury arising from other factors. As a result, the DOC fails to establish "a genuine and substantial relationship of cause and effect" between increased imports, and injury to the US aluminium industry.[374] The DOC's assessment is, therefore, inconsistent with Article 2.1.

(b) The DOC Steel Report

355. Similarly to the DOC Aluminium Report, the DOC focuses its assessment of injury to the US steel industry on just one segment of that industry, namely producers of semi-finished steel using the BOF production process. The DOC fails to show injury to two other segments of the US steel industry – producers of semi-finished EAF steel and producers of finished steel. As a result, the DOC fails to show that the US steel industry as a whole is injured.

356. In terms of causation, the DOC necessarily takes the same approach. Absent any assessment of injury to US producers of semi-finished EAF steel and finished steel, or to the US steel industry as a whole, the DOC cannot engage in any proper examination of potential causes of unidentified injury to these two industry segments or to the industry as a whole.

357. Absent a causation examination relating to the industry as a whole, taking proper account of the three industry segments, the DOC fails to comply with Article 4.2(b) of the *Safeguards Agreement*.

358. Even with respect to US producers of semi-finished BOF steel, the DOC's examination of the causes of injury falls far short of the requirements of Article 4.2(b) of the *Safeguards Agreement*. In particular, the evidence before the DOC indicates that the decline of US producers of semi-finished BOF steel is attributable, at least in part, to factors *other than* increased imports.

359. *First*, the DOC fails to account for the causal impact of the growth in semi-finished EAF production on US semi-finished BOF production. In particular, just as it does with US production of primary and secondary aluminium, the DOC considers the decline in domestic BOF production in isolation from the growth in domestic EAF production.

[374] Appellate Body Reports, *US – Wheat Gluten*, para. 69; *US – Lamb*, para. 179.

360. However, as with US unwrought aluminium production, the DOC's record suggests that US producers are switching from BOF to EAF production of semi-finished steel, with the latter largely replacing the former in the market.

361. For example, a report on the DOC's record explains that "cheap scrap has given so-called mini-mills that melt scrap in electric arc furnaces the cost edge over integrated producers, which utilize resource intensive blast furnaces".[375] Similarly, the report on the closure of the Sparrows Point mill explains that the BOF production process is increasingly "obsolete" in the US: "successful steel companies such as Nucor operate electric arc furnaces and compact casters to produce market-specific, high-grade products".[376]

362. The DOC also explains that "EAFs can be quickly stopped (or used for few shifts) and then restarted more easily than blast furnaces".[377] As a result, as the DOC recognises, semi-finished EAF producers are more "flexible" and "profitable" than semi-finished BOF producers.[378]

363. The evidence on the DOC's record, therefore, shows that one factor causing injury to domestic semi-finished BOF steel producers is competition with another segment of the US steel industry – producers of semi-finished EAF steel – which have advantages in terms of flexible production techniques, lower costs, and a smaller environmental footprint. As traditional domestic BOF production has declined, domestic EAF production is moving to replace it.

364. In assessing injury, the DOC fails to consider to what extent the decline in US semi-finished BOF production is attributable to the US industry's own response to the competitive and regulatory conditions facing the steel industry.

365. *Second*, the DOC's evidence refers to a variety of other causal factors, besides increased imports. The DOC does not examine any of these other factors, either to reject their causal relevance or, where relevant as causal factors, to attribute a portion of the injury to them.

366. The DOC does acknowledge the importance of one other causal factor, namely the regulatory burden facing US producers. It explains that the US steel industry has lost market

[375] "Losing strength US steel industry analysis", White & Case, 16 April 2016, **(Exhibit NOR-57)**.
[376] "Six reasons why the Sparrows Point steel mill collapsed", Baltimore Brew, 25 May 2012, **(Exhibit NOR-64)**.
[377] DOC Steel Report, **(Exhibit NOR-1)**, p. 39.
[378] DOC Steel Report, **(Exhibit NOR-1)**, p. 39.

share because prices of US steel are higher due to "higher taxes, healthcare, environmental standards, and other regulatory expenses".[379] However, in concluding that increased imports cause injury to US producers of semi-finished BOF steel, the DOC fails to address the causal effects of these factors.

367. The DOC's record identifies several other factors as contributing to steel mill closures. For example, a news report on the DOC's record identifies "[s]ix reasons why the Sparrows point steel mill collapsed".[380] None of the six reasons identified is increased imports. Instead, the closure is attributed to: reliance on obsolete BOF facilities; poor management strategy and remote ownership; union politics; a poor location; and cancellations of customer orders.

368. The DOC Report cites to a report that attributes the decline in the US steel industry to "homegrown problems", explaining that "fundamentals within the local market continue to weaken the domestic industry".[381] The DOC also cites to a report that identifies further non-attribution factors, describing mill closures as "part of an ongoing adjustment in operations due to challenging market conditions, including fluctuating oil prices, reduced rig counts, depressed steel prices and unfairly traded imports".[382]

369. The DOC fails to examine the causal impact of any of these other factors, which are identified in the DOC's own record. Strikingly, just one of the factors identified above relates to imports, namely "unfairly traded imports". However, the causal force of this factor is not even attributed to increased imports, but to the alleged "unfair" trading of the imports.

370. By failing to examine the impact of the different causal factors identified, disentangling their causal effects from those of increased imports, the DOC has failed to conduct a proper causation examination. Instead, the DOC risks attributing, to increased imports, injury arising from other factors. As a result, the DOC fails to establish "a genuine and substantial relationship of cause and effect" between increased imports, and injury to the US steel industry.[383] The United States, thereby, violates Article 2.1 of the *Safeguards Agreement*.

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[379] DOC Steel Report, **(Exhibit NOR-1)**, p. 33.
[380] "Six reasons why the Sparrows Point steel mill collapsed", Baltimore Brew, 25 May 2012, **(Exhibit NOR-64)**.
[381] "Losing strength US steel industry analysis", White & Case, 16 April 2016, **(Exhibit NOR-57)**.
[382] "U.S. Steel lays off 200 more workers in Fairfield", al.com, 18 March 2016, **(Exhibit NOR-65)**.
[383] Appellate Body Reports, *US – Wheat Gluten*, para. 69; *US – Lamb*, para. 179.

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

371. In this Section, Norway demonstrates that the US measures at issue are inconsistent with Article 2.2 of the *Safeguards Agreement*. *First*, Norway recalls the relevant factual background; *second*, it addresses the legal standard under Article 2.2; and *third* it applies the legal standard to the facts.

i. Factual background

372. The United States imposes safeguard measures in the form of tariffs on all subject aluminium products from all countries, except Argentina and Australia, *and* on subject steel products from all countries, except Argentina, Australia, Brazil and South Korea.

373. The Presidential Proclamations also establish the possibility for exporting Members to seek an exemption from the aluminium and steel tariffs by opening discussions with the United States ("Country Exemptions").[384] Following those discussions, the United States may grant an exemption if the applicant country and the United States agree on "alternative means" to address the injury to the US aluminium industry.[385]

374. With respect to imports of aluminium, Argentina opened negotiations with the United States to seek an exemption from the tariffs. Argentina and the United States agreed on "alternative means" to address US concerns through the imposition of a country-specific quota.

375. With respect to imports of steel, Argentina, Brazil and South Korea each opened negotiations with the United States to seek an exemption from the tariffs. Each country agreed on "alternative means" with the United States to address US concerns through the imposition of distinct country-specific quotas of differing quantities.[386]

376. With respect to imports of aluminium and steel, Australia and the United States appear to have agreed on "alternative means" to address the US concerns. However, these do not involve any restrictions on Australia's export trade in these products with the United States. Thus, the United States exempts imports from Australia from the tariffs on aluminium and steel, with no US import restrictions applying to imports from Australia.[387]

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[384] Proclamation No. 9704, **(Exhibit NOR-3)**, para. 8; Proclamation No. 9705, **(Exhibit NOR-4)**, para. 9.
[385] Proclamation No. 9704, **(Exhibit NOR-3)**, para. 8; Proclamation No. 9705, **(Exhibit NOR-4)**, para. 9.
[386] *See* above Section III.B.
[387] *See* above Section III.B.

ii. Legal standard

377. Article 2.2 of the *Safeguards Agreement* provides the following:

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

378. Article 2.2 embodies the most favoured nation ("MFN") obligation with respect to the application of safeguard measures. Thus, an importing Member must apply its safeguard measures to imported products from all sources, without consideration of origin.[388] A Member cannot, therefore, apply safeguard measures to imports from one Member, and fail to apply the same safeguard measures to imports from another Member. In that event, the application of the safeguard measures depends, impermissibly, on the origin of the imports.

iii. The measures at issue are not applied to imported products irrespective of their source

379. The United States fails to apply its safeguard measures to imports irrespective of their source. To recall, the United States purports to find that increased imports from all sources have caused serious injury to its aluminium and steel industries. In response, the United States applies safeguard measures, in the form of tariffs, to imported aluminium and steel products.

380. However, the United States does not apply these tariffs to imported aluminium and steel products from certain Members. In particular, imports from four Members (Australia, Argentina, Brazil, and South Korea) are exempt from the tariffs. Thus, the application of the safeguard measures depends on the origin of the products: imports from the four Members are exempt from the tariffs, whereas imports from all other origins are subject to them.

381. This origin-based discrimination in the application of the tariffs is inconsistent with Article 2.2.

382. Finally, Norway notes that the country-specific import quotas that the United States applies to imports from Argentina, Brazil and South Korea constitute a form of voluntary

[388] Article 9.1 of the *Safeguards Agreement* does, however, provide for an exception to this obligation, by stating that "[s]afeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports of the product concerned in the importing Member does not exceed 3 per cent, provided that developing country Members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned".

trade restriction that is inconsistent with Article 11.1(b) of the *Safeguards Agreement*. Norway considers these import quotas in Section VI.B.2.d below.[389]

c. The aluminium and steel tariffs at issue are inconsistent with Article 5.1 of the Safeguards Agreement

383. In this Section, Norway *first* summarises the legal standard under Article 5.1; and, *second*, it shows that the aluminium and steel tariffs are inconsistent with that provision, because they are not applied to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

i. Legal standard

384. Article 5.1 of the *Safeguards Agreement* provides, in relevant part, the following:

> A Member shall apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.

