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Re: Section 232 Investigation Comments of Japan Steel Associations

Dear Director Botwin:

Enclosed please find Section 232 investigation comments on the possible effects on the U.S. national security of imports of steel.

These comments are submitted on behalf of the Japan Iron and Steel Federation, Special Steel Association of Japan, Japan Stainless Steel Association Japan Wire Products Association, and Steel Castings and Forgings Association of Japan (collectively "**Japan Steel Associations**")

These comments are submitted pursuant to the invitation for comments set forth in the Commerce Department's *Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel* that was published in the Federal Register on April 26, 2017.

Japan Steel Associations appreciate the opportunity to provide these comments.



Curtis, Mallet-Prevost, Colt & Mosle LLP

Mr. Brad Botwin

May 31, 2017

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Please do not hesitate to contact any of the undersigned should you have questions.

Respectfully submitted,

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**BEFORE THE UNITED STATES COMMERCE DEPARTMENT
BUREAU OF INDUSTRY AND SECURITY**

In the Matter of

STEEL IMPORTS

Investigation conducted under Section 232 of
the Trade Expansion Act of 1962, as amended

PUBLIC DOCUMENT

**SECTION 232 INVESTIGATION COMMENTS OF
JAPAN STEEL ASSOCIATIONS**

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May 31, 2017

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INTRODUCTION AND SUMMARY OF COMMENTS

We hereby submit Section 232 investigation comments on the possible effects on the U.S. national security of imports of steel. These comments are submitted on behalf of the Japan Iron and Steel Federation, Special Steel Association of Japan, Japan Stainless Steel Association Japan Wire Products Association, and Steel Castings and Forgings Association of Japan (collectively 'Japan Steel Associations').

These comments are submitted pursuant to the invitation for comments set forth in the Commerce Department's *Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel* that was published in the Federal Register on April 26, 2017. Japan Steel Associations appreciate the opportunity to provide these comments.

These comments have seven separate sections.

Section I details the legal support for the proposition that a Section 232 investigation requires a narrow interpretation of the phrase “threaten to impair the national security. Such narrow interpretation is supported by a U.S. Supreme Court decision and past Commerce Department Section 232 determinations.

In **Section II** we demonstrate that undertaking the same analysis adopted in the Commerce Department's past Section 232 steel import determination with updated data confirms that steel imports today still do not threaten to impair the U.S. national security. Still today the very limited needs for finished steel of U.S. Defense Department (DOD)

can easily be satisfied by U.S. steel producers. And the updated data confirm that still today the steel needs of “critical industries” can also be satisfied by U.S. steel production.

Section III demonstrates how and why total steel imports do not threaten the very viability of the U.S. steel industry. Specifically, Section III provides data and information to demonstrate that the U.S. steel industry is fundamentally healthy and explains why total steel imports do not threaten the existence of the U.S. steel industry. Section III demonstrates that a large portion of total steel imports is actually purchased by the U.S. steel industry itself or by U.S. manufacturing companies that are not able to secure reliable supply from U.S. producers. Section III also demonstrates that imports of steel do not take away jobs from the U.S. steel industry or from the U.S. economy.

In **Section IV** we respectively submit that the Commerce Department’s Section 232 analysis must take into account the fact that U.S. steel producers already enjoy strong protection from steel imports. Section IV provides data demonstrating that, at present, there are ___ existing AD and CVD orders against steel products. Moreover, through successful AD-CVD cases, a huge volume of steel mill product imports from China have already been kicked out of the U.S. market.

Section V provides information and data demonstrating that steel imports from Japan, in particular, do not threaten to impair U.S. national security. Section V highlights data detailing the Japanese steel industry’s long history of U.S. investment in and cooperation with the U.S. steel industry. And Section V explains how imports of Japanese steel are focused on specialty products not readily available from U.S. steel producers.

In **Section VI** the Japan Steel Associations express their support for the suggestion Secretary of Commerce Wilbur Ross that it may not be necessary to impose any Section 232 restrictions on imports from certain countries or on certain products. In particular, the Japan Steel Associations wholeheartedly support the possibility of a mechanism to allow foreign exporters and U.S. importers to apply for an exclusion from the imposition of any Section 232 restrictions.

Finally, **Section VII** argues that the Commerce Department's Section 232 investigation conclusion must comply with U.S. Government's WTO obligations.

I. A SECTION 232 ANALYSIS REQUIRES A PROPER INTERPRETATION OF THE STATUTORY TERM “THREATEN TO IMPAIR THE NATIONAL SECURITY”.

A Section 232 investigation requires an analysis of whether the targeted imports “threaten to impair the national security.”¹ To undertake this analysis, the Commerce Department is instructed by the statute to investigate “the effects on the national security” of the targeted imports.²

Neither the statute itself nor the Commerce Department’s regulations define the terms “threaten to impair the national security” or “effects on national security.” Accordingly, other interpretative sources must be examined for the proper definition of the relevant statutory terms. We provide below what can be learned from (a) relevant court cases and (b) past BIS Section 232 determinations. As detailed below, both of these sources suggest that the term “national security should be interpreted narrowly.”

A. The U.S. Supreme Court Has Held That Term “National Security” Requires A Narrower Interpretation Than “National Interests”

There has been just one Supreme Court case addressing the interpretation of Section 232. And in its decision, the Supreme Court applied a relatively narrow definition of the term.

¹ 19 U.S.C. §1862.

² *Id.*

Specifically, in *Federal Energy Administration v. Algonquin SNG Inc.*,³ the Supreme Court noted that, in passing and renewing this provision, Congress specifically rejected an amendment that would have allowed the president to increase the duty on any article “when he finds it in the national interest.” Hence, the Court held that “national security,” whatever else it may be, is a narrower term than national interest.

Given this Supreme Court interpretation of the relevant statutory provision, we respectfully submit that the Commerce Department’s examination of the issue must focus on national security specifically and not on the impact of imports on an industry outside the context of national security.

B. Past Commerce Department Section 232 Determinations Also Support A More Narrow Interpretation Of “National Security”

There have been 14 past Section 232 determinations rendered by the Commerce Department. And virtually all of these past Commerce Department Section 232 decisions support the narrow interpretation of “threaten to impair national security” adopted by the Supreme Court. Specifically, past Commerce Department Section 232 determinations have essentially adopted the interpretation that national security requirements equate to the nation’s required supply of particular merchandise during a military conflict scenario.

For example, in its Section 232 investigation on imports of uranium, the Commerce Department’s Section 232 analysis focused on uranium requirements for a one-year mobilization period followed by the first three years of a major conventional

³ *Federal Energy Admin. v. Algonquin SNG Inc.*, 426 U.S. 548, 568-70 (1976).

conflict of indeterminate length. The national security requirements for uranium were provided by mobilization planning guidelines in a 1984 NSC Stockpile Study.⁴

And in the Commerce Department's investigation on imports of bolts, nuts, and large screws of iron or steel, the Commerce Department's analysis of national security requirements were based on a stockpile war scenario developed for the Department of Defense ("DOD")'s national defense stockpile planning, which covered both military and civilian consumption.⁵

In short, from past Commerce Department Section 232 determinations, it appears clear that, once the national security requirements for an investigation are defined, the Commerce Department has historically performed a two-step analysis to make its Section 232 national security conclusion. The two-step analysis is as follows:

- 1) The Department compares the anticipated supply during a national security emergency, which includes (1) domestic production and (2) reliable imports, against the expected demand (i.e. the national security requirements during a national emergency scenario).
- 2) If there is a supply shortfall, the Department then examines whether imports were a significant cause of the identified shortfall.⁶

We believe it is important to highlight the fact that, under this long-standing approach to a Section 232 analysis, no import merchandise has ever been found to "threaten to impair national security", except for petroleum oil products. Imports of crude oil have historically been deemed as a threat to the national security because of

⁴ See U.S. DEP'T OF COMMERCE, *The Effect of Imports of Uranium on the National Security* 1-4 (Sept. 1989).

⁵ See *Investigation of Imports of Bolts, Nuts and Large Screws of Iron or Steel*, 48 Fed. Reg. 8842, 8843 (Mar. 2, 1983).

⁶ See, e.g., U.S. DEP'T OF COMMERCE, *The Effect of Imports of Gears and Gearing Products on the National Security* (1992); see also U.S. DEP'T OF COMMERCE, *The Effect of Imports of Anti-Friction Bearings on the National Security* (July 1988).

U.S. producers' inability to meet projected national security requirements and because of the close relationship of the nation's energy security to the nation's economic welfare.

To better understand the Section 232 analysis that was adopted in these crude oil cases, it is useful to review the particular Section 232 investigation that was undertaken following OPEC's oil embargo against the United States in 1973.

Following the OPEC nations' oil embargo in 1973, the Secretary of Treasury (the previous authority administering Section 232 investigations) conducted a Section 232 investigation on oil. The Secretary found that oil imports threatened to impair the national security because there was a threat to both the country's national defense requirements and the health of the overall national economy. In his report to the President, the Secretary of Treasury stated:

Petroleum is a unique commodity: it is essential to almost every sector of our economy, either as a raw material component or as the fuel for processing or transporting goods. . . The vulnerability of the U.S. economy to petroleum supply interruption is highlighted by (1) the fact that it is the backbone, not only of our defense energy needs, but also of our economic welfare, and (2) the difficulty of bringing in alternate energy sources immediately.⁷

When the OPEC embargo occurred in 1973, petroleum oil accounted for 46% of the U.S.'s energy consumption.⁸ Following the OPEC embargo, all sectors of the economy were adversely impacted because the country was essentially running on

⁷ See Memorandum from U.S. Secretary of Treasury William E. Simon to the President: Report of Investigation of Effect of Petroleum Imports and Petroleum Products on the National Security Pursuant to Section 232 of the Trade Expansion Act, as amended (Jan. 14, 1975).

⁸ *Id.*

petroleum oil.⁹ This adverse impact on the economy was reflected in a sudden sharp decline in the gross national product.¹⁰ Not only were industries that require high energy consumption suffering (e.g., the consumer durables sector and the housing construction sector), there were more basic concerns for the supply of energy for heating in the parts of the country that have colder climatic conditions.¹¹ Meanwhile, a majority of the world's total oil production was controlled by those countries that were not considered "allies" of the United States at the time. OPEC nations accounted for 55% of the world's total oil production, communist countries accounted for 20%, and other countries including the U.S. produced the remaining 25%.¹²

Given these facts, the Secretary of the Treasury concluded that an interruption to the supply of oil imports had become an existential threat to the economy and therefore the domestic oil industry was essential to the country's national security. Such conclusion reflected a Section 232 approach under which, in addition to the two-step standard analysis for national security requirements, there would also be an analysis of the impact of imports on the welfare of the national economy. However, such analysis was explicitly limited to an examination of petroleum products that had been found to be critical to the very functioning of the entire U.S. economy.

Finally, we note that the most recent Commerce Department Section 232 determination was also the only instance in which the Commerce Department conducted a Section 232 analysis of steel. And in that case, the Commerce Department focused

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

exclusively on the effects of imports of steel products on national defense interests.¹³ In its 2001 Section 232 Steel Report, the Commerce Department noted that steel imports could threaten the national security in either of two ways: “(i) through excessive domestic dependency on unreliable foreign suppliers, or (ii) if such imports fundamentally threaten to impair the capability of the U.S. iron ore and semi-finished steel industries to satisfy national security requirements.”¹⁴ The Commerce Department ultimately concluded that there was no evidence that imports of iron ore or semi-finished steel threatened the national security.

