

CONGRESS'S CAUSATION CONUNDRUM: RETHINKING THE UNITED STATES'S APPROACH TO ESCAPE CLAUSE ACTIONS

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INTRODUCTION

During the summer of 2001, the United States International Trade Commission began to investigate the need for emergency tariffs to protect domestic steel manufacturers from injury due to imports.¹ The investigation marked the resurgence of the escape clause provision of the Trade Act of 1974, often used in the 1970s and 1980s to protect ailing domestic industries. Although the World Trade Organization (WTO) and the General Agreement on Tariffs and Trade (GATT) permit temporary protectionist measures, a string of failed attempts by the United States in invoking such measures resulted in Congress re-examining how to best protect American manufacturing. The result: the Trade Law Reform Act of 2007. Championed by its sponsors as the solution to the United States's causation conundrum, the question remains whether the United States can bring a successful escape clause action before the WTO.

To address this issue, this article presents a basic understanding of the WTO, as successor to the GATT, and the escape clause causation standard of the Trade Act of 1974. The Trade Law Reform Act of 2007 is also critically evaluated. Finally, a public policy critique of the causation issue will demonstrate why both parties, the WTO and the United States, may be wrong when it comes to a workable solution to the causation standard for injury determinations under escape clause actions.

GENERAL AGREEMENT ON TARIFFS AND TRADE

The Preparatory Committee of the United Nations Conference on Trade

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1. Investigation No. TA-201-73, Steel, 66 Fed. Reg. 35,267 (Jul. 3, 2001) ("Institution and scheduling of an investigation under the Trade Act of 1974.").

and Employment promulgated the GATT on October 30, 1947.² The United States and twenty-two other countries participating in the multilateral negotiations became contracting parties to the original GATT.³ On January 1, 1948, the GATT entered into force pursuant to the Protocol of Provisional Application of the General Agreement on Tariffs and Trade (Protocol).⁴ Through increased trade and economic expansion, the countries hoped to ensure long lasting peace and to prevent the future outbreak of another global war.⁵ The objectives of the GATT were as stated:

[R]aising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.⁶

To effectuate these objectives, the preamble of the GATT hinted at the procedures necessary for its successful implementation.⁷ Although no formalities for tariff and trade barrier reduction are explicitly contained in the GATT, the overriding principles of reciprocity and substantiality are paramount. These principles ensured that trade rounds conducted through mutually beneficial negotiations reached the ultimate goal of a substantial reduction, if not outright elimination, of protective import measures.

Interestingly, the GATT never became binding American law. Tariff cuts were “implemented immediately by President Harry S. Truman as his authority to sign the GATT was set to expire in June 1948.”⁸ Trade negotiators did not submit the GATT to Congress, fearing non-ratification due to rising opposition to multilateral agreements.⁹ Consequently, “[n]o American President ever submitted the GATT as a treaty to the Senate for its advice and consent.”¹⁰ The authority of the GATT in American law remained unclear due to this

2. General Agreement on Tariffs and Trade, B.I.S.D. § IV/1 (Mar. 1969) [hereinafter GATT].

3. *Id.*

4. Protocol of Provisional Application of the General Agreement on Tariffs and Trade, B.I.S.D. § IV/77-78 (Mar. 1969) [hereinafter Protocol].

5. See JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 37-38 (1969) (stating, in part, that America recognized the need for international economic institutions to prevent the type interwar economic policies that many believed lead to World War II itself).

6. GATT § IV/1, *supra* note 2.

7. *Id.* (“Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.”).

8. RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENTS ON TARIFFS AND TRADE 1135 (2005) (“President Harry S. Truman signed the GATT under the authority of the Reciprocal Trade Agreements Act of 1934, which Congress extended in 1945. The tariff cuts were implemented immediately, because the authority was set to expire in June 1948. The Truman Administration understood that deferring implementation beyond 1948 could mean that cuts never took effect if the 1934 Act authority were not extended.”) (emphasis omitted).