385. The term "only to the extent necessary to prevent or remedy serious injury" in Article 5.1, first sentence, "require[es] that safeguard measures may be applied *only to the extent* that they address serious injury attributed to increased imports".[390]

386. The Appellate Body has explained that "the wording of [Article 5.1] leaves no room for doubt that it imposes an *obligation* on a Member applying a safeguard measure to *ensure* that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment".[391]

387. In *Chile – Price Band System*, the panel recalled these findings, and explained 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 facilitating adjustment".[392]

388. If an authority fails to make a proper injury determination for the relevant domestic industry, there can be no "rational connection" between the measure and objective of

[389] Even if the country-specific quotas were subject to Article 2.2 of the *Safeguards Agreement* as safeguard measures themselves, these quotas would violate that provision. In that case, the United States would apply safeguard measures that differ according to the origin of the imported product. The United States would, thereby, fail to apply its safeguard measures irrespective of origin. Origin would, instead, be the decisive criterion in determining the form of the safeguard measures and, hence, trade restriction, applied.
[390] Appellate Body Report, *US – Line Pipe*, para. 260. Emphasis added.
[391] Appellate Body Report, *Korea – Dairy*, para. 96.
[392] Panel Report, *Chile – Price Band System*, para. 7.183. Emphasis original.

preventing/remedying serious injury. The Appellate Body confirmed this principle in *US – Line Pipe*.[393]

389. In that dispute, the United States had failed to establish, consistent with Article 4.2(b), that the domestic industry's serious injury was caused by increased imports.[394] The Appellate Body found that "by establishing that the United States violated Article 4.2(b) of the *Agreement on Safeguards*, Korea has made a *prima facie* case that the application of the line pipe measure was not limited to the extent permissible under Article 5.1".[395]

390. In other words, if an authority's serious injury determination is inconsistent with the *Safeguards Agreement*, then, *as a consequence*, safeguard measure is not properly "calibrated" under Article 5.1.

ii. The aluminium and steel tariffs are not applied to the extent necessary to prevent or remedy serious injury and to facilitate adjustment

391. Above, Norway demonstrates that the DOC fails to make a proper serious injury determination. Consistent with the legal standard described above, in such circumstances, there is no "rational connection" between the aluminium and steel tariffs, and the objective of preventing or remedying serious injury and facilitating adjustment.

d. The United States imposes country-specific quotas that are inconsistent with Article 11.1(b) of the Safeguards Agreement

392. In this section, Norway demonstrates that the United States violates Article 11.1(b) of the *Safeguards Agreement*. Specifically, in imposing country-specific quotas on imports of aluminium and steel products from Argentina, Brazil and South Korea, the United States has *sought*, *taken* and *maintained* trade restrictions that are prohibited under Article 11.1(b).

393. In this section, Norway *first* recalls the factual background; *second*, it summarises the legal standard under Article 11.1(b); and *third*, it shows that the country-specific quotas violate Article 11.1(b).

[393] Appellate Body Report, *US – Line Pipe*, para. 261.
[394] Appellate Body Report, *US – Line Pipe*, para. 261.
[395] Appellate Body Report, *US – Line Pipe*, para. 261.

i. Factual background

394. As explained in Section III.B above, instead of imposing tariffs on aluminium and steel products imported from Argentina, Brazil and South Korea, the United States has agreed on "alternative means" with these Members, specifically import quotas of differing quantities for each country. In this section, Norway explains the negotiation and adoption of these measures in further detail.

395. Presidential Proclamations 9704 and 9705, which impose the tariffs, provide the following:

> 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 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 remove or modify the restriction on steel articles imports form that country …

396. In the period immediately surrounding the publication of these proclamations, White House National Trade Council Director Peter Navarro explained that the objective of this invitation to discuss "alternative means" to the tariffs, is to agree on alternative means to address imports, *other than* the tariffs in question:

- "The guiding principle of this administration, from the president down to his team, is that any country or entity like the European Union, which is exempt from the tariffs, will have a quota and other restrictions."[396];

- "[The European Union, Canada, and Mexico] chose not to offer a reasonable quota, and we had to put the tariffs on.".[397]

397. Further, President Trump underscored his desire to address the alleged impact of imports on the US aluminium and steel industries through trade negotiations:

- "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!".[398]

398. Argentina, Brazil and South Korea each took up the United States' invitation to discuss "alternative means" of addressing the US concerns. Initially, while the negotiations

[396] "Trump trade adviser: All countries exempted from steel tariffs will face quotas", Politico, 5 January 2018, **(Exhibit NOR-66)**.
[397] "Trump tariffs are about national security: Peter Navarro", Fox News, 31 May 2018, **(Exhibit NOR-67)**.
[398] Tweet by President Trump, 10 March 2018, **(Exhibit NOR-68)**. Emphasis added.

with these and other countries were ongoing, the United States provided temporary exemptions from the tariffs.[399]

399. When Argentina, Brazil, and South Korea had reached agreement with the United States on "alternative means", the United States granted permanent exemptions to imports from these three countries. Specifically, the United States announced that it had "agreed", with Argentina, Brazil and South Korea on satisfactory alternative means to address its concerns.[400]

400. Pursuant to that agreement, the United States granted an exemption from the aluminium and steel tariffs to imports from Argentina (Proclamations 9758 and 9759); and it granted an exemption from the steel tariffs to imports from Brazil (Proclamation 9759) and South Korea (Proclamation 9740).

401. In return, Argentina, Brazil and South Korea accepted the imposition, by the United States, of import quotas with respect to the relevant products. Pursuant to these quota, the aluminium/steel imports from these three countries are subject to their own product-specific "annual aggregate limits", or annual quota levels.[401]

402. These imports are also subject to a quarterly aggregate limit: each quarter, these countries cannot export to the United States an amount of aluminium products that exceeds 500,000 kg and 30 percent of the annual quota for each country/an amount of steel products that is in excess of 500,000 kg and 30 percent of the annual quota for each country.[402]

ii. Legal standard

403. Article 11.1(b) of the *Safeguards Agreement* provides, in relevant part, that:

> [A] Member shall not seek, take or maintain any voluntary export restraints, orderly market 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.
>
> [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.

[399] Proclamation No. 9710, **(Exhibit NOR-6)**, paras. 4, 6-8, 10, and (1)-(4); Proclamation No. 9711, **(Exhibit NOR-7)**, paras. 4, 6-8, 10, and (1)-(4); Proclamation No. 9739, **(Exhibit NOR-11)**, paras. 4 and (1); Proclamation No. 9740, **(Exhibit NOR-8)**, paras. 5 and (1).
[400] Proclamation No. 9740, **(Exhibit NOR-8)**, paras. 4 and (1)-(2); Proclamation No. 9758, **(Exhibit NOR-9)**, paras. 5, (1)-(2), and (4); Proclamation No. 9759, **(Exhibit NOR-10)**, paras. 5 and (1)-(2).
[401] *See* above Section III.B.
[402] *See* above Section III.B.

> [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 licensing schemes, any of which afford protection.

404. Article 11.1(b) prohibits Members from adopting certain types of measures identified in that provision.

405. The first sentence of Article 11.1(b) identifies the following subject measures: "voluntary export restraints"; "orderly market arrangements"; *or* any "any other similar measures on the import or export sides". The scope of prohibited measures under Article 11.1(b) is not limited to specific identified measures, because the words "any other similar measures" identify a category of measures based on the characteristics of those measures.

406. Footnote 4 clarifies further the requisite characteristics of "similar measures" by providing "examples" of such measures: "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".

407. Footnote 4 confirms that Article 11.1(b) is not limited to specific identified measures, because it provides an illustrative, and not exhaustive, list of "examples" of "similar measures".

408. With the first sentence of Article 11.1(b), footnote 4 shows that the term "similar measures" covers measures that entail a restriction on trade between an exporting Member and an importing Member, whether on the export or import side.

409. Footnote 4 adds that the prohibited measures must afford "protection". The footnote does not clarify in whose favour this protection should operate. The protection could, for example, benefit a domestic industry of the importing Member, which is perceived to be injured by imports from the exporting Member. This understanding would accord with the inclusion of Article 11.1(b) in the *Safeguards Agreement*, which addresses measures intended to protect a domestic industry of an importing Member injured by increased imports.

410. The second sentence of Article 11.(b) adds clarification to the first sentence with respect to the character of the prohibited measures. They may encompass "actions taken by a single Member", which could be the importing or exporting Member; and "actions" taken pursuant to "agreements, arrangements and understandings" entered into by two or more Members.

411. The inclusion of measures taken pursuant to "agreements, arrangements and understandings" in the second sentence confirms the use of the word "voluntary" in the first sentence. These various terms capture restrictions on exports or imports in trade between the exporting and importing Members that are the result of the exporting Member's *acquiescence*.

412. Article 11.1(b), therefore, serves to prohibit exporting and importing Members from negotiating bilateral (or plurilateral) deals for the imposition of measures that restrict the trade between the exporting Member and the importing Member, with a view to protecting a domestic industry of the importing Member. Instead of such negotiated arrangements, Article 2.2 of the *Safeguards Agreement* requires that trade-restrictive measures to protect a domestic industry in the importing Member be imposed, on an MFN basis, in the form of WTO-consistent safeguard measures.

413. In sum, Article 11.1(b) prohibits, among others, measures that: (1) operate to restrict trade between an exporting Member and an importing Member, whether applied on the export or import side, and whether taken by one or more Members; (2) afford protection, for example, to a domestic industry of the importing country; and (3) are the result of an agreement, arrangement or understanding between the importing and exporting Members.[403]

iii. The import quotas agreed to between Argentina, Brazil, and South Korea and the United States are prohibited under Article 11.1(b) of the Safeguards Agreement

414. The quotas agreed between Argentina, Brazil and South Korea, as exporting Members, and the United States, as an importing Member, are prohibited under Article 11.1(b) of the *Safeguards Agreement*. Norway addresses in turn the three elements of the legal standard under Article 11.1(b) that it has just identified.

415. *First*, the quotas operate to restrict trade between an exporting Member and an importing Member. Quotas, by definition, restrict trade by limiting the volume of imports of a particular product. Indeed, for that reason, quotas are generally prohibited under Article XI of the GATT 1994.[404]

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[403] This interpretation of Article 11.1(b) is not intended to be exhaustive but has been developed with the facts of the present dispute in mind.

[404] *See, e.g.*, Appellate Body Report, *China – Raw Materials*, para. 320; Appellate Body Report, *India – Additional Import Duties*, para. 159. Panel Report, *Turkey – Textiles*, para 9.63; Panel Report, *Japan – Semi-Conductors*, para. 105; *India – Quantitative Restrictions*, para. 5.129; Panel Report, *US – Shrimp*, para. 7.11; Panel Report, *US – Poultry (China)*, para. 7.447; and Panel Report, *EC – Bananas III (Article 21.5 – US)*, para 7.640.

416. *Second*, the quotas afford protection to the US aluminium and steel industries. In particular, by restricting imports to a specified quantity, the quotas ensure that domestic products benefit from a quantitative limitation on the extent to which they face import competition.

417. *Third*, the United States adopted the quotas as a result of a negotiated bilateral agreement between each of the three exporting countries and the United States. The acquiescence of the exporting Members in the imposition of the quotas is evident from the terms of the measures themselves.

418. Under the Presidential Proclamations, exporting Members were invited to open discussions with the United States with a view to obtaining an exemption from the tariffs. Following bilateral negotiations with each of the three exporting Members, the United States issued Proclamations exempting them, respectively, from the tariffs ("Exempting Proclamations"). The Exempting Proclamations explain that "*[t]he United States has agreed on a range of measures with these countries*", warranting the exemption.[405] The Exempting Proclamations also repeatedly refer to the country-specific quotas as the "*agreed-upon*" measures with these countries.[406]

419. Thus, under the third element of the legal standard, the country-specific quotas are the result of an agreement, arrangement, or understanding between the importing and exporting Members.

420. For these reasons, the country-specific quotas meet the three elements of the legal standard under Article 11.1(b) of the *Safeguards Agreement* and are, hence, prohibited under that provision.

e. The aluminium and steel tariffs at issue are inconsistent with Articles 12.1 and 12.2 of the Safeguards Agreement

421. Article 12 of the *Safeguards Agreement* imposes notification and consultation obligations in the event that a Member applies a safeguard measure.

