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CAUSAL LINK, NON-ATTRIBUTION AND CONTINGENT PROTECTION IN THE WTO

Abstract

In several recent cases brought before the WTO's Dispute Settlement Body, several WTO Members have been taken to task for supposedly failing to comply with their obligations on establishing that a causal link existed between imports and injury caused to a domestic industry while at the same time failing to not attribute injury caused by other factors to injury caused by imports.

From the cases that have been brought before the WTO over the last several years, where a violation to demonstrate a causal link or a non-attribution violation has been alleged, the panels established to hear these cases and the Appellate Body asked to review the respective panels' finding have had a difficult time laying out clear and practicable criteria or standards that would provide domestic authorities with the kind of guidance they might need in order to be able to act in compliance with their WTO obligations. The result is a certain amount of confusion and dissatisfaction among all concerned.

The paper will examine the rules and case-law on antidumping, countervailing duties and safeguards under the WTO Uruguay Round agreements and attempt to examine what is meant by a "causal link" between imports and injury to a domestic industry. This analysis will include an examination of the obligations which ensue from the non-attribution language contained in the relevant WTO agreements.

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I. CAUSATION UNDER GATT 1947

GATT 1947 contains several articles which make the adoption of antidumping or countervailing duties and safeguard measures contingent upon a finding of a causal link between the imports in question and the injury allegedly suffered by a domestic industry.

1. GATT VI

The first of these to be examined in the context of the present paper is GATT VI, particularly VI:1 and VI:6(b), which address the imposition of antidumping and countervailing duties.

GATT VI:1 states that dumping is to be condemned if it "causes or threatens material injury to an established industry" or "materially retards the establishment of a domestic industry".

GATT VI:6(b) goes on to state that antidumping or countervailing duties shall only be imposed where the "effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry".

2. GATT XIX

The second provision in GATT 1947, which contains language on causation of interest to the present study, is GATT XIX entitled "Emergency Action on Imports of Particular Products" and is otherwise commonly referred to as the "safeguards" or "escape clause".

GATT XIX:1(a) sets the scene by stating, in language that is similar to GATT VI, that, where a Contracting Party (CP) has entered into an obligation under the GATT (essentially meaning where a CP has provided a tariff concession and thereby favorably increased access of a particular product to its domestic market) and imports of this product have increased in such quantities and under conditions that "cause or threaten serious injury to domestic producers of the like or directly competitive products", then the CP is free to "suspend the obligation in whole or in part or to withdraw or modify the concession.

In practice such suspension or withdrawal usually involves the product in question being subject to either an import quota, a higher tariff level or, as is most often the case in the practice of the United States, one of the biggest users of safeguard measures, a tariff-rate quota (TRQ).

Unfortunately, neither GATT VI or XIX contain any language that would give guidance on what kind of economic malaise a domestic producer has to be experiencing for the injury criteria to be fulfilled. Nor do these provisions contain guidance as to what economic factors need to be given in order for a causal link between imports and injury to be positively identified.

3. The Negotiating History of GATT VI and XIX[1]

I shall now turn to the drafting history of these two articles to try and gauge what the negotiators had in mind who, between 1945 and 1947, agreed upon this wording.

a) Negotiating History of GATT VI

The provisions on antidumping that were to form the framework governing this practice in the ITO Treaty and which eventually became GATT law, hark back to a draft article put forward by the US in its 1945 Proposals[2] and its subsequent 1946 draft[3] of an ITO Charter.[4]

It would seem that the drafters of the ITO Charter and thus the GATT were more concerned about discussing the merits of antidumping as a whole, rather than specifying, with any great deal of precision or in a comprehensive manner, the legal requirements under which such duties could be imposed. Thus it is, that we find that the notion that a country might legitimately wish to apply antidumping (and for that matter countervailing) duties as advanced in the US Proposals was, on the whole, accepted because "[t]here was general consent […] that circumstances might arise in which such duties may properly be applied".[5]

The discussions leading up to the ITO Charter and the GATT seemed to focus on defining the various kinds of dumping, and deciding which of these should be subject to the multilateral disciplines envisaged by the ITO Charter. It was generally agreed that there were "four types of dumping: price, service, exchange and social"[6] of which only the first was considered as justifying the kind of contingency measures represented by antidumping duties.

The drafters did, however, include a kind of "necessity test" which a country would have to pass in order to make the imposition of such measures legal under the ITO Treaty and thus the GATT. This test revolved around the requirement of demonstrating that such dumping was causing "injury" to the industry of a country's domestic market.[7]

Interestingly enough, there does seem to have been some discussion and finally a consensus on what the term "industry" was to encompass. Let us recall that GATT VI:6(a) requires that the injury allegedly being caused by the dumped or subsidized imports must be suffered by an "established domestic industry" or must be such as to

[1] The comments in the following section are based, in large part, on the explanations found in Jackson (1969). Citations in this section to the ITO and GATT preparatory documents and to State Department publications are taken from Jackson (1969).
[2] *US Proposals, Dep't of State Pub. No. 2411*, as cited in *Jackson (1969)*, at p. 368.
[3] *US Suggested Charter*, *Dep't of State Pub. No. 2598 (1946)*, as cited in *Jackson (1969)*, at p. 368.
[4] See *US Proposals, Dep't of State Pub. No. 2598, at 5, article 11 (1946)*, as cited in *Jackson (1969)*, at p. 403. Interestingly enough, Jackson notes that the US was not the first country to have antidumping legislation (as we understand it today in the GATT/WTO context) on its statute books, but rather Canada: see *Jackson (1969)*, at p. 403.
[5] See *UN Doc. EPCT/C.II/54, at 11 (1946)*, as cited in *Jackson (1969)*, at p. 404.
[6] See *UN Doc. EPCT/C.II/48, at 1 (1946)*, as cited in Jackson (1969), at p. 404, which also contains further elucidations as to what these four kinds of dumping involved and, interestingly, which nations were considered as being the main perpetrators of such forms of dumping at the time.
[7] It seems that there was some discussion as to whether the standard would be "injury" or "serious injury". See UN Doc. EPCT/C.II/12/, at 48 (1946); see also GATT 3d Supp. BISD 83 (1955), both documents cited in *Jackson (1969)*, at p. 405. In effect, the present standard as it exists today in GATT VI:6 (a) is "material injury".

"retard materially the establishment of a domestic industry". It was agreed that the term "industry" would include "such activity as agriculture, forestry, mining etc., as well as manufacturing"[8]. This definition was eventually to be subject to greater elucidation when the Antidumping Code was negotiated during the Kennedy Round. Nevertheless, for reasons of space, I shall not be able to go into greater detail on the delimitation of the term "industry" here.

Although the preparatory documents indicate that there was much discussion on the modalities and conditions under which such duties were to be allowed, it would seem that the drafters spent little to no time defining how a country might legally comply with the requirements of determining either injury or the causal link between such injury and the dumped (or subsidized) imports.

In fact, it would seem that it was not until the adoption of the Antidumping Code in 1967, that the oversight of the drafters of the ITO Charter and thus GATT 1947 in this regard, who, it must be admitted, had a lot of ground to cover, was addressed in more detail. I shall turn to these developments later in Section II.

b) Negotiating History of GATT XIX

Due to the underlying economic policy rationale inherent in its very nature, one would think that the safeguards clause might be a much more revealing place to seek clarification on what could be meant by the term "causal-link" between imports and injury to a domestic industry.

Whereas antidumping or countervailing duties are imposed on the economic grounds that price dumping and production subsidies lead (firstly) to unfair competition and then (secondly) could conceivably cause injury to a domestic industry or undermine the establishment of such an industry, there is no such (two-step) consideration in the economic logic underpinning the safeguards clause. Rather, safeguard measures are on the statute books to provide protection to domestic industries suffering injury at the hands of imports or inevitably likely to suffer such injury in the immediate future. Of course, that is not to say that there are not other legal requirements which such imports have to fulfill in order to qualify for contingency action under the escape clause. They have to be the cause of developments that were unforeseen when a GATT obligation was entered into or a concession offered on the tariff line(s) of the imported good in question. Such imports must also have risen sharply in the recent past. In any event it remains the injury or threat of injury determination and the fact that such injury has or will be caused by imports which lies at the very heart of the safeguards clause.

During the various talks that led to the creation of the ITO Charter and the GATT, it would seem that there was general consensus about the necessity of including such a clause, with most discussion focusing on the scope that such a clause might have. [9] The insertion of such a clause again harked back primarily to US efforts and the concerns, which had been prevalent in the US for several decades, that trade liberalization had to

[8] See *Havana Reports, UN Doc. ICITO/1/8, at 74 (1948)*, cited in *Jackson (1969)*, at p. 418.
[9] See *Jackson (1969)*, at p. 554.

go hand-in-hand with measures to safeguard US industries from any unwanted side-effects of such liberalization.[10]

Nevertheless, the discussions that ensued during the various meetings leading up to the Havana conference seemed to focus on elements such as whether a relative increase in imports would be enough to justify safeguard action or whether an absolute increase had to be shown.[11] Again there does not seem to have been very much effort made during the negotiations to define what factors might clearly indicate the presence of a causal relationship between increased imports and injury or threat thereof.

Indeed it would seem that this issue was only taken up much later, during the Tokyo Round negotiations, by which time it was clear to all parties that there was a real need for elucidation in order to stop abuse of the safeguards clause.

I shall describe the ways in which the element of causal link was dealt with in the negotiations on a Tokyo Round Safeguards Code under Section III.3 below.
For now, I should like to look at an early GATT dispute, which sheds some light on how the Contracting Parties struggled and came to terms with the requirement that a causal link be demonstrated between imports and injury to a domestic industry.

