

Does a Theory of Causation Exist under the WTO Safeguards Agreement?

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*A careful analysis of the US – Tyres from China WTO Panel report confirms the non-existence of any theory of causation under the WTO Safeguards Agreement. The Panel leaves a margin of discretion to the national investigating authorities to assess causation between imports and injury to the domestic industry. To develop a theory of causation, the author suggests applying the *conditio sine qua non* theory on causation under the WTO Safeguards Agreement, because it will facilitate the assessment of causation before the WTO panels and the national authorities.*

I INTRODUCTION

This analysis offers a critical view on causation under the WTO Agreement on Safeguards (hereinafter “Safeguards Agreement”). It also explores whether a theory of causation exists in that agreement or if improvement is needed.

A useful starting point for this analysis is to define the subject matter, namely the notion of safeguard measures and the conditions that should be fulfilled for their imposition by WTO members. Next, this article reflects on causation by presenting the *conditio sine qua non* theory. Through an example, the next section will analyze the implementation of causation into national law using the case of the United States through the *US-Tyres from China* Panel Report. The final section will consider, from a theoretical point of view, how causation should be *de lege ferenda* under the Safeguards Agreement.

This analysis focuses on the Safeguards Agreement. Issues relating to causation in Anti-dumping Agreement and the Agreement on Subsidies and Countervailing Measures are beyond the scope of this article. Nevertheless, to assess the content of causation in the Safeguards Agreement and to have a current view of the case law of

WTO Panels, we need to analyze *US-Tyres from China* (WTO Panel Report WT/DS399/R/13 December 2010) which concerns paragraph 16 of the Protocol of Accession of China and, indirectly, the Safeguards Agreement.¹ Please note that this article will not address the report of the Appellate Body concerning the same case, because it upholds the conclusions of the Panel Report.²

2 SAFEGUARDS: AN INTRODUCTION AND OVERVIEW

2.1 WTO Safeguards Agreement

2.1.1 Safeguard Measures

Any WTO member can temporarily suspend GATT tariff concessions or other GATT obligations owed to other WTO members by imposing safeguard measures to respond to rapidly increasing imports that are seriously injuring its domestic industry.³ Under certain conditions (see *infra*), the WTO member may take different types of safeguard measures such as increasing tariffs, placing quantitative restrictions or imposing an import

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¹ Panel Report, *United States – Measures affecting imports of certain passenger vehicle and Light Truck Tyres from China*, WT/DS399/R, adopted December 13, 2010 (hereinafter *US – Tyres from China* case).

² Appellate Body Report, *United States – Measures affecting imports of certain passenger vehicle and light truck tyres from China*, WT/DS399/AB/R, adopted September 5, 2011.

³ The imposed safeguards can only be applied temporarily. It should be noted that safeguard measures which exceed one year must be progressively liberalized and safeguard measures which exceed three years should be subject to a mid-term review. The total duration of the imposition of safeguard measures cannot exceed eight years; J. Grimmett, *Chinese Tire Imports: Section 421 Safeguards and the World Trade Organization (WTO)*, July 2011, <http://www.fas.org/sgp/crs/misc/R40844.pdf>, accessed on August 1, 2013, p. 2.

authorization. Those measures should be considered as exceptional measures. These are “emergency actions” and they can solely be invoked in situations in which a WTO member finds himself confronted with “*unforeseen developments*.”⁴

2.1.2 Conditions for the Adoption of Safeguard Measures

According to Article 2(1) of the Safeguards Agreement, a WTO member can only apply safeguard measures after conducting an investigation that satisfies procedural and substantial requirements contained in the Safeguards Agreement.⁵

From the point of view of procedure, the authority must give public notice of the proceeding, give importers, exporters and other interested parties the opportunity to submit evidence and express their views.⁶ Moreover, the authority must treat the information confidentially and publish a detailed analysis providing all relevant evidence for the final decision.⁷

From the point of view of substance, to apply safeguard measures, a WTO member must deem that a product has been imported in increased quantities.⁸ Furthermore, the increase in imports must have been such as to cause serious injury, or threaten to cause serious injury, to a domestic industry, namely the industry as a whole producing like or directly competitive products as those imported.⁹ Third, according to Article 4.2 (b) of the Safeguards Agreement, two relationships between increased imports and serious injury must be met. On the one hand, it should be demonstrated “on the basis of objective evidence” that the imports have caused serious injury. On the other hand, the non-attribution requirement should be fulfilled, namely that the injury caused by other factors must not be attributed to those imports.

Finally, if all these conditions are met, a test of necessity must be completed. According to Article 5.1 of Safeguards

Agreement, “safeguard measures can be applied only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.”¹⁰

2.1.3 What Sort of Link Is Required between Imports and Injury to the Domestic Industry under the WTO Safeguards Agreement?

