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### The Turn to Safeguard Measures in the Solar Trade War

#### Henok Asmelash\*

The growing energy security and climate change concerns have created a huge demand and global market for renewable energy technologies such as solar panels. The race to capture a share of this lucrative global market and other political economy considerations have inspired a trade war. Much of this war has been fought with and against green industrial policy measures such as subsidies tied to local content requirements (LCRs) and trade remedy instruments such as antidumping and countervailing duties. Safeguard measures are the latest additions to the armoury of trade defence measures in this burgeoning trade war. This article examines the dynamics behind and the implications of the turn to renewable energy safeguards for the global effort to accelerate the development and deployment of renewable energy technologies in light of the recent World Trade Organization (WTO) Panel report on US – Safeguard Measure on PV Products. The article makes three interrelated arguments. First, the WTO jurisprudence on renewable energy support measures and rapidly evolving global value chains in renewable energy technologies helped spur the turn to safeguard measures (SGMs). Second, the seal of approval from the Panel will drive interest in the use of renewable energy safeguards. Third, the increased and unfettered use of safeguard measures is detrimental to the transition towards sustainable energy sources.

Keywords: Safeguards, Solar Panels: Renewable Energy, Trade War, DS562, Trade and Environment

#### 1 INTRODUCTION

On 2 September 2021, the WTO Panel issued its report in US – Safeguard Measure on PV Products.<sup>1</sup> This is the latest in the long line of trade disputes over governmental measures in the renewable energy sector.<sup>2</sup> At the heart of the dispute is a maiden renewable energy safeguard measure that seeks to protect domestic industries from a surge in imports. The United States imposed the safeguard measure on imports of crystalline silicon photovoltaic cells ('CSPV products') at the height of

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<sup>1</sup> Panel Report, United States – Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products

<sup>(</sup>US – Safeguard Measure on PV Products) WT/DS562/R, circulated 2 Sep. 2021.

<sup>&</sup>lt;sup>2</sup> For an overview of the jurisprudence, see Henok Asmelash, Ten Years of WTO Jurisprudence on Renewable Energy Support Measures: Has the Dust Settled Yet?, 21 World Trade Review 1 (2022).

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the US-China trade war in 2018.<sup>3</sup> This led South Korea and China to file a formal WTO complaint almost instantly and a number of other WTO Members to request consultations with the US under Article 12.3 of the Agreement on Safeguards (ASG).<sup>4</sup> Three Canadian firms filed a suit before US domestic courts contesting the legality of the safeguard measure under domestic law and the then North American Free Trade Agreement (NAFTA).<sup>5</sup> India also followed suit by imposing its own safeguard measure on solar cells and modules in July 2018.6 Malavsia and Taiwan quickly reacted to the Indian renewable energy safeguard measure by requesting consultations with India under ASG Article 12.3.<sup>7</sup> These developments mark the emergence of safeguard measures (SGMs) in the global trade war over renewable energy technologies that shows no sign of abating. The growing energy security and climate change concerns have created a huge demand and global market for renewable energy technologies such as solar panels. The race to capture a share of this lucrative global market and other political economy considerations have inspired an international trade war.<sup>8</sup> Much of this war was previously fought with and against green industrial policy measures such as subsidies tied to local content requirements (LCRs) and trade remedy instruments. SGMs are the latest additions to the armoury of trade defence measures in this burgeoning trade war.

This article examines the dynamics behind and the implications of the turn to renewable energy SGMs for the global effort to accelerate the development and deployment of renewable energy technologies in light of the Panel report in US - Safeguard Measure on PV Products. This dispute SGMs represents the first

<sup>&</sup>lt;sup>3</sup> See Proclamation No. 9693, 83 Fed. Reg. 3541 (25 Jan. 2018).

<sup>&</sup>lt;sup>4</sup> See WTO, United States – Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products, Request for Consultations by the Republic of South Korea, WT/DS545/1 G/L/1234 G/SG/D51/1 (2018); WTO, United States – Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products, Request for Consultations by China, WT/DS562/1, G/L/1257, G/SG/D60/1 (2018) Additional eight WTO Members (namely, Taiwan, the European Union, Singapore, Japan, Philippines, Malaysia, Vie Nam and Thailand) also requested consultations with the United States under Art. 12.3 of the Agreement on Safeguards.

See Ana Swanson, Trump Trade Measures Set Off a Global Legal Pushback, The New York Times (9 Feb. 2018), https://www.nytimes.com/2018/02/09/us/politics/trump-trade.html (accessed 28 Oct. 2021).
See US – Safeguard Measure on PV Products, supra n. 1; WTO, Notification Under Article 12.1(a) of the

Agreement on Safeguard on Initiation of an Investigation and the Reason for It, G/SG/N/6/IND/44 (2018).

<sup>&</sup>lt;sup>7</sup> See WTO, Imposition of a Safeguard Measure by India on Imports of Solar Cells Whether or Not Assembled in Modules or Panels: Request for Consultations under Article 12.3 of the Agreement on Safeguards by Malaysia, G/SG/188 (2018); WTO, Imposition of a Safeguard Measure by India on Imports of Solar Cells Whether or Not Assembled in Modules or Panels: Request for Consultations Under Article 12.3 of the Agreement on Safeguards by Taiwan, G/SG/189 (2018).

<sup>&</sup>lt;sup>8</sup> See Joanna Lewis, The Rise of Renewable Energy Protectionism: Emerging Trade Conflicts and Implications for Low Carbon Development, 14 Global Envtl. Pol. 10 (2014); Mark Wu & James Salzman, The Next Generation of Trade and Environmental Conflicts: The Rise of Green Industrial Policy, 108 Nw. U. L. Rev. 401 (2014); Robert Y Shum, The Coming Solar Trade War: Obstacles to Decarbonization from a Political-Economy Conflict, 30 Electricity J. 49 (2017).

government measure for the protection of domestic renewable energy equipment industry to pass WTO scrutiny. WTO Panels and the Appellate Body found the challenged renewable energy support measures in all the previous renewable energy disputes inconsistent with WTO law.<sup>9</sup> These findings and their environmental implications have been the subject of considerable attention in the trade and environment scholarship.<sup>10</sup> SGMs received little attention so far due to their past absence from the policy toolkit for the promotion and protection of renewable energy equipment manufacturing.

The recent adoption of renewable energy SGMs in the US and India have already started to draw some attention and the Panel report in US - Safeguard *Measure on PV Products* will only serve to attract more interest towards renewable energy SGMs.<sup>11</sup> This article seeks to contribute to the emerging trade and environment scholarship on renewable energy SGMs and their implications for the climate change and energy security driven transition towards renewable energy sources. Having closely examined the emergence of renewable energy SGMs and the findings of the Panel report on US - Safeguard *Measure on PV Products* in the context of the regulation of SGMs, the WTO jurisprudence on renewable energy support measures and the urgent need to accelerate the sustainable energy transition, the article makes three interrelated arguments. First, WTO jurisprudence on renewable energy support measures and rapidly evolving global value chains helped spur the turn to SGMs. Second, the seal of approval from the Panel will serve to drive interest in the use of renewable energy SGMs. Third, the increased use of renewable energy SGMs is detrimental to the sustainable energy transition.

The article is structured in five sections. Section 2 examines the driving forces behind the rise of renewable energy SGMs. Section 3 investigates the legality of renewable energy SGMs. This section will consider the WTO disciplines on SGMs and the findings of the Panel in *US* – *Safeguard Measure on PV Products*. Section 4

<sup>&</sup>lt;sup>9</sup> Asmelash, *supra* n. 2.

<sup>&</sup>lt;sup>10</sup> Henok Asmelash, Energy Subsidies and WTO Dispute Settlement: Why Only Renewable Energy Subsidies are Challenged, 18 J. Int'l Econ. L. 261 (2015); Kati Kulovesi, International Trade Disputes on Renewable Energy: Testing Ground for the Mutual Supportiveness of WTO Law and Climate Change Law, 23 Rev. Eur., Comp. & Int'l Envtl. L. 342 (2014); Luca Rubini, 'Ain't Wastin' Time No More: Subsidies for Renewable Energy, The SCM Agreement, Policy Space, and Law Reform, 15 J. Int'l Econ. L. 525 (2012); Aaron Cosbey & Petros Mavroidis, A Turquoise Mess: Green Subsidies, Blue Industrial Policy and Renewable Energy: The Case for Redrafting the Subsidies Agreement of the WTO, 17 J. Int'l Econ. L. 11 (2014).

See Joshua E. Kurland, Dusting-Off Section 201: Re-Examining a Previously Dormant Trade Remedy, 49 Geo. J. Int'l L. 60 (2017); Arjun Dutt, Manu Aggarwal & Kanika Chawla, What Is the Safeguard Duty Safeguarding? Analysing Impact on Solar Manufacturing and Deployment in India Policy Analysis (Council on Energy, Environment and Water 2019); Mandy Meng Fang, Old Wine in a New Bottle? Green Industrial Policy and the Use of Safeguards in the Solar Sector, 55 J. World Trade 573 (2021).

then examines the implications of the increased use of renewable energy SGMs for the sustainable energy transition. Section 5 concludes the discussion by exploring ways of reversing the turn to renewable energy SGMs.