4. The Early Jurisprudence: The Hatters Fur Case[12]

a) Historical Background to the Dispute

In October 1950, on the eve of the fifth session of the GATT in Torquay, England, The United States announced that it would be taking action pursuant to GATT XIX to protect domestic producers of women's fur felt hats and bodies. The US argued that, due to significant tariff reductions granted on these products by the US in Geneva (1947), it had seen a substantial increase in imports, which had caused injury to domestic producers. As a result, it had chosen to withdraw the tariff concessions made in Geneva and thus restore the level of protection previously available to domestic producers of the products in question. In effect, this resulted in imports being subject to an import duty at an ad valorem rate of between 67.80 and 73.65 per cent instead of between 25.3 and 41.8 per cent.[13]

Pursuant to its obligations under GATT XIX, the US entered into consultations with several Contracting Parties who were affected by this course of action and managed to reach an agreement with each of these, with the sole exception of Czechoslovakia.

At the Torquay meeting the Czechoslovakian delegation lodged a protest against the action of the United States, claiming that certain conditions of GATT XIX had not been

[10] See for example Article XI of the *Reciprocal Trade Agreement with Mexico*, Dec. 23, 1942, 57. Stat. 833 (11943), E.A.S. No. 311 (effective Jan. 30, 1943), reprinted in *Jackson (1969)*, at p. 554, which interestingly enough, reads very much like GATT XIX as it exists today. See also 91 Cong. Rec. 4872 (1945) (remarks of Congressman Doughton); *Hearings on the Extension of the Reciprocal Trade Agreements Act Before the Senate Finance Comm.*, 79th Cong., 1st Sess. 84, 86, 90, 179-80, 459 (1945), as well as *Hearings on the Extension of the Reciprocal Trade Agreements Act Before the House Comm. On Ways and Means*, 79th Cong., 1st Sess. 273 (1945), both cited in *Jackson (1969)*, at p. 553, and both of which capture very succinctly the mood of US lawmakers at the time.
[11] See *Jackson (1969)*, at p. 555, note 12.
[12] Report on the Withdrawal by the United States of a Tariff Concession Under Article XIX of the GATT, Geneva, Nov. 1951, hereinafter cited as *the Hatters Fur Case* or simply *Hatters Fur*.
[13] See Appendix A of the Report of the Working Party dated 27 March 1951.

complied with. The complaint was referred to a specially appointed Working Party, which deliberated on the matter and presented its report on March 27, 1951. The methodology and findings of the Working Party in this case are interesting and will be discussed briefly here.

b) Methodology of the Working Party

The Working Party first set out the requirements of GATT XIX, stating that there were essentially three: (a) an abnormal development in the imports of the product in question; (b) the withdrawal of the concession must be limited to the extent and time necessary to prevent or remedy injury caused or threatened; (c) the need for the contracting party availing itself of the safeguard measure to give advance notice to the other contracting parties and provide the opportunity for consultations to those contracting parties affected by the measure. Thus there were three conditions to imposing a safeguard measure: two substantive and one procedural.

Furthermore, with regard to point (a) the Working Party specified that such abnormal developments would themselves consist of three elements:

(i) the product in question must be imported in increased quantities

(ii) the increased imports must be the result of unforeseen developments and of the effect of the tariff concession; and

(iii) the imports must enter in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products.

The Working Party also examined the extent and duration of the US' measure and whether it was limited to the extent necessary to prevent or remedy the injury. Effectively applying a kind of proportionality test.

Finally the Working Party went on to examine whether the procedural requirements of Article XIX had been met, namely with regard to advance notification of the measure and consultation with the affected parties.

In the following analysis, I shall limit my examination to those findings of the Working Party, which are of relevance to the question of causation.

c) Findings of the Working Party

When attempting to gauge whether there had been an increase in imports, the Working Party relied on the data supplied by the US Tariff Commission, the accuracy of which was not disputed by the Czech government. The data showed a substantial increase in the years since the tariff concession had entered into force (1948 to mid 1950).

With regard to the existence of unforeseen developments a long discourse ensued which has been the substance of extensive analysis elsewhere[14] and which will not be touched upon here, except to say that the broad interpretation given by the Working Party on

[14] See for example, Jackson (1969) at p. 559.

this point essentially discouraged any future challenges to determinations under this heading until 1998, when The European Communities challenged a safeguard measure applied by Argentina on imports of footwear.[15]

On the prerequisite of the existence or threat of serious injury, the submission of the United States government stated that, in the relevant period, imports of the product in question would seem to have replaced domestic production.[16] The US submission, however, also conceded that no data was available to assess the financial losses which domestic firms producing the like product had suffered from the increase in imports. The US government also argued that employment figures in the domestic industry producing the like product had been falling since 1947. However, on this last point, the US again conceded that "it was difficult to estimate to what extent the reduction in employment is due to increased imports [...] and to what extent due to other factors ...".[17] The US submission cited the report of the US Tariff Commission, which admitted on this point that "the proportion (of injury) attributable to that factor (imports) cannot be estimated with any degree of precision".[18]

The submission of the Czech government pointed out that "[t]he contention that there was a causal relationship between the increased imports [...] and the employment situation in the United States hat industry remained extremely doubtful".[19] The Czech submission also pointed out that employment statistics in the domestic industry had been on the rise during the first half of 1950.[20] It also pointed out that wages of the workers in the domestic industry had remained stable, which would further point to the fact that "increased imports caused or threatened no injury to the (domestic industry) workers".[21]

The Working Party took note of the arguments put forward by the Czech government but nevertheless came to the following findings:

- That the statistics up to mid-1950 seemed to indicate a "material degree of displacement"[22] of domestic production and that if the tariff rate had not been increased by the safeguard measure, such displacement might have taken place "to a considerably greater degree";[23]

- That the statistics provided on employment and unemployment were "inconclusive" and that "no degree of significance" could be attached to them;[24]

- That the data supported that "increased imports had caused or threatened to cause some adverse effects" to the US industry;[25]

[15] See report of the Appellate Body dated 14 December 1999, in *Argentina – Safeguard Measures on Imports of Footwear* hereinafter cited as *Argentina - Footwear* (WT/DS121/R/AB). See also Jackson (1997), which would seem to share this view, stating, at p. 187, that "it is argued that that the prerequisite cause of "unforeseen developments" has been essentially 'read out' of the GATT agreement".
[16] See para 15 of the Report, at p. 9
[17] See para 19 of the Report, at p. 9.
[18] See para 21(b) of the Report, at p. 10.
[19] See para 21(c) of the Report, at p. 10.
[20] See para 21(d) of the Report, at p. 10.
[21] See para 21(e) of the Report, at p. 10.
[22] See para 28 of the Report, at p. 14.
[23] Ibid.
[24] See para 29 of the Report, at p. 14.

- However, that it was unclear whether such adverse effects constituted "serious injury" but that such a finding was "essentially a matter of economic and social judgment involving a considerable subjective element";

- That the United States was not required to "prove conclusively that the degree of injury caused or threatened in this case must be regarded as serious" and that the United States was entitled to "the benefit of any reasonable doubt";

- That no facts had been advanced which would provide "any convincing evidence that it would be unreasonable to regard the adverse effects on the domestic industry concerned as a result of increased imports as amounting to serious injury or a threat thereof";[26]

- That the facts, viewed as a whole "certainly tend[ed] to show that some degree of adverse effect has been caused or threatened";[27]

The Working Party concluded its statements under this heading by finding that the "Czechoslovak Delegation had failed to establish that no serious injury has been sustained or threatened".[28]

d) Critique of the Working Party Report

With the benefit of hindsight, and with the advantage of having followed the numerous trade remedy disputes and seeing how the legal standards that are applied nowadays in WTO dispute settlement have evolved, the findings of the Working Party in *Hatters Fur* seem highly questionable to the contemporary observer and would most probably have been overruled by the Appellate Body if it were required to review this decision today.

To critique just a few points, one can emphasize the following shortcomings of the Working Party's approach.

Firstly the deference shown to the United States government when stating that they were entitled to "the benefit of any reasonable doubt" would, today, most likely be considered a violation of the standard of review.

Secondly the Working Party's interpretation that the United States was not required to "prove conclusively that the degree of injury caused or threatened in this case must be regarded as serious", but rather that it was up to the Czechoslovakian Government to establish that there was a lack of injury, completely turns on its head, any notion of the burden of proof as it functions today. Indeed, as the Party invoking the measure, it would be up to the United States to demonstrate that the legal requirements for its use had been fulfilled.

In any event, the only thoughtful comments that the Working Party Report in *Hatters Fur* contains on causation were advanced by the Czechoslovakian Government (who

[25] See para 30 of the Report, at p. 14.
[26] Ibid.
[27] Ibid.
[28] Ibid.

effectively questioned the causal link) but were essentially left unconsidered by the Working Party. In effect the Working Party seemed to rule that a coincidence of an increase in imports and injury suffered by a domestic industry would suffice, lacking other evidence to the contrary, to conclude that a causal link was present.

II. CAUSATION UNDER THE 1967 ANTIDUMPING CODE.

1. Historical Background

The lack of specificity in GATT VI caused several parties to the Agreement to pursue a consensus on establishing more rigid criteria for the imposition of antidumping duties. Negotiations to this effect began in 1966 and ended with the conclusion, in Geneva, in the year 1967, of an Agreement on Interpretation of Article VI[29] (otherwise known as the 1967 Antidumping or AD Code) signed by 18 nations including the United States.[30]

2. Key Provision governing Causation

The key provision of the 1967 AD Code concerning the determination of injury and causal link is Article 3 which states that:

> *A determination of injury shall be made only when the authorities concerned are satisfied that the dumped imports are demonstrably the principal cause of material injury or of threat of material injury to a domestic industry or the principal cause of material retardation of the establishment of such an industry. In reaching their decision the authorities shall weigh, on one hand, the effect of the dumping and, on the other hand, all other factors taken together which may be adversely affecting the industry.*

This provision, which was described by one US lawmaker as containing a "rigid causal relationship between dumping and injury" does, on its face, seem to add more detail to how domestic authorities are to go about proving a causal link. Furthermore it ups the ante by stating that dumped imports must be "demonstrably the principal cause" of injury or threat thereof (language which was struck from later Codes).