The requirement of causation between increased quantities and serious injury is one of the most difficult questions to address in the Safeguards Agreement. This issue is central to any investigation concerning safeguard measures adopted by a WTO member. That is why the panels in *Korea-Dairy*, *Wheat Gluten-US*, *US-Argentina-Footwear*, and *US-Lamb* cases have developed a working standard of causation;¹¹ it is divided into three tests.

First, the panel must consider whether an upward trend in imports (volume and market share) coincides with downward trends in the injury factors. This test is named the “correlation condition.” In *Argentina-Footwear*, the panel and the Appellate Body considered that this first step is central in the determination and the analysis of causation.¹² Nevertheless, there is nothing in the statements of the Panels in *Argentina - Footwear (EC)* and *U.S. - Steel* cases which suggests that changes in the rate of increase of imports should correspond to changes in the rate of decline in injury factors.¹³ In fact, these panels have simply found that imports should increase at a time when the injury factors fall.¹⁴

Second, the panel must consider whether the conditions of competition between imported goods and domestic products demonstrate the existence of the causal link between the imports and any injury.¹⁵ Investigative authorities must establish that the national product has been replaced by imports through market competition. However, analysis of competitive conditions must go beyond statistical comparisons of imports and the industry

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⁴ A.O. Sykes, “The Safeguards Mess: A Critique of WTO Jurisprudence”, *Chicago Working Paper*, No. 187, 2003, available at http://www.law.uchicago.edu/files/files/187.aos_safeguards.pdf, accessed on August 1, 2013, p. 3.

⁵ See Arts 3, 4 and 5 of the Safeguards Agreement.

⁶ *Ibid.*, Art. 3.

⁷ *Ibid.*, Art. 3.

⁸ *Ibid.*, Art. 2.

⁹ R. Wolfrum, P-T. Stoll & M. Koebele, *WTO - Trade remedies*, Max Planck Commentaries on World Trade Law, 2008, pp. 297–317 at p. 300.

¹⁰ See Art. 5(1) of the Safeguards Agreement.

¹¹ Panel Report, *Korea – Definitive safeguard measure on imports of certain dairy products*, WT/DS98/R, adopted June 21, 1999; Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, adopted January 19, 2001, as modified by the Appellate Body Report, WT/DS166/AB/R; Panel Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted January 12, 2000, as modified by Appellate Body Report WT/DS121/AB/R, DSR 2000: II, 575; R. Wolfrum, P-T. Stoll & M. Koebele, *supra* n. 9, p. 311.

¹² R. Wolfrum, P-T. Stoll & M. Koebele, *supra* n. 9, p. 312.

¹³ *Ibid.*, p. 313.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, p. 312.

as a whole.¹⁶ These statistics are only averages which are inadequate to provide sufficient information about the place of market competition.¹⁷

Third, the panel must determine whether other relevant factors have been analyzed and whether injury caused by other factors than imports has not been attributed to imports.¹⁸ Indeed, increases in import are not the sole cause of the serious injury.¹⁹ According to the Appellate Body, the authorities must determine if the increases in imports, not alone but in conjunction with other relevant factors, cause serious injury.²⁰ To underline this statement, the Appellate Body refers to the requirement of non-attribution contained in the last sentence of Article 4.2(b) of the Safeguards Agreement. In the case of *US-Wheat Gluten*, the Appellate Body analyzed the expression “causation” and concluded that this is a cause and effect phenomenon so that the increase in imports contributes to serious injury.²¹

This standard of causation presents limits that will be highlighted from the viewpoint of the analysis of *US-Tyres from China* case. Before that, however, it is important to explore what causation means and so we turn to the *conditio sine qua non* theory.

3 CAUSATION AND THE *CONDITIO SINE QUA NON* THEORY

The search for the cause is a frequent operation of the mind.²² The usual path of human logic is that of cause and effect. The principle is that the causal relation between two events is a relation such that, without the first event, the second would not have been produced.²³ By the concept of causation, the idea is to explain how one fact has led to another one.²⁴ This epistemological conception of causation has found varied applications in several theories of causation such as the *conditio sine qua non* (*csqn*)

which could be of application for causation under the Safeguards Agreement.