#### 2 THE RISE OF RENEWABLE ENERGY SAFEGUARDS

The use of SGMs for the protection of domestic renewable energy equipment manufacturers is a recent phenomenon. The trade war over renewable energy technologies has been raging for over a decade, but none of the warring parties resorted to SGMs until 2017. The historical unpopularity of safeguards explains the reluctance of the parties to use safeguards in the past but the reasons for the recent change of heart are not readily apparent.<sup>12</sup>

The academic literature on renewable energy SGMs offers some explanations but they are neither comprehensive nor conclusive. Writing before the circulation of the Panel report in US – *Safeguard Measure on PV Products*, Fang attributed the sudden emergence of renewable energy SGMs to three factors.<sup>13</sup> The first such factor is that unlike the other forms of trade remedies (i.e., antidumping and countervailing duties), the legal requirements for the imposition of SGMs are relatively less burdensome.<sup>14</sup> Fang argued that:

Invoking other two forms of trade remedies [...] is conditioned on a detailed analysis of whether dumping by foreign firms is occurring, or if subsidization by foreign governments exists, which involves extensive solicitation of data from the domestic industry and subsidizing or dumping government. While a safeguard investigation, at least on the face of it, can be more expediently instigated and easier to use.<sup>15</sup>

It is true that antidumping and countervailing duty investigations require establishing the presence of unfair practices (i.e., dumping and subsidies, respectively), which is a complex affair that requires data not always readily available to the investigating authorities.<sup>16</sup> Safeguard investigations, in contrast, do not need to demonstrate the presence of unfair practices. They require only the existence of unexpected increase in imports causing or threatening to cause serious injury to the domestic industry (*see* section 3). However, this does not mean that safeguard investigations are straightforward. Their traditional unpopularity largely stemmed from the difficulty of meeting the legal requirements for their adoption contained in Article XIX of the General Agreement on Tariffs and Trade (GATT) and the

<sup>&</sup>lt;sup>12</sup> Chad P. Bown, Why Are Safeguards Under the WTO So Unpopular?, 1 World Trade Rev. 47 (2002).

<sup>&</sup>lt;sup>13</sup> Fang, *supra* n. 11, at 279–282.

<sup>&</sup>lt;sup>14</sup> *Ibid.*, at 580 et seq.

<sup>&</sup>lt;sup>15</sup> *Ibid.*, at 580.

<sup>&</sup>lt;sup>16</sup> Yong-Shik Lee, Destabilization of the Discipline on Safeguards? Inherent Problems With the Continuing Application of Article XIX After the Settlement of the Agreement on Safeguards, 35 J. World Trade (2001).

ASG.<sup>17</sup> The imposition of SGMs also involves a political process unlike antidumping or countervailing duty measures that are purely bureaucratic.<sup>18</sup> In the US, for example, the imposition of SGMs under section 201 of the Trade Act of 1974 (commonly referred to as *section 201*) is the sole discretion of the US President. It is also clear from the trade remedy jurisprudence that the injury threshold for SGMs is higher than that of the antidumping and countervailing duty measures. Studies on the use of trade remedies in the US have long established that petitions for SGMs have less success rate than petitions for antidumping and this likelihood of success has made the later more popular.<sup>19</sup> This is even though SGMs tend to offer more protection than antidumping duties for import-competing domestic industries. Moreover, even if SGMs were more expeditious than the other trade defence instruments, this alone does not explain their belated emergence given their availability from the onset of the solar trade war.

Fang added that the two countries that have so far resorted to renewable energy SGMs are frequent users of SGMs with the necessary experience.<sup>20</sup> However, the recent trend in the use of SGMs suggests that experience plays limited role. Kim and Ahn have shown that the strict interpretation of the legal requirements has put off the traditional users of SGMs.<sup>21</sup> In contrast, the last few years have seen the increased use of SGMs by developing countries with 'little experience and capacity to manage trade remedy processes'.<sup>22</sup> It is also worth noting that the US has not used SGMs for most part of the two decades before the initiation of the safeguard investigations against CSPV products in 2017.<sup>23</sup> SGMs fell out of favour in the US as trade remedies following the consistent WTO rulings against such measures in the early 2000s.

Fang's second explanation for the sudden emergence of renewable energy SGMs is that unlike antidumping and countervailing duties, which are by default country-specific, SGMs offer protection against imports from everywhere.<sup>24</sup> The ASG requires SGMs to be applied on a non-discriminatory basis.<sup>25</sup> The multilateral nature of SGMs is particularly useful in overcoming the challenges of

Alan O. Sykes, The Safeguards Mess: A Critique of WTO Jurisprudence, 2 World Trade Rev. 261 (2003).
See Ben Zissimos & Jan Wouters, US-Shrimp II (Vietnam): Dubious Application of Anti-Dumping Duties – Should Have Used Safeguards, 16 World Trade Rev. 183, at 185 (2017).

<sup>&</sup>lt;sup>19</sup> See Wendy L. Hansen & Thomas J. Prusa, *The Road Most Taken: The Rise of Title VII Protection*, 18 World Econ. 295 (1995).

<sup>&</sup>lt;sup>20</sup> Fang, *supra* n. 11.

<sup>&</sup>lt;sup>21</sup> Hyerim Kim & Dukgeun Ahn, Judicial Conflicts Between Panels and the Appellate Body in the WTO Safeguard Jurisprudence, 54 J. World Trade (2020).

<sup>&</sup>lt;sup>22</sup> *Ibid.*, at 980.

 <sup>&</sup>lt;sup>23</sup> Kurland, *supra* n. 11. The EU also underlined this point noting that the US 'was not a traditional user of SG'. See WTO, *Minutes of the Regular Meeting Held on 28 Apr. 2018*, G/SG/M/53 (2018), para. 60.
<sup>24</sup> Fang, *supra* n. 11, at 581.

<sup>&</sup>lt;sup>25</sup> Article 2.2, Agreement on Safeguard (signed 15 Apr. 1994, entered into force 1 Jan. 1995) 1869 U.N. T.S. 154 (ASG).

circumvention that undermines the effectiveness of antidumping and countervailing measures. It is also worth noting that the US domestic industry that petitioned for the safeguard investigations against CSPV products previously petitioned for and obtained trade remedy relief through antidumping and countervailing measures against imports of solar products from China and Taiwan. Their decision to seek SGMs indicates that they found antidumping and countervailing measures inefficient in contrast to the global reach of SGMs to cope with the stiff competition from imports.<sup>26</sup> The dynamic nature of global value chains means that foreign manufacturers and importers could easily circumvent antidumping and countervailing duties by moving their supply chains to other countries.

The non-discriminatory aspect also makes SGMs more efficient than the country-specific trade remedies.<sup>27</sup> However, the rules on compensation and the opportunity to manage trade (e.g., through voluntary price undertakings) has historically made antidumping measures more appealing to WTO Members than the relative economic efficiency of multilateral SGMs.<sup>28</sup> More importantly, given that the rules on SGMs remain unchanged since the start of the solar trade war, their multilateral character is insufficient to explain the reluctance of WTO Members to resort to renewable energy SGMs in the past and their sudden change of heart.

The third explanation is the unsettled nature of the jurisprudence on renewable energy SGMs. The gist of the argument here is that unlike other green industrial policies such as LCRs, the jurisprudence on solar SGMs remains uncertain and the uncertainty prompted governments to introduce renewable energy SGMs.<sup>29</sup> This argument offers a better explanation of the belated emergence of renewable energy SGMs in the solar trade war, but it needs refining. To be sure, SGMs have been the subject of several trade disputes. As of October 2021, sixtytwo cases have been filled involving one or another provision of the ASG.<sup>30</sup> Twelve of these cases went at least to the Panel stage and seven reached the Appellate Body, yet considerable uncertainty and confusion persists over the legal requirements for adopting a WTO-consistent safeguard measure (*see* section 3).

<sup>&</sup>lt;sup>26</sup> Kurland, *supra* n. 11, at 611.

<sup>&</sup>lt;sup>27</sup> The efficiency stems from the fact that multilateral safeguards do not lead to trade diversion (i.e., imports switching to high cost but untargeted origins). See Zissimos & Wouters, supra n. 18, at 185; Bown, supra n. 12, at 50.

<sup>&</sup>lt;sup>28</sup> The Agreement on Safeguards (see Art. 11.1[b]) prohibits the use of Voluntary Export Restraints (VERs), while the Agreement on Antidumping allows voluntary price undertakings (see Art. 8.1). See Bown, supra n. 12.

<sup>&</sup>lt;sup>29</sup> Fang, *supra* n. 11, at 581–582.

<sup>&</sup>lt;sup>30</sup> WTO, Dispute Settlement – Index of Disputes by Agreement Cited, https://www.wto.org/english/tratop\_ e/dispu\_e/dispu\_agreements\_index\_e.htm (accessed 8 Oct. 2021). Not all safeguards lead to formal disputes. WTO Members reported 400 safeguard initiations between Jan. 1995 and Dec. 2020. See WTO, Safeguard Investigations by Reporting Member: 1995–2020, https://www.wto.org/english/tratop\_ e/safeg\_e/SG\_InitiationsByRepMember.pdf (accessed 8 Oct. 2021).