However, the provision falls short in several ways, such as by failing to specify how principal cause might be demonstrated or what other factors might be adversely affecting an industry and how they are to be quantified in order to determine whether they outweigh the adverse effects due to the dumped imports.

III. DEVELOPMENTS DURING THE TOKYO ROUND NEGOTIATIONS[31]

The Tokyo Round is interesting from the point of view of causal link in contingency protection because of two events. The first was the simultaneous watering down and tightening up of the causation standard in the AD Code. The second was the failure to develop a similar code for safeguards

[29] GATT, 15th Supp. BISD 74 (1968).
[30] See Jackson/Davey at p. 670 which includes some interesting explanations as to why the Code never became law in the US.
[31] For more background on the Tokyo Round Negotiations in general, see Winham. See also *Jackson/Louis/Matsushita.*

1. The Antidumping Code

I shall not go into too much detail on the substance of negotiations as this Code was being renegotiated. Suffice to say that the causation standard which had hitherto applied to signatories of the 1967 Code was substantially altered at the insistence of the United States.[32]

The reader will recall that, pursuant to Article 3 of the 1967 AD Code, a domestic authority wishing to impose antidumping duties on an imported good had to demonstrate that imports of such dumped goods had been "the principal cause of material injury or of threat of material injury to a domestic industry or the principal cause of material retardation of the establishment of such an industry". It was precisely this "principal cause" requirement which was eliminated from the Tokyo Round Agreement.

Instead, the applicable cause on causal link, which was Article 3(4) read[33]:

> *It must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of this Code. There may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports* (footnotes omitted).

This clause can be said in one way to weaken the causation standard, but in another important way it represents a tightening up of the rules on causal link.

Clearly the fact that the dumped imports must no longer be demonstrated to be the principal cause of injury represents a huge step back from the discipline that existed under the 1967 AD Code. The clause as it stood after the Tokyo Round, retained a large measure of ambiguity as to whether imports must simply be *a* cause, *a significant cause*, *a minor cause* or *the dominant cause* of injury.

Nevertheless, the Tokyo Round causation clause introduced an important new notion into the whole debate on causal link. This was done by inserting the non-attribution language into Article 3(4). Henceforth, injury caused by other factors than imports could no longer simply be attributed to such imports. The language on non-attribution has remained part of the causation standard applicable in both antidumping and safeguards disputes to this day and has taken on great significance in the disputes that have been waged over the interpretation of this standard. I shall look at the significance this language has taken on in more detail below, when discussing the case law that has emerged under the Uruguay Round agreements.

2. The Subsidies Code

It has commonly been noted that one of the more obvious successes of the Tokyo Round of multilateral trade negotiations was the conclusion of a Subsidies Code.[34]

One of the major issues surrounding the negotiations of this code, was that of injury determination within the context of countervailing duties.[35] It will be recalled that the United

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[32] See Winham, at. P. 221.
[33] See Jackson/Davey at p. 674. For the text of the Code, see GATT 26th Supp. BISD 171 (1980), see also the following link, which has the text of this, and all the other Tokyo Round codes conveniently available in pdf format: http://www.worldtradelaw.net/tokyoround/antidumpingcode.pdf (last visited on 15 Oct., 2002).
[34] Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade.

States refused to adopt the 1967 AD Code, due, at least in part, to the stringent injury test this agreement contained. During the Tokyo Round, European insistence that the US join the 1967 AD code was met with a certain willingness to do so by the US under the condition that the Europeans enter into a subsidy/countervailing duty code. In addition, US lawmakers felt that both codes, each of which provided that either antidumping or countervailing duties could be imposed, should contain the same injury test. For this reason it was necessary to re-draft the injury language of the AD code, as described above, so that it would conform to the tastes of US lawmakers.

The result is that the language on causal link under Part I (Application of Article VI of the General Agreement) of the Tokyo Round Subsidies Code is, for all intents and purposes, identical to the language on causation and non-attribution which can be found in the Tokyo Round AD Code.

Thus Article 6(4) of the Subsidies Code provides that

> *It must be demonstrated that the subsidized imports are, through the effects of the subsidy, causing injury within the meaning of this Agreement. There may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the subsidized imports* (footnotes omitted).

3. The Failure to Conclude an Agreement on Safeguards[36]

One of the more significant setbacks experienced in the Tokyo round was the failure of the negotiators to conclude a code on the interpretation of GATT XIX.

This failure can largely be attributed to several stumbling blocks the largest of which was the Europeans insistence that any agreement contain a selective safeguard procedure (thus allowing countries to apply safeguard measures on a non MFN basis). However at least one commentator[37] has argued, quite convincingly, that if agreement had been reached on the issue of selectivity, then there were a number of other issues that would have caused considerable difficulties to the negotiators, such as agreeing on a definition for the term "injury" or the issue of structural assistance. Finally, it can also be attributed to the fact that the US was making liberal use by then of the safeguards clause (as well as other non-tariff measures such as voluntary export restraints or VERs) and that there was little enthusiasm in Congress for letting their hands become further tied.[38]

Indeed, the world trading system would have to wait until the conclusion of the Uruguay Round in 1994 before an Agreement on the application of the safeguards clause could be successfully negotiated. I shall look at this agreement in more detail below.

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[35] See Winham, at p. 220.
[36] See Winham, at pp. 240 – 247.
[37] Ibid, at pp. 240 – 242.
[38] See *Jackson/Davey*, at p. 646.

IV. Causation in WTO Law

I shall now turn from the past to the present and review, in brief, the law as it applies today within the WTO, on causal link and non-attribution in contingency protection measures. I shall begin with outlining the changes made to the relevant agreement (antidumping, subsidies and safeguards), before proceeding to a short account of how the case law has been developing

1. The Uruguay Round Agreements

The Uruguay Round saw the redrafting of several existing trade contingency agreements as well as the conclusion of several new agreements governing such contingency protection. In the first category we find the Antidumping Agreement[39] as well as the Subsidies Agreement[40]. In the second category we find the new Safeguards Agreement, as well as the Agreement on Clothing and Textiles, which also contains a special safeguard measure with its own injury test.

I shall begin my analysis with the language on causation and non-attribution in the Antidumping Agreement before proceeding to an examination of the corresponding language contained in the ASCM. I shall conclude with a review of the relevant language in the Safeguards Agreement. I shall not, due to reasons of time and space, go into the language of the special safeguard clause in the Agreement on Textiles and Clothing.

a) Causation and Non-Attribution under the Uruguay Round AD Agreement.

The Uruguay Round Antidumping Agreement contains a long and detailed article on injury determination, namely Article 3. In many ways this article is very similar to that of the Tokyo Round Code and does not go further in defining the causation standard. Nevertheless, it does contain a non exhaustive list of factors besides imports which could be causing injury to a domestic industry and which a domestic authority must investigate.

Article 3(5) reads as follows:

> *It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include,* inter alia, *the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign*

[39] Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
[40] Agreement on Subsidies and Countervailing Measures, hereinafter ASCM.

and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

b) *Causation and Non-Attribution under the Uruguay Round ASCM*

The Uruguay Round ASCM has several articles which contain language on causal link between imports and injury suffered by a domestic industry. The first is Article 7 on Remedies:

> *Except as provided in Article 13 of the Agreement on Agriculture, whenever a Member has reason to believe that any subsidy referred to in Article1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice, such Member may request consultations with such other Member*

Another provision of the Uruguay Round ASCM, which contains language on causation is Article 11, which governs the conditions under which a countervailing duty investigation must be initiated and conducted. It provides that an investigation shall only be initiated where an application to do so has been filed and said application:

> *[C]ontains evidence of the existence of (a) a subsidy and, if possible, it's amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury.*[41]

This provision then goes on to clarify what will be accepted as evidence on these factors. With regard to evidence of causal link. Article 11.2 /iv) states that the application to impose a countervailing duty shall contain:

> *[E]vidence that alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies: this evidence includes information on the evolution of the volume of the allegedly subsidized imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 15.*

Article 15 of the ACSM goes into quite some detail on the determination of injury. With regard to the causal link it states, in paragraph 5 that:

> *It must be demonstrated that the subsidized imports are, through the effects*[42] *of subsidies, causing injury within the meaning of this Agreement.*

[41] Article 11.2 of the ASCM.
[42] As set forth in paragraphs 2 and 4.

> *The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, inter alia, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.*

The observant reader will, of course, notice that the formulation of this paragraph does not represent much of an improvement on the language that was adopted during the Tokyo Round, except that, like the Uruguay Round Antidumping Agreement, it now contains a non-exhaustive list of factors, other than imports, which might also be causing injury to a domestic industry, and which must also be examined within any attempt to establish a causal link.

c) *Causation and Non-Attribution under the Safeguards Agreement*

The key provision of the Safeguards Agreement regarding causation and non-attribution is Article 4 entitled "Determination of Serious Injury or Threat Thereof". Paragraph 2(a) provides that:

> In the investiga*tion to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.*

Like its counterparts in the Uruguay Round Antidumping Agreement and ACSM, this article obliges the investigating authority to evaluate the factors that could be affecting the domestic industry and then lists which factors, other than imports, should be examined in order to evaluate what their role has been in the causal chain leading to the industry's malaise.