422. Article 12.1 provides:

[405] Proclamation No. 9758, **(Exhibit NOR-9)**, para. 5; Proclamation No. 9759, **(Exhibit NOR-10)**, para. 4. *See also* Proclamation No. 9739, **(Exhibit NOR-11)**, para. 4; Proclamation No. 9740, **(Exhibit NOR-8)**, paras. 4 and 5.
[406] Proclamation No. 9740, **(Exhibit NOR-8)**, para. 4; Proclamation No. 9758, **(Exhibit NOR-9)**, para. 6; Proclamation No. 9759, **(Exhibit NOR-10)**, para. 6.

> 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.

423. Article 12.2 provides, in relevant part:

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

424. In sum, Article 12 requires a Member to notify the Committee on Safeguards when imposing a safeguard measure. The United States has not notified the aluminium and steel tariffs to the Committee on Safeguards. The United States, therefore, violates Articles 12.1 and 12.2 of the *Safeguards Agreement*.

VII. THE MEASURES AT ISSUE ARE INCONSISTENT WITH ARTICLES I:1, II:1 AND X:3(A) OF THE GATT 1994

425. In this Section, Norway *first* demonstrates that the US measures at issue violate Articles II:1(a) and (b) of the GATT 1994, as they constitute ordinary customs duties applied in excess of those provided in the US Schedule (Section I.A). *Second*, Norway shows that the US measures at issue are inconsistent with the obligation to provide MFN treatment to products from all WTO Members, as required by Article I:1 of the GATT 1994 (Section I.B). *Third*, Norway demonstrates that the manner of administering the Country Exemptions and Product Exclusions is not reasonable and impartial, in violation of Article X:3(a) of the GATT 1994 (Section I.C).

A. THE ALUMINIUM AND STEEL TARIFFS AT ISSUE ARE INCONSISTENT WITH ARTICLES II:1(A) AND (B) OF THE GATT 1994

426. In this Section, Norway demonstrates that the US aluminium and steel tariffs violate Articles II:1(a) and (b) of the GATT 1994 because they constitute "ordinary customs duties" imposed in excess of the US bound tariff rates for the relevant aluminium and steel products.

427. Below, Norway addresses, *first*, the legal standard under Article II:1 of the GATT 1994. *Second*, Norway demonstrates that the tariffs are inconsistent with Article II:1.

1. Legal standard

428. Article II:1 of the GATT 1994 provides, in relevant part:

> (a) Each Member shall accord to the commerce of the other Members treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.
>
> (b) The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. 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.

429. Paragraph (a) of this provision contains a general prohibition against an importing Member according to imported products treatment that is less favourable than that provided in the Member's Schedule. Paragraph (b) elaborates on the principle articulated in paragraph (a), imposing disciplines on "ordinary customs duties" and any "other duties or charges".[407] The Appellate Body has said that a violation of Article II:1(a) necessarily entails a violation of Article II:1(b).[408]

430. The first sentence of Article II:1(b) clarifies that "ordinary customs duties" cannot exceed those provided in a Member's Schedule.[409] The case law indicates that the term "ordinary customs duties" "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 upon importation.[410]

431. The second sentence of Article II:1(b) prohibits the imposition of any "other duties or charges of any kind imposed on or in connection with the importation" (subject to certain

[407] In relation to the second sentence of Article II:1(b), the Appellate Body indicated that "the obligation to pay [] must accrue at the moment and by virtue of or, in the words of Article II:1(b), 'on', importation". Appellate Body Report, *China – Auto Parts*, para. 158.
[408] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47; Panel Report, *EC – Chicken Cuts*, paras. 7.64-7.65; and Panel Reports, *EC – IT Products*, para. 7.747.
[409] Part I of a Member's Schedule indicates a Member's MFN concessions. Appellate Body Report, *Argentina – Textiles and Apparel*, para. 45.
[410] Panel Report, *Dominican Republic – Safeguards*, para. 7.85. Emphasis added.

exceptions that are not relevant in this dispute).[411] The second sentence is designed to capture any import duties/charges that are not otherwise captured by the first sentence.[412]

2. The aluminium and steel tariffs at issue are applied in excess of the bound rates provided in the US Schedule

432. In terms of design and structure, the aluminium and steel tariffs are "ordinary customs duties" under the first sentence of Article II:1(b). The tariffs have the following features:

- The chargeable event for the imposition of the tariffs is the importation into the United States of a steel or aluminium good, with duty liability arising because the products are imported;[413]
- The tariffs are imposed at an *ad valorem* rate of, respectively, 25 percent (steel) and 10 percent (aluminium),[414] with the customs value of the products serving as the tax base;[415]
- The tariffs are imposed as part of a single, cumulative fiscal charge together with other ordinary customs duties imposed by the United States on the relevant products;[416] and
- The tariffs are characterised as "ordinary customs duties" in the "Harmonized Tariff Schedule of the United States" ("HTSUS").[417]

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[411] A Member is entitled to impose "other duties or charges of any kind" not in excess of those: (1) already imposed on the date of this Agreement; or (2) provided for in mandatory legislation in force on that date. To ensure transparency, "the nature and level" of any other duties and charges that could be maintained after the introduction of the GATT 1994 were also recorded in a Member's Schedule. *See* the Understanding on the interpretation of Article II:1(b) of the GATT 1994. The US aluminium and steel tariffs are not, however, recorded in the US Schedule.

[412] Appellate Body Report, *India – Additional Import Duties*, para. 151; Panel Report, *Peru – Agricultural Products*, para. 7.408; Panel Report, *Dominican Republic – Safeguards*, paras. 7.79 and 7.85.

[413] Proclamation No. 9704, **(Exhibit NOR-3)**, para. (2); Proclamation No. 9705, **(Exhibit NOR-4)**, para. (2); Proclamation No. 9772, **(Exhibit NOR-5)**, para. (1).

[414] Proclamation No. 9704, **(Exhibit NOR-3)**, paras. 7 and (2); Proclamation No. 9705, **(Exhibit NOR-4)**, paras. 8 and (2); as of 13 August 2018, all steel articles imports from Turkey specified in the Presidential Proclamations are subject to a 50 percent *ad valorem* rate of duty. *See* Proclamation No. 9772, **(Exhibit NOR-5)**, paras. 6 and (1).

[415] The Presidential Proclamations explain that these *ad valorem* rates of duty are "in addition to any other duties, fees, exactions, and charges applicable to such imported [aluminum/steel] articles". Proclamation No. 9704, **(Exhibit NOR-3)**, para. (2); Proclamation No. 9705, **(Exhibit NOR-4)**, para. (2); Proclamation No. 9772, **(Exhibit NOR-5)**, para. (1).

[416] The Annexes to Presidential Proclamations 9704, 9705, and 9772 indicate that the current applicable rate to the aluminium and steel products pursuant to the Presidential Proclamations is "[t]he duty provided in the applicable subheading+ [25%/10%]". *See also* Chapter 99 of the Harmonized Tariff Schedule of the United States, **(Exhibit NOR-15)**, p. 99 - III - 63 and 99 - III - 70. *See also* the description of the applicable rate to steel products from Turkey, Chapter 99 of the Harmonized Tariff Schedule of the United States, **(Exhibit NOR-15)**, p. 99 - III – 63.

[417] *See* U.S. Note 19(a) of subchapter III, Chapter 99 of the Harmonized Tariff Schedule of the United States, **(Exhibit NOR-15)**. *See also* Presidential Proclamations 9704 and 9705, Annexes: "Heading [9903.80.01/9903.85.01] sets forth the ordinary customs duty treatment applicable to all entries of [aluminum/steel products]".

433. Accordingly, the tariffs constitute "ordinary customs duties" pursuant to Article II:1(b) (first sentence).

434. To recall, Article II:1(b) (first sentence) prohibits a Member from imposing ordinary customs duties at a rate that exceeds the bound rate committed in the Member's Schedule for the relevant products. For purposes of assessing Norway's claim under Article II:1(b) (first sentence), Norway provides an overview of the tariffs for the relevant aluminium and steel products, and their relevant bound rates from the US Schedule, in the table below.[418]

TABLE 9: COMPARISON BETWEEN THE BOUND TARIFF RATES FOR THE RELEVANT ALUMINIUM AND STEEL PRODUCTS,[419] AND THE TARIFF RATES AT ISSUE

ALUMINIUM PRODUCTS SUBJECT TO THE TARIFFS[420]			
#	**HTS Code**	**Rates of customs duties**	
		US Schedule [bound rates]	**Presidential Proclamations [added rates]**
1.	7601	0 - 2.6%	10%
2.	7604	1.5 - 5%	
3.	7605	2.6 - 4.2%	
4.	7606	2.7 - 6.5%	
5.	7607	3 - 5.8%	
6.	7608	0 - 5.7%	
7.	7609	5.7%	
8.	7616.99.51	0 - 2.5%	

STEEL PRODUCTS SUBJECT TO THE TARIFFS[421]			
#	**HTS Code**	**Rates of customs duties**	
		US Schedule[422] [bound rates]	**Presidential Proclamations [added rates]**
1.	7206.10 - 7216.50	0	25%
2.	7216.99 - 7301.10		
3.	7302.10		
4.	7302.40 - 7302.90		
5.	7304.10 - 7306.90		

[418] See paras. 85 and 87. *See also* Proclamation No. 9704, **(Exhibit NOR-3)**, para. (1); Proclamation No. 9705, **(Exhibit NOR-4)**, para. (1); and U.S. Notes 16(b) and 19(b) of subchapter III, Chapter 99 of the Harmonized Tariff Schedule of the United States, **(Exhibit NOR-15)**.
[419] Based on the most recent version of the US Schedule.
[420] Proclamation No. 9704, **(Exhibit NOR-3)**, para. (1). *See* Section V.C above.
[421] Proclamation No. 9705, **(Exhibit NOR-4)**, para. (1). *See* Section V.C above.
[422] Source: US Bound Tariffs, **(Exhibit NOR-69)**.

435. The table above shows that, for each and every tariff line, the aluminium and steel tariffs exceed the bound rates set out in the US Schedule. As a result, the tariffs violate Article II:1(b) (first sentence).

436. Furthermore, because the tariffs impose ordinary customs duties in excess of the rates set forth in the US Schedule, the tariffs also violate Article II:1(a). As shown in the preceding paragraph, the tariff treatment afforded to the relevant aluminium and steel products is less favourable than that set forth in the US Schedule.[423]

437. Finally, even if the tariffs do not constitute "ordinary customs duties" under the first sentence of Article II:1(b), they constitute "other duties and charges" that are prohibited under Article II:1(b) (second sentence). This provision sets forth a residual category that captures any "other" (*i.e.*, non-ordinary customs duties) imposed by reason of importation.

B. The measures at issue are inconsistent with Article I:1 of the GATT 1994

438. The US aluminium and steel tariffs give rise to discriminatory restrictions on imported products from different sources that are inconsistent with Article I:1 of the GATT 1994.