9. See generally *id.*

10. *Id.*

anomaly. Accordingly, “[t]he GATT . . . receive[d] [its] authority in United States law, not as a result of any direct congressional act, but rather through Presidential agreement to and proclamation of the effectiveness of the [Protocol].”¹¹ Resultingly, the GATT remained in force as an “unapproved” agreement for nearly half a century.¹²

Although Congress never formally approved the GATT, it was enforced through presidential fiat and sustained by congressional funding. “In one way or another, Congress would note it had not approved the GATT. For example, it would include language in trade bills making it clear its passage of the bill was not to be construed as approval or disapproval of the GATT.”¹³ Not until the establishment of the WTO would the GATT become binding American law.

The Uruguay Round of multilateral trade negotiations marked a critical juncture in the history of the GATT. The Round involved 118 CONTRACTING PARTIES and more than \$3.7 trillion of trade.¹⁴ The astounding growth in the number of contracting parties and the value of trade covered by the GATT hinted at the need for a new organization. This new organization was the WTO. The contracting parties promulgated the Uruguay Round Agreement establishing the World Trade Organization (Agreement) on April 15, 1994.¹⁵ The WTO entered into force on January 1, 1995.¹⁶ Rather than abandon the framework that led to its creation, the WTO specifically incorporated the GATT into the Agreement.¹⁷ The official recognition of the GATT by the United States ultimately followed.

On December 8, 1994, Congress enacted legislation from the Uruguay Round Trade Agreement, officially subjecting the United States to the GATT for the first time in history.¹⁸ Through this enactment, Congress approved the General Agreement on Tariffs and Trade 1994 as one of many trade agreements listed in the Uruguay Round Trade Agreement.¹⁹ Although the Uruguay Round Trade Agreement distinguishes GATT 1947 from GATT 1994 in the definitions section of the act, the original GATT is nonetheless

11. Ronald A. Brand, *GATT and the Evolution of United States Trade Law*, 18 BROOK. J. INT’L L. 101, 119 n. 72 (1992).

12. See BHALA, *supra* note 8, at 1135.

13. *Id.*

14. *Id.* at 229.

15. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1994 WL 761479.

16. *Id.*; see also 19 U.S.C.A. § 3511 (West 2005) (adopting the WTO).

17. Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1994 WL 761480 (“Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts and all of the results of the Uruguay Round on Multilateral Trade Negotiations.”).

18. § 3511(a).

19. § 3511(d)(1).

incorporated into the laws of the United States.²⁰ This is a direct result of the WTO integrating the GATT into the Agreement.

Many scholarly works discuss the precarious position of the GATT in the legal framework of the United States, along with the interplay of the WTO, which is outside the scope of this article.²¹ This brief history of the GATT is to demonstrate the United States is officially subject to the treaty provisions of the GATT and the WTO.

ESCAPE CLAUSE

The substantial reduction in tariffs and other trade protection measures led to grave concern that contracting parties with seriously injured domestic industries may withdraw from the GATT and thus defeat the multilateral agreement altogether.²² To resolve this issue, and to guarantee participation by the United States based upon its foreign trade policy at the time, the drafters of the GATT inserted Article XIX.²³ Under Article XIX:1(a):

If, as a result of unforeseen developments and of the effect of the obligation incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.²⁴

This so-called “escape clause” measure contains prerequisites for its application as an emergency action. Among the prerequisites, the causation standard has come under considerable scrutiny.²⁵ Subsequent sections of this article elaborate on the causation standard in the context of the GATT and the WTO.

The WTO Agreement on Safeguards (AOS), drafted to clarify and reinforce Article XIX, contains parallel prerequisites.²⁶ Under Article 2:1:

20. See §3501(1).

21. See, e.g., JACKSON, *supra* note 5, at 106-117.

22. See *id.* at 553.

23. *Id.* (stating “[t]he GATT escape clause . . . was a result of United States desires.”).

24. Emergency Action on Imports of Particular Products, Mar. 1969, GATT B.I.S.D. art. XIX, at § IV/36-37.

25. See, e.g., Christy Ledet, *Causation of Injury in Safeguards Cases: Why the U.S. Can't Win*, 34 LAW & POL'Y INT'L BUS. 713 (2003).

26. Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreement on Trade in Goods, 1994 WL 761483 [hereinafter AOS] (“Recognizing the need to clarify and reinforce the disciplines of GATT 1994,

A Member may apply a safeguard measure to a product only if the Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.²⁷

Again, the escape clause measure contains certain conditions for its proper application. However, the AOS is more comprehensive in breadth and scope than Article XIX of the GATT. Interestingly, both Article XIX and the AOS allow for import protection “under circumstances where serious injury as a result of imports is alleged, but where there is no evidence to demonstrate an ‘unfair’ trade practice such as dumping or an illegal government subsidy.”²⁸ The justification for, and impact of, the AOS on escape clause measures requires an understanding of why such measures exist.

The idea for the escape clause has its beginnings in American foreign trade policy. “Escape clauses . . . were the answer to complaints from the United States Congress about the effects of liberalised [sic] trade.”²⁹ Indeed, President Harry S. Truman mandated escape clause provisions for every trade agreement entered into under the authority of the Trade Agreements Act of 1934.³⁰ Within the context of domestic legislation, the Article XIX escape clause provision is found in section 201 of the Trade Act of 1974.³¹ Even after the creation of the WTO, section 201 of the Trade Act of 1974 remains the standard upon which all American escape clause actions are judged. Any inconsistent international law from the Uruguay Round is subordinate to United States domestic law, according to jurisprudence in the area³² holding that: “[n]either the GATT nor any enabling international agreement outlining compliance therewith . . . trumps domestic legislation; if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress.”³³ Therefore, if any inconsistencies exist between Article XIX and section 201 of the Trade Act of 1974, domestic legislation controls. Since the text of Article XIX tracks almost identically to President Truman’s Executive Order,³⁴ a conflict between the GATT and

and specifically those of its Article XIX (Emergency Action on Imports of Particular Products), to re-establish multilateral control over safeguards and eliminate measures that escape such control.”).

27. AOS, *supra* note 26, at art. 2:1.

28. Raj Bhalal & David A. Gantz, *WTO Case Review 2001*, 19 ARIZ. J. INT’L & COMP. L. 457, 467 (2002).

29. BHALAL, *supra* note 8, at 942.

30. See Exec. Order No. 9832, 12 Fed. Reg. 1363 (Feb. 25, 1947).

31. Trade Act of 1974, 19 U.S.C.A. § 2251 (West 2005).

32. 19 U.S.C.A. § 3512(a) (West 2005) (stating “[n]o provision of any of the Uruguay Round Agreements . . . that is inconsistent with any law of the United States shall have effect”).

33. *Corus Staal BV v. Dep’t of Commerce*, 395 F.3d 1343, 1348 (Fed. Cir. 2005).

34. Emergency Action on Imports of Particular Products, Mar. 1969, GATT B.I.S.D. art.

domestic legislation is unlikely. However, the substantive changes made to escape clause actions under the AOS may produce conflict between enacted legislation and foreign obligation.

Economic theories provide justification for escape clause provisions. There is no denying “safeguards generally, and Article XIX in particular, [are] incongruous with the fundamental goal of GATT, namely, trade liberalization [sic].”³⁵ However, two main arguments for the protectionist measure exist. First, “relief pursuant to Article XIX allows for the restoration of competitiveness. By providing temporary protection, the relief gives an ailing industry time to generate profits, and reinvest these profits in factors of production so as to reduce its costs and thereby regain its competitive edge once protection is removed.”³⁶ The hope is that during the period of high tariff barriers, the domestic industry will be able to reorganize itself sufficiently to compete globally. Without an extension, the greatest amount of time the AOS allows for increased tariffs is four years.³⁷ Unfortunately, due to the limited duration of escape clause relief and the massive restructuring that is necessary to make some industries competitive, successful restoration of competitiveness is unlikely.