The WTO jurisprudence on SGMs has been the subject of serious criticism in the academic literature.<sup>31</sup> Kim and Ahn have also found a fundamental difference between WTO Panels and the Appellate Body in the interpretation of the WTO disciplines on safeguards.<sup>32</sup> WTO Panels tend to be more deferential to the findings of the national safeguard investigating authorities than the Appellate Body. The most prominent critique of the safeguard jurisprudence, Alan Sykes, argued that the Appellate Body created through 'a series of dubious and unhelpful rulings' a situation in which WTO Members 'cannot use safeguards without facing a near certainty that they will be found invalid'.<sup>33</sup> The fact that the turn to renewable energy SGMs and the demise of the Appellate Body occurred almost in tandem seem to indicate more than mere coincidence. The US and India knew too well that their SGMs stand a better chance of passing WTO scrutiny in the absence of the Appellate Body. However, this is not the whole story. The legal uncertainty might have pulled them towards SGMs, but it did not drive them all the way there on its own.

The turn to renewable energy SGMs took place against the backdrop of two important developments in international trade and renewable energy subsidy governance. These key developments are the evolution of the WTO jurisprudence on renewable energy support measures and the presidency of Donald Trump in the US. The legal dimension of the solar trade war began with Canada - Renewable *Energy/FIT* in 2010.<sup>34</sup> In this first WTO dispute over renewable energy support measures, Japan and the EU challenged the LCRs attached to the Feed-in Tariff (FIT) program of the Canadian Province of Ontario under GATT Article III, Article 2.1 of the Agreement on Trade-related Investment Measures (TRIMs) and Article 3.1(b) of the Agreement on Subsidies and Countervailing Measures (SCM). The Appellate Body found the LCRs to be inconsistent with GATT Article III:4 (and hence with TRIMs Article 2.1) for treating domestic renewable energy generation equipment more favourably than imported ones.35 Canada's only defence in this dispute was that its FIT program constituted a government procurement under GATT Article III:8(a) and hence exempted from the obligations under GATT Article III. The Appellate Body rejected this argument noting that the government procurement derogation applies only to the extent that the procured and less favourably treated products are the same products.<sup>36</sup> What

<sup>&</sup>lt;sup>31</sup> See Sykes, supra n. 17.

 $<sup>^{32}</sup>$  Kim & Ahn, supra n. 21.

<sup>&</sup>lt;sup>33</sup> Sykes, *supra* n. 17.

<sup>&</sup>lt;sup>34</sup> Appellate Body Reports, Canada – Certain Measures Affecting the Renewable Energy Generation Sector (Canada-Renewable Energy)/ Canada – Measures Relating to the Feed-in Tariff Program (Canada- Feed-In Tariff Program), WT/DS412/AB/R, WT/DS426/AB/R, Adopted 24 May 2013.

<sup>&</sup>lt;sup>35</sup> *Ibid.*, para. 5.85.

<sup>&</sup>lt;sup>36</sup> *Ibid.*, para. 5.75.

Canada procured under its FITs program was renewable energy; while what it discriminated against were renewable energy generation equipment. The Appellate Body also considered the claims under the Agreement on Subsidies and Countervailing Measures (ASCM) but failed to complete its analysis due to the insufficiency of facts on the record to determine whether the FIT program constituted a 'subsidy' within the meaning of Article 1 of the ASCM.

The initiation of this dispute and the findings of the Appellate Body prompted a spate of tit-for-tat trade disputes over similar renewable energy support measures (i.e., FITs with LCRs).<sup>37</sup> In the last two of such disputes that went at least to the Panel stage (i.e., India - Solar Cells and US - Renewable Energy), the Appellate Body and WTO Panels once again found the discriminatory aspects of the challenged renewable energy LCRs inconsistent with GATT Article III:4 and TRIMs Article 2.1.<sup>38</sup> In India – Solar Cells, India unsuccessfully tried to justify its renewable energy LCRs under GATT Article XX(d) and (j), while the US invoked no defence whatsoever in US - Renewable Energy to justify its LCRs. The findings in these disputes have made it abundantly clear that green industrial policies such as renewable energy LCRs stand little chance if any of passing WTO scrutiny.<sup>39</sup> It is no coincidence then that the two countries that introduced renewable energy SGMs (i.e., India and the US) were the very parties to the last two WTO disputes involving renewable energy LCRs. The near impossibility of adopting WTO-consistent LCRs seem to have forced them to resort to SGMs to protect/promote their renewable energy generation equipment manufacturers.

It is also important to note here that the turn to SGMs took place during the presidency of Donald Trump and his Administration's preference for power-based over rule-based international trade relations.<sup>40</sup> Renewable energy technologies were one but not the only imports to the US that faced SGMs during the Trump administration.<sup>41</sup> The administration imposed SGMs on large residential washers concurrently with the SGMs on CSPV products.<sup>42</sup> It also introduced additional import duties and quantitative restrictions on steel and aluminium products in a blatant disregard for multilateral trade rules.<sup>43</sup> As can be seen from

<sup>&</sup>lt;sup>37</sup> For a comprehensive of the WTO jurisprudence on renewable energy support measures, *see* Asmelash, *supra* n. 2.

 <sup>&</sup>lt;sup>38</sup> See Appellate Body Report, India – Certain Measures Relating to Solar Cells and Solar Modules (India – Solar Cells), WT/DS456/AB/R, Adopted 14 Oct. 2016; Panel Report, United States – Certain Measures Relating to the Renewable Energy Sector (US – Renewable Energy) WT/DS510/R, Circulated 27 Jun. 2019.
<sup>39</sup> Averable Construction of the Renewable Sector (US – Renewable Energy) WT/DS510/R, Circulated 27 Jun. 2019.

<sup>&</sup>lt;sup>39</sup> Asmelash, *supra* n. 2.

<sup>&</sup>lt;sup>40</sup> See Rachel Brewster, The Trump Administration and the Future of the WTO, 44 Yale J. Int'l L. 1 (2018).

<sup>&</sup>lt;sup>41</sup> Kurland, *supra* n. 11.

<sup>&</sup>lt;sup>42</sup> See Proclamation No. 9694, 83 Fed. Reg. 3553 (25 Jan. 2018).

<sup>&</sup>lt;sup>43</sup> These measures are now the subject of multiple WTO disputes. See Yong-Shik Lee, Three Wrongs Do Not Make a Right: The Conundrum of the US Steel and Aluminum Tariffs, 18 World Trade Rev. 481 (2019).

*figure 1* below, the rise in trade disputes over SGMs during the presidency of Donal Trump further illustrates the role his administration played in the turn to renewable energy SGMs.





India's reaction suggests that the resort to SGMs by the US may have opened the floodgates. Four major considerations suggest that more WTO Members may take the safeguard path to green protectionism. First, the absence of the Appellate Body that staunchly fought against the potential abuse of SGMs. Second, the limitations of the traditional trade remedy measures as effective tools for green protectionism. Third, the WTO jurisprudence that rendered the adoption of WTO-consistent green industrial policy such as LCRs virtually impossible. Fourth, the affirmative findings of the Panel in US - Safeguard Measure on PV Products (see section 3.2). Section 3 below considers the legality of renewable energy SGMs under WTO law.

#### 3 THE LEGALITY OF RENEWABLE ENERGY SAFEGUARDS

The potential spread of renewable energy SGMs heavily depends on their legality under WTO law. I noted earlier that the strict interpretation of the WTO rules on safeguards historically discouraged WTO Members from routinely resorting to SGMs to protect their fragile domestic industries. This section examines these rules and their application to renewable energy SGMs in three parts. Section 3.1 provides a brief overview of the rules governing SGMs. Section 3.2 considers how

Source: compiled by the author

the Panel in US - Safeguard Measure on PV Products applied these rules to renewable energy SGMs. Section 3.3 reflects on some of the key points from the Panel report.

#### 3.1 WTO disciplines on safeguards

SGMs offer temporary protection to domestic industries struggling to compete with imports. They are trade protectionist measures that run counter to the trade liberalization agenda of the multilateral trading system. To be sure, the WTO has several exceptions that authorize the use of trade restrictive measures to address unfair trade practices (e.g., dumping and subsidies) or public policy goals (e.g., environment). However, SGMs are not responses to any particular unfair trade practice or public policy goal. They offer protection for import-competing domestic industries when the going gets tough. The free trade doctrine that underpins the WTO rejects such measures as inefficient given that they delay the exit of industries lacking comparative advantage.<sup>44</sup> SGMs also lead to higher domestic prices to the detriment of final consumers and thereby reducing the gains from international trade. These considerations have long raised questions as to why a liberal trading system authorizes the use of SGMs.

The literature provides different justifications for SGMs.<sup>45</sup> The most common of these relates to the role of SGMs in facilitating trade negotiations.<sup>46</sup> Sykes argued that SGMs provide 'important political cover to trade negotiators, who will be more reluctant to make trade concessions unless SGMs or some reasonably close substitute are available'.<sup>47</sup> The reluctance stems from the understanding that the economic environment is vulnerable to sudden and unexpected changes that are not always foreseeable. Governments are less likely to make trade concessions in the absence of an 'escape clause' that allows them to at least temporarily renege on their commitments to mitigate the adverse effects of the unexpected surge in imports.<sup>48</sup> From this contractarian standpoint, the presence of safeguard clauses

<sup>&</sup>lt;sup>44</sup> Sykes, *supra* n. 17.

