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Reopening of safeguard investigation for the implementation of the ruling of the Dispute Settlement Body of the World Trade Organization regarding the safeguard measure applicable to imports into the Union of certain steel products

Dear Madam/Sir,

In the abovementioned investigation, Industrieverband Blechumformung e.V. ("IBU") and Fachvereinigung Kaltwalzwerke e.V. (FVK), Germany, have retained our services in order to represent its interests vis-à-vis the European institutions and other interested parties.

I. Introduction

With Notice of Initiation of 24 August 2022 (OJ 2022/C320/21, hereinafter: "Notice of Initiation"), the European Commission informed interested parties of its intention to implement the recommendation and ruling of the WTO Dispute Settlement Body (DSB) in dispute

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brought by Turkey DS595 (European Union - Safeguard Measures on Certain Steel Products). According to this notice, the Commission intends to bring the safeguard measure on certain steel products into conformity with the WTO Agreement on Safeguards and the GATT 1994 in cases where the WTO panel has concluded that the EU safeguard measure is not in conformity with said agreements.

For this purpose, the Commission, through its Notice of 24/08/2022, reopened the original safeguard investigation at the point of time where further clarifications are necessary in light of the findings of the panel. The relevant point of time is just prior to the adoption of the definitive safeguard measure, which has been adopted with Commission Implementing Regulation (EU) 2019/159 of 31 January 2019 (“Implementing Regulation”). To this end, the Commission invites comments from interested parties.

With this statement, we forward the comments of our clients, whose industries are significantly affected by the safeguard measure on certain steel products currently in force.

II. IBU, FVK and the members of our clients’ associations

Our clients and the companies represented by our clients shall be briefly introduced in the following:

- **IBU - Industrieverband Blechumformung e.V.** (association of the sheet metal forming industry) represents the companies in this industry and their partners as a national association. This industry is heavily relying on steel supplies, as each year, more than 5 million tons of steel components are manufactured from metal sheets. The cost for steel supplies amount to 50 - 60 % of the total production cost. The more than 230 members of the association are mainly suppliers to the automotive and electronics industry, the machine and plant building industry, the furniture and construction industry and medical technology. The sales volume of the sector stood at around 14.70 billion euros in 2017, with about 70,000 employees. Members are predominantly family-owned SMEs with a high degree of specialization and competition experience.
- **FVK - Fachvereinigung Kaltwalzwerke e.V.** represents the German cold rolling mills. This industry processes around 2.5 million tons of steel (hot rolled wide and medium wide strip) yearly. The share of material cost in value added is more than 40%. The sales volume of the sector with around 6,000 employees stood at

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around 3.3 billion euros in 2017. The 24 members of the association are predominantly family-owned SMEs with a high degree of specialization and a strong position in international markets. Exports have a share of around 34% of sales. With steel being by far its most important raw material, the companies represented by the associations are directly affected by the safeguard investigation.

The companies represented by IBU and FVK mainly use the following steel products:

- Non Alloy and Other Alloy Hot Rolled Sheets and Strips (included in product category 1 of the Implementing Regulation, Annex I);
- Non Alloy and Other Alloy Cold Rolled Sheets (included in product category 2 of the Implementing Regulation)
- Metallic Coated Sheets (i.e. Hot Dipped & Electrolytically metal coated sheets; included in product category number 4 of the Implementing Regulation),
- Stainless Cold Rolled Sheets and Strips (included in product category number 9 of the Implementing Regulation).

III. Previous submissions of IBU and FVK

Already in our submission dated 30 April 2018 we had, on behalf of our clients, forwarded our comments in the original safeguard investigation (OJ 2018/C111/10) Furthermore, we underlined our position in a hearing before the Commission on September 13, 2018 and submitted an additional submission dated 21 November 2018. Already in these submissions, we demonstrated that the legal conditions for the imposition of safeguard measures on imports of certain steel products were not fulfilled because

- no increase of imports in "greatly increased" quantities was apparent;
- there was no threat of a significant trade diversion due to the US Section 232 investigation;
- there were no signs for serious injury or threat of serious injury to the European steel industry as a result of increased imports
- the imposition of safeguard measures with regard to imports of steel products was against the Union interest.

We note that the abovementioned arguments we raised at that time have now been confirmed in DSB Panel Report DS 595. In this report, the Panel made it clear that the EU's

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explanations and justifications regarding certain aspects of its original measures did not comply with the requirements of the Agreement establishing the World Trade Organization ("WTO Agreement").

The Panel's findings concerned two legal issues under Article XIX:1(a) of the GATT 1994 and two elements of a legal issue under Article 4.1(b) of the WTO Agreement on Safeguards.