439. As explained above in Section III.B, pursuant to the Country Exemptions, the United States is willing to exempt imports from certain "qualifying" Members from the tariffs and, instead of tariffs, is *either* willing to forego import restrictions altogether; *or* to apply a quota to imports. Thus, the United States either entirely excludes imports from a qualifying Member from restrictions or it enables a qualifying Member to choose whether it prefers that its products are subject to a tariff, or a quota. In so doing, the United States extends an "advantage" to the qualifying Members that is not granted to other Members, including Norway.

440. In elaborating this claim, Norway sets out, *first*, the legal standard under Article I:1 and, *second*, demonstrates that the measures at issue violate Article I:1.

1. Legal standard

441. Article I:1 of the GATT 1994 provides as follows:

[423] *See also* Table 9, above.

> With respect to customs duties and charges of any kind imposed on or in connection with importation …, and with respect to all rules and formalities in connection with importation and exportation, … *any* advantage, favour, privilege or immunity granted by any Member to *any* product originating in … any other country shall be accorded immediately and unconditionally to the like product originating in … the territories of all other Members.[424]

442. Article I:1 thereby prohibits the discriminatory treatment of like products originating in different WTO Members.[425]

443. The Appellate Body has described the legal standard under Article I:1 in the following terms:

> [T]he following elements must be demonstrated to establish an inconsistency with that provision: (i) that the measure at issue falls within the scope of application of Article I:1; (ii) that the imported products at issue are "like" products within the meaning of Article I:1; (iii) that the measure at issue confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any country; and (iv) that the advantage so accorded is not extended "immediately" and "unconditionally" to "like" products originating in the territory of all Members.[426]

444. In setting out how the tariffs violate Article I:1, Norway considers these elements below.

2. The United States violates Article I:1 of the GATT 1994 by conferring an advantage on imported products from exempted countries

445. In this Section, Norway demonstrates that: *first*, the US measures at issue are subject to Article I:1 of the GATT 1994 (Section VII.2.a); *second*, the imported aluminium and steel products subject to the measures are "like" (Section VII.2.b); and, *third*, the US measures confer an "advantage" on imported products from some origins that is not accorded "immediately and unconditionally" to imported products from other origins (Section VII.2.c).

a. The measures at issue are subject to Article I:1 of the GATT 1994

[424] Emphasis and underlining added.
[425] *See* Appellate Body Report, *Canada – Autos*, para. 84.
[426] Appellate Body Report, *EC – Seal Products*, para. 5.86.

446. Article I:1 applies to "customs duties and charges of any kind imposed on or in connection with importation"; and to all "rules and formalities in connection with importation".

447. The steel and aluminium tariffs are subject to Article I:1 because, as Norway has explained in Section VII.2 above, the tariffs constitute "ordinary customs duties" (or "other duties and charges") under Article II:1(b) of the GATT 1994.[427] For the same reasons, under Article I:1, the tariffs constitute "**duties**" or "**charges**" imposed on or in connection with importation. Further, the quotas granted to Argentina, Brazil, and South Korea, pursuant to the Country Exemptions, are also subject to Article I:1, because they constitute "**rules and formalities in connection with importation"**.

b. The imported aluminium/steel products are "like"

448. The US measures establish three different categories of regulatory treatment for imported aluminium/steel products. According to the terms of the measures, the particular category into which an import falls depends entirely on the origin of the product: (1) products from Australia are subject to no import restrictions whatsoever; (2) products from Argentina, Brazil and South Korea are subject to a tariff *or* a quota, depending on a choice made by the exporting country; and (3) products from all other WTO Members are subject to a tariff. On this basis, the US measures discriminate, as a matter of law, or *de jure*, between imports based on their origin.

449. Under well-established case law, under Article I:1 of the GATT 1994, likeness is presumed when a measure differentiates exclusively on the basis of origin.[428] As a result, it is rebuttably presumed that aluminium and steel products from Australia, Argentina, Brazil and South Korea, are "like" aluminium and steel products from all other WTO Members.

c. The measures at issue confer an "advantage" in violation of Article I:1 of the GATT 1994

450. The US measures at issue confer an "advantage" on imports from Members that qualify for a Country Exemption. Imports from these countries fall within categories (1) and (2) above. The "advantage" afforded to imports from these qualifying Members is not

[427] Proclamation No. 9704, **(Exhibit NOR-3)**, para. (2); Proclamation No. 9705, **(Exhibit NOR-4)**, para. (2); Proclamation No. 9772, **(Exhibit NOR-5)**, para. (1).
[428] *See* Appellate Body Report, Argentina – Financial Services, para. 6.36; Panel Report, *Indonesia – Autos*, para. 14.113; Panel Report, *Colombia – Ports of Entry*, para. 7.355; Panel Report, *US – Poultry (China)*, paras. 7.427-7.428.

extended "immediately and unconditionally" to like aluminium and steel products from other Members that have not qualified for a Country Exemption.

451. To recall, the Presidential Proclamations provide that the United States is willing to "discuss", with any country with which it has "a security relationship", "alternative ways" to address the impact of imports from that country.[429] If the United States and another country "arrive at a satisfactory alternative means" of addressing the perceived impacts, the United States may exempt imports from that other country from the tariffs.[430]

452. The United States has granted Country Exemptions to Argentina, Australia, Brazil and South Korea.

453. *First*, by way of "satisfactory alternative means", the United States has granted a Country Exemption to Australia *without* imposing any restrictions to address the impact of subject aluminium/steel imports from Australia. The exemption of Australian imports from the tariffs, without the imposition of other import restrictions, constitutes an "advantage" that is not extended "immediately and unconditionally" to imports from any other WTO Member. In other words, the "advantage" afforded to Australian products, under category (1) above, is not afforded to products from other Members, under categories (2) and (3).

454. *Second*, the United States has granted a Country Exemption to Argentina, Brazil, and South Korea, in return for the acceptance of a quota as "alternative means" of addressing the impact of imports from these countries.[431] As explained below, this constitutes an "advantage" afforded to products from the three qualifying countries, under category (2) above, that is not afforded to products from non-qualifying Members, under category (3).

455. Pursuant to the quotas granted to imports from the three qualifying countries, aluminium and/or steel imports from these countries are subject to product-specific "annual aggregate limits", or annual quota levels, which differ for each of these countries.[432]

456. Further, these imports are also subject to a quarterly aggregate limit. Each quarter, these countries cannot export to the United States an amount of aluminium that is in excess of

[429] Proclamation No. 9704, **(Exhibit NOR-3)**, para. 8; Proclamation No. 9705, **(Exhibit NOR-4)**, para. 9.
[430] Proclamation No. 9704, **(Exhibit NOR-3)**, para. 8; Proclamation No. 9705, **(Exhibit NOR-4)**, para. 9.
[431] Proclamation No. 9740, **(Exhibit NOR-8)**; Proclamation No. 9758, **(Exhibit NOR-9)**; Proclamation No. 9759, **(Exhibit NOR-10)**.
[432] *See* above Section III.B.

500,000 kg and 30 percent of the annual quota and/or an amount of steel products that is in excess of 500,000 kg and 30 percent of the annual quota for each country.[433]

457. Up to these agreed annual and quarterly quota limits, imports from the three qualifying countries are exempt from the aluminium and/or steel tariffs. Beyond the quotas, imports from those countries are not permitted, unless a particular product benefits from a Product Exclusion.[434]

458. The United States, thereby, grants an "advantage" to imports from Argentina, Brazil, and South Korea. In effect, the United States afforded each of these countries the opportunity to **choose its preferred US import regime for its aluminium and steel products**: either tariff or quota. Thus, the qualifying countries were given a choice to accept or renounce the tariff exemption. If they accepted the tariff exemption, they agreed to the quota; and, if they renounced the tariff exemption, they agreed to the tariff.

459. The grant of this choice has important repercussions for the competitive conditions that apply to products imported from the qualifying countries. As a general matter, the tariff raises prices for products subject to that tariff. When products from the qualifying countries are imported under a quota, they do not face that tariff. As a result of the choice afforded by the Country Exemption, the qualifying countries can choose either to sell their products at a price lower than the tariff-paid price (leading to improved sales opportunities for those products) or at the tariff-paid price (leading to higher margins on sales of those products). However, the qualifying country cannot sell products in quantities exceeding the quota.

460. By granting the three exporting countries with a choice of import regime – tariff or quota – the United States affords an "advantage" to the products from these countries. Depending on the commercial circumstances facing the industries in each country, the choice of one form of restriction, over the other, will present more attractive competitive opportunities to products from the country in question. A country may prefer market access for an unrestricted quantity subject to payment of a tariff; or it may prefer access for a restricted quantity without payment of a tariff.

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[433] *See* above Section III.B.
[434] Proclamation No. 9776, **(Exhibit NOR-21)**, paras. 3 and (1); Proclamation No. 9777, **(Exhibit NOR-22)**, paras. 3 and (1) and (2); "Absolute Quota for Aluminum Products: Argentina", USCBP website, **(Exhibit NOR-70)**; "Absolute Quota for Steel Products: Argentina, Brazil and South Korea", USCBP website, **(Exhibit NOR-71)**; "Quota Administration General Information", USCBP website, **(Exhibit NOR-72)**.

461. Brazil weighed this choice between a tariff and quota, and opted for a quota in respect of steel, and a tariff in respect of aluminium. *Reuters* attributed Brazil's choice to an assessment made by Brazil's producers:

> Under the new quota-based system agreed to by Brazil's steel industry, the country's exports of steel to the United States are to fall by around a fifth, dealing a blow to a key sector already grappling with widespread idle capacity and excessive global supply.
>
> The Brazilian aluminum industry opted for the tariff rather than agreeing to a quota, and its export to the United States will face a 10 percent surcharge on current tariffs.[435]

462. Thus, on the one hand, Brazil's steel producers chose a quota: they preferred to export up to 80 percent of previous quantities without facing a 25 percent tariff, rather than sell unrestricted quantities with payment of that tariff. The exercise of this quota choice may allow Brazil's steel producers to enjoy a pricing advantage over competing imports on sales into the United States within the quota volume. Brazil's producers evidently considered that the choice of a quota would be more profitable, given commercial factors, such as their own production quantities, domestic sales, and sales to the United States and other markets.

463. On the other hand, Brazil's aluminium producers chose a tariff: they preferred to sell unrestricted quantities into the United States subject to a 10 percent tariff, rather than export a limited quantity without payment of tariffs. Brazil's producers evidently considered that the choice of a tariff would be more profitable, given the same types of commercial factor.

464. In short, Brazil has chosen the particular US import regime – tariff or quota – that affords optimal competitive opportunities to Brazilian products.

465. The choice afforded to the three qualifying countries is an advantage under Article I:1, because it permits the qualifying country to choose the US import regime that optimises competitive conditions for its products (category (2) above).

466. This advantage is not extended "immediately and unconditionally" to like aluminium and steel products originating in countries that do not qualify for an exemption (*i.e.*, category (3) above). Indeed, the qualifying countries were able to make their assessment of the optimal import regime – tariffs or quota – taking into account that products from non-qualifying countries would face tariffs of 10 or 25 percent.

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[435] *See* "Brazil says U.S. tariffs and quotas unjust, still open to negotiate", Reuters, 2 June 2018, **(Exhibit NOR-17)**. Notice 123, "US restrictions on exports of steel and aluminum", Press release from the Brazilian Ministers of Foreign Affairs and Industry, 2 May 2018 (English), **(Exhibit NOR-73-B)**.