According to the *csqn* or “*but for test*” theory,²⁵ the causes are all necessary conditions for the realization of the phenomenon.²⁶ For a fact to be considered as causal, it is necessary and sufficient that it has been one of the conditions necessary for the injury.²⁷ It follows that if one of the events selected as the cause is a fault, its author is obligated to repair all the injury.²⁸ Case law shows that the implementation of the *csqn* test requires a significant reconstructive imagination which is met with some difficulties, relating in particular to the identification of the injury and the identification of fault.²⁹ At the same time, the real advantage of that theory is its objectivity.³⁰ It guarantees legal certainty. However, a number of criticisms can be identified. The theory holds as “causal” a fact which is probably necessary but not sufficient. Morally, it is sometimes argued that the *csqn* theory can lead to solutions that, on a human level, seem unfair and unjust.³¹ The *csqn* undoubtedly favors the admission of the injury cascade.³²

This theory will be helpful at a later stage in our analysis, but for now it should be noted that the causal link (causation) between fault and injury in extra-contractual liability will be replaced in our analysis by causation between imports and injury under the Safeguards Agreement. Here, we do not speak about fault, but about increased quantities of imports.

4 IMPLEMENTATION OF CAUSATION INTO NATIONAL LAW: *US – TYRES FROM CHINA* WTO PANEL REPORT

Each WTO member should implement WTO rules in its own legal order, because those rules derive from international law. It means that the Safeguards Agreement

Notes

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*, p. 313.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*, p. 314.

²² J-L. Fagnart, *La causalité*, Kluwer, Waterloo, 2009, p. 17.

²³ C. Quezel-Ambrunaz, *Essai sur la causalité en droit de la responsabilité civile*, Dalloz, Paris, 2010, p. 4.

²⁴ *Ibid.*, p. 19.

²⁵ W. Van Gerven, *Verbintissenrecht: Aansprakelijkheidsrecht*, acco, Leuven, 2007, p. 417 and 419; C. Quezel-Ambrunaz, *supra* n. 23, p. 33.

²⁶ W. Van Gerven, *ibid.*, p. 417; J-L. Fagnart, *supra* n. 22, p. 22; C. Quezel-Ambrunaz, *supra* n. 23, p. 28.

²⁷ J-L. Fagnart, *ibid.*, p. 23.

²⁸ W. Van Gerven, *supra* n. 25, p. 420.

²⁹ J-L. Fagnart, *supra* n. 22, p. 23.

³⁰ *Ibid.*

³¹ *Ibid.*

³² C. Quezel-Ambrunaz, *supra* n. 23, p. 35.

is implemented in each WTO Member State. Here, we will analyze the implementation of paragraph 16 of the Protocol on the accession of the People's Republic of China (hereinafter "the Protocol") into American law. This paragraph which concerns the transitional safeguard mechanism applied to China has a first application in *US-Tyres from China* case.³³ The latter raises questions in relation to the safeguards provided for in the global WTO agreements, namely Article XIX of GATT and the Safeguards Agreement. Indeed, causation is a fundamental issue in this case, yet the appreciation of the idea is difficult, because the period covered by the investigation partially included a period marked by a severe global economic recession.³⁴ Also, this case allows us to assess whether a theory of causation exists in the Safeguards Agreement and whether the WTO members have implemented it. Moreover, we will verify whether the Panel uses the three tests seen above.

4.1 Paragraph 16 of the Protocol on the Accession of the People's Republic of China

When a State seeks to become a WTO member, it negotiates the terms of its accession multilaterally with all WTO members but also bilaterally with WTO members on an individual basis.³⁵ Between the United States and China, there is a transitional scheme in relation to specific safeguard measures whether imports from China increased significantly and the US domestic industry suffered material injury.³⁶ This provision was subsequently included in paragraph 16 of the Protocol under the caption "Transitional Product-Specific Safeguard Mechanism." The first and fourth indents of the paragraph are similar to Article 4 of the Safeguards Agreement at the difference that instead of injury to the domestic producers, the Protocol states "*market disruption*" and there is a requirement of "*significant cause*."

4.2 Facts

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) filed an application on April 20, 2009 to seek the opening by the United States International Trade Commission (USITC) of an investigation under section 421(b) of the American Act of 1974 on foreign trade (Trade Act of 1974).³⁷

The USITC determined that there was market disruption as a result of the rapid increase in imports of tyres from China and a significant cause of material injury to the domestic industry. Following a presidential decision, additional duties were imposed on imports of tyres covered for a period of three years, amounting to 35% ad valorem in the first year, 30% ad valorem the second year and 25% ad valorem in the third year.³⁸

The measures took effect on September 26, 2009 while China requested consultations with United States on September 14, 2009, pursuant to Article XXIII: 1 of GATT, Articles 1 and 4 of the Dispute Settlement Understanding (DSU) and Article 14 of the Safeguards Agreement, about the measures taken by the United States. China and the United States have held consultations in Geneva on November 9, 2009 but failed to resolve the dispute. At the DSB meeting held on January 19, 2010, China requested the establishment of a panel under Article XXIII: 2 of GATT, Articles 4.7 and 6 of the Memorandum Agreement and Article 14 of the Safeguards Agreement.³⁹

Can the United States impose safeguard measures on China tyres imports? Is the Trade Act of 1974 implementing correctly the Protocol and indirectly the Safeguards Agreement?