Of course, as long as there is no language on the importance of the role that imports and other factors are playing in the causal chain, i.e. whether imports must simply be identified as *a cause*, *a principal cause*, *an important cause* or *the only cause*, such an analysis might remain a fairly academic exercise.

This is one of the unfinished jobs that has fallen fairly squarely onto the shoulders of the WTO dispute settlement system and which, among other things, various panels and the Appellate Body have been struggling to make sense of.

V. THE EVOLUTION OF THE CASE-LAW UNDER THE WTO DISPUTE SETTLEMENT SYSTEM[43]

The following section will analyze how panels and the Appellate Body have grappled with the causal-link requirement and the language on non-attribution over the last several years.

1. Argentina Footwear[44]

In April 1998 the European Communities initiated proceedings at the WTO against Argentina with regard to the application of provisional and definitive safeguard measures on imports of footwear. This dispute was fought under Article XIX:(A) of GATT 1994 and the Safeguards Agreement. The findings of the Panel, which held that Argentina had violated its WTO obligations were appealed by both Argentina and the European Communities and the dispute was therefore "kicked upstairs" to the Appellate Body. The following analysis shall focus firstly on the methodology and findings of the panel and then move onto the reasoning and findings of the AB. I shall avoid going into the various procedural and substantive issues raised and focus my analysis uniquely on what was said with regard to causation and non-attribution.

a) *Report of the Panel*[45]

The Panel established to hear this case began its findings with regard to the causal link by citing subparagraphs a) to c) of Article 4.2 of the Safeguards Agreement. It then went on to state:

> Applying our standard of review, we will consider whether Argentina's causation analysis meets these requirements on the basis of (i) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether a reasoned explanation is provided as to why nevertheless the data show causation; (ii) whether the conditions of competition in the Argentine footwear market between imported and domestic footwear as analysed demonstrate, on the basis of objective evidence, a causal link of the imports to any injury; and (iii) whether other relevant factors have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports.[46]

It therefore established a three-step methodology, which it went on to elaborate under the titles of i) *coincidence of trends*, ii) *conditions of competition*, and iii) *other factors*.

[43] This section will focus uniquely on the case-law as it has developed with regard to the WTO Agreement on Safeguards. Future editions of this paper will also cover the relevant case-law under the Uruguay Round Antidumping Agreement and the ASCM.
[44] Argentina – Safeguard Measures on Imports of Footwear WT/DS121/R and WT/DS121/AB/R
[45] WT/DS/121R.
[46] Ibid, at para. 8.229.

i. Coincidence of Trends

When conducting its analysis on the coincidence of trends, the Panel stated:

> In making our assessment of the causation analysis and finding, we note in the first instance that Article 4.2(a) requires the authority to consider the "rate" (i.e., direction and speed) and "amount" of the increase in imports and the share of the market taken by imports, as well as the "changes" in the injury factors (sales, production, productivity, capacity utilisation, profits and losses, and employment) in reaching a conclusion as to injury and causation. As noted above we consider that this language means that the *trends* -- in both the injury factors and the imports -- matter as much as their absolute levels. In the particular context of a causation analysis, we also believe that this provision means that it is the *relationship* between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination.[47]

The Panel went on to affirm that for causation to be present "an increase in imports normally should coincide with a decline in the relevant injury factors"[48]. However it qualified this statement with the caveat that:

> While such a coincidence by itself cannot *prove* causation (because, *inter alia*, Article 3 requires an explanation – i.e., "findings and reasoned conclusions"), its absence would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation still is present.[49]

The Panel went on to find that it failed to see the expected coincidence of trends between imports and the injury factors which the Argentinean investigating authority had considered.[50] Indeed, the Panel noted that the data indicated that while production was falling, sales figures were also declining, as was employment, as was profit-and-loss. Nevertheless this decline in the relevant injury factors was accompanied by a decline in imports. The Panel thus came to the conclusion, on this point that "this suggests that factors other than imports were having an effect on the industry".[51]

The Panel then went on to evaluate Argentina's defense of its finding of causal link despite the fact that imports were in decline at the same time as the other injury factors. It qualified this defense as insufficient by stating:

> In our view, these statements do not provide the sort of detailed and reasoned explanation that would be necessary to reconcile the consistently and significantly declining trend in imports with a finding of current serious injury caused by increased imports.[52]

[47] Ibid, at para. 8237.
[48] Ibid, at para. 8.239.
[49] Ibid, emphasis in original.
[50] These were1) production, 2) sales, 3) employment and 4) profit-and-loss, see Panel Report at para. 8.243.
[51] Ibid.
[52] Ibid, at para. 8.246.

ii. Under such Conditions

With regard to its analysis under this heading, the Panel focused on the language to be found in Article 2.1 of the Safeguards Agreement, namely that a safeguard measure may only be applied where a 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".

In this context the Panel stated that:

> We believe that the phrase "under such conditions" would indicate the need to analyse the *conditions of competition* between the imported product and the domestic like or directly competitive products *in the importing country's market*. That is, it is these "conditions of competition" in the importing country's market that will determine whether increased imports cause or threaten to cause serious injury to the domestic industry. The text of Article 2.1 supports this interpretation, as the relevant phrase in its entirety reads "under such conditions *as to cause* or threaten to cause serious injury" (emphasis added). Seen another way, for a safeguard measure to be permitted, the investigation must demonstrate that conditions of competition in the importing country's market are *such* that the increased imports can and do cause or threaten to cause serious injury. Article 4.2(a) confirms this interpretation, in requiring that the competent authorities "evaluate all relevant factors of an objective and quantifiable nature *having a bearing* on the situation of that industry", which is further reinforced by Article 4.2(b)'s requirement that the analysis be conducted on the basis of "objective evidence". In our view, these provisions give meaning to the phrase "under such conditions", and support as well our view that for an analysis to demonstrate causation, it must address specifically the nature of the interaction between the imported and domestic products in the domestic market of the importing country. That is, we believe that the phrase "under such conditions" in fact refers to the *substance* of the causation analysis that must be performed under Article 4.2(a) and (b).[53]

The Panel then went on to analyze the conditions under which the subject imports were being imported, particularly the conditions of competition that existed between the subject imports and the domestically produced like or directly competitive products. The Panel particularly criticized the fact that Argentina had failed to conduct an analysis of the conditions of competition and noted that the lack of such an analysis must inevitably result in "an incomplete analysis of the causal link".[54]

[53] Ibid, at para. 8.250.
[54] Ibid, at para. 8.252.

Under this title the Panel went on to criticize the Argentinian Government's price analysis of imported footwear in the context of how likely it was that such imported footwear was undercutting domestically produced footwear and thus causing injury to the domestic industry. The Panel noted that Argentina's statements on the prices of imports relative to domestic products "were central to Argentina's causation finding" and that "low prices of imports and their asserted effects on the domestic industry, appears to have been the only 'condition of competition' between imports and domestic products on which Argentina's causation finding was based".[55]

The Panel concluded its analysis under this title by finding that Argentina had failed to demonstrate "either i) that imports were lower priced than comparable domestic goods, or ii) that any such lower-priced imports had an injurious effect on the domestic industry".[56]

iii. Other Factors

Under this title the Panel examined whether factors other than increased imports had been causing or threatening to cause injury to the domestic industry. It will be recalled that Article 4.2(b) of the Safeguard Agreement requires that such injury not be attributed to increased imports.

The European Communities had argued that there were a number of possible alternate causes of injury including i) the economic recession brought about in Argentina by the collapse of the Mexican peso (the so-called "tequila effect"), ii) imports under the Argentinean Government's Industrial Specialisation Regime[57], and iii) imports from Mercosur countries.[58] Argentina argued that it had examined the only other factor it had considered relevant, namely the tequila effect and that it had not attributed injury caused by that factor to the injury attributed to increased imports.[59]

The Panel concluded its analysis on this point by opining that Argentina had not given "sufficient consideration of the potential injury from 'the tequila effect' to the domestic industry".[60]

In summarizing its findings the Panel found that Argentina had failed to fulfill its obligations with regard to establishing a causal link and with regard to non-attribution. The Panel stated that the investigation conducted by the Argentine authorities

> did not demonstrate on the basis of objective evidence the existence of a causal link between increased imports and serious injury within the meaning of Article

[55] Ibid, at para. 8.254.
[56] Ibid, at para 8.262.
[57] See footnote No. 558 of the Panel Report which succinctly lays out this program of the Argentinean Government.
[58] That is, imports that were not subject to the contested safeguard measure, so-called "non-subject imports".
[59] See WT/DS/121R, at para. 8.266.
[60] Ibid, at para. 8.269.

2.2 and 4.2(b); that the investigation did not adequately take into account factors other than increased imports within the meaning of Article 4.2(b)".[61]

b) Report of the Appellate Body[62]

The Report of the Panel was appealed by both Argentina and the European Communities on various issues. The following analysis will focus uniquely on the issues of causation and non-attribution and the appeal submitted by Argentina on these findings.

The Argentine Government essentially argued that the Panel had exceeded its brief in "establishing and applying three 'standards' in its analysis on causation"[63]. It alleged that the Panel had read these standards into the Agreement on Safeguards and that there was no basis for these standards in the text of the Agreement.

The Appellate Body upheld the findings of the Panel with regard to the coincidence of trends.

