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WHAT IS A SAFEGUARD MEASURE UNDER WTO LAW?

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Despite being in operation for many years, safeguard measures are still shrouded in some amount of confusion and uncertainty. Certain issues that had been lying dormant for a while have now come to the fore, thanks to the tariff war between the United States and China. This article attempts to clarify some of the dense WTO jurisprudence concerning the meaning and legality of safeguard measures, in order to distinguish the two elements as has been suggested by the WTO's Appellate Body. It finds that while the character and purpose of a measure go to the definition of a safeguard, all other elements concern the legality of the same.

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I. INTRODUCTION: SEEMINGLY SIMPLE QUESTIONS

The trade wars are underway. The United States (US) and China are in disagreement over nothing less than the future of the international trading order. While the substance of the quarrel covers a vast number of issues,[1] the overarching US narrative has been that, for too long China has violated trade rules while other Members of the World Trade Organization (WTO)—the body responsible for regulating international commercial behaviour—watched, unable or incapable of resisting and responding to China's unlawful advances. The US seems to have now decided to take matters into its own hands and one of its approaches has turned out to be financial punishment. Reminiscent of the post-depression measures of the 1930s, the US has imposed steel and aluminium tariffs above its bound (*i.e.* allowed) rates in a bid to coax or arm-twist China into playing by American rules.[2]

Though the tariffs were initially aimed at China, the US has now imposed them across the board, prompting eight of the affected countries to take the US to the WTO's dispute settlement system.[3] At the same time, some affected countries have imposed tariff measures of their own, in response to the original US ones. Not one to be outdone, the US has initiated five disputes against these retaliatory tariffs.[4]

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[1] The gambit of US complaints include, historically, China's use of state-owned enterprises as subsidy-granting mechanisms (and WTO jurisprudence's failure to capture them), and more recently, intellectual property 'theft' through 'forced technology transfers'. *See* UNITED STATES TRADE REPRESENTATIVE, 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, (Jan. 2018), https://ustr.gov/sites/default/files/files/Press/Reports/China%202017%20WTO%20Report.pdf.

[2] As of December 2, 2018, the US and China have declared a cease-fire in further tariff escalations. *See US-China trade war: Deal agreed to suspend new trade tariffs,* BBC, Dec. 2, 2018, https://www.bbc.com/news/world-latin-america-46413196; *see generally* Sungjoon Cho, *The Truce in Buenos Aires: Is This the Beginning of the End or the End of the Beginning of the United States – China Trade Wars?*, INT'L ECON. L. & POL'Y BLOG (Dec. 2, 2018), https://worldtradelaw.typepad.com/ielpblog/2018/12/the-truce-in-buenos-aires-is-this-the-beginning-of-the-end-or-the-end-of-the-beginning-of-the-united.html.

[3] The disputes are: DS556 (Switzerland), DS554 (Russia), DS552 (Norway), DS551 (Mexico), DS550 (Canada), DS548 (EU), DS547 (India).

[4] These disputes are: DS561 (Turkey), DS560 (Mexico), DS559 (EU), DS558 (China), DS557 (Canada).

While there is displeasure in some pockets regarding the US's action, there is also a certain amount of confusion about exactly what it is that the US is doing. And it is a question that at least the first few active panels will have to explore: what is the proper characterization of the US's measures? Are they, as the US claims, 'ordinary' tariffs imposed on national security grounds[5] (justifiable under General Agreement on Tariffs and Trade (GATT) Article XXI),[6]or are they 'safeguard measures' (SGMs)?

This question is relevant for three reasons: Firstly, the US has spent considerable time and energy in developing a theory connecting economic and national security;[7] it has proceeded at every step with stated conviction that its measures are not SGMs; the panels' ruling will have a substantial impact on the (currently estranged) relationship between the US and the WTO.[8] Second, the answer will determine whether the WTO's Agreement on Safeguards[9] (SGA) applies to the US's measures; in general, it is in the interest of a respondent to reduce the number of possible (number and type of) claims against it. Finally, whether the US measures are SGMs also features in the determination of whether the retaliatory measures were lawful; SGMs are unique in that they grant a right of unilateral retaliation against them (*i.e.* without prior WTO-approval)[10]: GATT Article XIX:3[11] (and SGA Article 8[12] in more detail), allow affected Members to mirror the original imposing Member's action, i.e. to suspend "substantially equivalent concessions or other obligations under GATT 1994."[13]

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[5] *See President Donald J. Trump is Addressing Unfair Trade Practices That Threaten to Harm Our National Security*, THE WHITE HOUSE, (Mar. 08, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-addressing-unfair-trade-practices-threaten-harm-national-security/.

[6] General Agreement on Tariffs and Trade art. 21, April 15, 1994, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

[7] Whether it is a valid or indeed logical theory, is another matter. For context, however, *see* Jaemin Lee, *Commercializing National Security? National Security Exceptions' Outer Parameter under GATT Article XXI*, 13 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 277 (2018); Lakshmikumaran & Sridharan, *US steel and aluminum tariffs and the WTO's security exception: Unsecuring multilateral trade?*, LEXOLOGY (Apr. 30, 2018), https://www.lexology.com/library/detail.aspx?g=2deb59a4-7f6f-4fb3-8a6c-b56310ee52dd.

[8] *See* Gregory Shaffer et al., *The Slow Killing of the World Trade Organization*, HUFFINGTON POST, Nov. 17, 2017, https://www.huffingtonpost.com/entry/the-slow-killing-of-the-world-trade-organization_us_5a0ccd1de4b03fe7403f82df.

[9] Agreement on Safeguards, Apr. 15,1994, 1869 U.N.T.S. 154 [hereinafter SGA].

[10] Ordinarily, any kind of retaliation (for example in the situation of persistent non-compliance with a ruling) has to be approved by consensus of WTO Members.

[11] GATT 1994, s*upra* note 6, at art. XIX:3.