4.3 Allegations of China

China has argued before the panel five allegations concerning safeguard measures adopted by the United States under section 421(b) of the Trade Act of 1974.

Notes

³³ J. Grimmett, *supra* n. 3, p. 1.

³⁴ *US – Tyres from China* case, at para. 7.7.

³⁵ J. Grimmett, *supra* n. 3, p. 7.

³⁶ *Ibid.*, p. 1.

³⁷ It is interesting to note that the application was submitted by a Trade Union and not by the injured domestic industry; Section 421(b) of the Trade Act of 1974, which implements the Protocol, provides that the USITC must investigate, as fast as possible upon receipt of an application submitted to it, "whether products of the People's Republic of China are being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products"; J. Grimmett, *supra* n. 3, p. 1.

³⁸ J. Grimmett, *supra* n. 3, p. 1.

³⁹ *US – Tyres from China* case, at para. 1.1.

First, the United States did not adequately assess whether imports from China were in “such increased quantities” and “increasing rapidly” to allow the use of safeguard measures.⁴⁰

Second, China has argued that U.S. law that implements the Protocol contains a standard that does not comply with it.⁴¹

Third, the United States did not assess whether Chinese imports were a “significant cause” of material injury to the domestic industry.⁴²

Fourth, the safeguard measures imposed by the United States have gone beyond the “extent necessary.”⁴³

Fifth, the measures have lasted longer than the period required.

We will not focus on the last two allegations, because they are not essential for our purpose.⁴⁴

4.4 Evaluation by the Panel

4.4.1 General Overview

The Panel found no error in the conclusions of the USITC. Chinese imports were “increasing rapidly,” as required in paragraph 16 of the Protocol.⁴⁵ In its investigation, the USITC found that from 2004 to 2008 imports of tyres from China had increased in absolute terms.⁴⁶ The USITC also found that Chinese imports increased in relative market share and also increased relatively to U.S. domestic production.⁴⁷

In a second step, the Panel found that the language used in the Trade Act of 1974 that implements paragraph 16 of the Protocol does not create a non-compliant standard.⁴⁸ China argued that U.S. law weakened the causation standard contained in the Protocol, because the U.S. implementing Trade Act of 1974 uses the phrase “contributes significantly” instead of “significant cause” to

describe the causal link that must exist between the increase in imports and a material injury to the domestic industry.⁴⁹ In addition, China claimed that the standards are not consistent because the American standard that allows an increase in imports is one of several factors leading to injury in the domestic market while the Protocol requires that the increase in imports is independent enough to cause injury.⁵⁰ The panel pointed out that paragraph 16 of the Protocol refers to a significant cause.⁵¹ When we interpret the text of the Protocol literally, the Panel concluded that U.S. law which transposed WTO law is consistent.⁵² It allows the use of safeguard measures when there may be factors other than the increase in imports contributing to the injury. Indeed, the Panel considered that, in the context of paragraph 16.4 of the Protocol, which refers to “a significant cause,” WTO Members should be entitled to interpret the term “cause” in a way that recognizes the possibility that the causal factor is one of several causal factors that, together, produce or cause market disruption.⁵³ It seems reasonable that Members may refer to multiple causes that “contribute” to each result.⁵⁴

Furthermore, the Panel underlined the fact that a rapid increase in imports is a significant cause to injury, and it is equivalent to a finding that there is a significant causal relationship between imports and injury.⁵⁵ Regarding the meaning of “causation” (in the first sentence of Article 4.2(b) of the Agreement on Safeguards), the Appellate Body found in the case *United States–Wheat Gluten* that “the term ‘link’ simply indicates that the increased imports have contributed, or contributed to cause serious injury so that there is a ‘connection’ or ‘link’ between these two causal factors. Taking these terms together, the term ‘causal link’ denotes, according to the panel as a cause and effect such as increased imports contributed to the serious injury.”⁵⁶

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⁴⁰ *Ibid.*, at para. 6.4.

⁴¹ *Ibid.*, at para. 3.1.

⁴² *Ibid.*, at para. 6.26.

⁴³ *Ibid.*, at para. 3.1.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, at para. 7.86.

⁴⁶ *Ibid.*, at para. 7.85 and 7.100.

⁴⁷ *Ibid.*, at para. 7.98.

⁴⁸ *Ibid.*, at para. 7.160 and 7.379.

⁴⁹ *Ibid.*, at para. 7.136.

⁵⁰ *Ibid.*, at para. 7.30.