In particular, regarding Article XIX:1(a) of the GATT 1994, the original safeguard measure had not sufficiently explained how the increase in imports took place as a result of the unforeseen developments that had been identified. Also, the measure had not identified the GATT obligations whose effect resulted in the increase in imports.

Regarding Article 4.1(b) of the WTO Agreement on Safeguards, the panel found that two central elements of the determination of a threat of serious injury were not 'based on facts'. First, the finding that the domestic industry was 'in a fragile and vulnerable position', despite its improved performance and, second, the finding that a further increase in import volumes in the future would bring about serious injury to the domestic industry

Because of these shortcomings, we note that the safeguard measures fail to meet WTO requirements in extremely important respects. However, the EU Commission is apparently unimpressed by this and announces to remedy the deficiencies targeted by the WTO by simply supplementing Implementing Regulation (EU) 2019/159 on the above points.

We strongly disagree with this intention, as it one-sidedly anticipates the outcome of the proceedings initiated. Rather, in our view, the initiated proceedings must openly examine whether the deficiencies of Regulation L 31/27 of 01.02.2019 identified in the DSB report can be remedied at all. This would only be the case if the deficiencies had not arisen due to objectively existing facts, but due to technical errors and omissions in the preparation of the introductory regulation. In our opinion, however, an objective examination must come to the conclusion that the deficiencies identified cannot be remedied by adding subsequent information or reasons to the wording of the Regulation. Rather, the objective facts confirm

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that several legal requirements for the imposition of the definitive safeguard measures were not fulfilled. Therefore, the safeguard measures are not in conformity with WTO and EU law and must be revoked.

This is further explained in the following.

IV. Comments on the deficiencies identified in the panel report.

The Panel's findings on the above issues can be found, with respect to the link between increase in imports and unforeseen developments, in Section 7.3.2.3 of the Panel Report and with respect to the threat of serious injury, in Section 7.6.2.

1. No increase in imports due to unforeseen developments

In Section 7.3.2.3.4 of the report, the Panel finds that that the European Union acted inconsistently with Article XIX:1(a) of the GATT 1994 by imposing the definitive safeguard without establishing that the increase in imports took place "as a result of" the unforeseen developments.

Specifically, in this regard, the Panel finds that the European Commission has not demonstrated that the increase in imports was due to the increase in trade-restrictive and trade-defense measures. It further finds fault with the fact that the findings did not cite any evidence to support the European Commission's statements about the link between overcapacity and the increase in imports.

Most significant, however, in our view, is the Panel's finding that the European Commission failed to demonstrate that the U.S. Section 232 measures imposed in March 2018 led to an increase in EU imports of the 26 affected product categories. This is because, unlike the previous two issues, the imposition of the Section 232 measures was indeed an unforeseeable event. The Panel believes that establishing the link between the section 232 measures on steel and the increase in imports into the European Union "require[s] a much more detailed analysis" than "bringing two sets of facts together". The analysis that the European

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Commission has conducted with respect to the Section 232 measures does not satisfy this more detailed standard.

We have stated in previous submissions that the Commission's statements at the time were based on pure conjecture that was not tenable even on close examination. Namely, we pointed out that it is difficult to determine whether and to what extent certain events would indeed cause a change of trade flows, as steel trade flows are influenced by numerous possible causes, for example:

- the change of international price relations;
- the change of exchange rates;
- a change in regional demand dynamics;
- the entry of new, competitive suppliers into the international market;
- Changes in the supply behavior of domestic producers (e.g. reduced production, limited range of goods, long delivery times, sharp price increases, etc.)
- innovation, new products, new markets, substitution.

Due to these many and dynamically changing influences, it is in principle impossible to predict how a single changed framework condition will change trade flows. This was also the case in 2018, where one could not infer, on the basis of the facts available at the time, a significant trade diversion to the EU as a result of the U.S. measures.

Specifically, it would have been necessary to determine by what quantities U.S. imports of each of the 26 affected steel products would decline as a result of the measures, what portion of that would continue to flow into world trade, and what portion of that would arrive in the EU. In this regard, the Panel noted that the European Commission merely based its evidence on a U.S. estimate that the measures would have reduced steel imports to the United States by a total amount equivalent to 7% of EU steel consumption. This argument is used in recital 35 of Implementing Regulation 2018/1013 imposing provisional safeguard measures with regard to imports of certain steel products:

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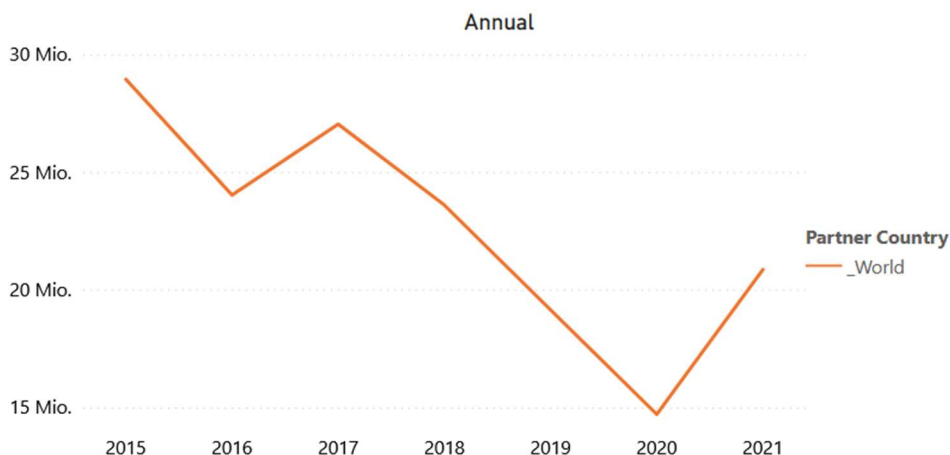
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"The U.S. have calculated that the imposition of a single across-product tariff under the Section 232 measures with almost no country exclusion should decrease imports by approximately 13 million tonnes – corresponding to 7 % of Union consumption. The Union market is generally a very attractive market for steel products both in terms of demand and prices. Some of the main exporters to the US are also traditional steel suppliers to the Union and there is no doubt that these countries, as well as others whose exports and production will be affected by the U.S. measures and the foreseeable trade diversion cascade, will redirect their exports to the Union."

We have already stated in our submission of 30.04.2018 that an alleged trade diversion of 13 million tons for the products under investigation was far from any reality for several reasons and was based on pure speculation (see p. 16 et seq. of our submission).

Indeed, the above is confirmed if one looks at the actual development of U.S. imports after the imposition of the measures under section 232. Here, the product group "semi-finished" must be left out, as no EU safeguard measures were imposed for it. Looking at the sum of the remaining categories "Stainless," "Pipe and Tube," "Flat products," and "Long products," U.S. imports fell from 27.041 million tons in 2017 to 23.602 million tons in 2018 and to 19.149 million tons in 2019. Thus, the decrease between 2017 and 2019 is 7.89 million tons, which is only 61% of the value assumed by the Commission.

US Imports of Stainless, Pipe and Tube, Flat products and Long products (Metric Tons)



Source: U.S. Department of Commerce, Enforcement and Compliance. Public trade data from IHS Global, Ltd.
Last updated on August 05, 2022 with June 2022 data.

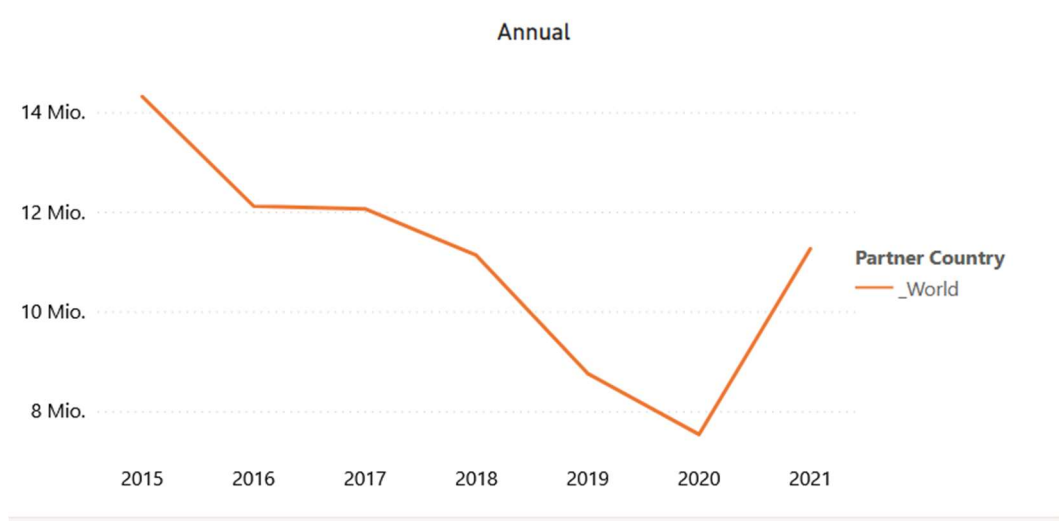
Source: <https://www.trade.gov/data-visualization/global-steel-trade-monitor>

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For flat products relevant to our clients, the decline in US imports between 2017 and 2019 is 3.30 million tons. This represents 3% of the Union consumption identified by the Commission in 2017 (L 31/37, 01.02.2019, para. 74)

US Imports of Flat products (Metric Tons)



Source: U.S. Department of Commerce, Enforcement and Compliance. Public trade data from IHS Global, Ltd.
Last updated on August 05, 2022 with June 2022 data.