[12] SGA, *supra* note 9, at art. 8.

[13] Both, GATT Article XIX:3 and SGA Article 8.2, do however impose temporal and notification requirements on this retaliatory action and further require that this action is "not

So, what is an SGM? And why does this question even exist?
WTO law does not define an SGM.[14] The SGA, the specialised agreement regulating SGMs, simply states that SGMs shall "be understood to mean those measures provided for in Article XIX of GATT 1994".[15] In turn, Article XIX:1 of the GATT states that:[16]

> *"1.* (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.*"*

On a plain reading, it becomes evident that the provision contains both *definitional* and *legality* aspects of SGMs. This may be because, at the time of drafting, the more detailed SGA did not exist and therefore all kinds of inquiries (those that could be agreed upon) were crammed into a single provision. In any case, the provision can be seen as made up of two parts: a permissive element (definition) and a set of

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disapproved" by the Members/Contracting Parties. In this sense, SGM disciplines display an important characteristic of WTO law—balance, between the right of Members to restrict trade in favour of legitimate (recognized) policy objectives and the need to ensure minimal trade imbalance as a result of such restrictions. In this regard, the AB in *US – Line Pipe* provided that there is a "a natural tension between, on the one hand, defining the appropriate and legitimate scope of the right to apply safeguard measures and, on the other hand, ensuring that safeguard measures are not applied against 'fair trade' beyond what is necessary to provide extraordinary and temporary relief". *See* Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, ¶83, WTO Doc. WT/DS202/AB/R (adopted Mar. 8, 2002) [hereinafter Appellate Body Report, *US – Line Pipe*]. This endeavour towards balance is visible in other "escape clauses" as well. For example, while the body of GATT Article XX allows Members to flout trade rules concerning goods, the provision's *chapeau* ensures that the application of non-compliant (but justifiable) measures is done in a proper (i.e. non-discriminatory) fashion.

[14] To be sure, there has never been a clear definition, not even in the charter of WTO's predecessor, the International Trade Organization. And complaints regarding this emerged, from some GATT Contracting Parties, as early as the 70s. *See* Committee on Trade in Industrial Product, GATT Secretariat, *GATT Safeguards Systems - Proposal by Canada*, GATT Doc. Spec 72(45), (Jun. 13, 1972), https://docs.wto.org/gattdocs/q/GG/SPEC/72-45.pdf.

[15] SGA, *supra* note 9, at art. 1.

[16] GATT 1994, s*upra* note 6, at art. XIX:1.

conditions (legality); while the former concerns applicability of the SGA, the latter concerns conformity with the SGA.

This distinction is important because, if a measure does not cross the threshold question of SGA application, there is no need to look at conformity questions.[17] Alternatively, as the European Union (EU) has explained: "[i]f such distinction would not be made, a Member could seek to take its measures outside the scope of Article XIX and the Agreement on Safeguards by simply not complying with one or several of the conditions, and then arguing that the measure should not be defined as a safeguard measure, to which Article XIX and the Agreement on Safeguards are applicable."[18] The Appellate Body (AB) has thus asked us not to "conflate" these two issues.[19] In the factual scenario described above, the number (and threshold) of questions contained in the definition inquiry will determine how easy (or difficult) it will be for countries imposing tariffs (like the US) to escape an SGM examination.

There are two main reasons why this distinction is not immediately clear. Firstly, the operationalisation of the concept of 'single undertaking' requires interpreters to look at both the GATT and the SGA when construing the meaning of an SGM. A cumulative reading throws up a number of elements, and to date, there is some uncertainty as to which elements fall under the definition, and which go to legality. And second, the WTO judiciary (panels and the AB) have not always been clear on how to approach these elements: the jurisprudence is somewhat messy—confusing over large swaths and sometimes simply contradictory. In fact, the way the AB looks at these elements has been modified over the years. The earlier thinking was what can be described as 'rights-based'. For example, in 2002, the AB in its report in *US – Line Pipe* ruled that there were two basic inquiries that are to be conducted under the SGA: first, whether there is a 'right' to apply an SGM; and second, whether that right was exercised within the limits of the treaty.[20] The interpretative process was described as follows:

> "First, the interpreter must inquire whether there is a right, under the circumstances of a particular case, to apply a safeguard measure. *For this right to exist, the WTO Member in question must have determined, as required by Article 2.1 of the Agreement on Safeguards and pursuant to the provisions of Articles*

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[17] Appellate Body Report, *Indonesia – Safeguard on Certain Iron and Steel Products*, ¶ 5.57, WTO Doc. WT/DS496/AB/R(adopted Aug. 27, 2018) [hereinafter Appellate Body Report, *Indonesia – Safeguards*].

[18] European Union Third Party Opening Statement, *Indonesia – Safeguards on Certain Iron or Steel Products*, WT/DS 490; WT/DS 496, ¶ 10 (May 8, 2018), http://trade.ec.europa.eu/doclib/docs/2018/august/tradoc_157288.pdf.

[19] *See* Appellate Body Report, *Indonesia – Safeguards*, *supra* note 17, ¶¶ 5.57, 5.61, 5.62.

[20] Appellate Body Report, *US – Line Pipe*, *supra* note 13, ¶ 84.