⁵¹ *Ibid.*, at para. 7.35.

⁵² *Ibid.*

⁵³ *Ibid.*, at para. 7.138.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, at para. 7.156.

⁵⁶ *Ibid.*, at para. 7.142.

According to China, paragraph 16 should be restrictively interpreted, because it should be differentiated from the less stringent causation standard that is applied in the Safeguards Agreement, whereas the Panel noted that, regardless of whether this paragraph should be considered an emergency measure or not, its terms must always be interpreted in accordance with Articles 31 and 32 of the Vienna Convention.⁵⁷

To assess if section 421 is consistent with the U.S. obligations under the WTO, the Panel had to establish what causation means.⁵⁸ In its defense, the United States produced evidence showing that the definition of the phrase “contributes significantly” is equivalent to the criterion of “significant cause” in the Protocol, because of the consistency of the USITC practice to require a demonstration of a “direct and material causal link” between the rapid growth of imports and market disruption.⁵⁹ In the opinion of the Panel, the rapid increase in imports could properly be a significant cause of market disruption although its causal role is not as significant as other factors.⁶⁰

It follows that the Panel stated that if the rapid increase in imports “contributes significantly” to the market disruption, it will necessarily be a “significant cause” of this market disruption for the purposes of paragraph 16.4 of the Protocol.⁶¹

Furthermore, the Panel found that the USITC adequately concluded that increased quantities of imports were a significant cause of material injury to the U.S. domestic market.⁶² China argued that the Protocol requires the use of the correlation condition to determine the cause of the injury, yet the Panel stated that no methodology is imposed on the importing country to determine the cause of the injury.⁶³ The Protocol requires only the consideration of certain objective factors to determine the cause and a methodology that takes into account additional factors to determine that the cause is not in violation of the Protocol.⁶⁴ China also argues that the USITC did not isolate only the injurious effects caused

by increased imports, but the Panel did not find the USITC analysis deficient.⁶⁵ Moreover, the Panel analyzed other factors that China considered as being relevant factors, including the relatively lower cost of goods sold from Chinese versus U.S. producers and the U.S. industry’s business strategy.⁶⁶ Finally, the Panel found that the USITC was entitled to support its determination of a significant finding because of overall coincidence between upward trend in imports from China and downward trends in the injury factors.⁶⁷

This overview has enabled us to highlight points of disagreement between China and the United States and to clarify the position of the Panel. In the following sections, we will briefly present some issues that were addressed by the Panel to respond ultimately whether a theory of causation exists under the Safeguards Agreement.

4.4.2 Competitive Condition and Correlation Condition

As the Panel confirmed, the investigating authority is free to choose any method to establish the existence of causation, if it takes into account the objective factors listed in paragraph 16.4 of the Protocol and a particular condition that is sufficient to establish that rapidly increasing imports are a “significant cause” of injury.⁶⁸ Nevertheless, the Panel believed that an analysis of competitive conditions will often be relevant and may, depending on the facts of a particular case, be essential to the review of the “significant cause.”⁶⁹ Otherwise, it could be very difficult to establish the existence of a “significant cause” without making this type of analysis.⁷⁰

According to the Panel, the correlation between the increase of imports and the decrease in injury is a tool that could be used by the authority of investigation to demonstrate a causal link (alone or jointly with other analyzing tools such as the competitive condition).⁷¹

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⁵⁷ *Ibid.*, at para. 7.23 and 7.145.

⁵⁸ *Ibid.*, at para. 7.138.

⁵⁹ *Ibid.*, at para. 7.149 and 7.155.

⁶⁰ *Ibid.*, at para. 7.139.

⁶¹ *Ibid.*, at para. 7.150.

⁶² *Ibid.*

⁶³ *Ibid.*, at para. 7.170.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, at para. 7.376.

⁶⁶ *Ibid.*, at para. 7.376.

⁶⁷ *Ibid.*, at para. 7.236.

⁶⁸ *Ibid.*, at para. 7.169.

⁶⁹ *Ibid.*, at para. 7.170 and 7.168.

⁷⁰ *Ibid.*, at para. 7.170.

⁷¹ *Ibid.*, at para. 7.226.