In reaching this conclusion, the Commerce Department analysis examined specifically the DOD requirements for “finished steel,” and found that they were very low. Domestic production of finished steel alone was more than one hundred times what the DOD consumed. Hence, defense needs could be “readily satisfied by domestic production.” The Department also noted that “no weapons system is dependent on foreign steel,” and that imports of iron ore and semi-finished steel are from “diverse and ‘safe’ foreign suppliers” such as Canada, Mexico and Brazil. Perhaps most importantly, the Department found that –

{T}here is no evidence that imports of these items (which account for approximately 20 and 7 percent of U.S. iron ore and semi-finished steel consumption, respectively) fundamentally threaten to impair the capability of U.S. industry to produce the quantities of iron ore and semi-finished steel needed to

¹³ *Report on the Effects of Imports of Iron Ore and Semi-Finished Steel on the National Security*, 67 Fed. Reg. 1958 (Jan. 15, 2002); *The Effect of Iron Ore and Semi-Finished Steel on The National Security* (U.S. Department of Commerce, Bureau of Export Administration, Oct. 2001) (hereinafter “Commerce Department’s Section 232 Steel Report”).

¹⁴ *Report on the Effects of Imports of Iron Ore and Semi-Finished Steel on the National Security*, 67 Fed. Reg. 1958, 1959 (Jan. 15, 2002).

satisfy national security requirements, a modest proportion of total U.S. consumption.¹⁵

In our view, this Commerce Department analytic approach exemplifies the proper analysis of what “threaten to impair national security” means in a Section 232 investigation. The question asked by the statute is not whether a given U.S. industry is itself threatened by imports, but rather whether imports threaten the very capability of that industry “to produce the quantities . . . needed to satisfy national security requirements.”

Hence, while the threat to a particular U.S. industry may be relevant to the Department’s analysis, it is relevant *only* to the extent that the threat to the industry affects national security. As the Department stated in *Iron Ore and Semi-finished Steel*, “the issue whether imports have harmed or threaten to harm U.S. producers writ large is beyond the scope of the Department’s inquiry, and need not be resolved here. Under Section 232, the Department is authorized only to determine whether imports fundamentally threaten the ability of domestic producers to satisfy the United States’ national security requirements.”¹⁶

In short, under the analytic approach adopted in virtually all past Section 232 investigations, even if imports cause “substantial economic hardship” to the industry in question, when those imports do not impair that industry’s ability to satisfy national security needs the national security is not threatened.

¹⁵ *Id.*

¹⁶ Commerce Department’s Section 232 Steel Report at 37.

II. UNDERTAKING THE SAME ANALYSIS ADOPTED IN THE COMMERCE DEPARTMENT’S PAST SECTION 232 STEEL IMPORT DETERMINATION WITH UPDATED DATA CONFIRMS THAT STEEL IMPORTS TODAY STILL DO NOT THREATEN TO IMPAIR THE U.S. NATIONAL SECURITY.

This investigation is not the first Section 232 investigation of steel imports. As noted above, in 2001 the Commerce Department undertook a Section 232 investigation on the “effect of imports of iron ore and semi-finished steel on the national security.”¹⁷ That Section 232 investigation concluded with the Commerce Department finding that “there is no probative evidence that imports of iron ore and semi-finished steel threaten to impair the U.S. national security.”¹⁸

This Commerce Department negative determination was premised upon the following key factual findings:

- “National defense requirements . . . by the U.S. Department of Defense for finished steel – and thus for iron ore and semi-finished steel as inputs -- are very low and likely to remain flat over the next five years. DOD’s current and projected demand for iron ore and steel can be readily satisfied by domestic production.”
- “The demand of critical industries for iron ore and semi-finished steel can be readily satisfied by domestic production, even assuming that all such demand were necessary to preserve the national security (which is not the case).
- {T}here is no evidence that imports of these items (which account for approximately 20 and 7 percent of U.S. iron ore and semi-finished steel consumption respectively) fundamentally threaten to impair the capability of the U.S. industry to produce the quantities of iron ore and semi-finished steel needed to satisfy national security requirements, a modest proportion of total U.S. consumption.”

¹⁷ Commerce Department’s Section 232 Steel Report.

¹⁸ *Id.* at 1.

- “These conclusions take into account the campaign against terrorism resulting from events of September 11, 2001, and the requirements of related military operations.”¹⁹

Of particular relevance here is the fact that these past Commerce Department factual findings were actually based on a comprehensive analysis of finished steel. Essentially, the Commerce Department examined the effects of semi-finished steel and iron ore by first studying the needs for finished steel by both the Department of Defense and identified “critical industries,” and then calculating needs for semi-finished steel and iron ore by utilizing a standard conversion factor. Indeed, this was made explicit by the Commerce Department’s Section 232 Steel Report:

For purposes of this investigation, we have converted the requirements for finished steel . . . into requirements for semi-finished steel and iron ore.²⁰

Or stated differently, the Commerce Department’s 2001 conclusion that the targeted steel imports did not threaten to impair the U.S. national security was explicitly premised upon examination of finished steel. And therefore, the logical question is whether there is anything different today that would compel a different conclusion.

We respectfully submit that the answer is an unqualified “no.” Such conclusion is particularly evidenced by the fact that employing the same analysis that the Commerce Department undertook in 2001 with more recent data yields the same underlying factual conclusions about the steel needs of the Department of Defense and identified “critical industries.”

¹⁹ Commerce Department Section 232 Steel Report at 1-2.

²⁰ Commerce Department Section 232 Steel Report at 15 (emphasis added).

A. The Very Limited Needs For Finished Steel Of U.S. Defense Department Can Easily Be Satisfied By U.S. Steel Producers.

As noted above, in 2001 the Commerce Department rendered the following factual conclusion: “National defense requirements . . . by DOD for finished steel . . . are very low and likely to remain flat over the next five years. DOD’s current and projected demand for iron ore and steel can be readily satisfied by domestic production.”²¹

We understand that in April 2017 the Commerce Department submitted a request to the U.S. Department of Defense (DOD) seeking an updated assessment of DOD’s requirements for finished steel. We further understand that DOD’s response to this request has not yet been made publicly available. However, all indications are that DOD’s updated assessment will not result in any material change from DOD’s 2001 assessment.

Specifically, in 2001, the DOD reported the following factual conclusions to the Commerce Department concerning its need for steel:

- DOD’s steel requirements are satisfied by both integrated steel mills (consumers of iron ore) and mini-mills (consumers of scrap).
- DOD’s demands for iron ore and steel for weapons systems are a small portion of the domestic industries’ annual output. DOD’s annual steel requirements comprise less than 0.3 percent of the industry’s output by weight (i.e., 325,000 net tons of finished steel per year).
- DOD’s requirement for steel for weapons systems is projected to be flat over the next five years, after declining in recent years. DOD projected a slight increase in its need for steel associated with shipbuilding and aircraft parts over the next five years, counterbalanced by a slight decrease in the need for steel for ammunition and aircraft engines.

²¹ Commerce Department Section 232 Steel Report a 1-2.

- Even after a 2-MTW conflict, the need to replenish the force would create a DOD demand for steel that would remain small relative to domestic output.
- DOD's demands for steel for military uses are met by domestic industries already subject to procurement policies establishing preferences for domestic suppliers. DOD stated that these domestic preferences apply to essentially all of the steel used in weapons systems. DOD also indicated that the preference defines domestic steel by where it is melted

There is no evidence that any of these key factual findings would be materially different today. Indeed, given the fact that advances in weapons (including ships) have led to the use of relatively less steel in favor of lighter metals and composites such as carbon fiber materials, it is unlikely that current DOD needs for finished steel are greater now than in 2001.

Moreover, although we do not yet have information on DOD's current needs for finished steel, we can place DOD's needs for finished steel in the context of current domestic steel output. According to the Commerce Department's *Steel Industry Executive Summary* issued in April of 2017, the U.S. steel industry's production in 2016 was 78.6 million tons, virtually unchanged from 2015. That amount is **two hundred forty (240) times** what DOD stated its steel needs were in 2001. Consequently, even if the Commerce Department were to assume the worst case scenario – a two-theater major war – domestic production would be more than one hundred and twenty five (125) times the DOD needs. Put differently, the domestic industry's production would have to decline by more than 99 percent in order to be unable to meet DOD's needs for steel. This is simply not a realistic possibility.

As limited as the DOD's overall needs for steel are, its needs for imported steel are even less. Virtually no steel is imported for defense use; almost all is imported solely for commercial uses, having nothing to do with national security. Indeed, only a few countries are even allowed to supply steel for DOD purposes. These countries, such as Canada, supply such steel pursuant to specific Memoranda of Understanding with the DOD. All of these countries that are dependable allies of the United States.

In short, there is simply no justification to believe that the factual findings about DOD's steel needs today will be any different from those in 2001.

B. Likewise, The Steel Needs Of “Critical Industries” Can Also Be Satisfied By U.S. Steel

Although admitting that it was not required to do so,²² in its 2001 Section 232 steel report the Commerce Department also examined the steel needs of certain “critical industries.” Specifically, after consulting with the Commerce Department's Critical Infrastructure Assurance Office, the Commerce Department identified certain industries that were deemed to be “critical to minimum operations of the economy and government.” The Commerce Department's 2001 report identified 28 such “critical industries.”²³

The Commerce Department's 2001 Report then undertook an assessment of the steel needs of these 28 critical industries. Such assessment was done by examining data from the Annual Input-Output Accounts (“I-O Accounts”) published by the Bureau of

²² See Commerce Department Section 232 Steel Report at 14 (“Historically, in conducting Section 232 studies, the Department has focused principally on DOD needs. {T}his ‘narrow’ definition of national security is defensible under the statute.”).

²³ Commerce Department Section 232 Steel Report at 14 -16.

Economic Analysis (“BEA”). As the BEA explains, the I-O Accounts “show how industries interact as they provide inputs to, and use outputs from, each other to produce GDP.”²⁴ The I-O Accounts include ‘use tables,’ which detail the total monetary value of a given commodity used by a given industry. For example, the 2001 report showed that in 1997, the crude petroleum and natural gas industry consumed \$1.956 billion worth of iron and steel. This value is then divided by the value of total iron and steel output to determine the percentage of steel output that is consumed by a given industry. Using this data, the Commerce Department’s 2001 Section 232 Steel Report made a factual finding that, in combination, all 28 all “critical industries” consumed approximately 30.8% of the total steel output of the United States²⁵.

The Commerce Department’s 2001 Section 232 Steel Report made use of detailed data from I-O Accounts published in 1997. Detailed data has been published every 5 years in the form of Benchmark Input-Output Accounts that are themselves based on periodic surveys conducted by the Census Bureau. Unfortunately, the last set of detailed Benchmark I-O Accounts was published in 2007. While more current data is available – the latest I-O Accounts have information from 2015 – the available post-2007 datasets do not contain data disaggregated to the same level of detail as the I-O Accounts of 2007 and 1997.

While it might be possible to aggregate the original 1997 categories into the summary categories used in 2015, such reorganization would inevitably lead to gross

²⁴ *Industry Economic Accounts Information Guide, Annual Input-Output (I-O) Accounts Overview*, BUREAU OF ECON. ANALYSIS, https://faq.bea.gov/industry/iedguide.htm#ioa_ou.