> *3 and 4 of the Agreement on Safeguards, that a product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry*. Second, if this first inquiry leads to the conclusion that there is a right to apply a safeguard measure in that particular case, then the *interpreter must next consider whether the Member has applied that safeguard measure 'only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment', as required by Article 5.1, first sentence, of the Agreement on Safeguards*. Thus, the right to apply a safeguard measure—even where it has been found to exist in a particular case and thus can be exercised—is not unlimited. Even when a Member has fulfilled the treaty requirements that establish the right to apply a safeguard measure in a particular case, it must do so 'only to the extent necessary …'".[21]

Thus the AB put almost the entirety of its focus on the lawful application of an SGM, while speaking only in terms of 'rights' when talking about the definition. This thinking was followed in the next case, *US – Steel Safeguards* as well,[22] though the roots of this approach lie in the old GATT panel report on *Hatter's Fur*.[23]
More recent decisions, however, have given up this kind of approach in favour of a more straightforward two-step (definition, legality) assessment. This kind of legal analysis is of course not endemic to SGMs; for example, before the legality of a sanitary or phytosanitary measure (SPS) can be checked under the SPS Agreement,[24] the measure must first be determined to be an SPS measure. However, even this approach has been ineptly handled. For example, the recent panel in *Indonesia – Safeguards*, while discussing the definition of an SGM, stated that:

> *"*…one of the defining features of the 'measures provided for' in Article XIX:1(a) (i.e. safeguard measures) is the suspension, withdrawal, or modification of a GATT obligation or concession that precludes a Member from imposing a measure to the extent necessary to prevent or

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[21] *Id* (emphasis added).
[22] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, ¶ 264, WTO Doc. WT/DS248/AB/R; WT/DS249/AB/R; WT/DS251/AB/R; WT/DS252/AB/R; WT/DS253/AB/R; WT/DS254/AB/R; WT/DS258/AB/R; WT/DS259/AB/R (adopted Dec. 10, 2003) [hereinafter Appellate Body Report, *US – Steel Safeguards*].
[23] Intersessional Working Party, *Report on the Withdrawal by the United States of a Tariff Concession under Article XIX of the General Agreement on Tariffs and Trade*, ¶¶ 3-4, GATT Doc. GATT/CP/106 (adopted Oct. 22, 1951) [hereinafter *Hatter's Fur*]. Though this may be because the case was the first to discuss SGMs, at a time when the SGA did not exist.
[24] Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 U.N.T.S. 493 [hereinafter SPS].

> remedy serious injury, *in a situation where all of the conditions for the imposition of a safeguard measure are satisfied*"[25] (emphasis added)

The emphasised portion shows that the panel confused (or conflated) SGM's definition with the "conditions for [lawful] imposition". One could of course read the statement to mean that *all* SGM elements are supposed to be definitional ones, but that of course cannot be the case. The statement is possibly a misreading of a somewhat similar utterance of the AB in *Argentina – Footwear*; but in that case, the AB clearly stated that it was the *application* of an SGM that required demonstration of all stipulations of the GATT and SGA.[26] In any case, in *Indonesia – Safeguards,* the AB corrected the panel by stating that "an assessment of whether the conditions for the imposition of a safeguard measure have been met is pertinent to the question of whether a WTO Member has applied a *safeguard* measure in a WTO-consistent manner".[27] Thus the AB refined the panel's line as requiring conformity assessment on measures *already determined to be* SGMs (i.e. measures that have already crossed the definitional threshold).

Given that there continues to be lack of clarity, it is incumbent upon academia to piece together the incoherent bits of law and logic, and to make sense of the situation. Discussions are ongoing on the blog-sphere,[28] and this short article is an attempt to take the conversation forward. Here, *all* relevant inquiries relating to SGMs, as found in the GATT and the SGA, are identified, and then, each inquiry is examined to determine its rightful place. The article's hypothesis is that the character (nature) and the purpose of the measures are definitional questions, while all other elements concern legality. Broadly speaking, *what* a Member did goes to the definition of an SGM, while *how* the Member did it relates to the SGM's legality. As a conclusion, the article will draw a simple guide for panels to take up when confronted with SGMs *may be*. Hopefully, the article will assist not only adjudicators,

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[25] Panel Report, *Indonesia – Safeguard on Certain Iron or Steel Products*, ¶ 7.15, WTO Doc. WT/DS490/R; WT/DS496/R (adopted Aug. 27, 2017) [hereinafter Panel Report, *Indonesia – Safeguard*] (emphasis added and omitted).

[26] *See* Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, ¶ 95, WTO Doc. WT/DS121/AB/R (adopted Jan. 12, 2000) [hereinafter Appellate Body Report, *Argentina – Footwear*].

[27] Appellate Body Report, *Indonesia – Safeguards*, supra note 17, ¶ 5.62.

[28] *See* Steve Charnovitz, *EU Can Retaliate Immediately Against Trump's Metal Tariffs*, INT'L ECON. L. & POL'Y BLOG (Mar. 9, 2018), https://worldtradelaw.typepad.com/ielpblog/2018/03/eu-can-retaliate-immediately-against-trumps-metal-tariffs.html; Simon Lester, *Implications of Indonesia—Safeguards for US 232 Challenges*, INT'L ECON. L. & POL'Y BLOG (Aug. 17, 2018), https://worldtradelaw.typepad.com/ielpblog/2018/08/implications-of-indonesiasafeguards-for-us-232-challenges.html. Most of the meat of the discussion can be found in the comments section.

but also imposing Members (particularly frequent users like India, Indonesia and Turkey),[29] as they would gain clarity on how to design and implement their measures.

II. HOW MANY STARS IN THE SGM CONSTELLATION?

A. Definitional Inquiries

First things first: are definitional inquiries even relevant? Chinese Taipei (and to a lesser extent, Japan) have argued that there *is* (supposed to be) no definition of an SGM; that the WTO rules only lay down the 'criteria or conditions' under which Members can 'legally impose' such a measure.[30] The argument is that no limits can, and should, be placed on the form that an SGM can take because the text does not say anything about what it is. While there is no problem with the immediate consequence of such thinking (SGM rules would simply apply to a larger pool of measures), taken too far, this may diminish a panel's duty to objectively assess "the applicability…of covered agreement[s]."[31] This is taken up later in the article, but for now it suffices to say that, by law, a panel is required to take up the question of definition (and by extension, application). Further, simply because the SGA has nothing akin to SPS Agreement's Annex 1 (which contains 'definitions' in big capitalized letters), it does not mean that there is no definition. As mentioned above, SGA Article 1 provides that SGM rules are to be applied to measures "provided for in GATT Article XIX:1;" and this latter provision sets out the kind of action that can be taken by Members. Insofar as the existence of a legal definition is in question, this is surely sufficient.[32]*Character and Nature of Measure ("suspension or withdrawal of an obligation or a measure*")