The Panel is not persuaded that the existence of causation can solely be based on a finding of a correlation, because it is not an exact science, especially because there may be other causes of injury involved.⁷² Accordingly, it would not be realistic to expect, or require a more or less precise correlation between the degree of changes in imports and the degree of changes in injury factors.⁷³

4.4.3 Non-attribution Requirement

The parties disagree on the extent to which an importing Member is required to assess the factors of injurious effects on the domestic industry other than increased imports and that those are not unduly attributed to increased imports.⁷⁴ China invoked the *United States – Lamb*, case on which China relies in its argument:

In a situation where several factors are causing injury at the same time, a final determination about the injurious effects caused by increased imports can only be made if the injurious effects caused by all the different causal factors are distinguished and separated. Otherwise, a conclusion based solely on the evaluation of a single causal factor - increased imports - rests on an uncertain foundation, because it assumes that other causal factors do not cause the injury which was attributed to increased imports.⁷⁵

That is the reason why the Panel considered that the causal link between the rapid growth of imports and the injury must be evaluated “in the context of other possible causal factors.”⁷⁶

4.4.4 Business Strategy of the Domestic Industry

China argued that business strategy of the domestic industry was another cause of injury to this branch, in the sense that declines in some indicators of injury (such as volume-based parameters, including production, shipments and net sales) should be attributed to the fact

that the domestic industry has withdrawn from low-end segments of the replacement market and not imports referred.⁷⁷ According to this theory, the subject imports have only to fill a “supply deficit” created by the withdrawal of the domestic industry.⁷⁸

China argued that U.S. producers are “global companies with outsourcing strategies worldwide,” and that their “operations in China have increased their profitability.” China further argued that “imports from China (and other countries at low prices) are a positive factor” for U.S. producers, who “were themselves responsible for the manufacture and importation of many of the tyres in question.”⁷⁹

The main question regarding plant closures is whether these closures have preceded, and in fact caused the increase of imports, or if factories were closed after competition from those imports.⁸⁰ Nevertheless, China did not present any convincing evidence establishing that the producers recognized that they had voluntarily ceased production operations in the United States to low-end tyres in the replacement market.⁸¹

4.4.5 Changes in Demand

During the investigation, demand should be analyzed as a whole and namely in correlation with the injury suffered by the domestic industry.⁸² China argued that the deteriorating situation of the domestic industry was correlated with an “extended contraction in demand,” and that the USITC should have attributed all injury suffered by the domestic industry to this contraction in demand. However, the Panel was convinced by the USITC’s analysis.⁸³

4.4.6 Various Other Factors

According to the Panel, it is not enough that a complaining party simply states that the authority’s investigation did not examine other factors in sufficient

Notes

⁷² *Ibid.*, at para. 7.229.

⁷³ *Ibid.*, at para. 7.228.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, at para. 7.173.

⁷⁶ *Ibid.*, at para. 7.177.

⁷⁷ *Ibid.*, at para. 7.283.

⁷⁸ *Ibid.*, at para. 7.285.

⁷⁹ *Ibid.*, at para. 7.289.

⁸⁰ *Ibid.*, at para. 7.296.

⁸¹ *Ibid.*, at para. 7.237.

⁸² *Ibid.*, at para. 7.333.

⁸³ *Ibid.*, at para. 7.345.

detail.⁸⁴ The complainant must first establish a prima facie relevance of these other factors, i.e., their ability to cause injury to the domestic industry.⁸⁵ Moreover, it should be proved that causation between increased imports and the injury to the domestic industry is broken. In this case, China did not meet the burden of proof.⁸⁶

4.4.7 Does a Theory of Causation Exist?

The analysis indicates that the Panel did not confirm or create any theory of causation under the Safeguards Agreement. It simply suggests using certain methods, such as the competitive condition and the correlation condition, because those help to determine causation.⁸⁷ In the case of *United States-Steel*, the USITC failed to demonstrate that the injury caused by other factors was not attributed to imports.⁸⁸ The Panel held that the causal link between increased imports and injury could be established either by an analysis of coincidence or by an analysis of competitive conditions.⁸⁹ These tests are not written tests in the legal text of the Safeguards Agreement, and it is not required that each of these tests should be subject to an analysis by the competent authority.

We understand that the Panel leaves some margin of discretion to the USITC and therefore to the competent authorities who make investigations concerning causation between the increased quantities of importations and the injury suffered by the domestic industry.

5 CAUSATION DE LEGE FERENDA UNDER THE WTO SAFEGUARDS AGREEMENT

The analysis of causation by national authorities has been contested in every case subject to a WTO panel. At the beginning of the case law, and especially in the case of *Peaches-Argentina*, the Panel declined to analyze the causal relationship for reasons of judicial economy.⁹⁰ Although most of the time, the analysis of national authorities has been inadequate, decisions to date have not highlighted causation well.⁹¹ We turn to the concept of *de lege ferenda*, which could be helpful in analyzing causation under the Safeguards Agreement.

5.1 Application of the *conditio sine qua non* Theory

5.1.1 General Remarks

In the first section, we presented the *csqn* theory. Now we can apply it to causation under the Safeguards Agreement. Under this theory, the question is without increased quantities in imports, the injury would have been suffered or threat to be suffered by the domestic industry as it happened or would happen. If the answer is affirmative, causation does not exist. If it is negative, the causal link is well established.