²⁵ Commerce Department Section 232 Steel Report at 19.

overestimations as the *broader* 2015 summary categories capture industries irrelevant to the investigation. Moreover, the broader summary categories are also applied to input commodities in the 2015 I-O Accounts. This creates a data problem in that the current investigation is interested in consumption of domestic steel production, whereas the input accounts from 2015 would only permit the tracking of domestic ‘primary metals’ consumption. This broader category includes various aluminum products, copper products, and other non-ferrous metals. Needless to say, inclusion of these other commodities would result in massive distortions in the final result.

Consequently, given the lack of detailed data in more recent years, the only way to update the Commerce Department’s 2001 analysis (based on 1997 data) is to utilize I-O Account data from 2007. Besides being the most recent year with detailed data available, the year also coincided with the troop surge in Iraq and a continuing war in Afghanistan. Housing prices in the United States only began to fall towards the end of 2007, so the data captures elevated levels of new construction as well. Accordingly, it is our view that the analysis using 2007 data actually to replicate the Commerce Departments’ analysis serves to provide an upper bound, given that actual current steel demand is likely to be lower.

We undertook the following methodology to replicate the Commerce Department’s 2001 analysis (using more recent data) of the steel needs of those 28 “critical industries.” We first tackled the issue of changes in classification. The original report made use of an I-O number to identify specific industries, e.g., crude petroleum and natural gas (industry number 8). However, this classification system has since been

updated to resemble the North American Industry Classification System (“NAICS”), which allows for a more detailed taxonomy of industry. As no direct conversion could be made, we made use of a 2001 Survey of Current Business, published by the Commerce Department that provides a conversion of the codes in the 1997 accounts into a Standard Industrial Classification (“SIC”) code. Once the original I-O numbers are converted into SIC codes, we could then make use of a set of concordance tables published by the Census Bureau. The tables allowed us to convert the SIC codes into 2002 NAICS codes, and then the 2002 NAICS codes into 2007 NAICS codes.

The set of converted 2007 NAICS codes permitted us to create an exact translation from the old I-O numbers to the current I-O codes. This list was then reconstituted to replicate a table using 1997 I-O codes. We were thus able to replicate Table 2 (from the Commerce Department’s 2001 Section 232 Steel Report) entitled: “The Use of Primary Iron and Steel Manufacturing Commodities by Critical Industries.” We provide this updated Table 2 below.

Figure 1: Updated Table of Primary Steel Manufacturing Commodities by Critical Industries
(based on 2007 I-O Account Data)

Industry No.	Industry Description	Value of Steel Consumed (millions of \$)	% of Steel Production
8	Crude petroleum and natural gas	2587	2.05%
11	New construction, including own-account construction	2288	1.81%
12	Maintenance and repair construction, including own-account construction	1953	1.55%
13	Ordnance and accessories	1128	0.89%
31	Petroleum refining and related products	137	0.11%
39	Metal containers	1405	1.11%
43	Engines and turbines	4079	3.23%
51	Computer and office equipment	823	0.65%
56	Audio, video, and communication equipment	87	0.07%
59A	Motor vehicles (passenger cars and trucks)	1383	1.10%
59B	Truck and bus bodies, trailers, and motor vehicle parts	4756	3.77%
60	Aircraft and parts	4480	3.55%
61	Other transportation equipment	6386	5.06%
65A	Railroads and related services, passenger ground transportation	185	0.15%
65B	Motor freight transportation and warehousing	1284	1.02%
65C	Water transportation	255	0.20%
65D	Air transportation	0	0.00%
65E	Pipelines, freight forwarders, and related services	17	0.01%
66	Communications, except radio and TV	98	0.08%
67	Radio and TV broadcasting	12	0.01%
68A	Electric services (utilities)	1	0.00%
68B	Gas production and distribution (utilities)	1	0.00%
68C	Water and sanitary services	0	0.00%
70A	Finance	47	0.04%
70B	Insurance	4	0.00%
73A	Computer and data processing services	77	0.06%
77A	Health services	167	0.13%
96C	National defense: consumption expenditures	0	0.00%
	Subtotal	33,640	26.64%
	Total Primary Iron and Steel Manufacturing Output	126,293	100.00%

As detailed by the above chart, an updated analysis of the steel needs of those 28 critical industries demonstrates that these 28 “critical industries” consume 26.6% of U.S. steel production, down from the figure 30.8% noted in the Commerce Department’s 2001 Section 232 Steel Report.

It is important to note that in its 2001 Report the Commerce Department went out of its way to make clear that its analysis “assumed” that the “entire” steel consumption by these 28 industries was related to supporting U.S. national defense and critical industry requirements but that this assumption was not true. As the Commerce Department noted, “in reality . . . a substantial portion of consumption by these {28 critical} industries is likely not related to national security requirements.” However, the Commerce Department concluded that because “even this over-estimate” of total steel consumption can easily be satisfied by domestic production, there was no need to develop some sort of discount for non-national security purposes. This same conclusion applies equally today.

Given our updated analysis above, the Commerce Department should reach the same conclusion today as it did in 2001; namely, “the demand of critical industries for steel can be readily satisfied by domestic production, even assuming that all such demand were necessary to preserve national security (which is not the case.)”²⁶

²⁶ Commerce Department Section 232 Steel Report at 2.

III. STEEL IMPORTS DO NOT THREATEN THE VERY VIABILITY OF THE U.S. STEEL INDUSTRY

As noted above, the relevant question asked by Section 232 investigation is not whether a given U.S. industry is itself threatened by imports, but rather whether imports threaten the very capability of that industry “to produce the quantities...needed to satisfy national security requirements.” As the Commerce Department itself noted in its *2001 Section 232 Steel Report*, “the issue whether imports have harmed or threaten to harm U.S. producers writ large is beyond the scope of the Department’s inquiry, and need not be resolved here. {Rather,} {u}nder Section 232, the Department is authorized only to determine whether imports fundamentally threaten the ability of domestic producers to satisfy the United States’ national security requirements.”²⁷

Or stated differently, if the U.S. steel industry can easily supply the needs of DOD and identified critical industries, then the only relevant factual question is whether steel imports threaten the very viability of the U.S. steel industry. As we demonstrate below, the answer to this question is “no.”

A. The U.S. Steel Industry Is Fundamentally Healthy

1. The U.S. Steel Industry Is Structurally Stronger Today Than It Was In 2001, The Last Time The Commerce Department Conducted A Section 232 Steel Examination.

Some history is important in understanding the true situation of today’s domestic steel industry. Suffice it to say, this is not the same industry examined by BIS in 2001. In that review, BIS found that there was no probative evidence that imports of iron ore or semi-finished steel threatened to impair U.S. national security. It further found that there

²⁷ Commerce Department’s Section 232 Steel Report at 37.

was no evidence showing that imports of iron ore or semi-finished steel fundamentally threatened the ability of domestic producers to satisfy national security requirements.²⁸

Remarkably, the domestic steel industry in 2001 was highly fractured and operating several inefficient assets. Consolidation and rationalization were badly needed. But even in that state, BIS could not conclude that national security was at stake.

Since 2001, the domestic steel industry transformed itself both structurally and through technology improvements. First, major consolidation and rationalization started in 2002. As discussed by the U.S. International Trade Commission back in 2005 focusing on flat rolled steel, which is the core of the U.S. steel industry:

{T}here has been extensive restructuring of the domestic industries producing certain carbon and alloy flat-rolled steel and tin. There are fewer domestic producers.

Four of the largest U.S. producers of certain carbon and alloy flat-rolled steel and tin – Bethlehem, National, LTV, and U.S. Steel – have been consolidated into two companies, which are now owned by Mittal Steel ISG and U.S. Steel. Mittal Steel ISG, U.S. Steel, and Nucor have invested billions of dollars to restructure and consolidate the industries by purchasing the assets of other companies. ISG was formed in March 2002 and purchased assets of producers LTV, Acme, Bethlehem, Weirton Steel, and Georgetown Steel. In April 2005, ISG merged with Mittal Steel Company, forming the largest steel company in the world.

Nucor expanded by purchasing the assets of idled producer Trico Steel Company and Birmingham Steel. In 2004, Nucor acquired a cold-rolling mill from Worthington Industries and substantially all of the assets of Corus Tuscaloosa. U.S. Steel acquired National Steel in May 2003.²⁹

This consolidation and rationalization continued to accelerate throughout the 2000's until the industry coalesced around three primary integrated flat rolled steel

²⁸ *The Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security*, BIS (Oct. 2001), p. 1.

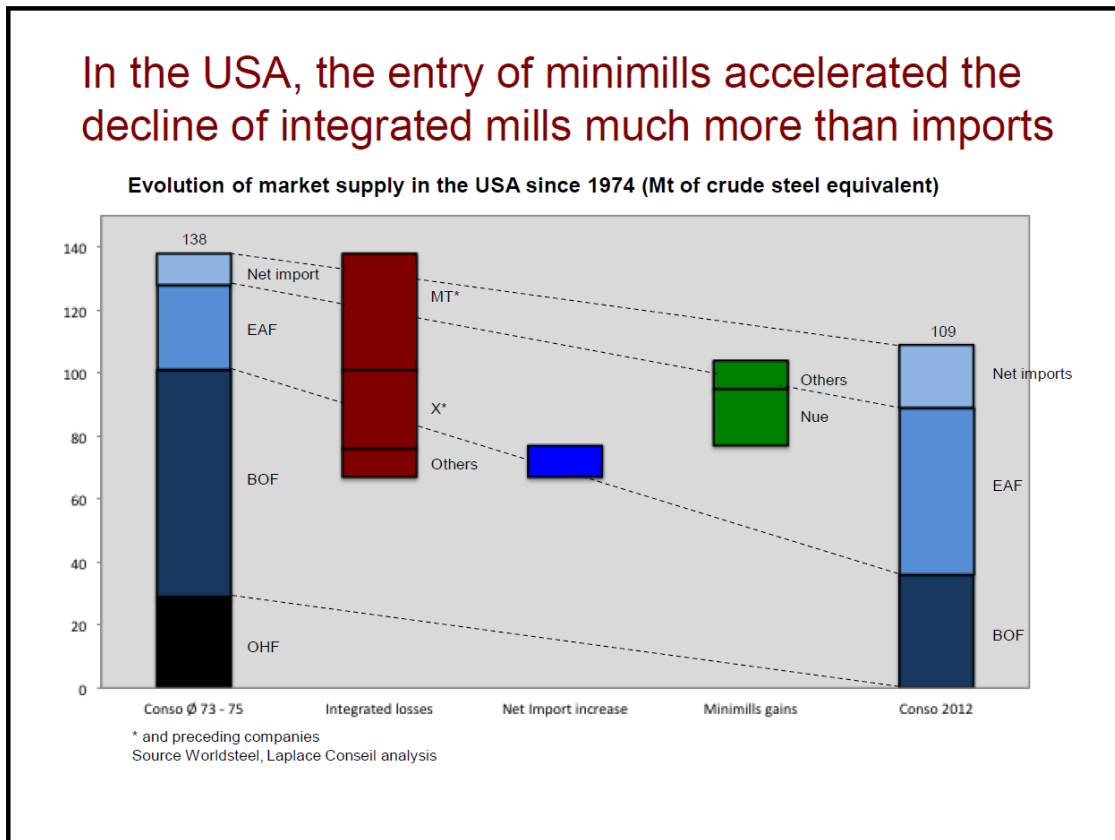
²⁹ *Steel: Evaluating the Effectiveness of Import Relief*, Inv. No. TA-204-12, USITC Pub. 3797 (Sept. 2004), p. 6.

producers using blast furnace / BOF technology, including Arcelor Mittal, U.S. Steel, and AK Steel, and a single dominant EAF producer in Nucor Steel. At the same time, existing and new investments in both EAF facilities and slab rolling facilities have dramatically altered the cost structure of the industry. Indeed, there has been a dramatic shift in steel production in the United States from integrated production to EAF production in order to leverage significant cost and operational advantages associated with EAF technology, causing further rationalization within the integrated steel sector.