C. THE ADMINISTRATION OF THE COUNTRY EXEMPTIONS AND PRODUCT EXCLUSIONS TO THE ALUMINIUM AND STEEL TARIFFS AT ISSUE IS INCONSISTENT WITH ARTICLE X:3(A) OF THE GATT 1994

467. In Section III above, Norway explained that there are two exceptions to the US aluminium and steel tariffs at issue. *First*, the United States provides for WTO Members to be exempted from the tariffs, if they meet certain criteria ("Country Exemptions"). *Second*, the United States provides for certain products to be excluded from the tariffs, upon application by the US domestic industry, again if certain criteria are met ("Product Exclusions"). These two exceptions are administered in an unreasonable and partial manner, contrary to Article X:3(a) of the GATT 1994.

468. Below, Norway *first* addresses the legal standard under Article X:3(a) (Section I.A.1). *Second*, Norway demonstrates that the administration of the Country Exemptions is not reasonable, due to the absence of any administrative process that applicant countries should follow in seeking an exemption; and due to the use of inherently vague and undefined eligibility criteria (Section I.A.2). *Third*, Norway demonstrates that the administration of the Product Exclusions is neither reasonable nor impartial, due to an inherent conflict of interest in the administrative process through the role afforded to US producers of aluminium and steel (Section I.A.3).

1. Legal standard

469. Article X:3(a) of the GATT 1994 requires that:

> [e]ach Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

470. Article X:3 establishes "certain minimum standards for transparency and procedural fairness in the administration of trade regulations".[436] To establish an inconsistency with Article X:3(a), a complainant must establish that the respondent: (1) *administers* laws, regulations, decisions or rulings of the kind described in Article X:3(a); and (2) does so in a manner that is *non-uniform*, *partial* and/or *unreasonable*.[437] Norway addresses these elements of the legal standard in turn.

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[436] Appellate Body Report, *US – Shrimp*, para. 183. The Appellate Body also underlined that "[i]nasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of due process should be required in the application and administration of a measure". Appellate Body Report, *US – Shrimp*, para. 182. *See also* Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.868.
[437] Panel Report, *Thailand – Cigarettes (Philippines)* (*Article 21.5 – Philippines*), para. 7.906.

a. Article X:3(a) applies to the "administration" of certain types of legal instrument

471. Article X:3(a) applies to the "administration" of the laws, regulations, decisions and rulings described in Article X:1. This includes the "administration" of measures "pertaining to … rates of duty … or to requirements, restrictions or prohibitions on imports or exports".

472. The word "administration" refers to the manner in which a Member *implements, applies* or *puts into practical effect*, relevant legal instruments covered by the provision.[438] Under Article X:3(a), a complainant may challenge either particular instances of "administration" or "administrative processes leading to administrative decisions".[439]

b. Article X:3(a) requires "uniform", "impartial" and "reasonable" administration

473. Article X:3(a) of the GATT 1994 establishes "certain minimum standards for transparency and procedural fairness in the administration of trade regulations".[440] To this end, the provision requires that administration be "uniform", "impartial" and "reasonable". These three terms impose distinct, rather than cumulative, obligations.[441] Thus, a Member must comply simultaneously with each of the three elements of the legal standard.

474. Accordingly, a complainant may establish that administration is inconsistent with Article X:3(a) by showing that it is not "uniform", "impartial", or "reasonable".[442] Norway's claims are focused on administration that is not "impartial" and "reasonable".

475. The ordinary meaning of the term "impartial" is "not partial", "not favouring one party or side more than another", "unprejudiced", "unbiased", "fair".[443] The ordinary meaning of the term "reasonable" is "[w]ithin the limits of what it would be rational or

[438] Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.873. *See also* Panel Reports, *US – COOL*, para. 7.821; and Appellate Body Report, *EC – Bananas III*, para. 200.
[439] Appellate Body Report, *EC – Selected Customs Matters*, para. 200; and Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.873.
[440] Appellate Body Report, *US – Shrimp*, para. 183.
[441] Panel Report, *Argentina – Hides and Leather*, para. 11.86; and Panel Reports, *China – Raw Materials*, para. 7.685.
[442] Panel Report, *China – Raw Materials*, para. 7.685.
[443] Oxford English Dictionary, OED Online, available at http://www.oed.com/view/Entry/92112?redirectedFrom=impartial#eid ("impartial", *adj*.) (last accessed 30 April 2019), **(Exhibit NOR-74)**.

sensible to expect", "proportionate", "in accordance with reason", "not irrational or absurd", and "sensible".[444]

476. Past cases offer insights into the application of the disciplines in Article X:3(a) that are instructive in this dispute. Below, Norway addresses four disputes involving unreasonable administration.

477. *US – Shrimp* concerned certification requirements for the import of shrimp into the United States. To secure access to the US market for shrimp, other countries were required to obtain US certification that their shrimp harvesting activities met certain US standards for the protection of sea turtles.[445] The WTO dispute addressed the US administration of the certification processes for applicant countries, among other issues.[446]

478. The Appellate Body found that the disciplines on administration of trade rules in Article X:3(a) of the GATT 1994 were relevant to ("bears upon") its examination of arbitrary discrimination under the *chapeau* of Article XX of the GATT 1994.[447] Specifically, the Appellate Body found that the following aspects of the United States' administration were "contrary to the spirit" of Article X:3(a):

- The process is "singularly informal and casual";[448]
- "[T]here is no formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it … before a decision to grant or to deny certification is made";[449]
- "[N]o formal written, reasoned decision, whether of acceptance or rejection, is rendered on applications for either type of certification";[450] and
- There is "no way that exporting Members can be certain whether [the measures] are being applied in a fair and just manner by the appropriate governmental agencies of the United States".[451]

479. In *US – COOL*, the dispute concerned the US country of origin labelling ("COOL") requirements for meat products, which were set forth in the COOL statute and the 2009 Final

[444] Oxford English Dictionary, OED Online, available at http://www.oed.com/view/Entry/159072?redirectedFrom=reasonable#eid ("reasonable", *adj*.) (last accessed 30 April 2019), **(Exhibit NOR-75)**.
[445] Appellate Body Report, *US – Shrimp*, paras. 2-6.
[446] Appellate Body Report, *US – Shrimp*, paras. 180 and 183.
[447] Appellate Body Report, *US – Shrimp*, para. 184.
[448] Appellate Body Report, *US – Shrimp*, para. 181.
[449] Appellate Body Report, *US – Shrimp*, para. 180.
[450] Appellate Body Report, *US – Shrimp*, para. 180.
[451] Appellate Body Report, *US – Shrimp*, para. 181.

Rule ("COOL measure"). In administering the COOL measure, US Secretary of Agriculture Thomas Vilsack issued a letter – the "Vilsack letter" – containing two relevant elements: *first*, an announcement that the 2009 Final Rule would enter into force; and, *second*, a suggestion that the industry should voluntarily adopt stricter labelling than required by the 2009 Final Rule. The Vilsack letter stated that the 2009 Final Rule would be modified if the industry did not voluntarily adopt the stricter practices suggested.

480. The panel could not "find any justifiable rationale" for the United States to administer the COOL measure in this way. On the one hand, the Vilsack letter allowed the 2009 Final Rule to enter into force but, on the other hand, it stated that the Rule would be modified if the industry did not voluntarily adopt stricter labelling requirements.[452] In the panel's view, this manner of administration "undermine[d] the labelling requirements in the 2009 Final Rule".[453] The panel found that the Vilsack letter "caused *uncertainty and confusion*" for the industry in seeking to comply with the labelling requirements, which was "not [] reasonable".[454]

481. In *China – Raw Materials*, the panel addressed eligibility criteria that China applied in administering export quotas. One criterion was the applicant's "operation capacity". The panel considered that this criterion was determinative because, if the applicant could not establish sufficient "operation capacity", no quota would be granted. The complainants objected that Chinese law did not define the "operation capacity" criterion. The panel found that "a system of quota allocation where an *undefined and vaguely* worded criterion can trump all other criteria" entails "unreasonable" administration.[455]

482. In *Thailand – Cigarettes (Article 21.5 – Philippines)*, the complainant challenged the administration of value added taxes ("VAT") through the imposition of certain notification requirements. Specifically, importers were required to notify market price information that they could not know at the time of notification; yet, they faced legal jeopardy if they notified incorrect information. The panel found that the notification requirements created "*uncertainty and confusion*" for importers as to how they should comply with the requirements, which was "unreasonable administration".[456]

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[452] Panel Reports, *US – COOL*, para. 7.859.
[453] Panel Reports, *US – COOL*, para. 7.859.
[454] Panel Reports, *US – COOL*, paras. 7.859 and 7.866. *See also* Panel Report, *Thailand – Cigarettes (Philippines)* (*Article 21.5 – Philippines*), para. 7.928.
[455] Panel Reports, *China – Raw Materials*, para. 7.744. *See also* Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines*), para. 7.927.
[456] Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 – Philippines*), para. 7.926.

2. The Country Exemptions are administered in an unreasonable manner

483. In this Section, Norway: *first* sets out relevant factual background; *second*, explains that it challenges the *administration* of the Country Exemptions; and *third*, demonstrates that this manner of administration is unreasonable.

a. Factual background

484. The Presidential Proclamations provide that exporting countries are "welcome to discuss" the possibility of a Country Exemption with the United States. The Proclamations provide scant information on the conditions governing the grant of a Country Exemption:

- The applicant country must have a "security relationship" with the United States;
- The applicant country and the United States must agree on "satisfactory alternative means" to the tariffs; and
- The President of the United States must determine that the imports from that country "no longer threaten to impair the national security".[457]

485. If the President considers these conditions to be met, he "may" grant the applicant country an exemption from the tariffs for its aluminium/steel products.[458]

486. The United States has granted certain countries temporary and/or permanent exemptions from its aluminium and steel tariffs. Specifically, the United States granted the following temporary exemptions:[459]

- From 23 March until 30 April: aluminium and steel products originating in South Korea were exempt from the tariffs; and
- From 23 March until 31 May 2018: aluminium and steel products originating in Argentina, Australia, Brazil, Canada, the EU, and Mexico were exempt from the tariffs.

487. The United States has also granted the following permanent exemptions:[460]

- For the steel tariffs: steel products originating South Korea (1 May 2018), and Argentina, Australia and Brazil (1 June 2018) are exempt from the tariffs;
- For the aluminium tariffs: aluminium products originating in Argentina and Australia (1 June 2018) are exempt from the tariffs.

[457] Proclamation No. 9704, **(Exhibit NOR-3)**, para. 8; Proclamation No. 9705, **(Exhibit NOR-4)**, para. 9.
[458] Proclamation No. 9705, **(Exhibit NOR-4)**, para. 8; Proclamation No. 9704, **(Exhibit NOR-3)**, para. 8.
[459] *See* Section III.B and Table 2 above.
[460] *See* Section III.B and Table 2 above.

488. The United States fails to establish any administrative process by which applicant countries may seek a Country Exemption. The Presidential Proclamations merely state that "[a]ny country with which we have a security relationship is **welcome to discuss** with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country".[461] No other measure sets forth any administrative process for seeking an exemption.