As mentioned above, plainly reading GATT Article XIX:1 presents several elements of SGMs. It is worth noting at the outset that because SGA Article 1 states that SGMs are only those provided for in GATT Article XIX, any analytical element that cannot be found in the text of this latter provision, cannot, *a priori,* be a part of SGM's definition. Article XIX is titled "Emergency Action on Imports of Particular

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[29] *See* Safeguard Measures by Reporting Member, WTO, https://www.wto.org/english/tratop_e/safeg_e/SG-MeasuresByRepMember.pdf (last visited Dec. 3, 2018).

[30] Appellate Body Report, *Indonesia – Safeguards*, *supra* note 17, ¶ 5.43.

[31] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 11, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

[32] The AB, while admitting that there is no "express definition" of an SGM, has clarified that the definitional inquiry must nonetheless be undertaken, and must be done on a case-by-case basis. Appellate Body Report, *Indonesia – Safeguards*, *supra* note 17, ¶ 5.57. This kind of "no limits" ideology was also rejected by the AB with respect to the question of whether it is optional for Members to withdraw/suspend an obligation/concession.

Products," and thus the first, and most basic question to ask is: what is this 'action'? The answer, according to the text, is: a suspension or withdrawal of an obligation or concession.[33] Further, the measure also probably cannot be an omission on part of a country.[34] Thus, to find out if a measure is an SGM, we must first look at what it does, *i.e.* whether it suspends or withdraws an obligation or concession.[35] For example, in *Indonesia – Safeguards* dispute, the fact that the imposing Member (Indonesia) did not have any bound commitments on the concerned product (galvalume), prompted the panel to conclude that the measure was not an SGM (though both disputing parties argued that it was): since there was no concession to begin with, the action could not possibly have constituted a withdrawal of the same. The panel stated that such suspension/withdrawal was a "defining feature" of an SGM,[36] and the AB confirmed that absent this feature, a measure cannot be considered an SGM.[37]

Indeed, Indonesia did argue, on the shoulders of the phrase "shall be free" in GATT Article XIX, that Members had the choice whether or not to suspend/withdraw an obligation/concession, when invoking SGMs. The AB, however, rejected this idea, stating: "[a]s we see it, those words simply accord to a Member the 'freedom' to exercise its right to impose a safeguard measure by suspending a GATT obligation or withdrawing or modifying a GATT concession if the conditions set out in the first part of Article XIX:1(a) are met."[38]

Another aspect of SGMs that must be considered as intrinsic is the nature of the measure. Three elements are to be considered: first, the 'extraordinary nature' of

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[33] Per definition, Members cannot use SGMs as a justification for export restrictions.

[34] European Union Third Party Written Submissions, *Indonesia – Safeguards on Certain Iron or Steel Products*, WT/DS490; WT/DS496, (Oct. 18, 2017), http://trade.ec.europa.eu/doclib/docs/2018/august/tradoc_157287.pdf. [hereinafter EU written Submission].

[35]Appellate Body Report, *Indonesia – Safeguards*, *supra* note 17, ¶ 5.55. In other words, the action contemplated under Article XIX:1(a) consists of the suspension, in whole or in part, of a GATT obligation or the withdrawal from or modification of a GATT concession. Absent such a suspension, withdrawal, or modification, we fail to see how a measure could be characterized as a safeguard measure.

[36] Panel Report *Indonesia – Safeguard*, *supra* note 25, ¶¶ 7.10 - 7.41. A problematic line regarding GATT obligations can be found in the AB's report in *Argentina – Footwear* when it states that the obligations concerned, like GATT Articles II and XI, are those that are "fundamental to the WTO Agreement". This should not be read as separate analytical requirements, especially since there is nothing to state that one GATT provision is more "fundamental" than the other. See Appellate Body Report, *Argentina – Footwear*, *supra* note 26, ¶ 95.

[37]*See* Appellate Body Report, *Indonesia – Safeguards*, *supra* note 17, ¶ 5.60.

[38]*See* Appellate Body Report, *Indonesia – Safeguards*, *supra* note 17, ¶ 5.55 n.188 (citing Appellate Body Report, *US – Line Pipe*, ¶ 84).

SGMs;[39] by definition, these are measures that are not to be taken during the 'ordinary' (non-emergency) state of international commerce.[40] Second, and flowing from the first point, SGMs must be temporary in nature, since it would be absurd to argue that an emergency state of affairs can continue in perpetuity.[41] Finally, SGM action cannot be taken against 'unfair trade'. SGMs are grounded in the idea that the harm it seeks to rectify is unintentional; this distinguishes them from remedies like anti-dumping and countervailing duties, which are responses to economically malevolent behaviour.[42]

However, character/nature cannot be the sole definitional inquiry, because in itself, it does not allow us to fully distinguish SGMs from 'ordinary' trade measures.

B. Purpose of the Measure ("temporary protection of domestic industry against sudden increased imports")

Take the real-life example mentioned in the introduction: how is one to determine whether the US measures are simple GATT Article II violations, or whether they constitute SGMs under GATT Article XIX?[43] The answer, as endorsed by the AB, lies in the "design, structure, and operation" of the measure.[44] The idea is to extract the true purpose of the measure. As mentioned above, SGMs are 'extraordinary' measures:[45] their purpose, as provided by the text of GATT Article XIX:1, is the temporary protection of domestic industry against sudden increased imports.[46] Indeed, the AB has stated that "where a measure suspends a GATT obligation or withdraws or modifies a tariff concession, *but that suspension, withdrawal, or modification does not have a demonstrable link to the objective of preventing or remedying injury*, we do not

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[39] *See*, Appellate Body Report, *Argentina – Footwear*, *supra* note 26, ¶ 94. Though, interestingly, the panel in *US – Line Pipe* ruled that it was not necessary to demonstrate (factually) the existence of such an "emergency". See Panel report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, ¶¶ 7.301–7.306, WTO Doc. WT/DS202/R (adopted Mar. 8, 2002) [hereinafter Panel Report, *US – Line Pipe*].