One of the fallacies of the past several years is that imports have caused a reduction in the integrated production base, but the reality is that the rise of EAF production has had a far more profound impact. This in fact is a good thing; the mini-mill model has proven highly and consistently profitable, as well as more flexible in terms of riding out economic cycles given much lower fixed costs. This is why even integrated producers are now moving some capacity toward EAF production, such as U.S. Steel's decision to convert to EAF production at its Fairfield Works. The capital cost is lower, you do not have to run it at 80 to 90 percent capacity to make a profit, and you can turn it on and off far more efficiently than an integrated asset.³⁰

³⁰ Alex Nixon, *U.S. Steel to enable scrap melting by building electric arc furnace*, TRIB LIVE (Sept. 16, 2015), located at <http://triblive.com/business/headlines/8936603-74/steel-furnace-arc>.

Figure 2: The Emergence of EAF Production³¹



In 2016, EAF capacity controlled more than 67 percent of raw steel production in the United States,³² representing a dramatic increase over conditions in 2001 when the Commerce Department last looked at the steel industry in a Section 232 investigation. Even now, new investments in greenfield EAF capacity are being made, regardless of the import environment. Given this EAF positioning in the market, the further consolidation that has taken place in the industry, and the continued rationalization of the integrated segment, it would be very difficult to conclude that present circumstances present a

³¹ *Impacts of Energy Market Developments on the Steel Industry*, 74th Session of the OECD Steel Committee Paris, 1-2 July 2013, located at <https://www.oecd.org/sti/ind/Item%209.%20Laplace%20-%20Steel%20Energy.pdf>.

³² AM. IRON & STEEL INST. (AISI), *Pig Iron and Raw Steel Production*, AIS 7 (Jan.-Dec. 2016).

greater risk to national security than they did in 2001. The industry is fundamentally stronger today than it was in 2001

Finally, in light of the restructuring that has gone on in the industry, the notion of some kind of critical mass extinction event for domestic steel making capacity is simply not credible. Imports will not lead to wholesale elimination of steel capacity in the United States. They may contribute to further reorganization of that capacity and continued transformation to different models, but not closure. History teaches us precisely this fact, and perhaps there is no one with better understanding of this reality than the Secretary of Commerce. Secretary Ross as an investor in 2001 acquired and consolidated steelmaking assets once considered “at risk,” forming International Steel Group from the assets of LTBV Steel, Acme Steel, and Bethlehem Steel.³³ But the capacity was not so much at risk as was the basis upon which it had operated. Rationalized and reorganized they were still viable, as Secretary Ross showed. Indeed, many of those assets operate to this day as part of Arcelor Mittal.³⁴

2. U.S. Steel Producers Have Enjoyed Solid Profits Over Time.

The domestic steel industry is not composed of just one or two producers whose survival could be threatened by imports. On the contrary, the industry is composed of scores of producers, including numerous basic oxygen and electric arc furnaces that

³³ See Nicholas Stein, *Wilbur Ross is a Man of Steel ...and Textiles and Optical Networking and Anything Else in Deep, Deep Trouble*, FORTUNE MAG. (May 26, 2003)

http://archive.fortune.com/magazines/fortune/fortune_archive/2003/05/26/343116/index.htm.

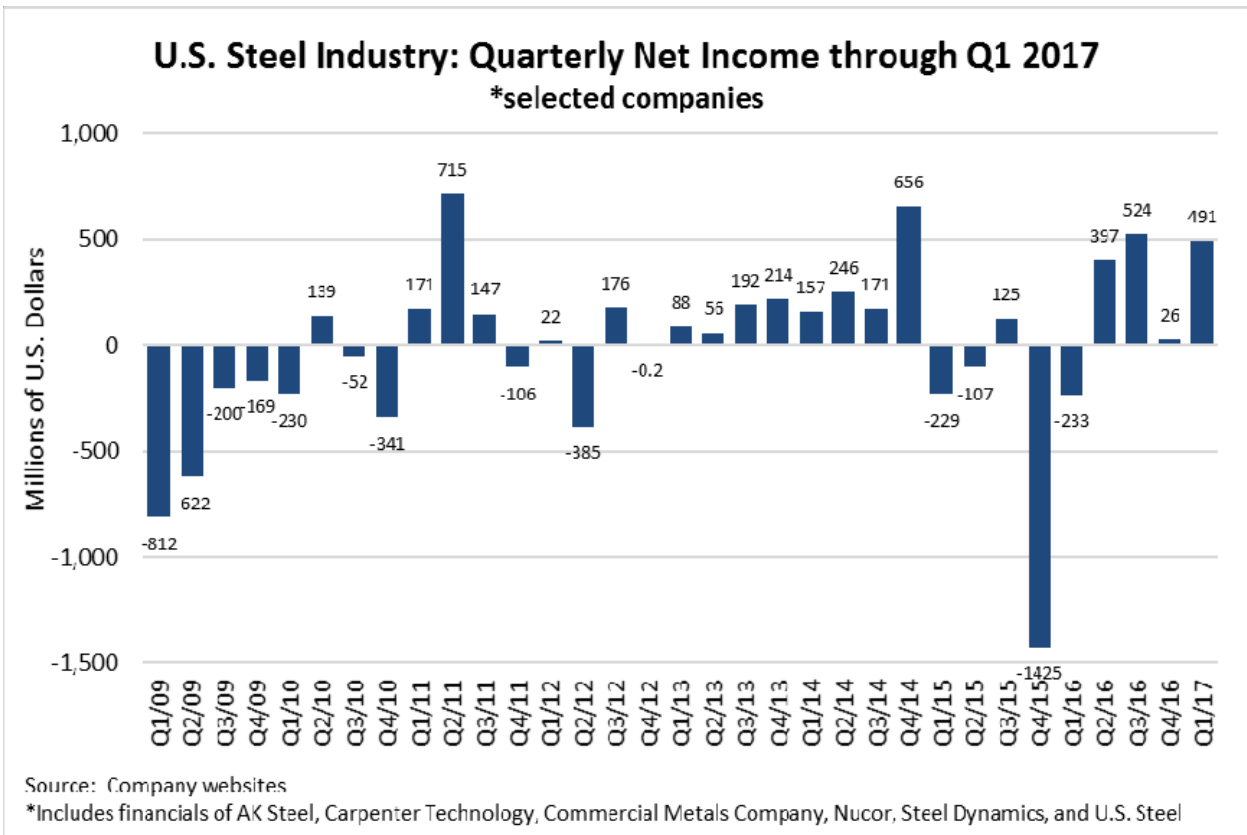
³⁴ See Tyler Durden, *Trump to Name Wilbur Ross Commerce Secretary*, ZEROHEDGE.COM (Nov. 29, 2016) <http://www.zerohedge.com/news/2016-11-29/trump-name-wilbur-ross-commerce-secretary>.

produce steel from iron ore or scrap, rolling mills and coating (galvanized and galvalume) facilities.

These producers are largely profitable and are not threatened with extinction.

Although there are no publicly available data on the profitability of the entire domestic steel industry, the Commerce Department does publish information on the profitability of the six largest domestic steel producers that publish quarterly financial statements.³⁵

These reports show that four of the six producers are currently profitable and that the industry has been profitable overall since 2009.



³⁵ These companies are AK Steel, Carpenter Technologies, Commercial Metals, Nucor, Steel Dynamics and US Steel. Dep't of Commerce, *Steel Industry Executive Summary* Apr. 2017 at 17.

As detailed by the data above, in the first quarter of 2017 alone, five of the six companies returned a total profit of \$695.6 billion with only US Steel showing a loss. And even with the US Steel loss, the net profit of the industry in the first quarter of 2017 was \$515 billion.

To be sure, the domestic producers have experienced the ups and downs of the industry cycle, with the major producers showing substantial losses in some years but substantial profits in others. Thus 2009, 2012, 2014 and 2015 were “down” years, while 2011, 2013, 2014, 2016 and now 2017 showed substantial profitability. And the good years were “very good.” In 2011 the six producers showed close to \$1 billion in profits, while in 2014 the six companies returned a total of \$1.2 billion.

Hence, although the industry’s financial performance is volatile from year to year, over the long term it is clearly viable. Or stated differently, this is not an industry that is threatened with imminent collapse.

3. U.S. Steel Industry Has Seen Significant Investment In New Production Facilities.

The continuing health of the domestic steel industry is confirmed by the fact that new domestic steel producers have continued to come into existence.

The most recent of these is Big River Steel in Osceola, Arkansas, which began production in January, 2017 with a record production run of 63,000 tons. Big River is an electric-arc furnace (“EAF”) producer with a capacity of 1.6 million tons of steel per year.³⁶ Big River reflects the trend in steel production away from large, expensive basic

³⁶ See Sandy Williams, *Air Products to Supply Big River Steel*, STEELMARKETUPDATE.COM (Apr. 27, 2015) <https://www.steelmarketupdate.com/news/6344-air-products-to-supply-big-river-steel>.

oxygen furnaces making steel from iron ore and scrap, toward more flexible mini-mills whose electric arc furnaces make steel from scrap metal.

Big River Steel in many ways is indicative of the positive change that has swept the domestic steel industry over the past 30 years. Domestic production of steel, which was once entirely made from basic oxygen furnaces (BOF) using iron ore, is now predominantly (by a substantial majority) made from EAFs. EAF production has substantial economic advantages over BOF production in that EAF facilities are cheaper to build and operate, and they are able to adjust their output upward or downward to meet demand without incurring substantial economic costs.

EAFs are not the only business model being adopted by the domestic industry to become more flexible and competitive. Another important model is the rolling mill, supplied with either steel slab feedstock or further downstream with finished coils. One of the more important new greenfield investments in this area resides along the Gulf Coast -- AM/NS Calvert in Calvert. The facility was built in 2010 and currently operated by ArcelorMittal USA and Nippon Steel & Sumitomo Metal Corp. (NSSMC). The plant has the capacity to produce 5.3 million tons of flat rolled carbon steel products annually in state of the art facilities. .

4. Lower Capacity Utilization Rates Do Not Threaten Viability.

To be sure, even when examining both BOF and EAF producers together, the domestic industry has not been operating at full capacity in recent years. Current capacity utilization now stands at 74.27%, which is virtually the same as the industry's average utilization ratio since 2006 (74.65%).

However, at these capacity utilization levels, the industry has still been able to generate profits. The chart below measures the profitability of the six major domestic producers tracked by the Department, and compares it with their capacity utilization.

Figure 3: Comparison of Profitability and Capacity Utilization of U.S. Steel Producers



As the chart above shows, the industry was profitable in 2011 and 2016, notwithstanding capacity utilization ratios below 80%. In the first quarter of 2017, moreover, the six companies showed profits of more than \$500 million with capacity utilization just at 74.27%.

Such results are not surprising. Given the dramatic paradigm shift in the steel industry, with more EAF capacity that is more flexible and therefore lower fixed costs, the U.S. steel industry no longer needs to run at high utilization rates to be profitable.

And so, the capacity utilization levels of recent years do not reflect an industry that is under serious threat.