489. Thus, the United States fails to set out the basic features of an administrative process. It does not indicate what information applicant countries should present, and to whom that information should be presented; it fails to provide any procedural rights for applicant countries, such as opportunities for an applicant to be heard, to respond to counterarguments, and to receive an explanation of a decision; and it fails to set out the administrative steps to be followed by the United States. Further, the United States does not explain the applicable criteria: "security relationship"; "satisfactory alternative means"; and, "no longer threaten to impair the national security".[462]

490. In these respects, the administration of the Country Exemptions may be contrasted with the administration of the Product Exclusions. With respect to the Product Exclusions, the Department of Commerce is mandated to publish an administrative process that protects the due process interests of interested parties. The Department of Commerce has published relevant administrative rules.[463] Indeed, the Department has even amended those administrative rules to address concerns that due process was not properly protected under the rules initially adopted.[464]

b. Norway challenges the administration of the Country Exemptions

491. As described above, the Presidential Proclamations constitute measures of general application "pertaining to … rates of duty … or to requirements, restrictions or prohibitions on imports or export" as described under Article X:1. More in particular, the Proclamations provide for: (1) the aluminium and steel tariffs at issue; and (2) the availability of country exemptions. Under Article X:3(a) Norway challenges the *administration* of the tariffs and exemptions at issue.

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[461] Proclamation No. 9704, **(Exhibit NOR-3)**, para. 8; Proclamation No. 9705, **(Exhibit NOR-4)**, para. 9.
[462] *See* Proclamation No. 9704, **(Exhibit NOR-3)**, para. 8; Proclamation No. 9705, **(Exhibit NOR-4)**, para. 9.
[463] Interim Final Rule, Fed. Reg. 83, 12,106, 19 March 2018 ("March Interim Final Rule"), **(Exhibit NOR-76)** and September Interim Final Rule, **(Exhibit NOR-20)**.
[464] September Interim Final Rule, **(Exhibit NOR-20)**, p. 46,026.

c. The United States' administration of the Country Exemptions is unreasonable

492. The United States' administration of the Country Exemptions falls short of the "minimum standards for transparency and procedural fairness" that are required under Article X:3(a).[465]

493. Norway's claim focuses on two aspects of the US administration of these exemptions: (1) the absence of any administrative process that applicant countries should follow in seeking an exemption; and (2) the use of inherently vague and undefined eligibility criteria. Each of these grounds gives rise to unreasonable administration, with the combination of grounds compounding their inconsistency.

i. The Country Exemptions are administered without a proper administrative process

494. The United States does not identify any administrative process that applicant countries should follow in seeking an exemption. Beyond a vague invitation to applicant countries "to discuss" an exemption,[466] the United States fails to indicate what administrative steps applicant countries should follow in seeking an exemption from the tariffs, such as to whom an application should be made, in what form, and with what supporting information. Equally, there is no indication of the process that the United States will follow in assessing applications.

495. In the Appellate Body's words in *US – Shrimp*, the United States' undefined "process" is "singularly informal and casual".[467] Indeed, the defining feature of the US administration is the total absence of any kind of administrative process, which creates uncertainty for applicant countries.

496. The Appellate Body's characterisations of the US certification process in *US – Shrimp* are all apposite in this case. Indeed, in this dispute, as the United States fails to set forth *any* kind of administrative process, the Appellate Body's remarks apply with even more force.

497. Thus, the United States fails to provide a "formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it", and to receive an explanation of a decision to grant/deny a request.[468] Applicant countries are thereby deprived

[465] Appellate Body Report, *US – Shrimp*, para. 183.
[466] Proclamation No. 9704, **(Exhibit NOR-3)**, para. 8; Proclamation No. 9705, **(Exhibit NOR-4)**, para. 9.
[467] Appellate Body Report, *US – Shrimp*, para. 181.
[468] Appellate Body Report, *US – Shrimp*, para. 180.

of the security and predictability that is intended to flow from the "minimum standards for transparency and procedural fairness" inherent in Article X:3(a).[469]

498. This manner of administration is inherently "unreasonable" in the senses set forth above. The United States' administration of the Country Exemptions has important consequences for the trade interests of applicant countries, because it directly affects the nature and extent of the US market access restrictions faced by their exports.

499. In keeping with earlier case law, in administering the Country Exemptions, the United States must respect the basic due process rights of interested parties, in particular applicant countries. Given the serious consequences of the administrative process for applicant countries, the absence of any process to administer the Country Exemptions is not "[w]ithin the limits of what it would be rational or sensible to expect", "proportionate", "in accordance with reason", "not irrational or absurd", and "sensible".[470]

500. In that respect, Norway notes that the context provided by other covered agreements supports this understanding. In particular, the *Safeguards Agreement*, the *Agreement on Subsidies and Countervailing Measures* and the *Anti-Dumping Agreement* set forth administrative processes relating to the imposition (or not) of import restrictions.[471] In these processes, exporting Members must be granted basic due process rights as interested parties.

501. Without suggesting that precisely the same due process rights must be afforded in administrative processes subject to Article X:3(a) of the GATT 1994, the trade remedy agreements support the view – expressed in the case law – that Article X:3(a) ensures that an exporting Member is afforded basic due process rights in an administrative process relating to the imposition of import restrictions.

502. For these reasons, the United States' administration of the Country Exemptions is unreasonable and, hence, violates Article X:3(a)

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[469] Appellate Body Report, *US – Shrimp*, para. 183.
[470] Oxford English Dictionary, OED Online, available at http://www.oed.com/view/Entry/159072?redirectedFrom=reasonable#eid ("reasonable", *adj*.) (last accessed 30 April 2019), **(Exhibit NOR-75)**.
[471] *See Agreement on Safeguards*, Articles 12-14; *Agreement on Subsidies and Countervailing Measures*, Articles 19-23 and Annex VI; and *Anti-Dumping Agreement*, Articles 9-13 and Annex I. Similar examples can be found in Articles 5.8, 7, 12 and Annexes B and C of the *Agreement on Sanitary and Phytosanitary Measures*, relating to the imposition, and maintaining of, sanitary and phytosanitary measures; Articles 2.5, 2.9-2.11, 5-6 and 10 of the *Agreement on Technical Barriers to Trade*, relating to the imposition, and maintaining of, technical regulations. *See also* Articles VII-XVII of the *Agreement on Government Procurement*, to which the United States is a party, relating to the procedures for government procurements.

ii. The Country Exemptions are administered using vague and undefined eligibility criteria

503. The uncertainty in the process for administering the Country Exemptions is exacerbated because the United States applies eligibility criteria that are "*undefined and vaguely* worded".[472] Thus, there is uncertainty both in terms of the process to be followed, and the criteria to be applied.

504. The key eligibility criteria are that: the exporting country has a "security relationship" with the United States; the two countries agree on "satisfactory alternative means" to the tariffs; and the US President determines that imports from that country "no longer threaten to impair the national security".[473] The United States offers no guidance to understand these criteria.

505. Each of the three criteria is vague and undefined, and gives rise to unreasonable administration.

506. To take the first criterion, *all* exporting countries have some kind of "security relationship" with the United States, with the *nature* of the relationships varying greatly. The United States offers no further guidance on the nature of the "security relationship" needed to obtain an exemption. This undefined first criterion is, therefore, inherently vague and open-ended, because it does not indicate the requisite nature of the "security relationship" that an applicant country must have with the United States to warrant consideration of an exemption.

507. The second criterion is likewise inherently uncertain by its own terms. The United States offers no guidance as to the types of "alternative means" of meeting US security needs that applicant countries should consider offering to the United States nor what factors would render "satisfactory" possible alternatives means. Absent such basic information, applicant countries cannot identify what information should be provided to the United States as part of the process to justify an application.

508. The third criterion is equally vague and undefined. The United States offers no guidance to indicate in what circumstances, and why, the grant of an exemption to an applicant country would alleviate the alleged threat to US national security interests that is otherwise imperilled by aluminium/steel imports from all countries. The absence of clarity

[472] Panel Reports, *China – Raw Materials*, para. 7.744; *see also* Panel Report, *Thailand – Cigarettes (Philippines) (Article 21.5 - Philippines*), para. 7.927.
[473] Proclamation No. 9704, **(Exhibit NOR-3)**, para. 8; Proclamation No. 9705, **(Exhibit NOR-4)**, para. 9.

regarding this criterion also prejudices the ability of applicant countries to provide pertinent information that could facilitate the grant of an exemption.

509. The United States' recourse to inherently uncertain eligibility criteria renders its administration of the Country Exemptions unreasonable. Applicant countries are deprived of the basic information needed to weigh whether pursuing an application would reflect constructive use of government resources. They also cannot determine what information should be gathered and submitted to demonstrate eligibility. Thus, they cannot develop the most pertinent and persuasive evidence and argument to show that they meet the criteria.

510. Further, the lack of a formal requirement to provide a reasoned decision explaining the denial of an exemption request compounds, over time, the uncertainty surrounding the eligibility criteria. Applicant countries are deprived of an opportunity to receive guidance on the interpretation and application of the eligibility criteria, and are unable to determine how they can improve their applications upon re-application.

511. To borrow again from the words of the Appellate Body, there is "no way that exporting Members can be certain whether [the eligibility criteria] are being applied in a fair and just manner by the appropriate governmental agencies of the United States".[474]

512. In sum, given the serious consequences that the administrative process has for applicant countries, the United States' reliance on vague and undefined eligibility criteria is unreasonable. In these circumstances, the uncertainty created is not "[w]ithin the limits of what it would be rational or sensible to expect", "proportionate", "in accordance with reason", "not irrational or absurd", or "sensible".[475]

iii. Conclusion

513. In sum, the absence of any administrative process, and the use of inherently vague and undefined eligibility criteria, give rise to unreasonable administration.

3. The Product Exclusions are administered in an unreasonable and partial manner

514. The United States also affords product-specific exclusions for particular aluminium and steel products, based on applications by private parties.

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[474] Appellate Body Report, *US – Shrimp*, para. 181.
[475] Oxford English Dictionary, OED Online, available at http://www.oed.com/view/Entry/159072?redirectedFrom=reasonable#eid ("reasonable", *adj*.) (last accessed 30 April 2019), **(Exhibit NOR-75)**.

515. In this Section, Norway: *first* sets out relevant factual background; *second*, explains that it challenges the *administration* of the Product Exclusions; and *third*, demonstrates that this manner of administration is unreasonable and partial.

a. Factual background

516. Under the Presidential Proclamations, an entity using aluminium and/or steel products in the United States[476] can apply for a particular steel or aluminium product to be excluded from the application of a tariff or a quota.[477] These Product Exclusions are granted if the Department of Commerce (specifically the Bureau of Industry and Security)[478] determines that:

- the relevant product is not produced in the United States "in a sufficient and reasonably available amount";[479]
- the relevant product is not produced in the United States in a "satisfactory quality";[480] *or*

[476] A request for a Product Exclusion may be submitted by a "directly affected party located in the United States". An individual or organisation is "directly affected" if they use aluminum/steel in business activities in the United States (*e.g.*, supplying product to users; construction; manufacturing). *See* September Interim Final Rule, **(Exhibit NOR-20)**, pp. 46,057 and 46,061. Further, "the individual or organization that will be identified as the beneficiary of the exclusion request must also be the importer of record". *See* September Interim Final Rule, **(Exhibit NOR-20)**, p. 46,035.