<sup>&</sup>lt;sup>45</sup> For a critical assessment of the arguments for safeguards, *see ibid.*; Chad P. Bown & Meredith A. Crowley, *Safeguards*, in *The World Trade Organization: Legal, Economic and Political Analysis* (Patrick F. J. Macrory, Arthur E. Appleton & Michael G. Plummer eds, Springer 2005).

<sup>&</sup>lt;sup>46</sup> This is a popular justification for the authorization of safeguards in the legal literature, see Sykes, supra n. 17, at 288 et seq; Arevik Gnutzmann-Mkrtchyan & Simon Lester, Does Safeguards Need Saving? Lessons from the Ukraine-Passenger Cars Dispute, 16 World Trade Rev. 227 (2017); Kim & Ahn, supra n. 21; Jan Tumlir, A Revised Safeguard Clause for GATT?, 7 J. World Trade 404 (1973); Alasdair I. MacBean, How to Repair the 'Safety Net' of the International Trading System, 1 World Econ. 149 (1978).

<sup>&</sup>lt;sup>47</sup> Sykes, *supra* n. 17.

<sup>&</sup>lt;sup>48</sup> Patrizio Merciai, Safeguard Measures in GATT, 15 J. World Trade 41 (1981); Meredith A. Crowley, Why Are Safeguards Needed in a Trade Agreement; (Federal Reserve Bank of Chicago 2007) WP 2006– 06.

encourage governments to enter into binding trade agreements.<sup>49</sup> However, this political economy rationale does not justify a cavalier resort to SGMs. This is apparent from the temporary nature and the legal requirements for the adoption of WTO-consistent SGMs.

These requirements were originally embodied in GATT Article XIX, but they have since been clarified and reinforced by the ASG.<sup>50</sup> The Appellate Body clarified in *Korea – Diary Products* that both instruments apply cumulatively.<sup>51</sup> GATT Article XIX:1 (a) provides that a WTO Member may apply a safeguard measure if any product is being imported into its territory in such increased quantity 'as a result of unforeseen developments' and 'of the effect of the obligations incurred' and causes or threatens to cause serious injury to its domestic industry.<sup>52</sup> The ASG makes no reference to the 'unforeseen development' and 'obligations incurred' requirements of GATT Article XIX, but reiterates that a Member may apply a safeguard measure only if it has determined that the increased imports have caused or threatened to cause serious injury to its domestic industry.<sup>53</sup> The absence of the 'unforeseen developments' and 'obligations incurred' requirements' and 'obligations incurred' requirements apply a safeguard measure only if it has determined that the increased imports have caused or threatened to cause serious injury to its domestic industry.<sup>53</sup> The absence of the 'unforeseen developments' and 'obligations incurred' requirements from the ASG has been the subject of a huge controversy and discrepancy between WTO Panels and the Appellate Body.<sup>54</sup> The Panel in *Korea – Diary*, for example, found that formal compliance with the GATT requirements was no longer required, but the Appellate Body reversed this finding based on a textual interpretation.

Establishing the consistency of a safeguard measure with WTO law, therefore, requires demonstrating the existence of 'increased imports', 'unforeseen developments', 'obligations incurred', and 'serious injury'. It also requires demonstrating the existence of a 'causal link' between the increased imports and the unforeseen developments and obligations incurred, on the one hand, and between the increased imports and the serious injury, on the other. These requirements help ensure that SGMs remain a special procedure for exceptional situation. However, neither the GATT nor the ASG define these requirements.<sup>55</sup> The lack of definition coupled with their stringent interpretation by the Appellate Body made the adoption of WTO-consistent SGMs historically difficult. Section 3.2 considers the application of these requirements to renewable energy SGMs in US - Safeguard Measure on PV Products.

<sup>&</sup>lt;sup>49</sup> Sykes, *supra* n. 17.

<sup>&</sup>lt;sup>50</sup> ASG.

<sup>&</sup>lt;sup>51</sup> On the cumulative application of GATT Art. XIX and the Agreement on Safeguards, *see* Lee, *supra* n. 16.

<sup>&</sup>lt;sup>52</sup> General Agreement on Tariffs and Trade 1994 (adopted 15 Apr. 1994, entered into force 1 Jan. 1995) Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 190 (GATT 1994).

<sup>&</sup>lt;sup>53</sup> Article 2.1, ASG.

<sup>&</sup>lt;sup>54</sup> See Kim & Ahn, supra n. 21, at 962.

<sup>&</sup>lt;sup>55</sup> On the lack of clarity and precision in these requirements, *see* MacBean, *supra* n. 46, at 155 et seq.

#### 3.2 US – safeguard measure on PV products

#### 3.2[a] Background to the Dispute

Having launched a safeguard investigation in response to a petition by two domestic solar cells manufacturers, the United States International Trade Commission (USITC) unanimously determined in November 2017 that the CSPV products 'were being imported into the US in such increased quantities as to be a substantial cause of serious injury to the domestic industry'.<sup>56</sup> The US Trade Representative (USTR) subsequently requested additional information from the USITC, including the identification of any 'unforeseen developments' that led to the increased imports.<sup>57</sup> The USITC then issued a 'supplemental report' in December 2017 identifying several 'unforeseen developments' that resulted in the increased imports of CSPV products.<sup>58</sup> Upon the receipt of the supplemental report, the US President imposed SGMs on CSPV imports from all countries in January 2018.<sup>59</sup> The SGMs on CSPV products took the form of tariff-rate quota and *ad valorem* duties for a period of four years.

On 14 August 2018, China requested consultations with the US alleging that the SGMs were inconsistent with Article XIX:1(a) of the GATT and ASG Articles 2.1, 3, and 4.2(b).<sup>60</sup> Its claims were fourfold. First, the US acted inconsistently with GATT Article XIX:1(a) by failing to establish that the increased imports were the result of 'unforeseen developments' and the 'effect of obligations incurred' by the US. Second, the US acted inconsistently with ASG Articles 2.1, 3.1 and 4.2(b) by failing to establish the existence of a 'causal link' between the increased imports and the serious injury to the domestic industry. Third, the US acted inconsistently with ASG Articles 2.1, 3.1, and 4.2(b) by failing to ensure that injury caused by 'other factors' was not attributed to increased imports. Fourth, the US acted inconsistently with ASG Articles 3.1 and 3.2 by failing to provide a timely and sufficient 'non-confidential summaries' to interested parties. The US rejected all the claims and maintained that its SGMs are consistent with its obligations under the GATT and the ASG.

#### 3.2[b] The Findings of the Panel

The Panel rejected all of China's claims and concluded that the US was not in breach of its obligations under the GATT and the ASG. We will briefly discuss the findings of the Panel with respect to each of China's four key claims below.

<sup>&</sup>lt;sup>56</sup> Paragraph 2.2, US – Safeguard Measure on PV Products, supra n. 1.

<sup>&</sup>lt;sup>57</sup> WTO, Notification Under Article 12.1(b) of the Agreement on Safeguards on Finding a Serious Injury or Threat Thereof Caused by Increased Imports: United States, G/SG/N/8/USA/9/Suppl.2 (2017).

 <sup>&</sup>lt;sup>58</sup> See USITC, Supplemental Report of the U.S. International Trade Commission Regarding Unforeseen Developments (United States International Trade Court 2017).
<sup>59</sup> See Developments (United States International Trade Court 2017).

<sup>&</sup>lt;sup>59</sup> See Proclamation No. 9693, 83 Fed. Reg. 3541 (25 Jan. 2018).

<sup>&</sup>lt;sup>60</sup> US – Safeguard Measure on PV Products, supra n. 1.

#### 3.2[b][i] Unforeseen Developments

The first disagreement between the parties was whether imports of CSPV products increased 'as a result of unforeseen developments' and 'of the effect of the obligations incurred' within the meaning of GATT Article XIX:1(a). The Panel started its analysis by recalling that Article XIX:1(a) contains three elements.<sup>61</sup> First, the existence of 'unforeseen developments'. Second, imports increased 'as a result of these unforeseen developments'. Third, imports increased 'as a result of the effect of the obligations incurred'. The USITC supplemental report found that the US GATT/WTO negotiators could not have foreseen the series of events that culminated in CSPV products being imported into the US in such increased quantities. The identified unforeseen developments include the adoption of industrial policies, plans and programs (hereinafter 'renewable energy support measures'), the effect of such measures on Chinese CSPV products manufacturing and export capacity, and the ineffectiveness of antidumping and countervailing duty measures to counter the resultant changes in the global supply chains and manufacturing processes.<sup>62</sup> China argued that the USITC failed to demonstrate why the identified events were unforeseen given it is normal that countries would seek economic development and energy security. It also insisted that the USITC failed to establish why it was 'completely unforeseen' that the imposition of antidumping and countervailing duties on imports from China would lead to imports from other countries. The US maintained that the USITC appropriately established that 'what was unforeseen was the scale of the effort, the speed with which it boosted Chinese production, the overcapacity that it created, and the degree to which these effects spilled into other countries where Chinese producers expanded their operations'.<sup>63</sup> The Panel agreed with the US that the USITC 'appropriately identified' developments that could not have been foreseen by the US.<sup>64</sup> It also rejected China's argument that the US negotiators could have foreseen the ineffectiveness of antidumping and countervailing duties and concluded that China failed to establish that the USTIC failed to 'appropriately identify' 'unforeseen developments' under GATT Article XI:1(a).