5. U.S. Steel Producers Enjoy The Highest Prices In The World.

Another measure of the continued strength of the U.S. steel industry is the fact that the U.S. steel market (the geographic market accounting for more than 95 percent of sales of U.S. steel production) enjoys the highest U.S. steel selling prices in the world. The chart below details a comparison of selling prices for key steel products among the major steel consuming regions.

Figure 4: Geographic Region Price Comparison of Four of the Largest AISI Steel Mill Product Categories³⁷

Jan 2017 Carbon Steel Prices (USD/metric ton)				
Region	Hot Rolled Coil (25.0%)	Hot Dipped Galvanized Coil (16.8%)	Cold Rolled Coil (12.0%)	Structural Shpaes (7.5%)
North America	\$711	\$1,015	\$896	\$739
Latin America	\$629	\$900	\$793	\$662
China	\$554	\$730	\$686	\$462
India	\$549	\$641	\$613	\$441
EU	\$532	\$686	\$625	\$549
Asia	\$519	\$684	\$612	\$549
Feb 2016 Carbon Steel Prices (USD/metric ton)				
Region	Hot Rolled Coil (25.0%)	Hot Dipped Galvanized Coil (16.8%)	Cold Rolled Coil (12.0%)	Structural Shpaes (7.5%)
North America	484	\$676	\$582	\$680
Latin America	441	\$590	\$517	\$602
Asia	352	\$523	\$438	\$443
India	\$378	\$557	\$420	\$366
China	\$313	\$452	\$431	\$310
EU	\$282	\$416	\$367	\$450

³⁷ Prices in Figure 4 were obtained from World Steel Price Index (MEPS) On-Line (<http://www.meps.co.uk/world-price.htm>), whose methodology involves confidential discussions with a wide range of steel buyers in 28 countries throughout the world. Original prices for India, China, and the EU are converted into USD using the monthly foreign exchange rates released by the Federal Reserve System (<https://www.federalreserve.gov/Releases/G5>). North American steel prices are computed from a weighted average of the low prices identified in the USA (midwest) and Canada, which are collected in national currencies and converted into US Dollars using currency exchange rates effective at the start of each month to provide a basis for comparisons. Latin American Steel Prices are derived from an arithmetic average of the transaction values identified in Brazil and Mexico, which are collected in national currencies and converted into U.S. dollars using currency exchange rates effective at the start of each month to provide a basis for comparisons. Asian steel prices are derived from an arithmetic average of the low transaction values identified in Japan, Taiwan, South Korea, and China, which are collected in national currencies and converted into US dollars using currency exchange rates effective at the start of each month to provide a basis for comparisons.

As detailed above, with respect to four of the largest volume steel mill product categories, U.S. mills enjoy the highest prices in the world. And indeed, the price advantage enjoyed by U.S. steel producers has grown over the last year as U.S. market selling prices have increased more than other steel producing regions.

B. Total Steel Imports Do Not Threaten The Existence Of The U.S. Steel Industry Because A Large Portion Of Total Steel Imports Is Actually Purchased By The U.S. Steel Industry Itself Or By U.S. Manufacturing Companies That Are Not Able To Secure Reliable Supply From U.S. Producers

Figure 3 above reveals another interesting fact: there is really no correlation between import penetration and U.S. steel producers' industry profitability. Import penetration approached 30 percent in 2014, yet the domestic producers turned a profit of \$1.2 billion. By the same token, import penetration was 26% in 2009, yet the industry showed large financial losses.

Indeed, over the past seven years, import penetration has been remarkably stable at about 27-28 percent of apparent domestic consumption, while the profitability of the major steel producers has swung wildly from year to year.

The reason that the domestic steel industry's profitability has so little to do with import penetration is simple. The U.S. economy in general, and the U.S. steel industry in particular, need a certain amount of imported steel to perform properly.

There are at least three reasons why steel is imported into this country. First, steel may be imported by steel makers themselves, as raw material for their operations. This is the case for slab, as well as for hot-rolled steel imported to make cold-rolled steel and for

cold-rolled steel imported to make coated steel and hot-rolled steel imported to make pipe and tube. Second, flat-rolled steel may be imported for direct manufacturing, such as steel imported to make “blanks” for automotive parts, or to make automotive parts themselves. Third, steel may be imported for downstream industrial uses, such as cold-rolled steel used to make construction materials, furniture, and appliances.

In the first of these uses – steel imported to make steel – the imported steel cannot be considered to hurt the domestic steel industry at all. On the contrary, it permits domestic steel producers to function competitively in supplying the needs of the domestic steel market. Imported slab is the most obvious of these products. Slab imports in 2016 totaled 6.65 million tons, almost 13% of total imports of steel mill products. U.S. producers such as AM/NS Calvert in Calvert, Alabama must purchase slab because they lack sufficient “hot-end” production of their own to keep up with the needs of their rolling mills. CSI in California is in a similar position, as it lacks any raw steel production facility at all. Since very little domestic slab is sold in the merchant market, these companies must import considerable quantities of slab to keep their rolling mills operating.

U.S. producers also find it necessary to import hot-rolled steel as the raw material to make further processed steel mill products. Although we have been unable to find statistics detailing precisely how much finished steel is imported to make other finished steel, the Department’s hearings saw numerous examples of steelmakers who import steel to make steel. Steelscape, discussed in detail above, is one such producer. Steelscape

imports both hot-rolled and cold-rolled steel in order to make its coated, painted steel in the U.S.

Another company is Ohio Coatings Company (OCC). As OCC testified before the Department, it does not have its own supply of black plate, the type of cold-rolled steel which it uses to produce tin plate. OCC must purchase black plate, which it is unable to do in the domestic market because domestic producers of black plate are OCC's competitors, and they will not provide it with sufficient steel to operate. OCC must be able to purchase black plate from import sources in order to remain in business.

American steel producers located along the West Coast of the United States are another group of steelmakers that must rely on imported steel for their raw materials. As noted above, on the West Coast there are virtually no "hot-end" steel producers,³⁸ and flat-rolled steel producers – all of which are rolling mills only – must purchase their substrate (hot-rolled or cold-rolled steel) from other suppliers. On the West Coast, the availability of domestic substrate is limited by the Rocky Mountains which make it prohibitively expensive to obtain steel from mills located in the Midwest or along the Gulf Coast. All of these mills must purchase a significant amount of imported steel substrate in order to produce the amount of steel their customers require.

In the second type of use, U.S. companies that manufacture downstream products directly from steel require some imported steel for particular uses or to round out their

³⁸ Nucor Steel does have an EAF facility in Seattle, Washington. However, this facility produces bar, rod and other "long" products. It does not produce flat-rolled steel

supply sources. For example, Hyundai Motor Manufacturing Alabama and Kia Motors Manufacturing Georgia have both stated to the Commerce Department that they must import a significant amount of cold-rolled and coated (corrosion-resistant) steel from Korea and Japan. Some of this steel is simply not produced domestically, and some is not available domestically in the quality and quantity they require. These companies have to purchase up to sixty percent of their steel from import sources.

Similarly, Nippon Steel & Sumikin Cold Heading Wire Indiana Inc. stated that it must import cold-heading quality wire rod from Japan in order to make wire and wire products in its Indiana plant. The quantity of cold-heading quality wire rod it needs to make its products is simply not available domestically. For these companies, and many others, it is necessary to import steel in order to be able to be productive, profitable companies employing thousands of Americans.

Pipe and tube makers have a particularly strong need for imported pipe for at least part of their pipe production. State pipe, an oil country tubular goods (“OCTG”) manufacturer, must import smaller sizes of OCTG tubing and larger sizes of casing pipe that it cannot produce in its U.S. mill. And Borusan Mannesmann Pipe U.S. Inc. of Texas, also an OCTG manufacturer, has noted that it must “fill out its product line by importing selective sizes of pipe” that are not produced domestically.

Imported steel can be particularly important for manufacturing companies located close to the border. For example, automotive assembly plants are located on both the

Canadian and U.S. sides of the Great Lakes. Numerous steel “stampers,” who manufacture “first-stage blanks” for automotive parts, are also located on both sides of the border in close proximity to the car companies’ automotive assembly plants. U.S. stampers frequently import a certain amount of flat-rolled steel from Canada in order to have sufficient supply to meet the just-in-time delivery requirements of the automotive plants, especially where the Canadian suppliers are certified by the automotive companies as providing acceptable products.

In all these uses, imported steel does not displace domestic steel production, it complements it. Imported steel allows domestic steel producers to operate to their maximum efficiency, and it allows steel users to have stable supplemental sources of supply to meet their clients’ needs. These imports do not threaten the viability of the U.S. steel industry or the national security.

C. Imports Of Steel Do Not Take Away Jobs From The U.S. Steel Industry Or From The U.S. Economy

Available evidence reveals that imports have not had any negative impact on employment, either in the domestic steel industry itself or among the industry’s customers. With respect to direct steel makers, making steel either from hot-metal or from purchased steel, national employment levels have ranged between 135,000 and 160,000 employees since January of 2007, over ten years. While levels have fluctuated up and down with the steel business cycle, there is no significant trend in employment

levels that relates to imports. The current employment level of steel producers stands at 140,000 employees.³⁹

Moreover, these employment levels consider only employees engaged in the direct production of steel. When downstream effects of employment are considered, the positive impact of steel imports is considerably clearer. As noted above, many downstream manufacturers require imported steel either to obtain specialized raw materials not available in sufficient quantities domestically or to obtain a stable supplemental source of raw materials that allows them to meet their customers' requirements for quick delivery. These downstream companies, in turns out, employ many more employees than direct steel producers do.

A recent report by Daniel Pearson of the Cato Institute notes that downstream manufacturers that use steel as an input employed 6.5 million people in 2014.⁴⁰ In early 2017, there were some 140,000 people employed in direct steel making. Hence, **downstream manufacturers employ more than 46 workers for every one employed in direct steelmaking.** By providing these downstream manufacturers with a steady, reliable supplemental source of raw materials, imported steel allows them not only to remain in business, but to maximize their efficiency in production, thus preserving many more jobs than even exist in direct manufacturing.

In sum, it is apparent that imported steel does not produce a net loss of American jobs. Rather, it allows American manufacturing to operate to the best of its ability,

³⁹ Bureau of Labor Statistics monthly employment data, categories CES3133110001 and CES3133120001.

⁴⁰ Daniel Pearson, *Global Steel Overcapacity: Trade Remedy 'Cure' is Worse than the 'Disease'*, Free Trade Bulletin No. 66, Apr. 11, 2016, at 2.

securing many more jobs throughout the economy than would be the case if imports of steel were restricted. Imported steel helps, rather than hurts, the American economy.

IV. U.S. STEEL PRODUCERS ALREADY HAVE STRONG PROTECTION FROM UNFAIRLY TRADED STEEL IMPORTS

We respectfully submit that the Commerce Department's Section 232 analysis must take into account the fact that U.S. steel producers already enjoy strong protection from steel imports. Since 1997, as detailed below by product type, there are 170 antidumping (AD) and countervailing duty (CVD) orders that affect steel imported into the United States.