[477] Norway notes that obtaining an exclusion is phrased as obtaining "relief" from the tariff or quota in the Presidential Proclamations. *See* Proclamation No. 9704, **(Exhibit NOR-3)**, para. (3) and Proclamation No. 9705, **(Exhibit NOR-4)**, para. (3); and Proclamation No. 9776, **(Exhibit NOR-21)**, paras. 3 and (1) and Proclamation No. 9777, **(Exhibit NOR-22)**, paras. 3 and (1). Pursuant to Proclamations 9710 and 9711, "[s]uch relief may be provided to directly affected parties on a party-by-party basis taking into account the regional availability of particular articles, the ability to transport articles within the United States, and any other factors as the Secretary deems appropriate". *See* Proclamation No. 9710, **(Exhibit NOR-6)**, para. (6) and Proclamation No. 9711, **(Exhibit NOR-7)**, para. (6). Additionally, any aluminium or steel article for which relief is granted from the quota is also not subject to the additional rate of duty set forth in Proclamations 9704 and 9705. *See* Proclamation No. 9776, **(Exhibit NOR-21)**, para. (1) and Proclamation No. 9777, **(Exhibit NOR-22)**, para. (1).

[478] The Bureau of Industry and Security ("BIS") is the lead agency deciding whether to grant aluminium and steel tariff exclusion requests. *See* September Interim Final Rule, **(Exhibit NOR-20)**, p. 46,027.

[479] "The exclusion review criterion "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. "Immediately" means that a product is currently being produced or could be produced "within eight weeks" in the amount needed in the business activities of the user of steel in the United States described in the exclusion request. *See* September Interim Final Rule, **(Exhibit NOR-20)**, pp. 46,058 and 46,062.

[480] "Th[is] exclusion review criterion … does not mean the aluminium needs to be identical, but it does need to be equivalent as a substitute product. 'Substitute product' for the purposes of this review criterion means that the [aluminium/steel] being produced by an objector can meet 'immediately' …. The quality (*e.g.*, industry specs or internal company controls or standards), regulatory, or testing standards, in order for the U.S. produced [aluminium/steel] to be used in that business activity in the United States by that end user." *See* September Interim Final Rule, **(Exhibit NOR-20)**, pp. 46058 and 460062.

- there are "specific national security-based considerations" to exclude a specific product from the tariffs or the quota.[481]

517. In contrast to the provisions regarding Country Exemptions, the Presidential Proclamations provide that the Secretary of Commerce is responsible for establishing an administrative process for consideration of requests for a Product Exclusion.[482]

518. The Secretary initially adopted relevant administrative rules in March 2018 ("March Interim Final Rule").[483] However, to ensure respect for due process rights, the Secretary amended the administrative process in September 2018 ("September Interim Final Rule").[484] Under the amended administrative rules:

- a US applicant must submit an "exclusion request", explaining why the product in question should be excluded from the tariffs or quota;[485]
- a US producer of the product subject to the request may submit an objection to the request, on the grounds that it currently produces, or could produce, the product in question "within eight weeks" ("US producer");[486]
- if an objection is filed, the US applicant is entitled to provide a rebuttal, and the US producer can then file a surrebuttal;[487]
- the DOC issues a decision.[488]

519. The administrative rules provide for the views of US producers of aluminium and steel products play a key role in this process.

520. When US producers make an objection (*i.e.*, they assert the existence of US production), the DOC typically accepts the objection and denies the exclusion request. In

[481] The Secretary of Commerce is also authorised to grant relief from quota through a second, separate exclusion process limited to steel products, based on the existence of a contract that pre-dates 8 March 2018. *See* Proclamation No. 9777, **(Exhibit NOR-22)**, paras. 4 and (2).
[482] *See* Proclamation No. 9704, **(Exhibit NOR-3)**, para. (4) and Proclamation No. 9705, **(Exhibit NOR-4)**, para. (4). *See also* Proclamation No. 9776, **(Exhibit NOR-21)**, para. (2); and Proclamation No. 9777, **(Exhibit NOR-22)**, para. (4).
[483] March Interim Final Rule, **(Exhibit NOR-76)**.
[484] September Interim Final Rule, **(Exhibit NOR-20)**, p. 46,026.
[485] "The request should clearly identify, and provide support for, the basis upon which the exclusion is sought", September Interim Final Rule, **(Exhibit NOR-20)**, pp. 46,057 and 46,062.
[486] The Rules define an objector as: "[a]ny individual or organization that manufacturers [aluminium/steel] articles in the United States". September Interim Final Rule, **(Exhibit NOR-20)**, pp. 46,058 and 46,062.
[487] September Interim Final Rule, **(Exhibit NOR-20)**, pp. 46,058-46,059 and 46,063.
[488] Pursuant to the March and September Interim Final Rules, "incomplete" submissions are defined and handled as follows: (i) exclusion requests that do not satisfy the requirements regarding the forms to be used and the criteria for a valid exclusion request, "will be denied"; (ii) objections, rebuttals and surrebuttals that do not satisfy the requirements regarding the forms to be used and the criteria for a valid objection, rebuttal or surrebuttal "will not be considered". With regard to the "complete" submissions, the DOC "post[s] responses in regulations.gov to each exclusion request". *See* March Interim Final Rule, **(Exhibit NOR-76)**, pp. 12111-12112; September Interim Final Rule, **(Exhibit NOR-20)**, pp. 46,059-46,060 and 46,063-46,046.

other words, the DOC accedes to the views of US producers in deciding that the relevant products are produced in the United States and treats that as the decisive consideration in its process.

521. As a result, US producers are able, through their own action in filing an objection, to shield the US market, and their (potential) production, from import competition with respect to the aluminium/steel products that they produce.

522. As of 18 March 2019, the DOC had considered 4,706 exclusion requests for aluminium products. With respect to seven of these requests, US producers filed objections that were properly constituted and met the relevant objection criteria. In the case of each of these seven objections, the DOC accepted the objection and denied the exclusion request.[489]

523. With respect to steel products, as of the same date, the DOC had considered 28,052 exclusion requests. US producers filed one or more objections against 1,385 of these exclusion requests. With respect to 563 of the exclusion requests that received an objection, US producers filed objections that were properly constituted. In the case of 501 of these 563 instances (nearly 90 percent), the DOC accepted the objection and denied the exclusion request.[490]

524. In sum, for aluminium products, the DOC uniformly accepted qualifying objections made by US producers. For steel products, the DOC accepted an overwhelming majority of the objections from US producers.

525. Norway now turns to its claims that the Product Exclusions to the US aluminium and steel tariffs are administered in an *unreasonable* and *partial* manner. .

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[489] US producers have filed objections with respect to 40 aluminium exclusion requests in total. The DOC found that 21 of these objections by US producers did not satisfy the conditions for an objection because the US producer did not meet the objection criterion of showing that it was apparently able to make the relevant product or that it would commence production of that product. *See* Selected objection forms to the 21 aluminium exclusion requests, **(Exhibit NOR-77)**. Further, objections were also filed regarding 12 requests where the request was rejected because the request was incomplete. In sum, in all 7 instances where a valid exclusion request and a valid objection were filed, the DOC denied the exclusion request. *See* Overview of the results of the DOC's decisions on the aluminium exclusion requests, through 18 March 2019, available at https://quantgov.org/tariff-exclusion/ (last accessed 30 April 2019), **(Exhibit NOR-78)**.

[490] US producers have filed objections with respect to 1,385 steel exclusion requests in total. The DOC found that two of these objections by US producers did not satisfy the conditions for an objection. The DOC's decision memo reads: "[N]o objections have been filed to this exclusion request that meet the requirements laid out in Supplement No. 1 to 15 CFR Part 705, and therefore *none have been considered*". Emphasis added. *See* BIS Decision Memo, BIS-2018-0006-15963, **(Exhibit NOR-79)**; and BIS Decision Memo, BIS-2018-0006-76581, **(Exhibit NOR-80)**. Objections were also filed regarding 820 requests where the request was rejected because the request was incomplete. Overview of the results of the DOC's decisions on the steel exclusion requests, through 18 March 2019, available at https://quantgov.org/tariff-exclusion/ (last accessed 30 April 2019), **(Exhibit NOR-81)**.

b. Norway challenges the administration of the Product Exclusions

526. The Presidential Proclamations and the Interim Final rules constitute measures of general application "pertaining to … rates of duty … or to requirements, restrictions or prohibitions on imports or export" as described under Article X:1. Both the Proclamations and the Interim Final Rules set forth, relevantly: (1) the aluminium and steel tariffs at issue; (2) the availability of Product Exclusions; and (3) the process by which an entity using aluminium and/or steel products in the United States can apply for a Product Exclusion for a particular aluminium or steel product.

527. Under Article X:3(a) Norway challenges the third aspect of these measures, which relates to the administration of the Product Exclusions.

c. The United States' administration of the Product Exclusions is unreasonable and partial

528. Norway now shows that the United States administers the Product Exclusions in a manner that is unreasonable and partial. To recall, the ordinary meaning of the term "unreasonable" is "[n]ot within the limits of what would be rational or sensible to expect", "excessive in amount or degree", "illogical" and "irrational".[491] The ordinary meaning of the term "impartial" is "not partial", "not favouring one party or side more than another", "unprejudiced", "unbiased", "fair".[492]

529. Accordingly, Article X:3(a) establishes that the manner of administration of the relevant laws and regulations must be fair and appropriate, and unbiased and unprejudiced.

530. As explained in Section III.C above, in deciding whether to allow the importation of a particular aluminium/steel product through an exclusion from the tariffs, the DOC gives US producers an opportunity to object to the admission of imported products subject to an exclusion request.

531. These US producers have an important commercial interest that is adverse to admitting the imported product subject to the exclusion request, because their aluminium/steel products compete with the imported products. They, therefore, have a

[491] Oxford English Dictionary, OED Online, available at http://www.oed.com/view/Entry/216857?redirectedFrom=unreasonable#eid ("unreasonable", *adj*.) (last accessed 30 April 2019), **(Exhibit NOR-82)**.
[492] Oxford English Dictionary, OED Online, available at http://www.oed.com/view/Entry/92112?redirectedFrom=impartial#eid ("impartial", *adj*.) (last accessed 30 April 2019), **(Exhibit NOR-74)**.

commercial interest in shielding their product from import competition. Whereas these US producers have an important commercial interest in the imported products, they are not buyers, sellers, or importers of the imported products. Thus, they have a commercial interest in the imports, but no legal interest.[493]

532. In these circumstances, by affording US producers a formal opportunity to shield their own production from import competition, the United States creates an inherent conflict of interest in its administration of Product Exclusions, which favours the commercial interests of US producers.

533. This conflict raises concerns that are not merely theoretical. Rather, as explained above, in practice, objections made by US producers carry considerable weight in the administrative process. When US producers make an objection, the DOC typically defers to it. In other words, US producers play a decisive role in deciding whether their own production will face import competition.