A second argument in favor of escape clause provisions implicates the theory of orderly contraction. “It is ventured the escape clause facilitates the orderly contraction of industries that cannot regain their competitive edge.”³⁸ The protection produced by the relief from imports “slows the rate of contraction in an import-sensitive industry. Workers are not thrown from their jobs, and their wages are not slashed without warning. Rather, displaced workers have time to find new work, or possibly retrain.”³⁹ Increased tariffs give industries and workers additional time to gradually shutter production and to acquire new skills or jobs. However, once tariffs are in place, it may not be possible to determine which industries will reorganize and become globally competitive and which industries will ultimately fail. It remains likely some workers and industries will continue to be stilted because they will not make an effort to retrain and contract in an orderly manner until it is too late to do so. Although neither economic justification for the escape clause is overly persuasive, Article XIX remains an integral part of the GATT.

XIX, at § IV/36-37; Exec. Order No. 9832, 12 Fed. Reg. 1363 (Feb. 25, 1947) (both stating that escape clause actions could be brought when “such article is being imported in such increased quantities and under such conditions as to cause, or threaten, serious injury to domestic producers”).

35. BHALA, *supra* note 8, at 943.

36. *Id.* at 944.

37. AOS, *supra* note 26, at art. 7:1.

38. BHALA, *supra* note 8, at 945.

39. *Id.*

THE TRADE ACT OF 1974

As previously mentioned, Article XIX is codified in American law in the Trade Act of 1974 (Act).⁴⁰ Under increasing pressure from global competition and economic chaos in some areas of the world during in the 1970s, the United States Congress enacted this protectionist legislation. The Act “coincide[d] with a serious crisis in the domestic and world economies”⁴¹ in which “[t]rade negotiations [were] urgently needed to promote fairness and equity in the international trading system and to prevent a serious deterioration in the spirit of economic cooperation that is essential for the preservation of economic and political stability in a rapidly changing world.”⁴²

The Act seeks “to provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition, and to assist industries, firm [sic], workers, and communities to adjust to changes in international trade flows.”⁴³ This purpose reflects the traditional economic justifications for protective trade measures: restoration of competition and orderly contraction. Furthermore, the Act sought to reform the GATT through “expansion of the safeguard provision (Article XIX) to cover all forms of import restraints countries use in response to injurious competition.”⁴⁴ Congress wished to provide maximum protection during one of the toughest periods of economic adjustment in American history. This is clearly seen in the purposes and objectives of the Act.

In particular, sections 201 to 204 of the Act illustrate the procedure for relief from injury caused by import competition.⁴⁵ Section 201 gives the President the power to put emergency tariffs in place to protect domestic industries harmed, or threatened to be harmed, from import competition due to American GATT obligations.⁴⁶ In particular, the President “[s]hall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs.”⁴⁷ The President cannot do this unilaterally, but must wait for a determination by the United States International Trade Commission (Commission) that goods are “[b]eing imported into the United States at such increased quantities as to be a substantial cause of serious injury or the threat thereof”⁴⁸ Once the Commission determines a domestic industry is being harmed, the President must decide the extent of trade protection bestowed

40. Trade Act of 1974, 19 U.S.C.A. § 2101 (West 2005).

41. Trade Act of 1974, Pub. L. No. 93-618, 1974 U.S.C.C.A.N. 7186, 7187.

42. *Id.* at 7188.

43. 19 U.S.C.A. § 2102(4) (West 2005) (So in original; probably should read “firms”).

44. 1974 U.S.S.C.A.N. at 7203.

45. 19 U.S.C.A. §§ 2251-54 (West 2005).

46. § 2251(a).

47. *Id.*

48. *Id.*

upon domestic industries, if any.