Figure 5: Existing AD-CVD Orders Against Steel Imports

Product	Order Year	Target Countries
Carbon steel plate	1997	China, Russia, Ukraine
Stainless steel wire rod	1998	Taiwan, Korea, Japan
Hot-rolled carbon steel flat products	1999	Russia
Stainless steel plate in coils	1999	Belgium, South Africa, Taiwan
Stainless steel sheet & strip	1999	Japan, Korea, Taiwan
Carbon steel plate	2000	India, Indonesia, Korea
Large diameter seamless pipe	2000	Japan
Small diameter seamless pipe	2000	Japan, Romania
Tin mill products	2000	Japan
Hot-rolled carbon steel flat products	2001	China, Taiwan, Thailand, Ukraine, India, Indonesia
Steel concrete reinforcing bar	2001	Belarus, China, Indonesia, Latvia, Moldova, Poland, Ukraine
Welded large diameter line pipe	2001	Japan
Carbon steel wire rod	2002	Brazil, Indonesia, Mexico, Moldova, Trin & Tobago
Circular welded carbon quality steel pipe	2008	China
Light-walled rectangular pipe and tube	2008	China, Korea, Mexico
Light-walled rectangular pipe and tube	2008	Turkey
Circular welded austenitic stainless pressure pipe	2009	China
Circular welded carbon quality steel line pipe	2009	China
Steel threaded rod	2009	China
Oil Country Tubular Goods	2010	China
Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe	2010	China
Diffusion-Annealed, Nickel-Plated Flat- Rolled Steel Products	2014	Japan
Non-Oriented Electrical Steel	2014	China, Germany, Japan, Korea, Sweden, Taiwan
Oil Country Tubular Goods	2014	India, Korea, Taiwan, Turkey, Vietnam
Prestressed Concrete Steel Rail Tie Wire	2014	China, Mexico
Steel Concrete Reinforcing Bar	2014	Mexico
Welded Stainless Pressure Pipe	2014	Malaysia, Thailand, Vietnam
Carbon and Certain Alloy Steel Wire	2015	China
Steel Nails	2015	Korea, Malaysia, Oman, Taiwan, Vietnam
Welded Line Pipe	2015	Korea, Turkey
Cold-Rolled Steel Flat Products	2016	Japan, China, Brazil, India, Korea, United Kingdom
Corrosion-Resistant Steel Products	2016	China, India, Italy, Korea, Taiwan
Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes	2016	Korea, Mexico, Turkey
Hot-rolled carbon steel flat products	2016	Australia, Brazil, Japan, Korea, Netherlands, Turkey, United Kingdom
Welded Stainless Pressure Pipe	2016	India
Carbon and Alloy Steel Cut-to-Length Plate	2017	Brazil, South Africa, Turkey, China
Circular Welded Carbon-Quality Steel Pipe	2017	Oman, Pakistan, United Arab Emirates
Stainless Steel Sheet and Strip	2017	China
Carbon and Alloy Steel Cut-to-Length Plate	2017	Austria, Belgium, France, Germany, Italy, Japan, Korea, and Taiwan

Importantly, as detailed below, most of these AD and CVD orders affect imports of primary “steel mill products.”

Figure 6: Total Steel Imports by AISI Category

Category	AISI Code	Total imports in 2016 (kg)	Has order?
Ingots and Steel for Castings	1A	30,009,411.00	No
Ingots and Billets and Slabs	1B	6,032,804,976.00	No
Wire Rods	3	1,445,703,168.00	Yes
Structural Shapes Heavy	4	794,480,888.00	No
Steel Piling	5	83,359,166.00	No
Plates Cut Lengths	6A	1,113,996,285.00	Yes
Plates in Coils	6B	1,216,069,676.00	Yes
Rails Standard	7	253,158,494.00	No
Rails all Other	8	62,178,120.00	No
Railroad Accessories	9	8,959,785.00	No
Bars - Hot Rolled	14	1,075,998,409.00	No
Bars - Light Shapes	14A	167,256,318.00	No
Bars - Reinforcing	15	1,913,716,156.00	Yes
Bars - Cold Finished	16	281,278,646.00	No
Tool Steel	17	138,844,653.00	No
Standard Pipe	18	757,798,101.00	Yes
Oil Country Goods	19	1,045,526,905.00	Yes
Line Pipe	20	1,244,348,948.00	Yes
Mechanical Tubing	21A	467,706,871.00	Yes
Pressure Tubing	21B	44,100,029.00	No
Stainless Pipe and Tubing	21C&D	118,373,626.00	No
Pipe and Tubing Non Classified	21E	20,549,417.00	No
Structural Pipe and Tubing	22A	481,355,784.00	Yes
Pipe for Piling	22B	19,707,096.00	No
Wire Drawn	23	807,866,546.00	No
Black Plate	28	99,376,329.00	Yes
Tin Plate	29	804,631,994.00	Yes
Tin Free Steel	29A	194,373,792.00	Yes
Sheets Hot Rolled	31	2,630,846,600.00	Yes
Sheets Cold Rolled	32	2,301,596,368.00	Yes
Sheets and Strip Galvanized	33	2,958,904,239.00	Yes
Sheets and Strip All Other Metalci CTD	34	937,723,392.00	Yes
Sheets and Strip - Electrical	35	59,833,437.00	No
Strip - Hot Rolled	36	145,323,035.00	Yes
Strip - Cold Rolled	37	198,860,130.00	Yes
Total Worldwide Imports with Order		19,957,857,773.00	
Total Worldwide Imports		29,956,616,790.00	
Percentage of Worldwide Imports with Order			67%

As detailed above, imports of steel mill product categories accounting for a full 69 percent of all steel imports are affected by AD and/or CVD orders.

Moreover, the AD and CVD orders have a dramatic effect on the imports of steel mill products from China.

Figure 7: Change in Imports from China After Imposition of AD-CVD Orders

Product	Order date	Initiation Year	Quantity in year before initiation (kg)	Quantity in 2016 (kg)	Change (%)
Carbon and Certain Alloy Steel Wire	1/8/2015	2014	561,357,147.00	40,308.00	-100%
Circular welded austenitic stainless pressure pipe	3/17/2009	2008	27,521,135.00	872,216.00	-97%
Circular welded carbon quality steel line pipe	5/13/2009	2008	256,073,396.00	2,430,891.00	-99%
Circular welded carbon quality steel pipe	7/22/2008	2007	589,420,196.00	78,638,427.00	-87%
Cold-Rolled Steel Flat Products	7/14/2016	2015	792,268,266.00	1,750,529.00	-100%
Corrosion-Resistant Steel Products	7/25/2016	2015	840,481,845.00	16,602,537.00	-98%
Hot-rolled carbon steel flat products	11/29/2001	2000	828,629,016.00	5,846,720.00	-99%
Light-walled rectangular pipe and tube	8/5/2008	2007	75,532,234.00	1,147,750.00	-98%
Non-Oriented Electrical Steel	12/3/2014	2013	12,738,607.00	21,683.00	-100%
Oil Country Tubular Goods	5/21/2010	2009	1,993,610,074.00	616,833.00	-100%
Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe	11/10/2010	2009	402,134,057.00	32,660,507.00	-92%
Stainless Steel Sheet and Strip	4/3/2017	2016	133,486,087.00	36,332,612.00	-73%
Steel concrete reinforcing bar	9/7/2001	2000	15,918,810.00	250,794.00	-98%
Steel threaded rod	4/14/2009	2008	74,565,672.00		-100%

The chart above proves rather forcefully that the complaints by many U.S. steel producers about Chinese steel have little applicability, *today*, to the U.S. market. By and large, through successful AD-CVD cases, a huge volume of steel mill product imports from China have already been kicked out of the U.S. market.

**V. STEEL IMPORTS FROM JAPAN, IN PARTICULAR, DO NOT
THREATEN TO IMPAIR U.S. NATIONAL SECURITY.**

**A. The Japanese Steel Industry Has A Long History Of Investment In
And Cooperation With The U.S. Steel Industry.**

In a Section 232 proceeding that is focused on the perceived threat of steel imports to the national security of the United States, it is important to recall the important contributions that the Japanese steel industry has made to the very competitiveness of the U.S. steel industry through investment and other cooperative endeavors.

In fact, Japanese investment over the past 40 years has been substantial and continues to this day. An illustration of some of the more important investments over the period are presented in the table below:

Figure 8: Japanese Investments in the U.S. Steel Industry

Year	Facility/ Joint Venture Name	Japanese Company Investing (with U.S. investor)	Production Type
1975	Auburn Steel ⁴¹	Kyoei/Sumitomo Corp	Mini-mill
1984	NKK acquired 50% of National Steel ⁴²	NKK and National Intergroup	Integrated steel assets
1984	California Steel ⁴³	Kawasaki Steel with Brazilian company Companhia Vale Do Rio Doce (CVRD)	Rolling mill
1984	VAM USA LLC (original name VAM-PTS Co.) ⁴⁴	Nippon Steel & Sumitomo Metal Corp.	Processes Oil Country Tubular Goods
1986	Wheeling-Nisshin ⁴⁵	Nisshin Steel Co., Ltd and Wheeling Pittsburgh Steel Corporation	Coating lines
1986	LSE I ⁴⁶	Sumitomo Metals and LTV	Galvanizing line
1988	Nucor-Yamato ⁴⁷	Yamato Kogyo and Nucor	Mini-mill
1988	Wheeling-Nisshin ⁴⁸	Nisshin Steel Co., Ltd and Wheeling Pittsburgh Steel Corporation	Galvanizing and coating line
1988	Wheeling-Nisshin ⁴⁹	Nisshin Steel Co., Ltd and Wheeling Pittsburgh Steel Corporation	Integrated steel mill
1989	Armco Steel Co. Ltd. ⁵⁰	Kawasaki Steel and Armco	Integrated steel mill
1989	USS-Kobe Steel ⁵¹	Kobe Steel and U.S. Steel	Integrated bar and pipe mill
1989	Inland Steel ⁵²	Nippon Steel and Inland Steel	Integrated steel mill
1990	I/N Tek ⁵³	Nippon Steel and Inland Steel	Cold rolling mill
1990	NKK acquired an additional 20% of National Steel ⁵⁴	NKK and National Steel	Integrated steel assets
1990	International Crankshaft Inc ⁵⁵	Nippon Steel & Sumitomo Metal Corp.	Manufacturers crankshaft
1991	I/N Kote ⁵⁶	Inland Steel (Ispat) and Nippon Steel	Galvanizing line

⁴¹ S. Yonekura, *The Japanese Iron and Steel Industry, 1850-1990: Continuity and Discontinuity* 267 (Springer, 1994) (citing M. KENNEY & R. FLORIDA, *BEYOND MASS PRODUCTION* 157 (Oxford: Oxford University Press, 1993)).

⁴² ARTHUR J. ALEXANDER, *JAPAN ECON. INST. OF AM. (JEI), REPORT NO. 42A JAPANESE DIRECT INVESTMENT IN THE UNITED STATES: REVISING AND UPDATING PERCEPTIONS* 14 (1997) <http://www.jei.org/AJAclass/FDlinUS.pdf>.

⁴³ R. Florida & M. Kenney, *Restructuring in Place: Japanese Investment, Production Organization, and the Geography of Steel*, 68 *INDUS. GEOGRAPHY* 146, (1992).

⁴⁴ *Parent Companies*, VAM-USA.COM <https://www.vam-usa.com/about/parent-company/>.

⁴⁵ Florida & Kenney, *supra* note 43; see also *W-P, Japanese Firm to Build W.Va. Facility*, *THE PITTSBURGH PRESS* (Jan. 16, 1986).

⁴⁶ Florida & Kenney, *supra* note 43.

⁴⁷ Yonekura, *supra* note 41.