Turning to the question whether the increased importation of CSPV products was the result of these unforeseen developments, the Panel found that the USITC sufficiently established that China's renewable energy support measures led to increased production capacity that exceed domestic consumption in China and contributed to the increased imports. It further noted that the lack of direct

<sup>&</sup>lt;sup>61</sup> See ibid., paras 7.14–7.17.

<sup>&</sup>lt;sup>62</sup> *Ibid.*, para. 7.21.

<sup>&</sup>lt;sup>63</sup> *Ibid.*, para. 7.24.

<sup>&</sup>lt;sup>64</sup> *Ibid.*, para. 7.26.

connection between China's renewable energy support measures and increased capacity and production in third countries does not undermine the linkage the USITC established between the unforeseen developments and increased imports from China.<sup>65</sup> It then went onto dismiss China's allegation that the USITC was wrong to infer that Chinese-affiliated CSPV producers in third countries contributed to the increase in US imports. The Panel found the fact that the Chinese affiliated companies significantly increased their production capacity in third countries in the same years when imports from those countries into the US significantly increased as a sufficient evidence to establish the existence of a meaningful connection between the two. The Panel, therefore, concluded that the USITC appropriately demonstrated that the increased imports of CSPV products was the result of the unforeseen developments.

The Panel also rejected China's argument that the USITC failed to identify the specific obligations that the US incurred and how such obligations resulted in increased imports.<sup>66</sup> The USITC supplemental report identified that the CSPV products were contained in its Harmonized Tariff Schedule and had been free of duty since at least 1987. China contented that the duty-free treatment of CSPV products since at least 1987 is neither a 'commitment' nor a 'tariff concession' within the meaning of GATT Article II.<sup>67</sup> The Panel found that although the USITC could have been clearer, it has established that the US' duty-free treatment was related to its WTO obligations. Having rejected all other arguments of China, the Panel concluded that the USICT has appropriately demonstrated that imports of CSPV products increased 'as a result ... of the effect of the obligations incurred' by the US.

#### 3.2[b][ii] A Causal Link Between Increased Imports and Serious Injury

The parties also disagreed over the existence of a causal link between increased imports and serious injury to the domestic industry. ASG Articles 4.2(a) and 4.2(b) enjoin the USITC to determine whether increased imports are causing, or threatening to cause, serious injury to the domestic industry.<sup>68</sup> The USITC must also consider whether 'factors other than increased imports are causing injury to the domestic industry at the same time' as increased imports and ensure that the injury caused by those factors is not 'attributed to increased imports'.<sup>69</sup> The Panel noted that the absence of specific methodology for establishing such a causal link under

<sup>&</sup>lt;sup>65</sup> *Ibid.*, para. 7.38.

<sup>&</sup>lt;sup>66</sup> *Ibid.*, para. 7.48.

<sup>&</sup>lt;sup>67</sup> *Ibid.*, paras 7.555 & 7.56.

<sup>&</sup>lt;sup>68</sup> *Ibid.*, para. 7.73.

<sup>&</sup>lt;sup>69</sup> Ibid.

these provisions allows the USITC to use any methodology to establish the existence of 'sufficiently clear' contribution by those imports.<sup>70</sup> However, increased imports do not need to be the sole cause of injury.<sup>71</sup> A causal link may still exists even when other factors are also contributing to the serious injury at the same time.

The USITC determined the existence of a causal link based on a coincidence between increased imports and a variety of injury factors, as well as on the conditions of competition between domestic and imported CSPV products. The Panel noted that what matters in causation analysis based on the coincidence of upward imports and downward injury factors is the 'overall coincidence'. Where such an 'overall coincidence' does not exist, the USICT may still demonstrate the existence of a causal link insofar as it can explain why a causal link nevertheless exists. China argued that the USITC neither established the existence of an 'overall coincidence' nor offered a compelling explanation. Underlying China's argument on 'overall coincidence' was the fact that the USITC itself admitted that certain injury factors improved during the period of investigation. China took the existence of positive injury trends to mean that there was no 'overall coincidence'. The Panel rejected this argument noting that 'the mere presence of positive trends or lack of perfect correlation between increased imports and serious injury trends do not necessarily preclude the existence of an "overall coincidence".<sup>72</sup> It also disagreed with China that in the absence of 'overall coincidence' the USITC was required to provide a 'compelling' explanation to justify the linkage that it found between increased imports and specific injury factors'.<sup>73</sup> The Panel reiterated that the ASG establishes no specific methodology for the causation analysis. Regardless of whether the USITC demonstrated the existence of an overall coincidence or otherwise, what matters is the presence of 'a reasoned and adequate explanation demonstrating a causal link between increased imports and serious injury'. However, in cases where there are multiple injury factors, the explanation demonstrating the existence of the causal link need to 'properly account for any positive injury factors' to be 'reasoned and adequate'.<sup>74</sup>

The Panel then went onto consider whether the USITC appropriately addressed the relevant injury factors and accounted for the prevailing conditions of competition in the US market. China's central argument here was that 'the USITC overstated the importance of negative trends in light of the conditions of competition and thereby failed to provide a "compelling" explanation to justify the

<sup>&</sup>lt;sup>70</sup> *Ibid.*, paras 7.74–7.77.

<sup>&</sup>lt;sup>71</sup> *Ibid.*, para. 7.77.

<sup>&</sup>lt;sup>72</sup> *Ibid.*, para. 7.83.

<sup>&</sup>lt;sup>73</sup> *Ibid.*, para. 7.84.

<sup>&</sup>lt;sup>74</sup> *Ibid.*, para. 7.84.

causal link'.<sup>75</sup> China contended that the injury to domestic industry was resulted not from low-priced imports, but because of market segmentation. It argued that the domestic industry focused on residential and commercial segments of the US market whereas the explosive growth in demand for CSPV products came from the utility segment of the market. The gist of China's argument here was that the domestic industry was simply unable to meet the increased demand. The US disagreed with this argument noting that 'increased imports themselves directly impeded the domestic industry's ability to compete with low-priced imports in the first instance'.<sup>76</sup> It was of the view that 'the USITC properly found that domestic and imported CSPV products competed in the residential, commercial and utility segments and also that domestic and imported CSPV products were "highly substitutable".<sup>77</sup>

The Panel disagreed with China that the market conditions not the increased imports prevented the domestic industry from capitalizing on growth in the domestic market. Given that the USITC found that 'the domestic industry had significant unused capacity', the Panel failed to see 'why the small size of the domestic industry in relation to the overall US market necessarily demonstrates that the domestic industry would have been unaffected by the significant increase in imports that occurred over the [period of investigation]'.<sup>78</sup> The Panel further noted that the USITC did not err in finding that 'domestic and imported CSPV products competed in the residential, commercial, and utility segments and were "highly substitutable"".<sup>79</sup> It also dismissed China's claim that the USITC failed to 'precisely analyse' both the extent to which domestic and imported products competed in the residential and commercial segments, and the role of non-price factors in limiting competition between domestic and imported products.<sup>80</sup> The Panel found that contrary to China's claim, the 'USITC found that a majority of domestic products were sold to residential and commercial segments where a substantial amount of imports were also sold'.<sup>81</sup> On the utility segment, China's argument was that the USITC erroneously focused on "limited instances in competition in the small utility segment", which was not sufficient to support a finding that the domestic industry competed in the utility segment as a whole'.<sup>82</sup> It also claimed that the USITC's analysis of competition in the 'small utility' segment was 'absolutely insufficient' given that the domestic industry was not competitive

- <sup>79</sup> *Ibid.* <sup>80</sup> *Ibid.*, para. 7.95.
- <sup>81</sup> *Ibid.*

<sup>&</sup>lt;sup>75</sup> *Ibid.*, para. 7.86.

<sup>&</sup>lt;sup>76</sup> *Ibid.*, para. 7.90.

<sup>77</sup> Ibid.

<sup>&</sup>lt;sup>78</sup> *Ibid.*, para. 7.91.

<sup>&</sup>lt;sup>82</sup> *Ibid.*, para. 7.96.

even in this part of the market for reasons unrelated to imports.<sup>83</sup> The Panel was not convinced that 'it was inappropriate for the USITC to find that the domestic industry competed in the utility segment'. The USITC indeed found that the majority of imports were shipped into the utility segment, but it also found that domestic CSPV products were sold to utility customers. The Panel also noted that the USITC's conclusion that the domestic industry competed or sought to compete in the utility segment was informed by its finding that the domestic industry had participated in bids in the utility segment and produced CSPV modules typically required for utility installations.<sup>84</sup> The Panel further rejected China's contrary evidence that suggested that the USITC failed to 'properly account for' the domestic industry's smaller size and its alleged inability to supply large-scale projects in the utility segment.<sup>85</sup> Hence, it concluded that the USITC's analysis of conditions of competition was not flawed.