Section 202 contains the procedures for investigations, determinations, and recommendations by the Commission to the President for escape clause measures.⁴⁹ This important section lists the definitions and standards to determine whether harm is occurring. Most notably, section 202 contains the causation standard for escape clause relief.⁵⁰

After the Commission determines a domestic industry is suffering from import injury, section 203 enumerates permissible Presidential actions.⁵¹ The President must act within sixty days after a determination by the Commission of import injury.⁵² Section 203 also outlines the various types of trade remedies available to the President to correct import injury.⁵³ Trade remedies are not mutually exclusive⁵⁴ and judicial review of Presidential actions is very limited.⁵⁵ However, no matter the type or combination of remedies used to correct injury to a domestic industry from imports, the duration of the remedies cannot exceed a total of eight years.⁵⁶

Lastly, section 204 describes the monitoring, modification, and termination of escape clause actions initiated by the President.⁵⁷ Importantly, if the initial period or the period of extension of remedial action exceeds three years, the Commission must submit a report of the impact of the trade remedy over the prior three years to the President.⁵⁸ Before an extension to modify the original trade action is granted, “the Commission shall investigate to determine whether action under [section 203] of [the Trade Act of 1974] continues to be necessary to prevent or remedy serious injury and whether there is evidence that the industry is making a positive adjustment to import competition.”⁵⁹ The language in this section is consistent with the “temporary” language and economic justifications found in GATT Article XIX.

THE GATT CAUSATION STANDARD TO INVOKE THE ESCAPE CLAUSE

When interpreting the causation standard of any treaty, the text of the

49. See § 2252.

50. § 2252(b)(1)(B).

51. See 19 U.S.C.A. § 2253 (West 2005).

52. § 2253(a)(4)(A).

53. § 2253(a)(3).

54. § 2253(a)(3)(J) (permitting extensions under exceptional circumstances).

55. See *Corus Group PLC v. Bush*, 26 Ct. Int'l Trade 937, 941 (2002) (citing *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985)) (holding “[b]ecause the Act vests the President and [Commission] with ‘very broad discretion’ and does not specifically provide for judicial review, the court’s review is extremely limited”).

56. See § 2253(e)(1)(B)(ii).

57. See § 2254.

58. § 2254(a)(2).

59. § 2254(c)(1).

treaty controls over any jurisprudence.⁶⁰ It is believed the intent of the drafters is fully expressed in the carefully selected words that form the treaty itself. Unfortunately, the language of the GATT provides little help in defining a causation standard. GATT Article XIX:1(a) provides relief from “[a]ny product . . . being imported into the territory of [a] contracting party in such increased quantities and under such conditions *as to cause* or threaten serious injury to domestic producers in that territory of like or directly competitive products”⁶¹ It is unclear from this text which conditions or how many imports are sufficient so as to cause or threaten serious injury.

The problem is further compounded by the outright lack of jurisprudence interpreting Article XIX because of the structure of the former dispute settlement process under the GATT. Dispute settlement procedures under GATT Articles XXII and XXIII “were criticized . . . as insufficiently precise and, therefore, ineffective.”⁶² Key deficiencies included the lack of concrete time periods for the various procedural steps and the ability of any CONTRACTING PARTY to block the formation of a panel.⁶³ Even more astonishing, “assuming a panel was agreed to and the panel issued a report, adoption of the report by the Contracting Parties could be blocked. Typically, the losing party would block adoption, either of panel formation, report adoption, or both.”⁶⁴ Articles XXII and XXIII required “[a] consensus among contracting parties . . . to agree to form a panel or adopt a report.”⁶⁵ The ability of the losing party to block its sanction prevented any significant interpretation of Article XIX, especially when ailing domestic industries were likely to garner political support to the extent that a contracting party would be unwilling to adopt a resolution not in its favor.

Ultimately the deficiencies of the GATT would heed to the more stringent procedures of the Dispute Settlement Understanding (“DSU”) of the WTO. Article 4.2 of the AOS provides details for escape clause determinations. “To determine whether increased imports have caused or are threatening to cause serious injury . . . the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry”⁶⁶ Relevant factors are specifically enumerated in the AOS.⁶⁷ Under the causal link element of Article 4:2(b), escape clause determinations

60. Statute of the International Court of Justice, Art. 38, *available at* <http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm> (last visited Nov. 18, 2006).