⁴⁸ Florida & Kenney, *supra* note 43.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ ROGER FARRELL, *JAPANESE INVESTMENT IN THE WORLD ECONOMY: A STUDY OF STRATEGIC THEMES IN THE INTERNATIONALISATION OF JAPANESE INDUSTRY* 260 (Edward Elgar Publ'g Ltd. 2008)

⁵⁵ *About Us*, <http://internationalcrankshaft.com/about.html> (listing Nippon Steel & Sumitomo Metal Corp. as the majority shareholder).

⁵⁶ Florida & Kenney, *supra* note 43.

Year	Facility/ Joint Venture Name	Japanese Company Investing (with U.S. investor)	Production Type
1991	LSE II ⁵⁷	Sumitomo Metals and LTV	Galvanizing line
1991	Armco Steel Co. Ltd. ⁵⁸	Kawasaki Steel and Armco	Galvanizing line
1992	Protec Coating Co. ⁵⁹	US Steel (Ohio) and Kobe Steel (Protec)	New coating lines
1992	Pennsylvania Extruded Tube Co. ⁶⁰	Nippon Steel & Sumitomo Metal Corp.	Manufactures seamless stainless pipes
1993	Wheeling-Nisshin ⁶¹	Nisshin Steel Co., Ltd and Wheeling Pittsburgh Steel Corporation	Galvanizing line
2008	Nippon Steel & Sumikin Crankshaft, LLC (original name SMI Crankshaft LLC) ⁶²	Nippon Steel & Sumitomo Metal Corp.	Processes crankshaft
2009	Nippon Steel Corp. acquired Suzuki Metal (formerly named Haldex Garphyttan AB) ⁶³	Nippon Steel & Sumitomo Metal Corp.	Manufacturers steel wires
2011	Standard Steel LLC ⁶⁴	Nippon Steel & Sumitomo Metal Corp.	Manufactures wheels and axles
2012	Wheeling-Nisshin ⁶⁵	Nisshin Steel Co., Ltd and Wheeling Pittsburgh Steel Corporation	Coated steel
2012	Southern Tube LLC ⁶⁶	Nippon Steel & Sumitomo Metal Corp.	Processes Oil Country Tubular Goods
2014	AM/NS Calvert ⁶⁷	Alabama Steel sold to Arcelor Mittal and Nippon Steel & Sumitomo Metal corp.	Hot strip mill
2015	Seymour Tubing, Inc. ⁶⁸	Nippon Steel & Sumitomo Metal Corp. and Mitsui & Co.	Carbon and stainless tubing
2016	Kyoei Steel acquired BD Vinton, which was owned by Bayou Steel Group and Arcelor Mittal USA ⁶⁹	Kyoei Steel and Bayou Steel Group and Arcelor Mittal USA	Rebar mill
2018	Nippon Steel & Sumikin Cold Heading Wire Indiana Inc. ⁷⁰	Nippon Steel & Sumitomo Metal Corp.	Cold heading steel wire

⁵⁷ Florida & Kenney, *supra* note 43.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See *NSSMC Company Brochure* at 6, https://www.nssmc.com/en/company/pdf/nssmc_brochure_en.pdf.

⁶¹ Florida & Kenney, *supra* note 43.

⁶² *Company Profile*, NSICRANKSHAFT.COM, <http://www.nsicrankshaft.com/CompanyProfile.aspx>.

⁶³ *Suzuki Metal Industry Becomes a Subsidiary of Nippon Steel Through Nippon Steel Subscription for its Shares*, NSSMC.COM (June 15, 2009) http://www.nssmc.com/en/news/old_nsc/detail/index.html?rec_id=3638.

⁶⁴ *Company Profile*, STANDARDSTEEL.COM, <http://www.standardsteel.com/profile.php>.

⁶⁵ *About Wheeling-Nisshin*, WHEELING-NISSHIN.COM, <http://www.wheeling-nisshin.com/about>.

⁶⁶ *Nippon Steel & Sumitomo Metal Agrees to Acquire WSP Houston's Production Facilities in the U.S.*, NSSMC.COM (Oct. 4, 2012) http://www.nssmc.com/en/news/20121004_10.html.

⁶⁷ *AM/NS Calvert*, USA.ARCELORMITTAL.COM, <http://usa.arcelormittal.com/our-operations/joint-ventures/calvert>.

⁶⁸ *Company Overview of Seymour Tubing, Inc.*, BLOOMBERG.COM (May 30, 2017) <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=4292664>.

⁶⁹ *Kyoei Steel, Ltd. Acquired Vinton Steel Facility of Bayou Steel Group from Black Diamond Capital Management*, PRNEWswire.COM (Dec. 21, 2016) <http://www.prnewswire.com/news-releases/kyoei-steel-ltd-acquires-vinton-steel-facility-of-bayou-steel-group-from-black-diamond-capital-management-300382160.html>.

⁷⁰ See *Joint Venture Manufacturing Steel Wires for Cold Heading and Forging to be Established in USA*, NSSMC.COM (Jan. 27, 2016) http://www.nssmc.com/en/news/20160127_100.html.

The table above represents billions of dollars of assets where the Japanese industry either made greenfield investments, acquired existing assets or participated as a partner in the operation. These investment have helped the U.S. steel industry grow and be competitive. Consider, in particular, the AM/NS facility identified above. Purchased by ArcelorMittal and NSSMC as joint venture partners in 2014 for \$1.5 billion, the plant has the capacity to produce 5.3 million tons of flat rolled carbon steel products annually. The facility includes a river terminal, hot strip mill, cold rolling mill, three hot dip galvanizing lines, a rail yard, and supporting infrastructure. It is one of the newest operations in the United States serving the automotive, construction, pipe and tube, service center, and appliance/ HVAC industries with various steel grades for high-value applications including hot rolled bands, hot rolled pickled and oiled, cold rolled, and advanced coated products.

These investments reveal a very strong connection between foreign direct investment (FDI) from Japan and dynamism in the U.S steel industry. And while there are decisions made to both invest in U.S. capacity and to export to the United States, these decisions are not mutually exclusive, and often support each other. Restraining imports threatens to disrupt that balance, actually causing more harm to the future of the U.S. domestic industry than good.

B. Imports Of Japanese Steel Are Focused On Specialty Products Not Readily Available From U.S. Steel.

It is also important to highlight the fact that steel imports from Japan consist primarily of specialty products that are not readily available from U.S. mills. Indeed, in virtually all instances in which the volume of imports from Japan of a particular steel mill product are noticeably higher than imports from other countries, it is because the type of steel being imported from Japan consists of a specialty product not readily available from U.S. mills or other import sources.

A good example are imports of “**tin free steel**” –_AISI category 29A. Tin free steel imports from Japan accounted for 20 percent of the total U.S. imports of tin free steel in 2016. However, 100 percent of the volume of tin free steel imports from Japan consist of those products for which U.S. steel producers have admitted that they cannot readily supply and so have agreed to have these products excluded from the existing AD order on tin mill steel from Japan.

A very similar example exists with respect to imports of “**line pipe**” – AISI category 20. A very large proportion of the total volume of line pipe from Japan consist of those products for which U.S. steel producers have admitted that they cannot readily supply and so have agreed to have these products excluded from the existing AD order on line pipe from Japan. Consequently, the line pipe imports from Japan consist of line pipe with high strength material for deep-water use that cannot be manufactured by U.S. steel producers. Such line pipe meets the stringent end user requirements such as low temperature fracture toughness and high deformability.

Another example are imports from Japan of “**standard rails**” – AISI category 7. Standard rail imports from Japan accounted for more than 80 percent of all standard rail imports in 2016. However, it is well recognized that Japanese steel producers employ special production technologies to make a type of wear resistant rail that is highly desired by U.S. railroad companies, but which very few other steel producers in the world can produce. Specifically, Japanese premium steel rails have particular high performance characteristics that make the final rail products resistant to wear, surface defects and residual stress. Moreover, not a single U.S. steel producer has the capability of manufacturing a 480 foot long steel rail, as do Japanese steel suppliers.

Another example are imports from Japan of “**wire rod**” – AISI category 3. There is abundant evidence that such imports from Japan do not constitute harm to U.S. steel producers. Perhaps the best evidence is the fact that imports from Japan were not included in the large AD-CVD case just recently filed by U.S. wire rod producers, which targeted ten different countries. Notwithstanding that imports of Japanese wire rod in 2016 constituted a healthy proportion of total imports for wire rod, U.S. wire rod producers did not include Japan in the universe of countries targeted by the AD-CVD case.

The primary reason is because much of the imported wire rod from Japan consists of wire rod that was produced using a new steel production methodology which has not yet been adopted by U.S. wire rod producers. Just one example of a difference in the production process concerns the billet mill process. At NSSMC, for instance, after steel blooms are made through continuous casting, the blooms go through a reheating furnace

and are rolled into billets (two heat billet process). This process ensures a smooth surface and enables better control over the distribution of impurities contained in the billets. The smooth, flat surface and uniform internal quality are preconditions for making CHQ wire rods. In comparison, U.S. wire rod producers manufacture wire rods using the one heat billet process, which cannot achieve the same level of surface smoothness or control over impurities required for CHQ wire rod.

These are just some examples – there are many more – of how and why a large proportion of steel imports from Japan consist of those types of steel products not reliably offered by U.S. steel producers, and therefore Japanese steel cannot possibly be designated as harming the ability of U.S. producers to meet the limited steel needs of the Department of Defense or those 28 “critical” steel consuming industries.

VI. THE COMMERCE DEPARTMENT SHOULD RECOMMEND A MECHANISM FOR EXCLUDING STEEL IMPORTS THAT DO NOT THREATEN TO IMPAIR NATIONAL SECURITY.

The Japan Steel Associations understand that, at the beginning of the Commerce Department's Section 232 hearing, Commerce Secretary Wilbur Ross requested consideration of the possibility that any Section 232 import restrictions may not apply to all countries and all products.

The Japan Steel Associations wholeheartedly support the suggestion by Secretary of Commerce Wilbur Ross that it may not be necessary to impose any Section 232 restrictions on imports from certain countries or on certain products. In particular, the Japan Steel Associations wholeheartedly support the possibility of a mechanism to allow foreign exporters and U.S. importers to apply for an exclusion from the imposition of any Section 232 restrictions.

VII. THE SECTION 232 CONCLUSION MUST COMPLY WITH THE U.S. GOVERNMENT’S WTO OBLIGATIONS.

As discussed above, Section 232 of the Trade Expansion Act of 1962 allows the President to impose restrictions on imports that are found to “threaten to impair the national security.” But in carrying out any actions under section 232, the United States must keep in mind that as a member of the World Trade Organization (WTO), the United States has an obligation to adhere to the WTO’s rules governing the multilateral trading system.

In general, restrictions on trade are disfavored and potentially violate many WTO obligations. Although there is an exception for national security provided for in Article XXI of the General Agreement on Tariffs and Trade of 1994 (GATT 1994)⁷¹, the language of this Article is narrowly construed and only allows WTO Members to impose restrictions that are *necessary* for the protection of *essential* security interests.⁷² Such measures may also only be taken within the context of a time of “war or other emergency in international relations” or else must relate to arms, ammunition or fissionable materials.⁷³ Although there is limited jurisprudence in which a Panel or Appellate Body has provided a definitive interpretation of the Article XXI exception,⁷⁴ we note that from the plain text of the Article, the context of this provision, its object and purpose, as well

⁷¹ General Agreement on Tariffs and Trade 1994 art. XXI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 187 U.N.T.S. 154, 33 I.L.M. 1153 (1994) (hereinafter “GATT 1994”).

⁷² GATT 1994, *supra* note 1, at art. XXI (emphasis added).