Source: <https://www.trade.gov/data-visualization/global-steel-trade-monitor>

Thus, it can be noted that in 2018, for the products subject to safeguard measures, the Commission assumed a decrease in imports that was approximately 40% higher than the actual decrease. For the flat product category, the import decline was equivalent to about 3% of EU consumption, less than half as significant as the Commission had assumed. That the U.S. import decline in 2018 would be much weaker than the Commission had claimed was already clear beyond doubt by mid-year 2018.

In addition to the above, it must be emphasized that the decline in U.S. imports alone says nothing about what share of that decline would be redirected to the EU. On this issue, the European Commission – as can be seen in the above cited Recital 35 of Implementing

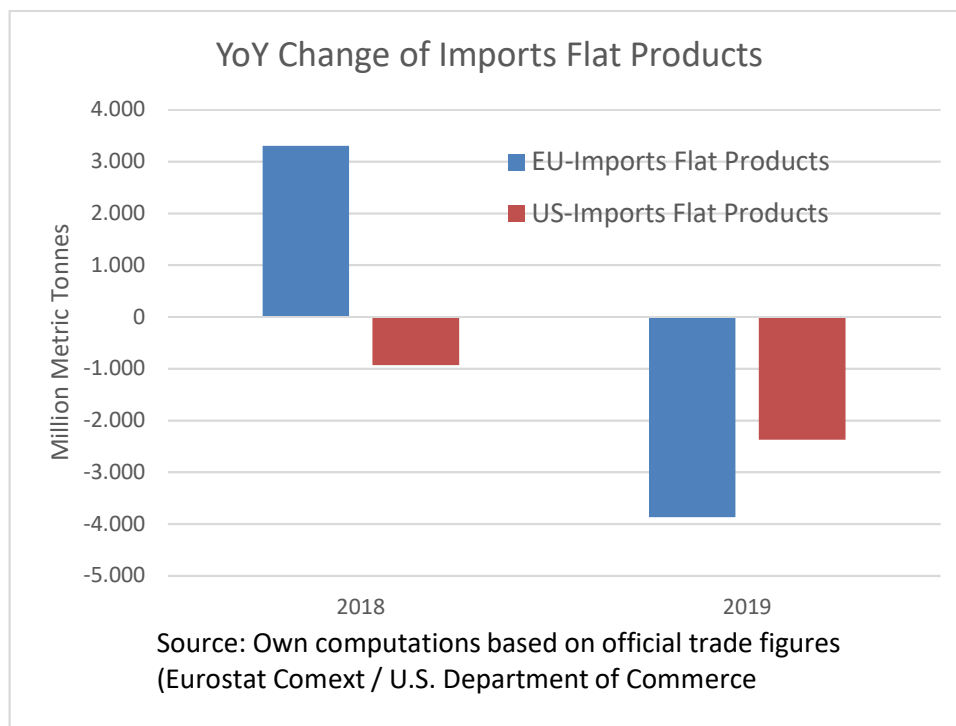
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Regulation 2018/1013 - limited its analysis to the assertion that the EU market was "generally very attractive" to exporters displaced from the U.S. market because of both demand and prices.

With regard to the vagueness of this statement, we welcome the Panel's finding that the Commission has not provided evidence to support its assertion. Nor, in our view, can such evidence be provided retrospectively because, as discussed above, the attractiveness of a market is constantly changing and depends on numerous factors. This is confirmed by the fact – for which we have already provided evidence in our November 2018 statement - that there was no significant increase in EU imports of the steel products relevant to our clients during 2018.

Indeed, for flat products, the actual import trend shows no correlation between a decline in U.S. imports and any increase in EU imports, as shown in the following chart:



According to this graph, the increase in EU imports in the year was more than three times the decrease in U.S. imports. In 2019, U.S. imports fell by nearly 2.4 million metric tons, but

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there appears to have been no trade diversion to the EU at all. That is because EU imports actually fell by 2.9 million tons this year. This simple comparison thus shows that there is no clear, predictable causality between the US Sec. 232 measures and the EU's import development.