In what constitutes a rare (if not characteristically critical) endorsement of the findings of the Panel the AB stated that:

> We are somewhat surprised that the Panel, having determined that there were no "increased imports", and having determined that there was no "serious injury", for some reason went on to make an assessment of causation. It would be difficult, indeed, to demonstrate a "causal link" between "increased imports" that did not occur and "serious injury" that did not exist. Nevertheless, *we see no error in the Panel's interpretation of the causation requirements*, *or in its interpretation of Article 4.2(b) of the* Agreement on Safeguards. Rather, we believe that Argentina has mischaracterized the Panel's interpretation and reasoning. Furthermore, we agree with the Panel's conclusions that "the conditions of competition between the imports and the domestic product were not analysed or adequately explained (in particular price); and that 'other factors' identified by the CNCE in the investigation were not sufficiently evaluated, in particular, the tequila effect." [64]

The AB therefore upheld the Panel's conclusion that "Argentina's findings and conclusions regarding causation were not adequately explained and supported by the evidence".[65]

[61] Ibid, at para. 8.279.
[62] WT/DS121/AB/R.
[63] Ibid, at para. 143.
[64] Ibid, at para. 145, emphasis added.
[65] Ibid, at para 146.

c) *Adoption of the Panel and AB Reports before the Dispute Settlement Body*

The Reports of the Panel and the Appellate Body in this case were adopted at a meeting of the Dispute Settlement Body which was held on 12 January 2000 in the Centre William Rappard.[66]

The Reports were the subject of several statements by a number of Members including the European Communities, Argentina, Indonesia, Brazil, the United States and Uruguay. Much, if not all of the discussion, focused on other issues that had arisen in the context of this dispute such as unforeseen developments and Article XXIV of GATT 1994.

Interestingly enough, none of the Members making statements that day said anything about the Panel's and the Appellate Body's handling of causation and non-attribution. The contrast with the DSB meeting at which the Panel and AB Reports in the next safeguards dispute – *US-Wheat Gluten* – were to be adopted, could not have been starker.

2. US-Wheat Gluten[67]

In March 1999 it was again the European Communities that initiated proceedings before the WTO Dispute Settlement Body under Article XIX of the GATT 1994 and the Agreement on Safeguards. The dispute involved the imposition, by the United States, of a definitive safeguard measure on certain imports of wheat gluten. The findings of the Panel, which came down strongly against the USA, were again the subject of an appeal before the WTO Appellate Body. As alluded to above, the DSB meeting at which the Panel and AB Reports were adopted proved to be one at which a number of WTO Members expressed strong criticism of the Appellate Body's reasoning and conclusions. Indeed, it can safely be said that the controversy that has surrounded the questions of causation and non-attribution over the last few years was born during the *Wheat Gluten* dispute.

As was the case above, during my analysis of *Argentina Footwear*, the comments and elucidations offered below shall be strictly limited to the issues of causal link and non-attribution.

a) *Report of the Panel*[68]

The Panel began its deliberations on these issues by according the demonstration of a causal link between increased imports and serious injury the status of a "*fundamental requirement* for the imposition of a safeguard measure"[69]

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[66] See WT/DSB/73

[67] United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities, WT/DS166/R and WT/DS166/AB/R.

[68] WT/DS166/R.

[69] Ibid, at para. 8.90, emphasis added.

Being very careful to stick to the approach set out in *Argentina Footwear*, the Panel stated that:

> We consider that an appropriate approach for a panel to take in assessing whether a Member has fulfilled the requirements of Article 4.2(a) and (b) SA with respect to causation consists of a consideration of: (i) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether an adequate, reasoned and reasonable explanation is provided as to why nevertheless the data show causation; (ii) whether the conditions of competition between the imported and domestic product as analyzed demonstrate the existence of the causal link between the imports and any injury; and (iii) whether other relevant factors have been analyzed and whether it is established that injury caused by factors other than imports has not been attributed to imports. We observe that this three-step approach to causation was also followed by the panel in *Argentina-Footwear Safeguard* and that the Appellate Body saw "no error" in that panel's approach· We note that, before us, the European Community espoused the latter panel's approach and the United States did not specifically object to it.[70]

The Panel therefore chose to follow the same three-step methodology set out by the Panel and endorsed by the AB in *Argentina Footwear*.

i. Coincidence of Trends

With regard to the trends analysis first followed by the *Argentina Footwear* Panel, the Panel in this case went on to examine the arguments of first the EC and then the United States. It concluded by essentially upholding the findings of the US investigating authorities:

> we consider that the rate of rise in imports in both absolute and relative terms would not preclude an investigating authority from characterizing this trend, both qualitatively and quantitatively, as sufficiently recent, sudden, sharp and significant to cause serious injury[71]

It concluded its analysis on this point by affirming that it found nothing in the USITC's analysis which might constitute a breach of its WTO obligations:

> We consider that in light of the *overall* coincidence of the upward trend in increased imports and the negative trend in injury factors over the period of investigation, the existence of slight absences of coincidence in the movement

[70] Ibid, at para. 8.91, footnotes omitted.
[71] Ibid, at para. 8.98, footnotes omitted.

of *individual* injury factors in relation to imports would not preclude a finding by the USITC of a causal link between increased imports and serious injury.[72]

ii. Under such Conditions

With regard to the analysis that a domestic authority must undertake under this title, the Panel also went on to uphold the methodology and findings adopted by the USITC. The Panel found, in particular that, although the USITC "might have provided a more robust explanation in its findings of how pricing data interrelated with the movement of trends in imports", it was essentially satisfied that the "USITC Report contains an adequate, reasoned, and reasonable explanation of how the facts support the determination made on this point, and that the USITC Report contains a demonstration of the relevance of this factor".[73]

iii. Other Factors

It was during its assessment of what other factors might be causing injury to the domestic industry and its examination as to whether the injury caused by these factors was not being attributed to imports that the Panel's analysis started to become very interesting.

The European Communities argued that the US legislation on which the USITC had carried out its investigation required a simple "preponderance" test when attempting to establish a causal link, i.e. that the US statute simply required that imports only represent a "substantial cause" of the injury. The EC argued that this approach was not the one required by WTO law and that Article 4.2(b) of the Safeguard Agreement required "that a Member demonstrate that 'increased imports' caused 'serious injury' *per se*, i.e. taken alone".[74]

In examining this point the Panel began by noting

> As we have previously observed, Article 4.2(b) SA contains an explicit textual link to Article 4.2(a) SA. It stipulates that "[t]he determination made in subparagraph (a) *shall not be made* unless" the investigation demonstrates the existence of the causal link between increased imports and serious injury. Article 4.2(a) and (b) require a Member: (i) to demonstrate the existence of the causal link between increased imports and *serious* injury; and (ii) not to attribute injury being caused by other factors to the domestic industry at the same time to increased imports. [75]

[72] Ibid, at para. 8.101, emphasis in original.
[73] Ibid, at para. 8.117.
[74] Ibid, at para. 8.130, the Panel was citing from the European Communities' response to Panel Questions 8 and 9, footnotes omitted, emphasis in original.
[75] Ibid, at para. 8.138.

In the same paragraph the Panel went on to state

> We consider that, read together, these two propositions require that a Member demonstrate that the increased imports, under the conditions extant in the marketplace, *in and of themselves*, cause *serious* injury. This is not to say that the imports must be the sole causal factor present in a situation of serious injury. There may be multiple factors present in a situation of serious injury to a domestic industry. However, the increased imports must be sufficient, in and of themselves, to cause injury which achieves the threshold of "serious" as defined in the Agreement. [76]

The Panel then went on to examine the investigation conducted by the USITC in regard to the standard it had just laid down. It found that the USITC causation analysis did not "ensure that imports, in and of themselves, are sufficient to cause serious injury to the domestic industry once injury caused by other factors is not attributed to imports".[77] The Panel concluded that the examination and conclusion of the USITC "that increased imports were an important cause of serious injury and a cause that is greater than any other cause" was not sufficient to meet the requirements of Article 4.2(b) of the Safeguards Agreement as "they do not ensure the non-attribution to imports of injury caused by other factors"[78].

b) Report of the Appellate Body[79]

The Report of the Panel in this case was again the subject of an appeal before the AB. As before, the following analysis will focus uniquely on the issues of causation and non-attribution and the appeal submitted by the United States on these findings.

The AB began its analysis on this point by trying to follow the reasoning of the Panel that could have led it to its findings that increased imports examined, "alone", "in and of themselves", or "*per se*", must be causing or threatening to cause injury that is serious.[80]

It offered the following explanation of the Panel's reasoning:

> It seems to us that the Panel arrived at this interpretation through the following steps of reasoning: first, under the first sentence of Article 4.2(b), there must be a "causal link" between increased imports and serious injury; second, the non-"attribution" language of the last sentence of Article 4.2(b) means that the effects caused by increased imports must be *distinguished from* the effects caused by other factors; third, the effects caused by other factors must, therefore, be *excluded* totally from the determination of serious injury so as to

[76] Ibid.
[77] Ibid, at para. 8.152.
[78] Ibid, at para. 8.154.
[79] WT/DS166/AB/R.
[80] Ibid, at para. 66.