61. GATT Art. XIX(1)(a), B.I.S.D. § IV/36-37 (Mar. 1969) (emphasis added).

62. BHALA, *supra* note 8, at 1159.

63. *Id.*

64. *Id.*

65. *Id.*

66. AOS, *supra* note 26, at art. 4:2(a).

67. *Id.* The AOS lists “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” as factors to be taken into consideration. *Id.*

require a “causal link between increased imports of the product concerned and serious injury or threat thereof.”⁶⁸ Increased imports must cause serious injury to the domestic industry of a Member.

Under the non-attribution element of Article 4:2(b), “[w]hen 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.”⁶⁹ Other conditions harming a domestic industry of a Member may not be attributed to imports in an escape clause measure determination. Analysis of both parts of Article 4:2(b) is required for a successful escape clause action to be brought before the WTO. Nonetheless, the treaty text “sidesteps the crucial question about causation: how immediate, direct, and discreet must the ‘cause’ be?”⁷⁰ Therefore, jurisprudence is needed to flesh out the details.

The failure of the AOS to provide sufficient details on crucial causation matters places the burden on WTO panels and the Appellate Body to define causation. There have been four American cases in recent history which confront this issue. This article provides only a basic framework of the causation standard in light of these decisions, as other articles have covered the effects of the decisions involving the United States in greater detail.⁷¹

In *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* (“*Wheat Gluten*”), the WTO Appellate Body addressed both the causal-link and non-attribution elements for proper causation determinations in escape clause actions.⁷² According to the Appellate Body, the causal link “denotes . . . a relationship of cause and effect such that increased imports contribute to ‘bringing about’, ‘producing’ or ‘inducing’ the serious injury.”⁷³ However, this does not mean increased imports must be the sole cause of serious injury to a domestic producer.⁷⁴ “‘The causal link’ between increased imports and serious injury may exist, *even though other factors are also contributing, ‘at the same time’, to the situation of the domestic industry.*”⁷⁵ Because other factors may simultaneously be the cause of injury to a domestic industry, the non-attribution element takes on even greater importance for a successful escape clause action.

A proper non-attribution analysis must occur prior to a causal-link determination by the competent authority. The principle of non-attribution

68. *Id.* at art. 4:2(b).

69. *Id.*

70. BHALA, *supra* note 8, at 975.

71. *See, e.g.*, Ledet, *supra* note 25.

72. *See* Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R (Dec. 22, 2000) [hereinafter *Wheat Gluten*].

73. *Id.* at ¶ 67.

74. *Id.*

75. *Id.*

exists because the drafters of the AOS understood increased imports were never likely the sole cause of injury to a domestic industry. “If the non-import effects are first distinguished from the effects of imports, they will not be erroneously attributed to imports.”⁷⁶ “What is important in this process is separating or distinguishing the *effects* caused by the different factors in bringing about the injury.”⁷⁷ However, the Appellate Body still needed to fill the gaps in the non-attribution procedure left in the AOS.

Anticipating difficulties in applying the strict requirements of Article 4:2(b), the Appellate Body developed a three-step analysis to aid the competent authority in complying with the causation standard. This analysis is as follows: (1) “distinguish injurious effects of imports from injurious effects of other factors;” (2) “demonstrate that the injury caused by those other factors was not caused by imports;” and (3) “determine a ‘genuine and substantial relationship of cause and effect’ between the increased imports and serious injury.”⁷⁸ The first two steps ensure compliance with the non-attribution element of Article 4:2(b) while the last step ensures compliance with the causation element. Under the three-step analysis, if the injury to the domestic industry caused by increased imports is insubstantial, then an escape clause action will fail. Although increased imports on their own may not cause serious injury, if increased imports are a substantial cause of injury when coupled with other factors, an escape clause action will prevail.⁷⁹

In *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (Lamb Meat)*, the Appellate Body confirmed the three-step process of *Wheat Gluten*, emphasizing the three steps are not legal tests requiring “separate finding[s] or reasoned conclusion[s] by the competent authorities”⁸⁰ but merely a “logical process for complying with the obligations relating to causation set forth in Article 4:2(b).”⁸¹

The Appellate Body further clarified the causation standard in light of multiple injurious factors. The AOS “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.”⁸² 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

76. Bhala & Gantz, *supra* note 28, at 613.

77. See *Wheat Gluten*, *supra* note 69, at ¶ 68.

78. Bhala & Gantz, *supra* note 28, at 625.

79. See *Wheat Gluten*, *supra* note 73, at ¶ 70.

80. See Appellate Body Report, *United States — Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, ¶ 178, WT/DS177/AB/R; WT/DS178/AB/R (May 1, 2001).