Additionally, it would be necessary for the EU Commission to show a clear correlation between trends in imports to the European Union and the United States for all 26 affected product categories and for the entire year of 2018 (not just a few months) to substantiate its claim. Likewise, we note that the WTO panel did not conclusively assess the timing issue. However, it is clear that any increase in EU imports prior to the imposition of the U.S. measure could not have occurred "as a result of" that measure.

In conclusion, therefore, consistent with the Panel ruling, we may emphasize that the European Union acted inconsistently with Article XIX:1(a) of the GATT 1994 by imposing definitive safeguard measures on imports of certain steel products without demonstrating that the increase in imports occurred "as a result of" unforeseen developments. Since no such correlation existed (and even can be disproved by the US and EU import figures), it is clearly not possible to prove such a correlation "based on facts" retrospectively.

2. No evidence of threat of serious injury caused by increase in import volumes.

Section 7.6.2 of the Panel Report discusses in great detail the issue of whether the Commission failed to provide a reasoned and adequate explanation for its finding of threat of serious injury. In conclusion, Section 7.6.2.4. of the Panel Report concluded that:

„In conclusion, we find that the definitive safeguard is inconsistent with Article 4.1(b) of the Agreement on Safeguards because two central elements of the European Commission's finding of a threat of serious injury were not "based on facts", as required by that provision. First, the European Commission's finding that the domestic industry was "in a fragile and vulnerable position" despite its improved performance was not "based on facts". Second, the European Commission's finding that a further increase in import volumes in the future would bring about serious injury to the domestic industry was not "based on facts."“

We very much support this conclusion, as it is entirely consistent with our 2018 submissions.

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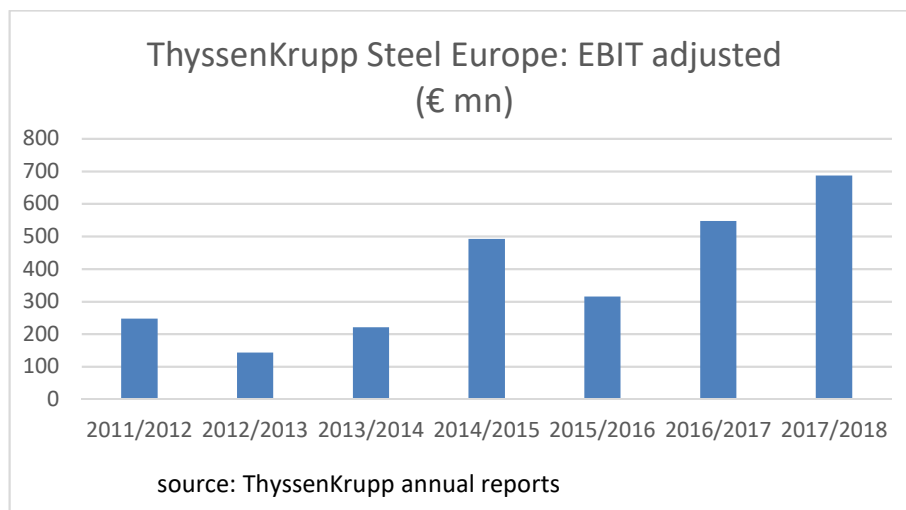
**- NON-CONFIDENTIAL Version -****a) No evidence of a “fragile” and “vulnerable” position of Union producers.**

Already in our submissions in the original investigation we provided evidence that there was no injury or threat of injury apparent in 2018. For this purpose, we referred to the indicators "sales prices of steel in the EU market", "profit margins of steel producers", as well as the business outlooks of major steel producers published in 2018.

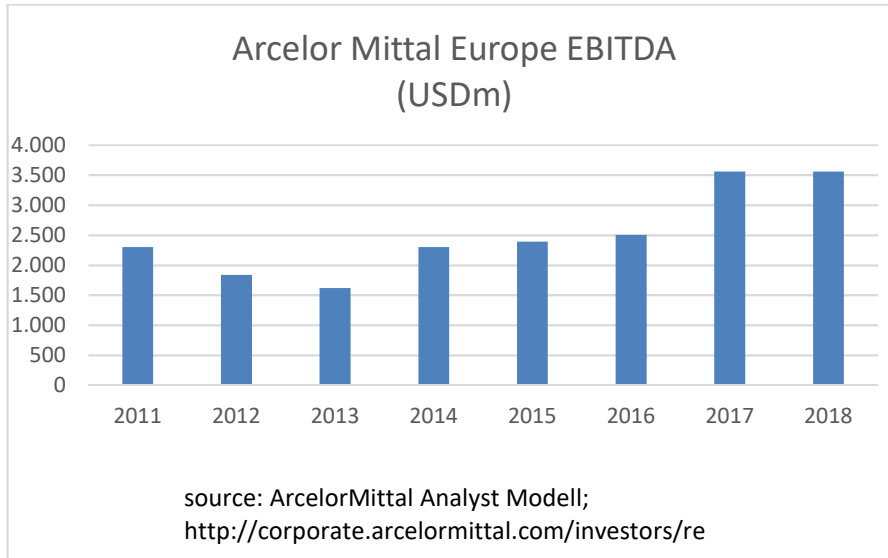
At Paragraph 7.202., the Panel Report describes that subject to Turkey's assertion that the Commission failed properly to determine a threat of serious injury, the Commission acknowledged an improved performance of the domestic industry, but found it to be partial, temporary, and readily reversible, such that the domestic industry remained vulnerable to a continued increase in imports.