534. It is neither reasonable nor impartial to administer the Product Exclusions through a process that entails such a conflict of interest. This conflict entails partial administration, because it necessarily favours the commercial interests of one set of private parties – namely, US producers – giving them one-sided, preferential, and inappropriate participatory rights in the administrative process. Such administration is also not "[w]ithin the limits of what it would be rational or sensible to expect, "proportionate", "in accordance with reason", "not irrational or absurd", or "sensible".[494]

VIII. REQUEST FOR FINDINGS

535. For the reasons set out in Sections IV to VII, Norway respectfully requests the Panel to find that the US aluminium and steel tariffs violate:

(i) Articles 2.1, 2.2, 5.1, 11.1(b), 12.1, and 12.2 of the *Safeguards Agreement*; and

(ii) Articles I:1, II:1 and X:3(a) of the GATT 1994.

536. Norway requests that the Panel recommend that the United States bring its measures found to be WTO-inconsistent into conformity with its WTO obligations.

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[493] Similar considerations led the Panel in *Argentina – Hides and Leather* to find that the customs laws were administered in a partial manner. *See* Panel Report, *Argentina – Hides and Leather*, para. 11.98.

[494] Oxford English Dictionary, OED Online, available at http://www.oed.com/view/Entry/159072?redirectedFrom=reasonable#eid ("reasonable", *adj*.) (last accessed 30 April 2019), **(Exhibit NOR-75)**.

LIST OF EXHIBITS

Exhibit No.	Description
(Exhibit NOR-1)	"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", DOC Report, 11 January 2018 ("DOC Steel Report")
(Exhibit NOR-2)	"The Effects of Imports of Aluminium on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, As Amended", DOC Report, 17 January 2018 ("DOC Aluminium Report")
(Exhibit NOR-3)	Proclamation No. 9704, 83 Fed. Reg. 11,619, 15 March 2018 ("Proclamation No. 9704")
(Exhibit NOR-4)	Proclamation No. 9705, 83 Fed. Reg. 11,625, 15 March 2018 ("Proclamation No. 9705")
(Exhibit NOR-5)	Proclamation No. 9772, 83 Fed. Reg. 40,429, 15 August 2018 ("Proclamation No. 9772")
(Exhibit NOR-6)	Proclamation No. 9710, 83 Fed. Reg. 13,355, 28 March 2018 ("Proclamation No. 9710")
(Exhibit NOR-7)	Proclamation No. 9711, 83 Fed. Reg. 13,361, 28 March 2018 ("Proclamation No. 9711")
(Exhibit NOR-8)	Proclamation No. 9740, 83 Fed. Reg. 20,683, 7 May 2018 ("Proclamation No. 9740")
(Exhibit NOR-9)	Proclamation No. 9758, 83 Fed. Reg. 25,849, 5 June 2018 ("Proclamation No. 9758")
(Exhibit NOR-10)	Proclamation No. 9759, 83 Fed. Reg. 25,857, 5 June 2018 ("Proclamation No. 9759")
(Exhibit NOR-11)	Proclamation No. 9739, 83 Fed. Reg. 20,677, 7 May 2018 ("Proclamation No. 9739")
(Exhibit NOR-12)	Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862)
(Exhibit NOR-13)	"Section 232 Investigations: Overview and Issues for Congress", Congressional Research Service, 2 April 2019
(Exhibit NOR-14)	"Australia rejects fears Trump steel tariff exemption subject to quotas", The Guardian, 2 May 2018
(Exhibit NOR-15)	Chapter 99 of the Harmonized Tariff Schedule of the United States

(Exhibit NOR-16)	"Argentina agrees to cap steel at 135 percent of three-year average", World Trade Online, 3 May 2018
(Exhibit NOR-17)	"Brazil says U.S. tariffs and quotas unjust, still open to negotiate", Reuters, 2 June 2018
(Exhibit NOR-18)	"South Korea agrees to open auto market in return for exemption from steel tariffs", The Washington Post, 26 March 2018
(Exhibit NOR-19)	"President Donald J. Trump is Fulfilling His Promise on the United States–Korea Free Trade Agreement and on National Security", White House statement, 24 September 2018
(Exhibit NOR-20)	Interim Final Rule, Fed. Reg. 83, 46,026, 11 September 2018 ("September Interim Final Rule")
(Exhibit NOR-21)	Proclamation No. 9776, 83 Fed. Reg. 45,019, 4 September 2018 ("Proclamation No. 9776")
(Exhibit NOR-22)	Proclamation No. 9777, 83 Fed. Reg. 45,025, 4 September 2018 ("Proclamation No. 9777")
(Exhibit NOR-23)	Statements by the United States at the Meeting of the WTO Dispute Settlement Body, 21 November 2018
(Exhibit NOR-24)	Memorandum for Secretary of Commerce, "Response to Steel and Aluminum Policy Recommendations", Secretary of Defense
(Exhibit NOR-25)	World Customs Organization, Guide to Explanatory Notes
(Exhibit NOR-26)	Explanatory Note to HS 7601, World Customs Organization
(Exhibit NOR-27)	USCBP Ruling N300053, 4 September 2018
(Exhibit NOR-28)	USCBP Ruling NYC83128, 9 January 1998
(Exhibit NOR-29)	USCBP Ruling N301439, 21 November 2018
(Exhibit NOR-30)	Explanatory Note to HS 7602, World Customs Organization
(Exhibit NOR-31)	USCBP Ruling NY808064, 21 April 1995
(Exhibit NOR-32)	Tweet by President Trump, 3 July 2017
(Exhibit NOR-33)	Tweet by President Trump, 5 March 2018
(Exhibit NOR-34)	Tweet by President Trump, 2 March 2018
(Exhibit NOR-35)	Tweet by President Trump, 1 March 2018
(Exhibit NOR-36)	Tweet by President Trump, 4 March 2018

(Exhibit NOR-37)	Tweet by President Trump, 8 March 2018
(Exhibit NOR-38)	Tweet by President Trump, 4 December 2018
(Exhibit NOR-39)	Tweet by President Trump, 3 January 2019
(Exhibit NOR-40)	Tweet by President Trump, 28 January 2019
(Exhibit NOR-41)	Remarks by President Trump in Listening Session with Representatives from the Steel and Aluminum Industry, 1 March 2018
(Exhibit NOR-42)	"Leveling the playing field for American workers", CNBC, 5 October 2018
(Exhibit NOR-43)	"US Commerce Secretary defends steel, aluminium tariffs; points to China", S&P Global, 19 July 2018
(Exhibit NOR-44)	"President Donald J. Trump: Standing up to Unfair Steel Trade Practices", the White House Fact Sheets, 20 April 2017
(Exhibit NOR-45)	Crystalline Silicon Photovoltaic Cells, USTC investigation, November 2017
(Exhibit NOR-46)	"Frequently Asked Questions: Section 232 Investigations: The Effect of Aluminum Imports on the National Security", Department of Commerce
(Exhibit NOR-47)	"Frequently Asked Questions Section 232 Investigations: The Effect of Steel Imports on the National Security", Department of Commerce
(Exhibit NOR-48)	"Aluminum: The Element of Sustainability" , the Aluminum Association, September 2011
(Exhibit NOR-49)	"Aluminum: Competitive Conditions Affecting the U.S: Industry", United States International Trade Commission, June 2017 ("USITC Aluminum Report")
(Exhibit NOR-50)	Aluminum Recycling in the United States in 2000, U.S. Department of the Interior and U.S. Geological Survey
(Exhibit NOR-51)	"About Steel", World Steel Association fact sheet
(Exhibit NOR-52)	Steel making process, diagram, Arcelor Mittel
(Exhibit NOR-53)	United States Geological Survey, Mineral Commodity Profile – Iron and Steel, 2005
(Exhibit NOR-54)	"The White Book of Steel", World Steel Association, 2012 World Steel Association publication

(Exhibit NOR-55)	United States Geological Survey, Iron and Steel Yearbook, 2000
(Exhibit NOR-56)	"Impacts of energy market developments on the steel industry", presentation delivered at the 74th Session of the OECD Steel Committee, 1-2 July 2013
(Exhibit NOR-57)	"Losing strength US steel industry analysis", White & Case, 16 April 2016
(Exhibit NOR-58)	A Guide to the Language of Steel
(Exhibit NOR-59)	"World Steel in Figures 2017" , World Steel Association
(Exhibit NOR-60)	"World Steel in Figures 2018", World Steel Association
(Exhibit NOR-61)	American Metal Markets, DRI & Mini-mills, DRI & Mini-mills Conference
(Exhibit NOR-62)	NAICS Code 3311
(Exhibit NOR-63)	NAICS Code 3312
(Exhibit NOR-64)	"Six reasons why the Sparrows Point steel mill collapsed", Baltimore Brew, 25 May 2012
(Exhibit NOR-65)	"U.S. Steel lays off 200 more workers in Fairfield", al.com, 18 March 2016
(Exhibit NOR-66)	"Trump trade adviser: All countries exempted from steel tariffs will face quotas", Politico, 5 January 2018
(Exhibit NOR-67)	"Trump tariffs are about national security: Peter Navarro", Fox News, 31 May 2018
(Exhibit NOR-68)	Tweet by President Trump, 10 March 2018
(Exhibit NOR-69)	US Bound Tariffs
(Exhibit NOR-70)	"Absolute Quota for Aluminum Products: Argentina", USCBP website
(Exhibit NOR-71)	"Absolute Quota for Steel Products: Argentina, Brazil and South Korea", USCBP website
(Exhibit NOR-72)	"Quota Administration General Information", USCBP website
(Exhibit NOR-73-A)	Notice 123, "US restrictions on exports of steel and aluminum", Press release from the Brazilian Ministers of Foreign Affairs and Industry, 2 May 2018 (Portuguese)

(Exhibit NOR-73-B)	Notice 123, "US restrictions on exports of steel and aluminum", Press release from the Brazilian Ministers of Foreign Affairs and Industry, 2 May 2018 (English)
(Exhibit NOR-74)	Oxford English Dictionary, OED Online, available at http://www.oed.com/view/Entry/92112?redirectedFrom=impartial#eid ("impartial", *adj*.) (last accessed 30 April 2019)
(Exhibit NOR-75)	Oxford English Dictionary, OED Online, available at http://www.oed.com/view/Entry/159072?redirectedFrom=reasonable#eid ("reasonable", *adj*.) (last accessed 30 April 2019)
(Exhibit NOR-76)	Interim Final Rule, Fed. Reg. 83, 12,106, 19 March 2018 ("March Interim Final Rule")
(Exhibit NOR-77)	Selected objection forms to the 21 aluminium exclusion requests
(Exhibit NOR-78)	Overview of the results of the DOC's decisions on the aluminium exclusion requests, through 18 March 2019, available at https://quantgov.org/tariff-exclusion/ (last accessed 30 April 2019)
(Exhibit NOR-79)	BIS Decision Memo, BIS-2018-0006-15963
(Exhibit NOR-80)	BIS Decision Memo, BIS-2018-0006-76581
(Exhibit NOR-81)	Overview of the results of the DOC's decisions on the steel exclusion requests, through 18 March 2019, available at https://quantgov.org/tariff-exclusion/ (last accessed 30 April 2019)
(Exhibit NOR-82)	Oxford English Dictionary, OED Online, available at http://www.oed.com/view/Entry/216857?redirectedFrom=unreasonable#eid ("unreasonable", *adj*.) (last accessed 30 April 2019)