> ensure that these effects are not "attributed" to the increased imports; fourth, the effects caused by increased imports *alone*, excluding the effects caused by other factors, must, therefore, be capable of causing serious injury.[81]

The AB then went on to offer its own interpretation of the language in question, namely Article 4.2(b) of the Safeguards Agreement. By referring closely to the text it established that "the requirement for a determination, under Article 4.2(a), is that the "causal link" exist. The AB then delved somewhat more deeply into possible interpretations of the term "causal link", concluding that "the term 'the causal link' denotes, in our view, a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury.[82]

The AB went on to reverse the conclusion of the Panel on this point by stating

> Although that contribution must be sufficiently clear as to establish the existence of "the causal link" required, the language in the first sentence of Article 4.2(b) does *not* suggest that increased imports be *the sole* cause of the serious injury, or that ""*other* factors" causing injury must be excluded from the determination of serious injury. [83]

In attempting to interpret the language on non-attribution, the AB went on to develop a three-step test. In the first step an investigating authority must distinguish "the injurious effects caused to the domestic industry by increased imports" from those caused by "other factors".[84] The second step is to "attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, 'injury' caused by all these different factors, including increased imports"[85]. The third and final step involves the competent authority making a determination as to whether a causal link exists between increased imports and serious injury "and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements as required by the Agreement on Safeguards".[86]

Having established this interpretation and the three step test that this interpretation requires the AB then went on to examine the investigation carried out by the United States in the dispute before it. It concluded that it was not satisfied that the US had fulfilled its obligations under the Safeguards Agreement and stated

> We are not satisfied, in light of the data that was before the USITC, that the USITC adequately evaluated the complexities of this issue […]. It follows, in this case, that the USITC has *not* demonstrated adequately, as required by Article 4.2(b), that any injury caused to the domestic industry by increases in

[81] Ibid, emphasis in original.
[82] Ibid, at para. 67.
[83] Ibid.
[84] Ibid, at para. 69.
[85] Ibid.
[86] Ibid.

average capacity has not been "attributed" to increased imports and, in consequence, the USITC could not establish the existence of the "causal link" Article 4.2(b) requires between increased imports and serious injury.[87]

c) *Critique of the Appellate Body's interpretation*

Before embarking on a critique of the AB's interpretation of the language contained in Article 4.2(b), it must be noted that there is no basis in the text of the Safeguards Agreement for the interpretation offered by the Panel, namely that increased imports taken "alone", "in and of themselves", or "*per se*", be causing or threatening to cause serious injury. The Appellate Body was thus correct in exposing and overturning this erroneous interpretation by the Panel. Indeed, it is inconceivable, given its recalcitrance on this issue in the context of antidumping, that the United States would ever have agreed to allow such language into the Safeguards Agreement, either explicitly or implicitly. The attentive reader will recall that language approaching this standard had been drafted into the 1967 AD code (signed but never adopted by the US) but then diluted in the AD code that emerged from the Tokyo Round of multilateral trade negotiations[88].

Instead of a sole-cause standard the Appellate Body opted for the much watered down "genuine and substantial relationship of cause and effect" standard. Although this is also language that does not figure explicitly in the Agreement, it would seem to do more justice to the requirement that a causal link be established than the sole cause standard advocated by the Panel. One may certainly affirm with confidence that it cannot have been the intention of the drafters of Article 4.2(b) to allow a safeguard measure to be put in place where the causal link between increased imports and injury to the domestic industry is one based upon a relationship of cause and effect that is neither genuine nor substantial.

Unfortunately the terms "genuine and substantial" do not offer very much in the way of a concrete benchmark that an investigating authority, respondent, Panel or even Appellate Body Member might avail him or herself of, if he or she were seeking to ascertain whether a given determination in a given case satisfied the requirements set out in Article 4.2(b) of the Safeguards Agreement.

Another element of the AB's analysis on this issue cannot go unremarked. I am referring to the three-step test it requires investigating authorities to undergo with regard to other factors than increased imports in order to comply with the non-attribution obligations of Article 4.2(b) of the Safeguards Agreement.

The reader will recall that the first step consists of the competent authority distinguishing the injurious effects caused to the domestic industry by increased imports from those caused by other factors. That is step one. In step two, the same competent

[87] Ibid, at para. 91.
[88] The language in the 1967 Code spoke of dumped imports representing a principal cause. The Tokyo Round Code omitted the word "principal".

authority must attribute to increased imports injury caused by such imports, while by implication attributing to the other relevant factors injury which they have caused.[89] That is step two. The author would politely like to point out that, if one thinks through this procedure, one must inevitably come to the conclusion that steps one and two are essentially one and the same operation. Such an operation and the third step which concludes this examination, itself completely lacking in any kind of operational clarity, do little to help the many practitioners working with these issues every day and in the real world.

d) Adoption of the Panel and AB Reports before the Dispute Settlement Body

The Reports of the Panel and the Appellate Body in this case were adopted at a meeting of the Dispute Settlement Body which was held on 19 January 2001 in the Centre William Rappard.[90]

Unlike the meeting at which the Reports in Argentina Footwear were adopted, this meeting saw a large number of Members take the floor in order to make statements on the Appellate Body's handling of the issues of causation and non-attribution. The comments expressed by New Zealand serve as a good example of the general mood which prevailed on that day

> New Zealand considered that while the Appellate Body was succinct and clear in its analysis of much of the Agreement on Safeguards, it would need in the future to further clarify its interpretation of the requirements of Article 4.2(b) of that Agreement. […]New Zealand agreed fully with the sentiments of the Appellate Body that there had to be a direct causal link between increased imports and serious injury, and that injury caused by other factors had to be properly attributed. […]It was not clear, however, how a Member was to follow this reasoning in its demonstration that increased imports had caused serious injury. New Zealand considered that the Appellate Body did not go far enough in explaining its own approach to causation or the standard that was to be applied by Members. This was an issue on which further elaboration from the Appellate Body would be necessary in order to ensure that Members had appropriate guidance and to avoid the provisions of the Agreement on Safeguards being exploited in the future.[91]

[89] See WT/DS166/AB/R, at para. 69.
[90] See WT/DSB/97.
[91] Ibid, at para. 11.

3. US-Lamb[92]

In July 1999 New Zealand and shortly thereafter Australia initiated proceedings before the WTO's Dispute Settlement Body against the United States with regard to a definitive safeguard measure imposed by the US on imports of lamb meat. A Panel was established to hear the matter and circulated its Report in December 2000. Again this report was the subject of appellate proceedings before the AB, who circulated its Report on May 1, 2001. As above, the analysis given here shall focus uniquely on the issues of causation and non-attribution.

a) Report of the Panel

When reading the Report of the Panel in *US Lamb*, it is important to note that it was fought and heard at a time when the Panel Report in US Wheat Gluten had been circulated and was pending appeal by the Appellate Body. Thus the findings of the AB in *US-Wheat Gluten* had not yet been handed down, nor had the Reports of the Panel or the AB been adopted by the Dispute Settlement Body.

The Panel in *US-Lamb* began by examining the approach traditionally taken by the USITC in its causation analysis, namely the "substantial cause" and "not less than any other cause" standard.[93] New Zealand and Australia argued before the Panel, that this standard was inconsistent with Article 4.2(b) of the Safeguards Agreement and that what was required was that an investigating authority be able to find that "increased imports 'by themselves' must be causing or threatening a degree of injury that is 'serious'"[94]

The Panel went on to summarize the approach traditionally taken by WTO Panels adjudicating disputes under Article 4.2(b) of the Safeguards Agreement. It recalled the three-step test involving i) *coincidence of trends*, ii) *under such conditions*, and iii) *other factors*.[95] The Panel then established that "in our view the main focus of the causation analysis in this dispute is in respect of the application of the third step, especially in the light of the United States' application of its 'substantial cause' standard in this investigation".[96]

The Panel then went on to list a number of definitions of the words "to cause" and concluded that

> We agree with the United States that the ordinary meaning of "cause" implies that increased imports need not be the *sole or single* cause of serious injury. But all these dictionary definitions indicate that *serious* injury or threat thereof must result from increased imports, regardless of whether increased imports are qualified as an "important" cause, or one that "materially aids" in generating the result. In other words, the ordinary meaning requires a showing of a link (i.e., a unifying element) between increased imports and injury or threat thereof of a "*serious*" degree. It is not enough that increased

[92] United States- Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177/R, WT/DS178/R.
[93] See WT/DS177/R, WT/DS178/R, at para. 7.228.
[94] Ibid, at para. 7.229.
[95] Ibid, at para. 7.232. See also the analysis offered in the present paper with regard to the Panel report in Argentina Footwear.
[96] Ibid, at para. 7.232.

> imports cause just some injury which may then be intensified to a "serious" level by factors other than increased imports. In our view, therefore, the ordinary meaning of these phrases describing the Safeguards Agreement's causation standard indicates that increased imports must not only be *necessary*, but also *sufficient* to cause or threaten a degree of injury that is "*serious*" enough to constitute a significant overall impairment in the situation of the domestic industry.[97]

The Panel thus laid out a new standard for causal link, namely that increased imports be a "sufficient and necessary cause" of injury. It also sought to qualify this language in respect to the language that had been advocated in the *Wheat Gluten* Panel and which was being advocated by Australia and New Zealand before it, namely the language on sole cause:

> We also note that there is a difference between a sole cause, on the one hand, and a necessary and sufficient cause, on the other. Any sole cause is by definition a necessary and sufficient cause, but obviously not any necessary and sufficient cause is the sole cause, it may coincide with other causes as recognised by the second sentence of SG Article 4.2(b).[98]

The Panel also drew upon the object and purpose of the Safeguards Agreement in order to support its interpretation claiming that the objectives of the Agreement "could not be accomplished if increased imports are not a necessary and sufficient cause for serious injury or threat thereof".[99] The Panel then went on to refer to GATT and WTO case-law in an effort to lend greater weight to its interpretation.[100] After examining the case-law, particularly in an earlier GATT dispute involving antidumping duties imposed by the United States on chilled salmon from Norway, the panel went on to find that

> In our view, this reasoning confirms our interpretation that SG Article 4.2(b) requires that increased imports by themselves must be a necessary and sufficient cause of serious injury or threat thereof and injury caused by other factors must not be attributed to increased imports.[101]

The Panel then turned back to the US substantial cause standard in order to test whether it conformed to the interpretation of Article 4.2(b) it had just laid out. It found that the US standard focused on a "somewhat different question than SG Article 4.2(a) and (b) as interpreted by us above".[102]

The Panel then went on, after some lengthy hypothetical analysis to conclude that the US substantial cause standard does not address the question of whether increased imports are by themselves, a necessary and sufficient cause of serious injury. The Panel also found that the substantial cause standard did not "address the issue of ensuring in all cases that no injury caused by other factors is attributed to increased imports."[103]

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[97] Ibid, at para. 7.238, emphasis in original.
[98] Ibid.
[99] Ibid, at para. 7239.
[100] It specifically referred to *Argentina Footwear*, *US Wheat Gluten* and two GATT Panel Reports on United States – Salmon from Norway. See footnote 254 of the Panel Report in Lamb.
[101] WT/DS177/R, WT/DS178/R, at para. 7.247.
[102] Ibid, at para. 7.249.
[103] Ibid, at para. 7250.