More specific, in the Commission's view, the domestic industry's position was fragile subject to a continued downward trend in the domestic industry's market share, employment, and inventories, despite improvements in other factors.

Although the European Commission indicated that the data for the first half of 2018 could not be verified, it noted that these data confirmed that the "partial recovery" of the domestic industry would still take time. In this regard, we note that the data now available for 2018 show not a fragile and temporary, but a distinctly strong and stable recovery in the EU industry. As an example, the business results of two major EU steel producers are shown below.



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The profits of the companies, in which the business performance is summarized, reached the highest level in many years in 2017 and 2018. Other indicators for 2018 also show no signs of injury. At the time of the imposition of the safeguard measures, therefore, a “fragile” or unstable situation of the EU industry was not evident in any way.

b. Improvement of the situation in 2018 not "partial" or "easily reversible".

The Panel Report underlines that the improvement in the performance of the domestic industry toward the end of the POI is undisputed between the parties. Rather, the parties disagree on whether the European Commission could reasonably conclude that this improvement was "partial," "temporary," and easily "reversible."

In this regard, the European Commission argues that the recovery of the domestic industry in 2017 was primarily due to the application of AD/CV measures, particularly since 2016, and that lower raw material costs and a "general recovery of the steel market" through improved profitability and higher prices also contributed to this recovery. In that respect, it must be noted that the application of AD/CV measures, in particular since 2016, was the *only* factor identified by the European Commission to explain why the domestic industry improved its competitive position with imports after 2016.

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In contrast to the Commission's vague assertion of an improved, however easily reversible performance of the EU industry, Article 4.1(b) of the Agreement on Safeguards requires a "threat of serious injury" and specifies that serious injury must be clearly imminent. A determination of the existence of a threat of serious injury must be based on facts and not merely on allegations, conjecture, or remote possibility. All relevant objective and quantifiable factors affecting the condition of that industry must be included. The question of whether a threat of material injury in accordance with the Agreement on Safeguards can be assumed subject an improved, however temporary and reversible performance thus needs to be diligently answered in detail and must be based on ample and undisputable evidence.

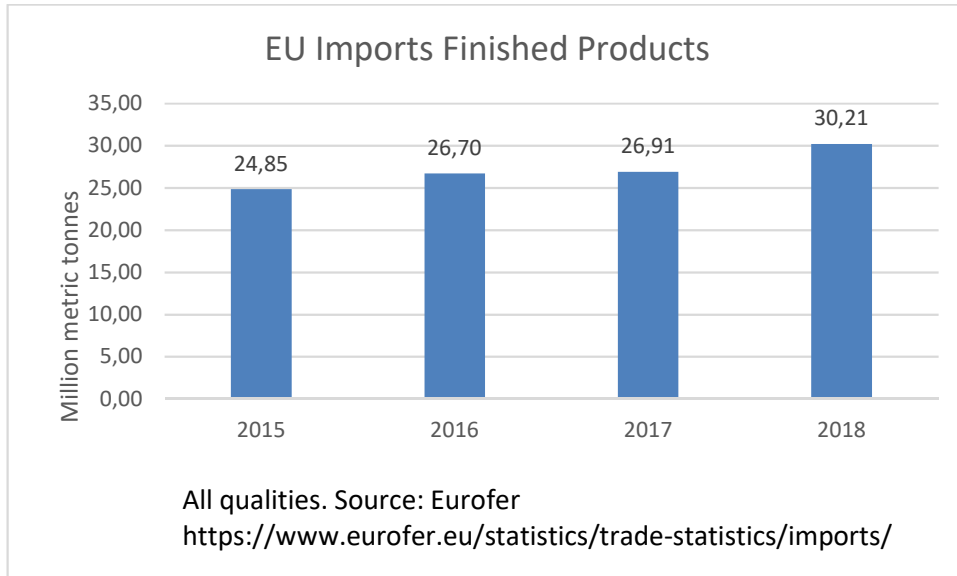
In this respect, we totally agree with the Panel's finding that the European Commission's analysis of the role of AD/CV measures in improving the performance of the domestic industry does not provide a sufficient basis for concluding that the improvement was "temporary" and "reversible." This is already evident from the fact that 2017 saw an increase in profitability which was unrelated to the adoption of AD/CV measures. Also, the data examined on the evolution of profits in each product category do not support the claim that the fact and the extent of the improvement in the level of profits in 2017 depended on the adoption of the recent AD/CV measures.