[40] *See also* Appellate Body Report, *US – Line Pipe*, *supra* note 13, ¶ 80; Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶ 86, WTO Doc. WT/DS98/AB/R (adopted Jan 12, 2000) [hereinafter Appellate Body Report, *Korea – Dairy*]. The 'extraordinary' nature of SGMs is confirmed by the object and purpose of GATT Article XIX, *see* Appellate Body Report, *Argentina – Footwear*, *supra* note 26, ¶¶ 93–95; ¶ 51, n.50.

[41] At least in terms of international commerce, this has never happened.

[42] *See* Appellate Body Report, *Argentina – Footwear*, *supra* note 26, ¶ 94.

[43] This question was taken up by the panel in Panel Report, *Indonesia – Safeguard*, *supra* note 25, ¶ 7.40.

[44] Appellate Body Report, *Indonesia – Safeguards*, *supra* note 17, ¶ 5.60. As such, the WTO judiciary is quite fond of this term.

[45] *See supra* note 38.

[46] See Panel Report, *Indonesia – Safeguard*, *supra* note 25, ¶ 7.28; Appellate Body Report, *Argentina – Footwear*, *supra* note 26, ¶ 94.

consider that the measure in question could be characterized as one 'provided for' under Article XIX."[47]

Again, an analogy can be drawn with SPS measures which are defined almost entirely by reference to their purpose. However, importantly, this is not the case for all types of measures: for example, technical regulations, standards, and conformity assessment procedures are defined by their form,[48] while TRIMS measures are defined by what they do, *i.e.* their operation.[49] Nonetheless, it is now well established that not all measures that suspend or withdraw obligations or concessions can be classified as SGM; only those that have the objective of temporarily protecting the domestic industry, can.

Before proceeding further, two short discussions are merited.

1. Who Decides?

The amount of deference that panels must give Member's determinations is generally a big debate under WTO law.[50] The question is: how much of what Members argue is the panel to take on face value? It would seem that when the matter concerns the extent of available policy space, the WTO judiciary has a more deferential stand. For example, an oft-quoted paragraph from the AB's ruling in *EC – Asbestos* declares that Members have a right to determine, more or less unilaterally, the level of health protection they wish to grant their citizens; in that case France had opted for a "zero-risk" policy against asbestos, and the AB ruling confirmed that a panel could not question France's stated amount of protection.[51] The same is true for Member's determination of what a 'public moral' is, and whether that moral exists within the territory of that Member.[52]

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[47] Appellate Body Report, *Indonesia – Safeguards*, *supra* note 17, ¶ 5.56 (emphasis added).

[48] *See* Agreement on Technical Barriers to Trade Annex. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT].

[49] *See* Agreement on Trade-Related Investment Measures Annex. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 [hereinafter TRIMS].

[50] For a discussion on panel review of good-faith obligations, *see* Akhil Raina, *The Day the Music Died: The Curious Case of Peru – Agricultural Products*, 11(2) GLOBAL TRADE & CUSTOMS J. 71 (2016).

[51] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶168, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001).

[52] For the supposedly ever expanding scope of public morals under GATT Article XX(a), see Akhil Raina, *My morals, your trade, our WTO: Public Morals after Brazil – Taxation*, LINKLATERS: TRADE LINKS (May 31, 2018), https://www.linklaters.com/en/insights/blogs/tradelinks/my-morals-your-trade-our-wto-public-morals-after-brazil-taxation; *see* generally the jurisprudence developed by panel in,

However, the same amount of deference is not given to a Member's categorisation of its measures. The AB has categorically stated that a Member's determination (whether in a domestic investigation, or before a panel) that a measure is an SGM, is "not dispositive".[53] In fact, strange as this may seem at first, even a Member's notification of a measure as an SGM to the WTO Committee on Safeguards is only, at most, a relevant factor for panels to consider.[54] On reflection, this makes sense, as if this were allowed, Members could pick and choose the legal framework that would apply to their measures, simply by giving them a particular name. In the words of the AB:

> "As part of its determination, a panel should evaluate and give due consideration to all relevant factors, including the manner in which the measure is characterized under the domestic law of the Member concerned, the domestic procedures that led to the adoption of the measure, and any relevant notifications to the WTO Committee on Safeguards. However, no one such factor is, in and of itself, dispositive of the question of whether the measure constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards."[55] (citation omitted)

Panel Report, *Brazil – Certain Measures Concerning Taxation and Charges*, WTO Doc. WT/DS472/R; WT/DS497/R (appealed by Brazil Sept. 28, 2017), and by the AB (and panel) in, Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/AB/R; WT/DS401/AB/R (adopted June 18, 2014); Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/R; WT/DS/401/R (adopted Jun. 18, 2014).

[53]Appellate Body Report, *Indonesia – Safeguards*, *supra* note 17, ¶ 5.32 & nn.118-119. This is again not particular to SGMs; the AB has consistently ruled that (regardless of relevant agreement), a Member's municipal characterisation of a measure is not dispositive of it being so. *See* Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, ¶ 593, WTO Doc. WT/DS353/AB/R (adopted Mar. 23, 2012); Appellate Body Report, *Canada – Measures Relating to the Feed-in Tariff Program*, ¶ 5.127, WTO Doc. WT/DS412/AB/R; WT/DS426/AB/R (adopted May 24, 2013). Further, as the EU has pointed out, "[t]he assessment whether something is a 'safeguard measure' is, in the same way as the assessment whether something is a 'measure' at all, a legal characterization and not just a factual one…"; see EU Written Submission, *supra* note 34, ¶ 22; Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, ¶ 188, WTO Doc. WT/DS268/AB/R (adopted Nov. 28, 2005).