The Panel proceeded to analyze what other factors had been investigated by the USITC and whether it had succeeded in not attributing to increased imports any injury that resulted from these other factors. The other factors the USITC had investigated were i) Termination of payments under the National Wool Act of 1954;[104] ii) Competition from other meat products and demand side factors;[105] iii) Increased input costs;[106] iv) Alleged overfeeding of lambs;[107] v) Alleged concentration on the packer segment of the industry;[108] vi) Failure to develop and implement an effective marketing programme for lamb meat.[109]

The Panel went on to criticize the USITC's explanations and reasoning on determining and evaluating the other factors on the state of the domestic industry. The Panel concluded that

> [T]he determinations by the USITC in respect of four of the six "other factors" examined do not constitute determinations that these factors made no appreciable contribution to the threat of serious injury. Rather, the USITC found that these four factors were "less important" causes than increased imports of the threat of serious injury, which in our view means that they were contributing in a more than insignificant way to that threat. Therefore, we conclude that the USITC's application of the "substantial cause" test in the lamb meat investigation as reflected in the USITC report did not ensure that threat of serious injury caused by other factors has not been attributed to increased imports.[110]

The Panel concluded by finding the USITC's examination had not shown that increased imports were by themselves a necessary and sufficient cause of threat of serious injury and was therefore inconsistent with Article 4.2(b) of the Safeguards Agreement.

b) Report of the Appellate Body[111]

The Report of the Panel was appealed first by the United States and then subsequently by Australia and New Zealand. The issue of causation was appealed by the United States, which argued that there was "no basis" in Article 4.2(b) of the Agreement on Safeguards "to support the Panel's interpretation that increased imports must be a 'necessary and sufficient cause' of, or must 'considered alone', cause, injury or a threat thereof.

The United States made a reasonably big deal of the fact that the *Lamb* Panel had essentially used the same interpretation of Article 4.2(b) as the Panel in *US Wheat Gluten*, and that this interpretation had been reversed on appeal. It thus insisted that the Appellate Body do the same in this appeal.

In effect, the Appellate Body had little choice but to acquiesce in this and found

[104] See ibid at paras. 7.263 f.
[105] See ibid, at paras. 7.266 f.
[106] See ibid, at paras. 7.268 f.
[107] See ibid, at paras. 7.270 f.
[108] See ibid, at paras. 7.272 f.
[109] See ibid, at paras 7.274 f.
[110] Ibid, at para. 7.277.
[111] WT/DS177/178/AB/R.

> In view of the close similarity between the respective interpretations of the causation requirements in the *Agreement on Safeguards* given by this Panel and by the panel in *United States – Wheat Gluten Safeguard*, we are of the view that, for the reasons we gave in *United States – Wheat Gluten Safeguard*, the Panel in this dispute erred in its interpretation of the causation requirements in the *Agreement on Safeguards*. As we held in *United States – Wheat Gluten Safeguard*, the *Agreement on Safeguards* does not require that increased imports be "sufficient" to cause, or threaten to cause, serious injury. Nor does that Agreement require that increased imports "alone" be capable of causing, or threatening to cause, serious injury.[112]

The Appellate Body then went on to reverse the findings of the Panel on this point.[113] It then proceeded to consider whether the Panel was nevertheless correct in concluding that the United States acted inconsistently with the causation requirements in Article 4.2 of the Agreement on Safeguards. The Appellate Body examined in particular whether the USITC had "properly ensured that injury caused, or threatened, by factors other than increased imports was not attributed to increased imports, as required by Article 4.2(b)".[114]

In doing this the Appellate Body essentially upheld the three-step test it had produced in its Report in *Wheat Gluten*. However it did qualify this process by stating

> We emphasize that these three steps simply describe a logical process for complying with the obligations relating to causation set forth in Article 4.2(b). These steps are not legal "tests" mandated by the text of the *Agreement on Safeguards*, nor is it imperative that each step be the subject of a separate finding or a reasoned conclusion by the competent authorities. Indeed, these steps leave unanswered many methodological questions relating to the non-attribution requirement found in the second sentence of Article 4.2(b).[115]

The AB emphasized that the objective of this three-step "process" was to determine whether there is a "genuine and substantial relationship of cause and effect".[116]

In assessing whether the USITC Report did a sufficiently good job on non-attribution, the AB pointed out several flaws in the USITC's reasoning and explanations. For example the Appellate Body noted that "The USITC Report, on its face, does not explain the process by which the USITC separated the injurious effects of the different causal factors, nor does the USITC Report explain how the USITC ensured that the injurious effects of the other causal factors were not included in the assessment of the injury ascribed to increased imports".[117] In the same paragraph the Panel went on to note that "the USITC should also have assessed, to some extent, the injurious effects of these other factors. It did not do so".[118] The Appellate Body summed up its position on the USITC Report by stating

[112] Ibid, at para. 170
[113] Ibid, at para. 171.
[114] Ibid, at para 175.
[115] Ibid, at para. 178.
[116] Ibid, at para. 179.
[117] Ibid, at para. 185.
[118] Ibid.

> In short, without knowing anything about the nature and extent of the injury caused by the six other factors, we cannot satisfy ourselves that the injury deemed by the USITC to have been caused by increased imports does not include injury which, in reality, was caused by these factors.[119]

For these reasons the AB upheld the Panel's ultimate finding that the United States had acted inconsistently with Article 4.2(b) of the Agreement on Safeguards.[120]

c) Critique of the Appellate Body Report in US Lamb.

The Appellate Body in this case made essentially the same findings on causation as it had in *Wheat Gluten* and thus one can essentially raise the same criticism, namely that it has established a three-step "process" which is inherently illogical and has set out language ("genuine and substantial cause") which, on its face, gives little to no concrete indication of how much injury must be attributable to other factors before they succeed in breaking the causal link between increased imports and injury to a domestic industry.

One might be able to interpret the statements made by the Appellate Body in paragraph 178 (cited above) as an attempt to distance itself somewhat from the three-step test set out in *Wheat Gluten*, but again this is done in a manner which still leaves many questions unanswered. These concerns were again taken up by the Dispute Settlement Body at the time of the Reports' adoption.

d) Adoption of the Panel and AB Reports before the Dispute Settlement Body

The Report of the Appellate Body and the Report of the Panel as amended by the Appellate Body were adopted at a meeting of the Dispute Settlement Body held at the Centre William Rappard on 16 May, 2001.[121]

Again the AB's findings with regard to causation did not pass unremarked by the WTO Membership.

The Australian Government seemed to express their satisfaction on the overall outcome but remained silent with regard to the elaboration of the Appellate Body's causation standard.[122]

The US Government was openly appalled at the decisions and their statement, made by no lesser person than their Ambassador to the WTO, makes this very clear.[123] On the issue of causation, the United States expressed its satisfaction that the AB had rejected the findings of the Panel that imports alone or by themselves had to be sufficient to cause injury. The United States also congratulated the Appellate Body for its qualifying statement that its three-step "logical process" for reviewing compliance with Article 4.2(b) was "not a legal test mandated by the Agreement on Safeguards".[124] The United States, however, critiqued the Appellate Body's suggestion that an investigating

[119] Ibid, at para. 186.
[120] Ibid, at para 188.
[121] See WT/DSB/M/105.
[122] Ibid, at para. 39.
[123] Usually the USTR, the US government agency which represents America's interests at the WTO, would send a more technically specialized and lower ranking individual to speak for it at the DSB, normally a lawyer with several years of experience in international trade matters. See WT/DSB/M/105 at paras. 41 ff.
[124] Ibid, at para. 43.

authority be required to demonstrate "affirmatively that any injury caused by other factors was not improperly attributed to imports" as having no "textual basis".[125] The United States concluded its statement on this issue by expressing its view that

> The touchstone for evaluating this issue remained the Appellate Body's unambiguous finding that it was not necessary under the terms of the Safeguards Agreement to demonstrate that imports alone, or by themselves or *per se* were causing a degree of injury that was "serious".[126]

Several Members expressed the desire to achieve greater clarity on this issue. In this vein it was Japan who remarked

> If as stated in the Appellate Body Report, it was not required that increased imports alone be capable of causing or threatening to cause serious injury, then the standard for determining the existence of a genuine and substantial relationship should be clarified in the near future.[127]

Another Member who was concerned with the lack of clarity offered by the Appellate Body's interpretation of Article 4.2(b) of the Safeguards Agreement was Hong Kong, China, who stated

> [I]t was far from clear how safeguards authorities should attribute injuries to various factors including increased imports. It is also unclear what would constitute a "genuine and substantial relationship of cause and effect".[128]

The next opportunity that the Appellate Body was to be given to clarify its statements on this subject was to follow fairly soon, in the US-Line Pipe case.