At Paragraph 7.221., the Panel Report refers to the possibility that something other than AD/CV measures was driving the improved competitiveness of the EU industry. In that respect, it is mentioned in the Panel Report that the Commission failed to provide any evidence that such a possibility had been explored by it.

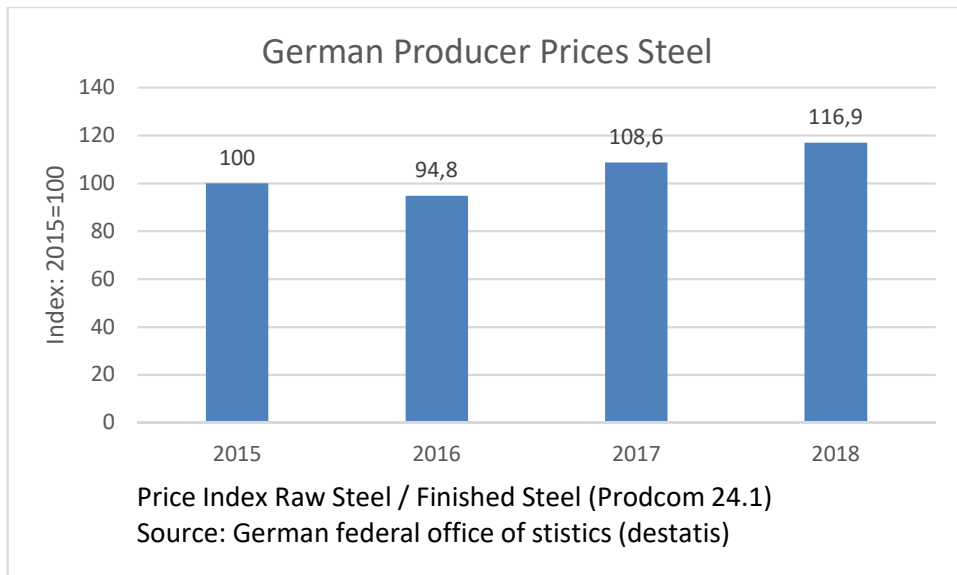
Contrary to the assertions of the EU Commission, an unbiased assessment of the objective facts and data on the European steel market in 2017 and 2018 reveals that the improved competitiveness of the European steel industry did neither depend on the level of imports, nor on the existence of AD/CV measures. This is demonstrated in the following:

In 2018, EU imports of rolled steel products reached 30.21 million tons, by far the highest level since 2015, with an increase of more than 3 million tons compared to 2017.

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Nevertheless, steel prices in 2018 also reached by far the highest level since 2015, as shown in the following chart.



The strong price increase in 2018 was observed across the EU and for all steel products. We have already shown above that not only steel prices, but also manufacturers' profits peaked in 2018. This clearly shows that the level of imports says nothing about the state of

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the steel industry. Rather, the decisive factors are the relationship between supply and demand on the EU market, the development of raw material costs and international price relations. In fact, in 2017 and 2018, the performance of the domestic industry improved, although import volumes continued to increase.

With regard to the above figures, we thus fully agree with the WTO Panel's analysis (paras. 7.2.2.1 and 7.2.2.6.) that the performance of the domestic industry improved after 2016, even though imports continued to increase. This analysis particularly contradicts the Commission's finding that the domestic industry was "vulnerable" to an increase in these imports, as in 2018, notwithstanding substantially increased imports, the EU industry was highly profitable and EU producers were able to increase their sales prices. The European Commission's conclusion regarding the domestic industry's "vulnerability" to further competition from imports is thus not "based on fact" as required by Article 4.1(b), but rather contradicted by the market situation in 2018. Moreover, even the mere prospect of a further increase in imports – without analysis of any further factors - is not sufficient to demonstrate that the situation of the domestic industry was "vulnerable and fragile."

In that respect, it must be underlined once again that these serious deficiencies in the analysis of the Commission cannot be remedied by a subsequent amendment of the Recitals of the Implementing Regulation. Both the available data and all experience on the influences on steel prices and the situation of steel producers show that these are due to factors unrelated to imports.