[54] This would logically also work in a situation where the Member notifies or determines the measure as a non-SGM, for example as a subsidy.

[55]Appellate Body Report, *Indonesia – Safeguards*, *supra* note 17, ¶ 5.60. Interestingly, all of the jurisprudence that the AB cites (previous reports) concern subsidies. *See* Appellate Body Report, *Indonesia – Safeguards*, *supra* note 17, ¶ 5.60 n.196.

This thinking was followed by the panel in the recent *India – Safeguards* dispute, which stated that while not dispositive, Member's national determination is a "useful starting point" in assessing the design, structure and operation of a measure.[56] This holistic approach is somewhat of a penchant for WTO jurisprudence: all relevant factors are to be considered (more or less) equal, and then are to be "weighed" against one another.[57]

In the end, panels will have to make an independent and objective assessment of the facts of the case to determine whether the imposing Member's measure is, in fact, an SGM. As stated above, in the *Indonesia – Safeguards* dispute, both parties argued that the measure was an SGM; both were content with battling out under the SGA, and thus the panel could have easily glossed over this threshold question. But the panel was aware of its duty under DSU Article 11,[58] and concluded, after an independent assessment, that the measure at issue was not an SGM.[59] This approach (and conclusion) was endorsed by the AB.[60]

2. What 'if'?

A connected point: GATT Article XIX:1 begins with the conditional particle 'if', and proceeds to mention four conditions for imposition of an SGM. It is worth nothing that this conjunction is unconnected to Member determination. In other words, GATT Article XIX: 1 is unlike GATT Article XXIII, which, in several parts contains the phrase "if any Member [should] consider[s]"; it is more like GATT Article XX(g), which contains the phrase "if such measures are made effective in conjunction with restrictions on domestic production or consumption", *sans* reference the imposing Member. The difference should be appreciated since it concerns the subjective/objective distinction and amount of deference to be given by panels: whereas the first class of provisions are more 'self-judging', somewhat in the sense of GATT Article XXI,[61] the latter genus requires 'objective' assessment (or determination) by panels.

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[56] Panel Report, *India – Certain Measures on Imports of Iron and Steel Products*, ¶ 7.40, WTO Doc. WT/DS518/R.

[57] This approach is seen most clearly in the 'weighing and balancing' test developed by the WTO judiciary, to determine whether a measure is 'necessary' to protect public health or public morals under GATT Article XX.

[58] DSU, s*upra* note 31, at art. 11.

[59] As mentioned above this was mostly because of a lack of binding commitments on the product, galvalume.

[60] Appellate Body Report, *Indonesia – Safeguards*, *supra* note 17, ¶ 5.71.

[61] *See* Tsai-fang Chen, *To Judge the "Self-Judging" National Security Exception under the GATT 1994 – A Systematic Approach* 12 ASIAN J. WTO & HEALTH L. & POL'Y 310 (2017); Sandeep

3. The Curse of Multiplicity

And what of measures with multiple purposes? What if a panel (objectively) determines that a measure pursues two purposes, only one of which concerns the protection of the domestic industry?[62] Can a measure be an SGM (amendable to GATT Article XIX and the SGA) *and* be a national security measure (under GATT Article XXI)? Further, does a successful justification under GATT Article XXI remove the ability of affected Members to retaliate against SGMs under GATT Article XIX:3?

Profs. Lorand Bartels and Steve Charnovitz (separately) seem to find no problem with duality in a measure's purpose.[63] However, SGA Article 11(1)(c) provides that the SGA does not apply to measures taken (or maintained) "*pursuant to provisions of GATT 1994 other than Article XIX, and Multilateral Trade Agreements in Annex 1A other than this Agreement…*"[64] (emphasis added). This seems to suggest that SGM disciplines cannot apply to measures invoked under a non-GATT Article-XIX provision. Now, one could argue that measures are not "taken *pursuant*" to GATT Articles XX and XXI; that these are merely justifications for actions taken under other provisions. However, the author views exceptions as permissive, rather than simply defensive: these provisions *allow* Members to take certain exceptional action in certain situations.[65] Thus, in the author's opinion, a measure could be taken 'under' GATT Article XX or XXI, and in such a case, SGA Article 11(1)(c) would disallow it from being considered an SGM. Such a reading is in line with rulings like *China – Auto Parts, EC – Seals,* and *Indonesia – Safeguards,* which stated that in order to properly classify a measure, a panel had to identify all of its relevant elements, and then (though this could be a "complex exercise"), pinpoint the measure's "most central aspects"[66] and locate its "centre of gravity,"[67] in order to reveal its "primary"

Ravikumar, *The GATT Security Exception: Systemic Safeguards Against Its Misuse* 9 NUJS L. REV. 321 (2016).

[62] Assuming, of course, that these objectives do not conflict with one another. *See generally* Akhil Raina, *Multicolored in a Monochrome World: WTO and Conflicting Regulatory Purposes* 12 (7/8) GLOBAL TRADE & CUSTOMS J. 311 (2017).

[63] *See* comments in *supra* note 28.

[64] SGA, *supra* note 9, at art. 11(1)(c).

[65] One could go so far as to argue that, keeping with the purpose of these exceptions (protecting policy space), these clauses actually *encourage* the adoption of measures that further legitimate policy goals.

[66] Appellate Body Report, *Indonesia – Safeguards*, *supra* note 17, ¶ 5.64. Note that the AB said "aspects", in plural, implying again that there could be multiple central aspect*s* of a measure.