Moreover, the Panel rejected China's argument that the USITC erred in finding that domestic and imported CSPV products were 'highly substitutable'.<sup>86</sup> In arriving at this conclusion, the Panel dismissed each argument China put forward to distinguish between domestic and imported CSPV products and the USITC's failure to account for such distinctions. China also challenged the USITC's attribution of the injury sustained by the domestic industry (i.e., adverse price condition, lost market share, financial deterioration and plant closure) to the increased imports, but the Panel rejected all of China's claims.

The parties also disagreed over the USITC's treatment of seemingly positive serious injury factors (e.g., increases in the domestic industry's capacity, production, and shipments; employment; and capital expenditures, Research and Development (R&D) expenses, and value of production assets). China argued that the fact that the USITC largely dismissed the existence of these factors casts doubt on its finding that increased imports caused serious injury to the domestic industry. The US maintained that first, the USITC considered these factors and second, their existence did not undermine its finding of a causal link. The Panel rejected China's claim that the USITC failed to 'appropriately explain' why increased imports caused serious injury to the domestic industry's increases in its capacity, production, and shipments,<sup>87</sup> the improvements in the domestic industry's capital expenditures, R&D expenses, and value of its production assets.<sup>89</sup>

- <sup>86</sup> *Ibid.*, para. 7.110.
- <sup>87</sup> *Ibid.*, paras 7.169–7.171.

<sup>89</sup> *Ibid.*, paras 7.185–7.188.

<sup>&</sup>lt;sup>83</sup> *Ibid.*, para. 7.96.

<sup>&</sup>lt;sup>84</sup> *Ibid.*, para. 7.98.

<sup>&</sup>lt;sup>85</sup> *Ibid.*, para. 7.99.

<sup>&</sup>lt;sup>88</sup> *Ibid.*, paras 7.177–7.180.

Having rejected all of China's claims regarding the causation analysis, the Panel concluded that the US has not acted inconsistently with ASG Articles 2.1, 3.1 and 4.2(b).

## 3.2[b][iii] Other Factors Allegedly Causing Serious Injury to the Domestic Industry

The parties further disagreed over the USITC's assessment of the injurious effects of factors other than increased imports. China argued that the USITC failed to account for the injurious effects of 'other factors' contrary to the requirements of ASG Article 4.2(b). The 'other factors' that the USITC allegedly failed to properly consider include: the 'missteps by the domestic industry',<sup>90</sup> the domestic industry's quality and product-type issues, the domestic industry's service and delivery issues, changes in the availability of government incentive programs, declining raw material costs and increased production efficiencies, and the need to attain 'grid parity' with other sources of electricity. The Panel considered whether the USITC properly considered the injurious effects of each of these 'other factors' on the domestic industry and found that the USITC 'improperly dismissed' none of these factors.<sup>91</sup> It accordingly rejected China's claim that the US acted inconsistently with ASG Article 4.2(b), second sentence.

#### 3.2[b][iv] Confidential Information

The final issue of disagreement between the parties was whether the USITC failed to comply with the requirements of ASG Article 3. China argued that the USITC acted inconsistency with Article 3 by failing to provide sufficient non-confidential summaries of confidential information to allow interested parties to present a meaningful defence. It claimed that both the procedure and substance of the non-confidential summaries provided by the USITC were inconsistent with Article 3. The Panel found that China's claim was based on incorrect interpretation of Article 3. It noted that 'while the third sentence of Article 3.1 envisages the publication of a report, that report need only contain "findings and reasoned conclusions reached on all pertinent issues of fact and law".<sup>92</sup> There is no requirement to publish a report containing intermediate findings or conclusions. Having found that Article 3 does not require publication of intermediate decisional documents, the Panel rejected China's claim that the timing of the publication of

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 $<sup>^{90}</sup>$   $\,$  For instance, to focus on the commercial and residential segments than on the utility segment of the market.

<sup>&</sup>lt;sup>91</sup> US – Safeguard Measure on PV Products, supra n. 1, paras 7.287–7.289.

<sup>&</sup>lt;sup>92</sup> *Ibid.*, para. 7.308.

the non-confidential versions of the USITC's prehearing injury and remedy reports was inconsistent with the Article 3. It also rejected China's claim that the timing of the publication of the non-confidential versions of the USITC final report and final staff report was inconsistent with Article 3 noting that the second sentence of Article 3.1 requires the USITC to hold public hearings 'or' provide other appropriate means for interested parties to present evidence and views. Since the USITC held public hearings, the Panel found that it 'had no obligation to provide "other appropriate means" for interested parties to provide further input'.<sup>93</sup> The Panel also rejected China's claim that the USITC failed to comply with Article 3 by providing non-confidential summaries that did not permit the interested parties to reasonably present a defence. The Panel was of the view that Article 3 permits but not require the USITC to provide 'non-confidential summaries' of confidential information relied upon in its final report.<sup>94</sup> It also opined that the mere absence of non-confidential summaries does not mean that the USITC failed to 'publish a report "setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law"".95

#### 3.3 Has the panel made safeguards safe?

China filed an appeal against the Panel report on 16 September 2021.<sup>96</sup> It expressed its regret over the demise of the Appellate Body but submitted its notification of appeal in the interest of 'fairness and orderly procedure in the conduct of the appeal'.<sup>97</sup> The notification itself is devoid of any specific points of appeal, but it serves to underline China's disagreement with the Panel report and prevent its adoption. Suspending the adoption of the Panel report enables China to undermine its potential to influence the jurisprudence on renewable energy SGMs. The Appellate Body has long established that past dispute settlement reports have no precedential value, but it has been common practice to refer to past reports under the guise of maintaining consistency and predictability.<sup>98</sup> Panel reports normally carry little weight in this regard, but their influence is set to grow in the absence of the Appellate Body. However, the Appellate body itself has clarified in *Japan – Alcoholic Beverages* that only adopted panel reports 'create legitimate expectations among WTO Members, and, therefore, should be taken into account

<sup>&</sup>lt;sup>93</sup> *Ibid.*, para. 7.309.

<sup>&</sup>lt;sup>94</sup> *Ibid.*, para. 7.316.

 <sup>&</sup>lt;sup>95</sup> Ibid.
<sup>96</sup> Substitution

 <sup>&</sup>lt;sup>96</sup> See WTO, Notification of an Appeal by China: United States – Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products, WT/DS562/12 (2021).
<sup>97</sup> It: J

<sup>97</sup> Ibid.

<sup>&</sup>lt;sup>98</sup> See Appellate Body Report, Japan – Taxes on Alcoholic Beverages (Japan – Alcoholic Beverages II), WT/DS8/ R, WT/DS10/R, WT/DS11/R, Adopted 1 Nov. 1996.

where they are relevant to any dispute'.<sup>99</sup> Perhaps in recognition of this, the Panel in US - Safeguard Measures on PV Products seem to have drawn a distinction between adopted and un-adopted reports by referring to past Appellate Body reports as 'DSB reports'.<sup>100</sup> As such, China's appeal to the void may serve to undermine the jurisprudential value of US - SGMs on PV Products. This is not to say that the appeal will make the Panel report irrelevant.

The role of WTO Panels and the Appellate Body in safeguard and other trade remedy disputes is confined to judicial review. They do not undertake a de novo review, but examine whether the competent national authority complied with the requirements contained in GATT Article XIX and the ASG.<sup>101</sup> The degree of deference they give to the competent national authority determines the outcome of the judicial review. I noted earlier that Panels are historically more deferential to the national authorities than the Appellate Body. As such, the Panel in US - Safeguard Measure on PV Products simply continued this tradition. The difference now is that WTO Panels operate without the Appellate Body hoovering over their heads. Even if the Appellate Body resurrects from the dead in the future, it may not maintain its judicial zeal to apply a standard of review that proven almost impossible to meet. These considerations suggest that the findings of the Panel in US - Safeguard Measures on PV Products may have far-reaching repercussions for the use of renewable energy SGMs. The USITC investigation has set a blueprint for a WTO-consistent renewable energy safeguard measure that can easily be replicated in other jurisdictions. Given China's dominance of the global market for renewable energy technologies, almost all jurisdictions import most of their renewable energy generation equipment from China. This allows them to adapt the USITC investigation into their particular circumstances and impose a safeguard measure.

#### 4 THE ENVIRONMENTAL IMPLICATIONS OF RENEWABLE ENERGY SAFEGUARDS

Understanding the environmental implications of renewable energy SGMs requires understanding the role of renewables in the quest for the climate change and energy security driven transition away from fossil fuels and the policy toolkit available to make the transition happen. Fossil fuels still account for over eighty

<sup>&</sup>lt;sup>99</sup> See ibid., para. 108.

<sup>&</sup>lt;sup>100</sup> See Simon Lester, Some Quick Reactions to the WTO Panel Report on U.S. – Safeguards on Photovoltaic Products (International Economic Law and Policy Blog), https://ielp.worldtradelaw.net/2021/09/ some-quick-reactions-to-the-wto-panel-report-on-us-safeguards-on-photovoltaic-products.html (accessed 27 Sep. 2021).