⁷³ *Id.*

⁷⁴ We note that there are GATT panel reports, before the WTO came into existence, in which Article XXI is discussed. However, these reports provide very little analysis or interpretation of the precise meaning and scope of the Article XXI exception. These reports were also not adopted by the Contracting Parties. Most important to this discussion – the language found in paragraph (b) of Article XXI: “which it considers necessary for the protection of essential security interests” – has not been interpreted by a GATT or WTO Panel or Appellate Body.

as scholarly commentary, Article XXI provides a narrow exception that does not apply broadly to generalized economic considerations that may relate peripherally to national security.

The United States must adhere to its WTO obligations, and therefore may not impose protectionist measures to broadly restrict imports for what is largely a commercial or economic objective. The plain text of Article XXI states in relevant part:

Nothing in this Agreement shall be construed

- (b) to prevent any contracting party from taking any action which it considers **necessary** for the protection of its **essential** security interests
 - (i) relating to fissionable materials or the materials from which they are derived;
 - (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - (iii) taken in **time of war** or other **emergency in international relations**; . . .

As Article 3.2 of the Dispute Settlement Understanding (DSU) requires, panels and the Appellate Body must “clarify” the WTO Agreements “in accordance with customary rules of interpretation of public international law.”⁷⁵ The Appellate Body explained in *United States – Standards for Reformulated and Conventional Gasoline*⁷⁶ and *Japan – Taxes on Alcoholic Beverages*⁷⁷, that this requirement refers to Articles 31 and 32 of the

⁷⁵ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, May 20, 1996, WTO Doc. WT/DS2/AB/R, at 16-17, 20, 23 *reprinted in* 35 I.L.M. 603 (1995) (hereinafter “*U.S. – Gasoline*”).

⁷⁶ *Id.*

⁷⁷ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, Nov. 1, 1996, WTO Doc. WT/DS8, 10, 10/AB/R, at 10-15 (hereinafter “*Japan – Alcoholic Beverages*”).

Vienna Convention of the Law of Treaties.⁷⁸ In interpreting GATT 1994 and other WTO Agreements, the Appellate Body therefore held that “the words of a treaty form the foundation for the interpretive process. The provisions of the treaty are to be given their ordinary meaning in their context. The object and purpose of the treaty are also to be taken into account in determining the meaning of its provisions.”⁷⁹

Moreover, even measures that are “necessary” for “essential” national security interests are further limited to specific circumstances. The sub-provisions of Article XXI(b) relate to specific items (such as “implements of war”) and specific circumstances (such as “time of war” or an “emergency”). This language further narrows the scope of this exception. Moreover, this language is couched as objective terms, subject to external evaluation. A WTO Member is not free to offer its own definitions of what constitutes an “emergency.”

Thus, beginning with the words of Article XXI itself,⁸⁰ a Member may only take actions – such as imposing restrictions on imports that are otherwise in violation of GATT obligations, i.e., the obligation under Article XI of the GATT to *not* impose quantitative restrictions on imports – that are *necessary* for the protection of an *essential* security interest. The plain meaning of the term “necessary” is: “needed to be done, achieved, or present; essential”⁸¹, while the meaning of “essential” is “absolutely

⁷⁸ Vienna Convention on the Law of Treaties, May 23, 1969, Arts. 31-33, 1155 U.N.T.S. 331 (hereinafter “Vienna Convention on the Law of Treaties”).

⁷⁹ *Japan – Alcoholic Beverages*, at 11-12.

⁸⁰ We note that we are assuming in this circumstance that the United States would most likely seek a defense under paragraph (b)(iii) of Article XXI.

⁸¹ *Necessary*, OXFORD DICTIONARY (last updated 2017) <https://en.oxforddictionaries.com/definition/necessary>.

necessary; extremely important”⁸². By including these adjectives in the text of the Article, the contracting parties restricted a WTO Member’s ability to have total discretion in taking any action it desired in the name of “national security.”

Thus, although a Member is free to define its own security interests, the subset of such security interests that can be deemed as “essential” must clearly meet some higher standard (i.e., absolutely necessary; extremely important) in relation to other “normal” security interests.⁸³ In fact, we note that the drafting history of this Article confirms the intention of the Contracting Parties to include a provision that enabled Members to care for real security interests, while also limiting the exception “so as to prevent the adoption of protection for maintaining industries under every conceivable circumstance.”⁸⁴

The words “which it considers” included in paragraph (b) do not preclude an objective assessment of actions taken under Article XXI. Nor does this language preclude a WTO Panel from reviewing the actions of a Member, and we note that the Appellate Body has interpreted similar language in the past.⁸⁵ As scholars have explained, the act of “considering” whether an interest is threatened and which means are

⁸² *Essential*, OXFORD DICTIONARY (last updated 2017) <https://en.oxforddictionaries.com/definition/essential>.

⁸³ See Hannes L. Schloemann and Stegan Ohlhoff, “Constitutionalization” and Dispute Settlement in the WTO: National Security as an Issue of Competence, 93 AM. J. INT’L L. 424, 445 (1999).

⁸⁴ *Article XXI Security Exceptions*, GATT, ANALYTICAL INDEX – GUIDE TO WTO LAW AND PRACTICE 600 (6th ed. 1994) (hereinafter “GATT ANALYTICAL INDEX”; see also Alan S. Alexandroff and Rajeev Sharma, *Chapter 35, The National Security Provision – GATT Article XXI*, THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 1571-1579 (2005).

⁸⁵ See *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities Under Article 22.6 of the DSU: Decision by the Arbitrators*, WT/DS27/ARB/ECU (Mar. 24, 2000) (hereinafter “*European Communities – Article 22.6 of the DSU*”) (finding that the although the “party considers” language of DSU Article 22.3(b) and (c) “leave{s} a certain margin of appreciation to the complaining party” with respect to the practicality and effectiveness of suspending concessions in another sector or agreement, the “margin of appreciation by the complaining party . . . is subject to review by the arbitrators.”); see also Peter Lindsay, Note, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 DUKE L. J. 1277, 1289 (2003) (using the example from *European Communities – Article 22.6 of the DSU* to argue that “WTO action in other areas in which it has examined the “it considers” language also suggests that a WTO panel would find jurisdiction to review a national security defense.”).

necessary to protect it is technical in nature.⁸⁶ Once a State has specified or identified a threatened interest, the determination of the appropriate means for securing that interest is a matter of correctly assessing risks and possibilities.⁸⁷ {Context for following quote} “Where a risk to a defined interest does not exist, or a measure will have no effect on protecting the interest it is meant to protect, the corresponding state action cannot be justified under Article XXI.”⁸⁸

Scholars have further argued that the test for proportionality between the action taken by the State to address the identified interest should be, as it is in other areas of the law, the reasonableness of the measure in the context.⁸⁹ A WTO dispute settlement panel would thus review the Member’s determination, sorting out cases that are objectively unreasonable.⁹⁰ The United States must therefore adhere to its obligations under Article XXI as it investigates and determines what action, if any, it will take pursuant to its section 232 investigation. The United States must be sure that any actions it does take relate to one of the three requirements listed in Article XXI, are actions necessary to the protection of essential security interests, and are reasonable in context – i.e., proportionate to the threat.

Although the language of Article XXI has not yet been interpreted by the WTO dispute settlement body, the Appellate Body has interpreted other exceptions found

⁸⁶ Hannes L. Schloemann and Stegan Ohlhoff, “Constitutionalization” and Dispute Settlement in the WTO: *National Security as an Issue of Competence*, 93 AM. J. INT’L L. 424, 443 (1999).

⁸⁷ *Id.*

⁸⁸ Schloemann & Ohlhoff, at 443.

⁸⁹ *Id.*, at 444-45

⁹⁰ *Id.*, at 444-45; see also Markus A. Reiterer, *Article XXI GATT – Does the National Security Exception Permit “Anything Under the Sun”?*, 2 AUSTRIAN REV. INT’L. & EUR. L. 191, 210 (1997).

within the GATT. In *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, the Appellate Body pointed out:

“To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect reduces its treaty obligation to a merely facultative one and dissolves its juridical character, and, in doing so, negates altogether the treaty rights of other Members.”⁹¹

Thus, a balance must be struck between the right of a Member to invoke an exception under the WTO Agreements based on legitimate policy interests, such as protection of *essential* security interests, on the one hand, and the substantive rights of the other members under those agreements on the other hand.⁹² In *U.S. – Shrimp* the Appellate Body was analyzing the use of an exception under Article XX (general exceptions), which contains a chapeau that more explicitly establishes the balance between the right of the member to invoke the exception and its duty to respect the substantive rights of the other members.⁹³ Scholars have noted, however, “{o}n the same grounds, an interpretation of Article XXI ‘in light of {the WTO Agreements’} object and purpose’ also requires a balanced approach”.⁹⁴ Thus, should the United States decide to take action as a result of its section 232 investigation, its right to protect legitimate policy interests must be balanced with the substantive rights of other WTO Members.

⁹¹ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Nov. 6, 1998, WTO Doc. WT/DS58/AB/R, para. 157, *reprinted in* 38 I.L.M. 118 (1999) (hereinafter “*U.S. – Shrimp*”).

⁹² Schloemann & Ohlhoff, at 438.

⁹³ *Id.*, at 438-39 (citing *U.S. – Shrimp* and *U.S. – Gasoline* and explaining that past practice shows that panels have consistently applied the GATT’s exceptions in such a way as not to frustrate its substantive rules: “In particular, they have required contracting parties, where a prima facie violation of GATT principles has been established, to justify restrictive measures taken by them under an exception and to carry the burden of proof that the measure indeed comes under the exception.”).

⁹⁴ Schloemann & Ohlhoff, at 439 (citing Vienna Convention on the Law of Treaties, May 23, 1969, Art. 31(1) 1155 U.N.T.S. 331).

Finally, we address the fact that if the United States does take action as a result of its section 232 investigation, and such action violates its WTO obligations and does not adhere to Article XXI, another WTO Member maintains the right to initiate a dispute under Article XXIII of the Dispute Settlement Understanding.⁹⁵ Article XXIII of the DSU requires members “{w}hen {they} seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, {to} have recourse to, and abide by, the rules and procedures” of the DSU.⁹⁶ Therefore, in order to resolve a trade dispute, members shall have recourse to the WTO’s dispute settlement mechanism, and according to Article 1 of the DSU, it is applicable to all disputes between members unless there is an explicit reference to them in Appendix 2. There is no explicit reference to disputes concerning the national security exception, and thus the contracting parties decided that such disputes should not be treated differently from other disputes under the covered agreements. Moreover, the purpose of Article XXIII of the DSU, as made evident by its title, is the “strengthening of the multilateral system.” If members were able to circumvent the application of the DSU, and all WTO obligations for that matter, by merely invoking the national security exception of GATT Article XXI, the purpose of “strengthening the system” would not be achieved.

⁹⁵ See Raj Bhala, *National Security and International Trade Law: What the GATT Says, and What the United States Does*, 19 U. Pa. J. Int’l Econ. L. 263, 279 (1998); Schloemann & Ohlhoff, at 439; Reiterer, at 210; Lindsay, at 1294.

⁹⁶ Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 23(1), in FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, MARRAKESH, 15 Apr. 1994 (1994), *reprinted in* 33 I.L.M. 1144, 1226.

CONCLUSION

The Japan Steel Associations respectfully request that the Commerce Department fully consider these comments when undertaking its Section 232 investigation and rendering its Section 232 determination.

Respectfully submitted,

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