[67] Appellate Body Report, *China – Measures Affecting Imports of Automobile Parts*, ¶ 171, WTO Doc. WT/DS339/AB/R; WT/DS340/AB/R; WT/DS342/AB/R (adopted Jan. 12, 2009).

or "main" purpose.[68] This would put to rest the cumulative application theory—measures are thus purpose binary: they can either be for the protection of domestic industry (and hence, SGMs), or for other purpose(s) (and hence, not SGMs).[69]

III. MIDDLE GROUND: DEFINITION, LEGALITY, NONE OR BOTH?

A. "Unforeseen Developments and Effect of Obligations"

Discussions surrounding this phrase are, essentially, a conversation about the relationship between the GATT and the SGA.[70] There are a few ways to view the phrase. One could argue that since the term does not (re)occur in SGA Article 2.1 (and indeed, not in the entire SGA), it may be the drafter's intention to tilt it more towards the definitional elements, rather than the legality ones.[71] On the other hand, the panel in *Korea – Dairy* reasoned that the phrase "unforeseen development and of the effect of the obligations incurred" did not contain any independent legal condition at all, but rather was inserted in GATT Article XIX as an explanation of why such a provision was needed in the first place.[72] Particularly:

> "The reference to 'unforeseen developments' was probably considered necessary as negotiators had just ended a negotiating exercise which was based on expectations of trade increases (therefore foreseen developments) and where some quantitative restrictions were grand-fathered. We think that this reference to 'unforeseen circumstances' must be interpreted within its context, namely in view of the rest of this proposition which provides that '… the effect of the obligations incurred by a contracting party under this Agreement'. These latter terms can only refer to the binding nature of the GATT prohibitions against breach of tariff concessions and the prohibition against quotas, as it would not be logical to conclude that a Trade Minister would have negotiated a particular concession if it could have been foreseen that such a concession

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[68] For a discussion on a 'hierarchy' between a measure's objectives, see *supra* note 61.

[69] Tackled with respect to technical regulations in *id.*

[70] *See* Appellate Body Report, *Argentina – Footwear*, *supra* note 26, ¶¶ 76 – 90 ; Appellate Body Report, *Korea – Dairy*, *supra* note 40, ¶¶ 76 – 80 .

[71] Vietnam preferred the opposite view in *Indonesia – Safeguards* case, *see* Appellate Body Report, *Indonesia – Safeguards*, *supra* note 17, ¶ 5.45.

[72] Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶ 7.42, WTO Doc. WT/DS98/R (adopted Jan. 12, 2000) [hereinafter Panel Report, *Korea – Dairy*].

> would result in increased imports, that, in turn, would seriously injure an industry in the country granting the concession…"[73]
> "The adoption of the Agreement on Safeguards without this phrase 'as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement' is logical. It was not necessary to refer to this context which had by then evolved. Members had since understood the GATT system of binding obligations... Because Members had understood that this reference to 'unforeseen developments' did not add to the rest of the paragraph (but rather described its context), there was no need to insert it explicitly in the Agreement on Safeguards."

However, this thinking was rejected by the AB,[74] stating instead that unforeseen developments and the effect of obligations were "circumstances" that had to be "demonstrated as a matter of fact" *before* an SGM could be imposed.[75] This idea finds reflection in the AB reports in *US – Steel Safeguards* and *Argentina – Footwear* as well.[76] But what this means exactly is somewhat unclear, and the recent panel in *Ukraine – Passenger Cars* was tasked with the same question. It declared that it understood the AB's ruling to mean that "competent authorities must explain in their published report how the factual evidence before them demonstrates the existence of these circumstances . . . [and that it is] not sufficient for competent authorities to satisfy themselves that these circumstances exist as a factual matter; they must also provide a demonstration of their existence in their published report".[77] As its conclusion, the panel stated that:

> *"...the two elements of the first clause of Article XIX:1(a), 'unforeseen developments' and the effect of GATT 1994 obligations, are circumstances that the competent authorities are legally required under Article XIX:1(a) to demonstrate as a matter of fact. They are not conditions. The conditions for the application of a safeguard measure are contained in the second clause of Article XIX:1(a) and Article 2. Although different in legal nature, the relevant conditions and circumstances have in common that: (i) their satisfaction or existence be demonstrated by the competent authorities, through reasoned and adequate explanations, (ii) in the published report, and (iii) before a safeguard measure is applied."* (citation omitted; emphasis added)

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[73] *Id.* ¶ 7.44. However, the panel admitted that in GATT practice, particularly in the *Hatter's Fur* case, unforeseen developments were considered a criteria that had to be respected (though this was supposed to be automatic). See *Id.* ¶ 7.46 n.425.
[74] Appellate Body Report, *Korea – Dairy*, *supra* note 40, ¶ 82.
[75] Appellate Body Report, *Argentina – Footwear*, *supra* note 26, ¶ 92.
[76] *Id.*
[77] Panel Report, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, ¶ 7.54, WTO Doc. WT/DS468/R (adopted June 26, 2015).

According to the panel, this factor is definitely not a part of the legality inquiry. Jurisprudence also does not say that it is an independent criterion for an SGM's definition. However, it could be a part of the purpose inquiry: whether or not there were unforeseen developments that led to the increased imports can be assessed under the umbrella-question of: was the purpose of the measure to protect the domestic industry?

B. Legality Inquiries

In 1995, when the WTO was created, the global trading community was given new regulatory tools to use and disciplines to contend with. One such new legal framework was that of the SGA, the purpose of which is to "clarify and reinforce the disciples of the GATT 1994."[78] SGA Article 2—notably titled "Conditions"—provides that:

> "1. A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products."[79] (citation omitted)

Questions regarding elements contained in SGA Article 2 are no doubt concerned with the legality of SGMs.[80]Articles 3 to 12 establish rules on *how* a Member can (should) impose SGMs. On a strictly textual reading, these conditions or requirements become legality inquiries, because in essence, they concern the manner of imposing the measure by the Member, rather than the measure in itself. Alternatively, and as a logic-experiment, one may ask for all such inquiries, what the consequence of non-compliance would be. And in all cases the answer would be: an *unlawful* SGM, rather than a *non*-SGM. We will now examine two of the most contentious conditions.