<sup>&</sup>lt;sup>101</sup> Gnutzmann-Mkrtchyan & Lester, *supra* n. 46.

percent of global energy supply. Besides their finite nature and limitations to meet the growing global demand for energy, they generate two-thirds of global greenhouse gas emissions. Meeting the 1.5 or 2 degree targets of the Paris Agreement is dependent on the rapid deployment of renewable energy technologies.<sup>102</sup> In recognition of the existential need to help accelerate the energy transition, governments around the world have introduced a broad array of legal and policy measures over the last few decades. The most prominent of these measures are subsidies. Almost all countries now have at least one form of renewable energy subsidy in place.<sup>103</sup> These subsidies have been instrumental in promoting the uptake of renewables.<sup>104</sup> However, more of such support measures are necessary for the world to have any chance of avoiding the worst consequences of climate change.

However, the subsidization of renewables takes place neither in a legal nor in a political economy vacuum. First, governments use subsidies not only to combat climate change but also to achieve economic policy goals. Global annual renewable energy investment reached USD 322 billion in 2018.<sup>105</sup> Subsidies are the most popular policy instruments governments use to attract such investment. Second, governments often find it difficult to justify the subsidization of renewables solely on environmental grounds. Governments finance renewable energy subsidies through taxes or by diverting scarce public funds away from other areas. Doing so requires garnering political support from a wide range of stakeholders. Environmental justifications are not always adequate to attain such support. The combination of these economic and political economy considerations has led governments to link renewable energy subsidies with economic growth and job creation. Renewables have grown into major sources of employment. They created 11.8 million jobs worldwide in 2019.106 Subsidies help generate such 'green jobs', but they cannot determine on their own the location of the jobs they help create. This is particularly the case for employment in upstream manufacturing sectors. The demand for renewable energy technologies that subsidies help create is often met by imports from countries that are able to produce such technologies at a lower cost.

These considerations have led governments to look for policy measures that retain the economic benefits of renewable energy subsidies at home. The most popular of these measures has been LCRs. Attaching LCRs to renewable energy

See IEA, Net Zero by 2050 – A Roadmap for the Global Energy Sector (International Energy Agency 2021).
BENDAL RESEARCH AND ALL 2020 CLIENTS (IN ENDAL 2020).

<sup>&</sup>lt;sup>103</sup> See REN21, Renewables 2020 Global Status Report (REN21 2020).

<sup>&</sup>lt;sup>104</sup> See Renewable Energy Sources and Climate Change Mitigation: Special Report of the Intergovernmental Panel on Climate Change (Ottmar Edenhofer et al. eds, Cambridge University Press 2012); Ibid.; Marcella Nicolini & Massimo Tavoni, Are Renewable Energy Subsidies Effective? Evidence from Europe, 74 Renewable & Sust. Energy Rev. 412 (2017).

<sup>&</sup>lt;sup>105</sup> See IRENA and CPI, Global Landscape of Renewable Energy Finance 2020 (IRENA 2020).

<sup>&</sup>lt;sup>106</sup> See IRENA, Renewable Energy and Jobs – Annual Review 2020 (IRENA 2020).

subsidies help governments justify such subsidies both on environmental and economic grounds.<sup>107</sup> However, LCRs have been the subject of intense trade disputes in the WTO. In the four disputes that went at least to the Panel stage, WTO Panels and the Appellate Body made it abundantly clear that renewable energy LCRs are inconsistent with GATT Article III:4 and TRIMs Article 2.1 and unlikely to find shelter under any of the exceptions contained in these agreements.<sup>108</sup> The turn to renewable energy SGMs is taking place against these legal and political economy background.

The underlying assumption behind renewable energy SGMs is that they help create (and/or retain) green jobs by promoting domestic renewable energy equipment manufacturing. The economic argument for SGMs contends that the temporary protection from imports help the domestic industry regain its competitiveness. However, unlike LCRs tied to renewable energy subsidies, SGMs do not stimulate the demand for renewable energy technologies. Safeguards afford protection to domestic industries by making imports more expensive (tariffs) or limiting the amount of imports (quotas) or the combination of both (tariff-rate quota). Irrespective of the particular form they take, SGMs result in increased domestic prices.<sup>109</sup> The increase in the price of renewable energy equipment has significant implications for the deployment of such equipment and hence for the sustainable energy transition.

Studies both in the US and in India since the adoption of their respective renewable energy SGMs show that the SGMs resulted in a significant decrease in imports of solar products and increase in the domestic price of such products.<sup>110</sup> This affects the ability of consumers to purchase renewable energy generation equipment. One of the main obstacles to the sustainable energy transition is the cost of renewable energy technologies. Such technologies have come a long way over the last decade or so in terms of their competitiveness. The price of solar panels, for example, fell down by around 90% over the last decade.<sup>111</sup> Renewables are now cost competitive with conventional sources of energy in some places, but they have long way to go to outcompete and replace fossil fuels that have benefited from several decades of public support and the failure of the market to internalize their negative externalities.

Despite the repeated calls for and intergovernmental efforts to phase out such subsidies, fossil fuels continue to receive the largest sum of public support that goes

<sup>&</sup>lt;sup>107</sup> See Jan-Christoph Kuntze & Tom Moerenhout, Local Content Requirements and the Renewable Energy Industry: A Good Match? (International Centre for Trade and Sustainable Development 2013).

<sup>&</sup>lt;sup>108</sup> Asmelash, *supra* n. 2.

<sup>&</sup>lt;sup>109</sup> See Hansen & Prusa, supra n. 19.

<sup>&</sup>lt;sup>110</sup> See Fang, supra n. 11.

<sup>&</sup>lt;sup>111</sup> See IRENA, Renewable Power Generation Costs in 2019 (IRENA 2020).

to the energy sector annually. The International Energy Agency (IEA) estimated global fossil fuel consumption subsidies alone to account around USD 440 billion in 2021.<sup>112</sup> The IMF puts this figure much higher at USD 5.9 trillion in 2020 by accounting for the negative externalities of fossil fuels.<sup>113</sup> Such subsidies derail the energy transition by keeping the cost/price of fossil fuels artificially low and thereby undermining the competitiveness of renewables (despite their plummeting costs). SGMs and other trade restrictive measures add insult to the injury. They tilt the energy market in favour of the incumbent carbon in intensive energy sources. Studies show that governments impose substantially higher trade barriers on cleaner industries than on their dirtier counterparts.<sup>114</sup> In recognition of this and to enhance the mutually supportiveness of trade and environment, WTO Members launched a multilateral negotiations on environmental goods and services over twenty years ago in Doha.<sup>115</sup> These multilateral negotiations have since turned into plurilateral with limited focus on environmental goods, but they are vet to bear any fruit.<sup>116</sup> While fossil fuels face virtually no trade barriers, renewable energy technologies continue to face high import tariffs and non-tariff barriers in many jurisdictions. The increased use of SGMs will only exacerbate the challenges facing such technologies.

The foregoing is not to say that there are no legitimate concerns driving protectionism in the renewable energy sector. The energy transition needs not only be sustainable but also just and equitable. We need to recognize that the transition creates new job opportunities, but also destroy others. The location of the new and lost jobs are not always the same. The latest report of the International Renewable Energy Agency (IRENA) shows that China accounted for 38% of the world's total renewable energy employment in 2019.<sup>117</sup> Much of this has to do with the size of the Chinese market but also its emergence as a global leader in mass production of renewable energy generation equipment over the last few decades. This was mainly the result of its green industrial policy and aggressive

<sup>&</sup>lt;sup>112</sup> See IEA, World Energy Outlook 2021 (International Energy Agency 2021).

See Ian Parry, Simon Black & Nate Vernon, Still Not Getting Energy Prices Right: A Global and Country Update of Fossil Fuel Subsidies, IMF Working Paper WP/21/236 (IMF 2021).
Sherica The Fuel Subsidies, IMF Working Paper WP/21/236 (IMF 2021).

<sup>&</sup>lt;sup>114</sup> See Joseph S. Shapiro, The Environmental Bias of Trade Policy, 136 Q. J. Econ. 831 (2021).

 <sup>&</sup>lt;sup>115</sup> Paragraph 31(ii), Ministerial Declaration, WT/MIN(01)/DEC/1, adopted 14 Nov. 2001 ('Doha Declaration').
<sup>116</sup> S. M. J. W. The HTTO, Facility of the American Even Military in the State of the Sta

<sup>&</sup>lt;sup>116</sup> See Mark Wu, The WTO Environmental Goods Agreement: From Multilateralism to Plurilateralism, in Research Handbook on Climate Change and Trade Law (Panagiotis Delimatsis ed., Edward Elgar 2016); Jaime de Melo & Jean-Marc Solleder, Barriers to Trade in Environmental Goods: How Important They Are and What Should Developing Countries Expect from Their Removal, 130 World Dev. 104910 (2020).