As a result, therefore, the European Commission's conclusion in the safeguard investigation that the improvement of the EU industry was partial, temporary and easily reversible, as well as the European Commission's characterization of the domestic industry as "fragile" and "vulnerable" despite this improvement, are not supported by any objective facts and cannot thus be justified retroactively by an additional substantiation of the Implementing Regulation.

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c. No evidence of imminent significant overall impairment

Finally, the Panel Report rightly notes at Paragraph. 7.239. that "[e]ven if imports were set to increase in 2018, this does not automatically lead to the conclusion that there is a significant overall impairment in the position of the domestic industry which is clearly imminent." This is because a potential impairment in the position of the domestic industry cannot be inferred from the industry's performance from 2013 to 2016, nor from its performance in 2018.

We therefore urge the Commission to evaluate the price development of 2018 not just for the third quarter, but for the entire year, and to consider not only imports, but all influencing factors when drawing conclusions in an unbiased manner. For this purpose, for each product concerned, at least the development of EU consumption, stocks and stock influences, EU production, raw material costs, and price relations in the EU compared to other regions must be examined in detail and taken into account.

At Paragraph 7.240. the Panel Report concludes that „the European Commission's determination of a threat of serious injury was not "based on facts" as required by Article 4.1(b) of the Agreement on Safeguards. The data presented in the European Commission's findings do not show that a further increase in imports would "necessarily" lead to a deterioration in prices and profitability.

We agree with this conclusion and underline once again that a threat of serious injury of the EU industry cannot be inferred from the objective economic data available. This follows necessarily from our comments on the above points. For, first, a threat of a sharp increase in imports due to an “unforeseen event” did not take place and could not be substantiated from the data available in 2018. And secondly, it cannot necessarily be deduced from a further increase in imports that this would lead to price pressure and a decline in the profitability of the domestic industry. The economic data of the EU-industry in 2018 clearly contradicts this presumption.

With regard to the above, therefore, we urge the Commission to evaluate the price development of 2018 not just for the third quarter or for individual months, but for the entire

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calendar year (as has been done in previous years), and to consider not only imports but all influencing factors in order to draw unbiased conclusions. As stated in previous submissions, we are firmly convinced that an objective and complete assessment of the facts available would reveal that a threat of injury according to WTO standards has not been existent and cannot be determined retrospectively.

V. Conclusion

We note, in line with the Panel ruling, that the European Union acted inconsistently with Article XIX:1(a) of the GATT 1994 by imposing the definitive safeguard measure without demonstrating that the increase in imports occurred "as a result of" the unforeseen developments. We also note that due to the factual absence of a causal link, it is not possible to demonstrate such a correlation retroactively.

Further, also in line with the Panel ruling, we hold that the definitive safeguard measure is inconsistent with Article 4.1(b) of the Agreement on Safeguards because two key elements of the European Commission's finding of serious injury are not "based on facts":

On the one hand, the European Commission's allegation that the domestic industry was in a "vulnerable and endangered situation" despite its improved performance lacks any factual evidence. On the other hand, the European Commission's conclusion that further increases in import volumes in the future would cause serious injury to the domestic industry is a pure assertion disproved by the industry's own economic figures.

Rather, we strongly believe that, on an objective and comprehensive assessment of all the facts at hand will come to the result that a threat of injury cannot – and could not at the time – be established under WTO standards.

We therefore strongly disagree with the Commission's intention to amend the legal considerations for the imposition of the safeguard measure with a view to bringing it into conformity with the aforementioned legal preconditions retroactively. Rather, we urge the Commission to conduct an open and unbiased investigation of the deficiencies identified in the DSB

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report. It is our conviction that such an investigation will show that the abovementioned deficiencies cannot be remedied by adding subsequent information or reasons to the wording of the Implementing Regulation. However, if this Regulation suffers from fundamental and irremediable defects, as found by the Panel, the imposition of safeguard measures is and remains unlawful from the outset.

As a result, therefore, we request the Commission to repeal safeguard measures on imports of certain steel products, as the imposition and extension of these measures is in breach of the WTO Agreement on Safeguards and the corresponding EU-legislation.

A handwritten signature in black ink, appearing to be 'Tim Lieber', written in a cursive style.

Tim Lieber
Rechtsanwalt
Henseler & Partner

A handwritten signature in black ink, appearing to be 'Andreas Schneider', written in a cursive style.

Andreas Schneider
Dipl.-Volkswirt
StahlmarktConsult

on behalf of:

Industrieverband Blechumformung e.V.

Fachvereinigung Kaltwalzwerke e.V.