C. To the Extent (and for such time) as May be Necessary

As discussed above, in order to be defined as an SGM, a measure must, through its design and structure, show that its intent is that of temporary domestic protection. However, WTO jurisprudence has wedged apart two similar (sounding) aspects, claiming that while the question of whether a measure was *designed* to temporarily

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[78] SGA, *supra* note 9, Preamble.
[79] SGA, *supra* note 9, at art. 2.
[80] *See* Appellate Body Report, *Argentina – Footwear*, *supra* note 26, ¶ 115.

protect the domestic industry is a question of definition, the inquiry of whether the measure was actually *necessary*, *i.e.* required, is a legal inquiry.[81] Thus, *prima facie*, if a panel finds, through the 'design, structure, and operation' of a measure, that the measure was indeed 'designed to' temporarily protect the domestic industry, the panel can move towards concluding that it is an SGM. Later, on substance, the panel must look at whether there were indeed circumstances that required the adoption of the SGM, *i.e.* whether the SGM measure was necessary for temporary domestic protection.[82] Indeed, the *Chile – Price Band* panel said that whether the measure was necessary was a question of application of SGMs.[83] To do so, a panel would have to look into whether there were increased imports of such quantity that would risk harm to the industry, and whether the competent authorities sufficiently proved the existence of such quantity/harm.

D. Determination (or Investigation) of Injury (or threat thereof) Pursuant to SGA, and Increased Imports

SGA Articles 3 and 4 provide the procedure and rules for the competent domestic authorities to determine whether there are conditions that "cause or threaten to cause serious injury to the domestic industry". The 2012 Panel Report in *Dominican Republic – Safeguards* considered determination conducted pursuant to the SGA as a relevant criterion for defining an SGM.[84] This year's panel report in *India – Safeguards,* however, presented the opposite view. It explained that:

> "It follows from the above that while a *WTO-consistent investigation is a necessary prerequisite for the application of a WTO-consistent safeguard measure, the fact that an importing Member may have conducted an investigation in accordance with the Agreement on Safeguards does not mean that any measures adopted as a result of the conclusions in that investigation suspend, modify, or withdraw any GATT obligation or concession and, therefore, constitute 'safeguard measures'* within the meaning of Article 1 of the Agreement on Safeguards. Because a Member is free to choose not to apply a safeguard measure, even when all of the conditions for application are satisfied, the mere fact that it has undertaken

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[81] Appellate Body Report, *Indonesia – Safeguards*, *supra* note 17, ¶ 5.59. Further, this 'necessity' requirement again demonstrates the aforementioned balance of rights: while it is a Member's right to suspend or withdraw an obligation or concession, such flagrantly unlawful behaviour can be justified if the end aim pursued is important enough, i.e. is "necessary".

[82] Panel Report, *India – Safeguards*, *supra* note 56, ¶¶ 7.181 – 7.186.

[83] Panel Report, *Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WTO Doc. WT/DS207/R (adopted Oct. 23, 2002).

[84] Panel Report, *Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, ¶ 7.89, WTO Doc. WT/DS415/R; WT/DS416/R; WT/DS417/R; WT/DS418/RDR (adopted Feb. 22, 2012) [hereinafter Panel Report, *Dominican Republic – Safeguards*].

> a WTO-consistent safeguard investigation and made all necessary notifications to the WTO Committee on Safeguards does not render that Member's consequent actions a 'safeguard measure' for the purpose of WTO law."[85]

While there is no definitive AB report on the issue, the author agrees with the latter report. In no event is Member determination (whether conducted correctly as per the SGA or not) dispositive of the existence of an SGA.[86] Further, SGA Articles 3 and 4 relate to *how* a Member implements SGAs, and in case there is non-compliance with these provisions, the result is a WTO-inconsistent SGA, not a non-SGA.[87]

IV. CONCLUSION: SIMPLE ANSWERS AND FURTHER QUESTIONS

Over the years, the AB has tweaked its understanding of what a (lawful) SGM is. We now have greater clarity regarding of which elements in the SGA and the GATT concern the definition of an SGM, and which concern legality. Some pending questions, however, remain. These include important ones like: are the "obligations" and "concessions" referred to in the first part of GATT Article XIX: 1 the same as the "obligation" and "concession" contained in the second part?[88]

Finally, in order to determine if the US tariffs are SGMs one would have to closely study the implementing measures, and determine (1) their character and nature, and (2) their purpose. Interestingly enough, the US could 'pay' it's way out: SGA Article 8(1) provides that a Member wishing to maintain an SGM must ensure a substantially equivalent level of concessions and other obligations "...between it and the exporting Members which would be affected by such a measure ...," and that to achieve this, the concerned Members can "agree on any adequate means of *trade compensation* for the adverse effects of the measure on their trade."(emphasis added).

It is hoped that this short note has added to the clarity rather than the clutter that surrounds SGMs. The debate is far from over and will surely provide fodder for lawyers and academics for some time to come.

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[85] Panel Report, *India – Safeguards*, *supra* note 56, ¶ 7.39 (emphasis added).

[86] *See supra* note 56.

[87] A similar thinking can be applied to the requirement of demonstration of increased imports: the focus of this inquiry is the domestic (competent) authorities, not the measure itself.

[88] While the panel in Panel Report, *Dominican Republic – Safeguards*, *supra* note 85, said that this parallelism made sense (on the basis of textual interpretation), it declared that it was not necessary to make a ruling on this. This was the position of the AB in *Indonesia – Safeguards* as well. *See* Appellate body Report, *Indonesia – Safeguards*, *supra* note 17, ¶ 5.60 n.194.