4. US-Line Pipe[129]

In June 2000 the Korean Government initiated proceedings before the WTO Dispute Settlement Body against the United States with regard to a definitive safeguard measure imposed by the US on imports of circular welded carbon quality line pipe. A Panel was established to hear the case and circulated its Report on 29 October 2001. The findings of the Panel were appealed and the Report of the Appellate Body in this case was circulated on 15 February 2002. The analysis offered below shall focus uniquely on the issues of causation and non-attribution which arose in the context of this dispute.

a) *Report of the Panel*[130]

The Panel allowed itself to be guided in great part by the findings of the Appellate Body in *US-Wheat Gluten and US-Lamb*. In evaluating the approach adopted by the USITC in it investigation in this case, the Panel established that the USITC had analyzed a number

[125] Ibid, at para. 43.
[126] Ibid.
[127] Ibid, at para. 46.
[128] Ibid, at para. 49.
[129] United States-Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/R and WT/DS202/AB/R.
[130] WT/DS202/R.

of other factors causing injury to the domestic industry including "the decline in line pipe demand resulting from reduced oil and natural gas drilling and production activities".[131]

However the Panel seemed to be unsatisfied with the USITC's analysis, and found

> From the above findings of the ITC, it can be established that the methodology used in its analysis of the injury caused by the oil and gas industry decline has the objective (consistent with applicable US law) of determining whether this factor is a more important cause of injury than the increased imports. We are not convinced that such a determination is enough to satisfy the requirements of Article 4.2(b), which mandates that injury caused by other factors not be attributed to the increased imports. Indeed, the ITC recognizes that the decline in the oil and gas industry was having injurious effects on the domestic line pipe industry. However, it is not apparent from this analysis how, if at all, the ITC separated the injurious effects of the decline in the oil and gas industry from the injurious effects of the increased imports. The ITC's analysis provides no insight into the nature and extent of the injury caused by the decline in the oil and gas industry. Instead, as in the *US – Lamb Meat* case, the United States effectively assumed that the decline in the oil and gas industry did not cause the injury attributed to increased imports. As found by the Appellate Body in *US – Lamb Meat*, such an assumption is inconsistent with Article 4.2(b).

The Panel went on to offer further criticism of the USITC's methodology and concluded that the USITC's report "did not adequately explain how it ensured that injury caused to the domestic industry by factors other than increased imports was not attributed to increased imports".[132] The Panel therefore found that the US had acted inconsistently with Article 4.2(b) of the Safeguards Agreement.[133]

b) Report of the Appellate Body[134]

In its appeal the United States essentially made two arguments with regard to the Panel's findings on causation. The first was that the Panel's finding was "flawed because it rests on the theory that the USITC, by determining whether injury caused by any other factor is not greater than the injury caused by the increased imports, was performing a causation analysis which the Panel ruled 'was inherently inconsistent with Article 4.2(b)'".[135] Secondly the United States argued that the USITC had indeed "expressly explained how it ensured that it did not attribute injury caused by other factors to the selected imports".[136]

The Appellate Body began by examining the standard applied by the USITC in its causation analysis, namely the "substantial cause" standard. However the AB was careful to explicitly state that it was examining the measure "as defined in this appeal; we are

[131] Ibid, at para. 7.287.
[132] Ibid, at para. 7.290.
[133] Ibid.
[134] WT/DS202/AB/R.
[135] Ibid, at para. 205.
[136] Ibid.

not reviewing the 'substantial cause' standard in the United States law *per se*, but rather only its application in this case".[137]

The AB then went on to list which other factors the USITC had identified in its investigation,[138] and to explain the USITC's methodology in evaluating those factors. This methodology consisted of establishing that none of the other factors represented a greater contributing factor to the industry's serious injury than the increased imports, and thus concluding that the "substantial cause" standard had been met and that a causal link could be said to exist between increased imports and serious injury.[139]

The AB then went on to reiterate the two distinct legal requirements contained in Article 4.2(b) of the Agreement on Safeguards, namely finding of a causal link and non-attribution.[140] It thereafter proceeded to summarize its case-law in *US-Wheat Gluten* and *US-Lamb*.

The AB then launched into an exposé of the wording and corresponding case law of Article 3.5 of the Agreement on Implementation of Article VI of the General Agreement in Tariffs and Trade 1994 (the Anti-Dumping Agreement). Citing from the appeal in *US – Hot Rolled Steel*[141], the AB claimed that

> [A]lthough the text of the *Agreement on Safeguards* on causation is by no means identical to that of the *Anti-Dumping Agreement*, there are considerable similarities between the two Agreements as regards the non-attribution language…Our statements in US – Hot-Rolled Steel on Article 3.5 of the Anti-Dumping Agreement likewise provides guidance in interpreting the similar language in Article 4.2(b) of the Agreement on Safeguards.[142]

On the basis of its findings in both *US-Wheat Gluten* and *US-Hot Rolled Steel*, the AB concluded

> Thus, to fulfill the requirement of Article 4.2(b), last sentence, the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms.

Having established that this was what was needed to fulfill the legal requirements of Article 4.2(b), the AB then went on to determine whether the USITC had fulfilled these requirements. The AB was, in effect, not satisfied with the USITC'S report and concluded

> Our examination leads us to conclude that those cited parts of the USITC Report do not *establish explicitly*, with a *reasoned and adequate explanation*,

[137] Ibid, at para. 207.
[138] These were: i) a decline in line pipe demand resulting from reduced oil and natural gas drilling and production activities; ii) competition among domestic producers; iii) a decline in export markets in 1998 and interim 1999; iv) a shift from oil country tubular goods production to line pipe production; and v) a decline in raw material costs.
[139] See WT/DS202/AB/R, at para. 207.
[140] Ibid, para. 208.
[141] United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan WT/DS184/AB/R.
[142] WT/DS202/AB/R at para. 214, footnotes omitted.

> that injury caused by factors other than the increased imports was not attributed to increased imports.[143]

However, perhaps the most interesting aspect of this Report is what the AB said with regard to causation in the context of the permissible extent of the line pipe measure under Article 5.1 of the Safeguards Agreement.[144]

It was Korea who argued that there was "a link between the causation analysis that resulted in the determination to apply the line pipe measure and the permissible extent of the line pipe measure".[145] Korea asserted that "the extent of the measure should be confined to the amount of the serious injury that can be attributed to increased imports".[146]

The Appellate Body began by finding that the Panel had failed to make a finding on the merits of Korea's arguments under this point. It then went on to establish that the term "serious injury" referred to in Article 5.1 of the Safeguards Agreement must be considered one and the same as the "serious injury" referred to in Article 4.2.

The AB then went on to find that the non-attribution language contained in Article 4.2(b) was an "important part of the architecture of the Agreement on Safeguards and thus serves as a necessary context in which Article 5.1, first sentence, must be interpreted.[147]

In the same breath, the Appellate Body made the (rather remarkable) finding that one of the objectives of the non-attribution language in Article 4.2(b) was to serve as a "benchmark for ensuring that only an appropriate share of the overall injury is attributed to increased imports".[148] The Appellate Body concluded in this context that

> As we read the Agreement, this latter objective, in turn, informs the permissible extent to which the safeguard measure may be applied pursuant to Article 5.1, first sentence.[149]

In order to support this interpretation, the Appellate Body referred to its case law in *US –Cotton Yarn*.[150] It also invoked customary international law on state responsibility as well as the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts.[151]

The Appellate Body concluded by finding that the United States had applied the line pipe measure beyond the "extent necessary to prevent or remedy serious injury and to facilitate adjustment.[152]

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143 Ibid, at para. 220.
144 Ibid, at paras. 237 f.
145 Ibid, at para 238.
146 Ibid, footnotes omitted.
147 Ibid, at para. 252.
148 Ibid.
149 Ibid.
150 Ibid, at para 253. United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, WT/DS192/AB/R.
151 WT/DS202/AB/R at para. 259.
152 Ibid

c) Critique of the Appellate Body Report

With regard to the causation analysis and non-attribution obligations of Article 4.2(b) of the Safeguards Agreement, the Appellate Body in US-Line Pipe did little to nothing new except find that one could use the interpretative statements elaborated in the context of the corresponding article within the Anti-Dumping Agreement to better understand the causation and non-attribution language contained in the Safeguards Agreement and vice versa. This is an issue that will require greater examination as one should not be too hasty to conclude that the same causation standard exists between the AD and the Safeguards Agreement or the Safeguards Agreement and the ASCM.

The findings of the Appellate Body with regard to the extent of the measure do not seem unreasonable on their face. However the extraordinary lengths the AB goes to in order to support these findings do lead one to be slightly suspicious and thus the author believes that further investigation would be warranted on this point.

In any event, the Report does little to clarify the uncertainties surrounding the issues of causation and non-attribution and thus the concerns expressed by the Hong Kong Government at the occasion of the adoption of the AB Report in *US-Lamb* (cited above) remain unaddressed.

VI. FINDINGS AND CONCLUSIONS

It would seem fairly uncontroversial to state that clarification is required, quite urgently, on the language contained in Article 4.2(b) of the Agreement on Safeguards as well as the corresponding articles in the Anti-Dumping and Subsidies and Countervailing Measures Agreements.

However, one must not forget that, if there is ambiguity, then it is because the trade negotiators who came together to hammer out these agreements failed to insert language that would have made things clearer for those who must administer and work with these agreements.

Whether the ambiguity we have in these agreements today exists by design or default is a secondary consideration to the necessity of ironing out these ambiguities in order to strengthen what is and is supposed to be a rules based system.

One could easily argue that these ambiguities would best be ironed out by way of negotiation rather than leaving it to the WTO Dispute Settlement System.

One thing, however, is unambiguously clear and that is that no one can really tell what is meant by the words "a genuine and substantial relationship between cause and serious injury". Perhaps this is where any future negotiations on causation, whether they be under the auspices of the AD Agreement, the ASCM Agreement or the Safeguards Agreement, should start.

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