<sup>&</sup>lt;sup>117</sup> The report also shows that 87% of global solar PV employment was concentrated in the ten countries (i.e., China, Japan, United States, India, Bangladesh, Viet Nam, Brazil, Malaysia and Philippines) that lead in worldwide deployment and in the production of solar power equipment such as solar panels. *See* IRENA, *supra* n. 106.

promotion of renewable energy equipment manufacturing over the last few decades.<sup>118</sup> The attendant reduction in the price of such equipment undoubtedly benefits the transition but at what cost? Market mechanisms are unlikely to accelerate the transition let alone to make it equitable. Government intervention is not only necessary, but also imperative. The question is how to make the intervention more effective. SGMs do not only make the energy transition more expensive, but they are also counterproductive. They protect domestic industries with the ultimate objective of boost green investment and jobs, but studies show that they undermine investment and causes job losses in the downstream segments of the renewable energy market such as distribution, installation and maintenance.-<sup>119</sup> Studies estimate the US safeguard measure on solar products to cause a loss of 62000 jobs and USD 19 billion investment between 2017 and 2021.<sup>120</sup> The Indian safeguard measure on solar cells and modules is also projected to induce a significant renewable energy job and investment losses.<sup>121</sup> Moreover, the following three considerations make the turn to renewable energy SGMs problematic.

First, SGMs are likely to exacerbate the trade skirmish over renewable energy technologies. The ASG provides that the safeguard-imposing and affected-exporting members 'may agree on any adequate means of trade compensation for the adverse effects of the measure on their trade'.<sup>122</sup> If they fail to reach an agreement on compensation, the affected exporting member is free to take retaliatory measure.<sup>123</sup> The decline in tariffs has made agreement on compensation historically difficult. During the GATT-era, 'governments usually turned away from the SGMs and negotiated extra-legal forms of trade barrier, such as Voluntary Export Restraints (VERs)'.<sup>124</sup> The ASG strengthened the rules on safeguards by prohibiting VERs and imposing a three-year moratorium on retaliation.<sup>125</sup> However, affected exporting members often retaliate or threaten to retaliate against SGMs after the expiry of the first three years.<sup>126</sup> Although countries often engage in tit-for-tat antidumping and countervailing measures, the rules on antidumping or countervailing measures do not authorize the payment of compensation or retaliation. This aspect makes SGMs more likely to add fuel to the fire.

See John Helveston & Jonas Nahm, China's Key Role in Scaling Low-Carbon Energy Technologies, 366 Sci.
794 (2019).

<sup>&</sup>lt;sup>119</sup> See Fang, supra n. 11, at 583 (and the citation therein).

See SEIA, The Adverse Impact of Section 201 Tariffs: Lost Jobs, Lost Deployment and Lost Investments (Solar Energy Industries Association 2019).
See Device Association 2019.

<sup>&</sup>lt;sup>121</sup> See Dutt, Aggarwal & Chawla, supra n. 11.

<sup>&</sup>lt;sup>122</sup> Article 8.1, ASG.

<sup>&</sup>lt;sup>123</sup> Article 8.2, *ibid*.

<sup>&</sup>lt;sup>124</sup> See Mostafa Beshkar, Trade Skirmishes Safeguards: A Theory of the WTO Dispute Settlement Process, 82 J. Int'l Econ. 35 (2010).

<sup>&</sup>lt;sup>125</sup> Articles 8.3 & 11.1(b), ASG.

<sup>&</sup>lt;sup>126</sup> Bown & Crowley, *supra* n. 45.

Following the expiry of the three-year moratorium on retaliation, China warned that it 'still maintained the right to suspend substantially equivalent concessions or other obligations pursuant to relevant provisions of the WTO Agreements'.<sup>127</sup> It has not yet taken any retaliatory measure, but the possibility of doing so makes SGMs more troublesome than other trade remedies.

Second, SGMs are more trade disruptive than other trade remedy measures. Studies have long established that safeguards tend to restrict imports more than other trade remedies. Hansen and Prusa, for example, found that the imposition of SGMs in the US in the 1980s led to an average of 34% decline in trade volumes, while the imposition of antidumping duty measures during the same period led to only 11% decline.<sup>128</sup> The relatively more trade restrictive impact of SGMs stems from two sources. One, unlike countervailing and antidumping duties that take the form of additional tariffs, SGMs may also come in the form of quotas and tariff-rate quotas. Two, countervailing duties and antidumping duties are country-specific, while SGMs apply to imports from all sources. Therefore, the increased use of SGMs will have far-reaching impact on trade in renewal energy technologies than the other trade remedies.

Third, SGMs are the wrong instrument to address the underlying problem in the solar trade war. The theory of trade distortion has long established that government interventions work best when it is directly targeted at the problem.<sup>129</sup> What is apparent from the US safeguard investigation is that the cause of the surge in imports (and injury to the domestic industry) is the aggressive subsidization of renewable energy equipment manufacturing in China. The solution to this problem is to precisely target imports from China or China-affiliated companies from third countries. There is no reason whatsoever to subject imports from third countries to the safeguard measure. As the EU argued, the safeguard 'would cause too much collateral damage to imports that were not causing injury'.<sup>130</sup> The WTO has trade remedy instruments designed to address specifically this problem - countervailing duties. To be sure, global value chains undermine the effectiveness of such remedies as foreign producers often circumvent such remedies by rerouting their production via third countries. However, the solution lies in strengthening the countervailing duty regime not in resorting to SGMs.

<sup>&</sup>lt;sup>127</sup> WTO, Minutes of the Regular Meeting Held on 26 Oct. 2021, G/SG/M/57, para. 153 (2021).

<sup>&</sup>lt;sup>128</sup> Hansen & Prusa, supra n. 19.

<sup>&</sup>lt;sup>129</sup> See Jagdish Bhagwati & V. K. Ramaswami, Domestic Distortions, Tariffs and the Theory of Optimum Subsidy, 71 J. Pol. Econ. 44 (1963).

<sup>&</sup>lt;sup>130</sup> See WTO, supra n. 23, para 60.

#### 5 CONCLUSION

Trade in renewable energy technologies holds a great potential for a win-win outcome for both trade and environment. The removal of barriers to trade in renewable energy technologies promises to help reduce the costs of such technologies and thereby accelerate their diffusion. WTO Members launched the Doha Round negotiations on environmental goods and services in 2001 to turn this promise into reality. However, the last two decades have not only witnessed the failure of these negotiations but also the eruption of a trade war over renewable energy technologies. The recent resort to renewable energy SGMs in the US and India will exacerbate the adverse economic and environmental effects of the trade war.

Safeguards are more trade disruptive than the other green industrial policy measures countries have been using to protect their domestic industries. While WTO Panels and the Appellate Body consistently ruled against the most popular green industrial policy measures (i.e., renewable energy subsidies tied to LCRs), the Panel in US - Safeguard Measure on PV products found the safeguard measure consistent with WTO law. This finding has charted a dangerous legal path for green protectionism. The imposition of SGMs does not require the presence of unfair practices or pursuance of a particular public policy objective. The key requirement under the existing rules on safeguards is the existence of a serious injury (or a threat thereof) to the domestic industry caused by an unexpected surge in imports. The narrow focus on the injury to the domestic industry is problematic. Imports undoubtedly pose a challenge for import-competing domestic industries, but such industries are not the only domestic actors that need consideration. Final consumers benefit from the attendant decline in the price of renewable energy technologies. The price decline enhances the uptake of renewables and creates employment opportunities for downstream renewable energy activities such as distribution and installation. The existing rules on safeguards do not require weighing these positive and negative effects. They are inherently biased in favour of domestic industries, which are typically better organized than consumers.<sup>131</sup> If left unchecked, the turn to SGMs could only escalate the trade war and undermine the sustainable energy transition.

The solution lies in cooperation – not confrontation. The stalled negotiations on environmental goods and services have laid the foundations for cooperation. The urgency of climate change calls for a concerted and collective action to reinvigorate and advance these negotiations. The recently launched negotiations

<sup>&</sup>lt;sup>131</sup> See Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (21 printing, Harvard Univ Press 2003).

for a plurilateral Agreement on Climate Change, Trade and Sustainability (ACCTS) is a positive step in this direction.<sup>132</sup> Environmental goods and services also feature highly on the agenda of two recently formed informal country groupings in the multilateral trading system. Both the Friends of Advancing Sustainable Trade (FAST) and the Trade and Environmental Sustainability Structured Discussions (TESSD) identified environmental goods and services as one of the key areas to enhance the mutual supportiveness of trade and environment.<sup>133</sup> Parties to the TESSD are considering the resumption of the negotiations on environmental goods and services after the twelve WTO Ministerial Conference. Drawing on the lessons from past failures, they are planning to adopt 'staged approaches which could progressively expand the number of products under consideration'.<sup>134</sup> This is particularly useful in overcoming the disagreement over the definition of 'environmental goods' that obstructed previous negotiations. It is imperative that TESSD and similar initiatives recognize renewable energy products as one of the priority areas for consideration given their vital role in the global effort to avert the catastrophic consequences of climate change.

Joint Leaders' Statement on the Launch of the Agreement on Climate Change, Trade and Sustainability 2019.
WTO, Minutes of the Meeting Held on 26 Jul. 2018, WT/GC/M/173 (2018); WTO, WTO Trade and Environmental Sustainability Structured Discussions: Meeting Held on 26–28 May 2021, Informal Summary by the Coordinators, INF/TE/SSD/R/2 (2021).

<sup>&</sup>lt;sup>134</sup> WTO, Meeting Held on 26–28 May 20, supra n. 133, para. 3.1.