The *csqn* theory provokes a query: we are to wonder what would have happened to the domestic industry without the increased quantities of imports. In considering this question, the investigative authority must be careful not to change the circumstances of the injury. It must examine the causal link in the circumstances in which the injury occurred or would occur. The assertion that the injury would have been possible in the same manner provided that other conditions, that are purely hypothetical, would intervene is not probative. The investigative authority must take the actual situation as it appears and not a hypothetical one.

This reconstructive imagination of the causes must remain a work of reason. This procedure should properly be applied by the investigative authority. It must clearly analyze the injury suffered by the domestic industry and the increased quantities of imports or any other cause that could be retained.

By identifying the injury, it may be that without the increase in imports, the injury persists. The simple statement of the hypothesis shows that, without the increase in imports, the injury may exist. The increase of imports is causally related to the aggravation of the injury in that context.

If this theory is to work in practice, the investigative authority must use case in identifying the competitive conditions and correlation conditions to be used. We have pointed out in the case *US – Tyres from China* that those conditions are recommended by the Panel to be used by the investigating authority. The problem is that until now the Safeguards Agreement does not oblige Member States to implement causation in their legal order

Notes

⁸⁴ *Ibid.*, at para. 7.237.

⁸⁵ *Ibid.*, at para. 7.22 and 7.237.

⁸⁶ *Ibid.*, at para. 7.238.

⁸⁷ *Ibid.*, at para. 7.170.

⁸⁸ A.O. Sykes, *The WTO Agreement on Safeguards. A Commentary*, Oxford Commentaries on GATT/WTO Agreements, 2006, p. 184.

⁸⁹ *US – Tyres from China* case, at para. 7.170.

⁹⁰ A.O. Sykes, *The WTO Agreement on Safeguards. A Commentary*, *supra* n. 88, p. 174.

⁹¹ *Ibid.*

according to one specific standard. They are invited by the Panel to use those methods, yet another method could be accepted as far as the objective evidence is demonstrated by the investigating authority.

Causation under the Safeguards Agreement can be assessed, thanks to legal theories such as the *csqn*, yet with the help of economic theories. The investigating authority should examine economic data which should be expressed in graphs to compare conditions of competition and of correlation.

5.1.2 Increased Quantities of Imports is Not the Sole Cause

The problem of causation is a major challenge. This is because when you get right down to it, it is almost impossible to determine all the events which have prepared, preceded or contributed to the injury. Which event really played the role of cause? Many conditions are necessary for the realization of injury. It is therefore wrong to seek the sole cause of the injury. The increase in imports is not the sole cause of injury to the domestic industry. The problem is that Article 4.2(b) states that: “when factors other than increased imports are causing injury to the domestic industry at the same time, such injury shall not be attributed to increased imports.”⁹² It is the non-attribution requirement. Moreover, the Panel report in the *US-Tyres from China* case emphasized the importance of ensuring that the injury caused by other factors than increased imports cannot be attributed to increased imports. In our view, this position shall be interpreted as follows: when increased imports have made no causal contribution to the injury suffered by the domestic industry, then causation cannot be attributed to increased imports mistakenly.

This view seems to be the most logical. Indeed, it would not be correct to assert that because other factors were the causes of the injury, the increase in imports does not cause injury to the domestic industry. This is the better view, because the Appellate Body stated that “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.”⁹³

The Protocol itself states that the cause should be significant. The cause should be “important, notable and consequential.”⁹⁴ It makes a difference with other factors that are the cause of injury. It means that significant cause must be interpreted in a narrower meaning than causation enacted at present in the Safeguards Agreement.⁹⁵ Also, China’s view expressed in the *US-Tyres from China* case – that the Trade Act 1974 unduly assimilates the word “cause” with the word “contribute,” when the two words have a different meaning, is not correct.⁹⁶ Indeed, the ordinary meaning of the word “cause” is “that which produces an effect or consequence” or “something that brings about an effect or a result” and the ordinary meaning of the verb “contribute” is “to play a part in the achievement of a result” or “to play a significant part in bringing about an end or result.”⁹⁷

The advantage of the *csqn* theory is that the investigative authority cannot choose among the causes which have the most important causal power. The criterion of sufficient cause should not be retained. All necessary conditions have the same value. Without one of them, the injury would not have happened as it happened. So, the increased quantities of imports could contribute to the injury suffered by the domestic industry. Furthermore, the non-attribution requirement contained in the Safeguards Agreement speaks about simultaneity (at the same time) between other factors and the increase in imports. In practice it is unconceivable that all factors occur at the same time.

Nevertheless, to avoid retaining all necessary conditions, some analysts argue that the *csqn* theory may be accompanied by a criterion of direct cause, whereas others argue that the causal link must not be direct.⁹⁸ The correct view is that it needs only to be indirect, from the moment it necessarily appears.⁹⁹ We retain the necessary criterion; the direct criterion is of no use in this analysis.

5.1.3 Limits of the *csqn* Theory

The *csqn* theory is used to determine the causes of the injury. This theory emphasizes the necessity principle and involves an evaluation *in concreto*. This theory has the merit of simplicity, yet the risk is high that the research of causes is overextending in time and space.

Notes

⁹² Article 2.4(b) of the Safeguards Agreement.

⁹³ United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia WT/DS178/AB/R (2001), at para. 170.

⁹⁴ *US – Tyres from China* case, at para. 7.133.

⁹⁵ *Ibid.*, at para. 7.123.

⁹⁶ *Ibid.*, at para. 7.119.

⁹⁷ *Ibid.*, at para. 7.120.

⁹⁸ J-L. Fagnart, *supra* n. 22, p. 61.

⁹⁹ *Ibid.*

So as to avoid this problem, some propose the *causa proxima* theory.¹⁰⁰ Among the necessary conditions which cause the injury, the closer in time should be retained.¹⁰¹ This is the rule of American law called “last clear chance” or “last opportunity rule.”¹⁰² But this theory is overly simplistic.¹⁰³ The last event appears to be the most causal, yet this theory is illogical and can be unfair. We can contrast this theory with the *causa remota* whose idea is to consider the first necessary condition which appears in time.¹⁰⁴ A succession of necessary conditions causes the injury, and the earlier must be retained. This proposition is unenforceable in law. The chronological criterion is insufficient for the detection of causation.

However, the nearest antecedent of the injury has a higher propensity to causal explanation than another.¹⁰⁵ Indeed, it seems impossible to admit a breach of causation between the *causa proxima* and the injury.¹⁰⁶ From a theoretical point of view, nothing could come and break the causal link, yet from a practical viewpoint it seems unfair.¹⁰⁷

5.1.4 New Definition of Causation

After taking into consideration our reasoning in this chapter, the Article 4.2(b) of the Safeguards Agreement should become *de lege ferenda* the following:

The national authority shall demonstrate, on the basis of objective evidence, the existence of causation between increased imports of the product concerned and serious injury or threat by verifying whether without increased quantities in imports, the injury would have been suffered or threat to be suffered by the domestic industry as it happened or would happen. If the answer is affirmative, causation does not exist whereas if the answer is negative, the causal link is established.

When increased imports have made no causal contribution to the injury suffered by the domestic industry, then causation cannot be attributed to increased imports mistakenly.

In order to assess causation, the investigating authority should examine competitive conditions between imported and domestic products and the correlation between the increase of imports and the decrease in injury.

6 CONCLUSION

To summarize, the requirement of causation for the use of safeguard measures in the Safeguards Agreement is unsatisfactory from a legal point of view. Some authors think that safeguard measures are a form of protectionism.¹⁰⁸ That is the reason why they are satisfied with the current situation.¹⁰⁹ It is interesting to note that the literature and the WTO case law are trying to specify causation. There is a wave of systematization of the case law by drawing on other sources of inspiration. Unfortunately, case law refuses to recognize a doctrinal theory. Without any doubt, causation under the Safeguards Agreement is subject to controversy in the literature, and the doctrinal constructions are complex.

For those reasons, we suggest that causation should be redefined in the Safeguards Agreement in order to favor one theory of causation and to ensure consistency between the WTO law and national legal orders. If the redefinition seems to be idealist, at least, the WTO case law should choose one theory of causation under the Safeguards Agreement. The best theory of causation is the *csqn* theory, because it complies with the wording of Article 4.2(b) of the Safeguards Agreement.

Notes

¹⁰⁰ C. Quezel-Ambrunaz, *supra* n. 23, p. 49.

¹⁰¹ *Ibid.*, p. 49.

¹⁰² *Ibid.*, p. 51.

¹⁰³ *Ibid.*, p. 54.

¹⁰⁴ *Ibid.*, p. 55.

¹⁰⁵ *Ibid.*, p. 53.

¹⁰⁶ *Ibid.*, p. 55.

¹⁰⁷ *Ibid.*

¹⁰⁸ R. McCulloch & C. Bown, “Trade adjustment in the WTO system: are more safeguards the answer?” *Oxford Review of Economic Policy*, 2007, pp. 415–439 at p. 428, available at <http://oxrep.oxfordjournals.org/content/23/3/415.full.pdf+html>, accessed on August 1, 2013.

¹⁰⁹ *Ibid.*