81. *Id.* at ¶ 178 (emphasis in original).

82. *Id.* at ¶ 162 (emphasis in original).

be made if the injurious effects caused by all the different causal factors are distinguished and separated.”⁸³ A successful action therefore requires identification and attribution as separate steps, which must be properly evaluated by the authority in charge of making escape clause determinations.⁸⁴ Even with these further clarifications on the causation standard, questions still remained.

In *United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (Line Pipe)*, the panel further expounded on the extent to which a competent authority must properly analyze the non-attribution element of the causation standard. Although the determination by the Commission complied with section 201 of the Trade Act of 1974, it did not “satisfy the requirements of Article 4.2(b), which mandates that injury caused by other factors not be attributed to increased imports.”⁸⁵ The Commission failed to separate the injurious effects of one factor from the injurious effects of increased imports.⁸⁶ The Commission also “[i]mmediately determine[d] whether there [was] a link between the increased imports and the serious injury, without first attempting to separate out injury that [was] being caused by other factors.”⁸⁷ In doing so, the United States “assess[ed] the injurious effects of the other factor at issue against the injurious effects of increased imports and the remaining other factors.”⁸⁸ The failure to analyze the injurious effects of other factors against increased imports alone meant a proper causal link analysis involving a determination of a genuine and substantial relationship of cause and effect was impossible.⁸⁹ The Appellate Body affirmed its interpretation of the AOS,⁹⁰ holding that a proper non-attribution analysis must be completed prior to the causal link analysis for an escape clause action to prevail.

The last American action dealing with the causation standard to go before the Appellate Body was the 2003 case of *United States—Definitive Safeguard Measures on Imports of Certain Steel Products (Steel Products)*.⁹¹ The Appellate Body succinctly summarizes the procedure for a successful escape clause action.

In sum, the *Agreement on Safeguards* . . . requires that

83. *Id.* at ¶ 179 (emphasis in original).

84. BHALA, *supra* note 8, at 976.

85. See Panel Report, *United States — Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, ¶ 7.288, WT/DS202/R (Oct. 29, 2001).

86. *Id.*

87. *Id.* at ¶ 7.289.

88. *Id.* at ¶ 7.288.

89. *See id.*

90. *Id.* at ¶ 7.94.

91. Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R; WT/DS249/AB/R; WT/DS251/AB/R; WT/DS252/AB/R, WT/DS253/AB/R; WT/DS254/AB/R; WT/DS258/AB/R; WT/DS259/AB/R (Oct. 23, 2003).

competent authorities demonstrate the *existence* of a “causal link” between “increased imports” and “serious injury” (or the threat thereof) on the basis of “objective evidence”. In addition, the competent authorities must provide a reasoned and adequate explanation of how facts (that is, the aforementioned “objective evidence”) support their determination. If these requirements are not met, the right to apply a safeguard measure does not arise.⁹²

Therefore, the process outlined in *Wheat Gluten* is critical for a successful escape clause action. Not only must objective evidence be separated and distinguished to determine injury, it must also be properly analyzed to determine if a causal link between increased imports and injury exists. WTO jurisprudence highlights the repeated failure of the Commission in meeting this causation standard.⁹³ An in-depth understanding of this failure requires an analysis of the domestic embodiment of the GATT Article XIX.

THE TRADE ACT OF 1974: CAUSATION STANDARD TO INVOKE THE ESCAPE CLAUSE

The GATT Article XIX does not provide a causation standard in the text of the treaty itself.⁹⁴ Because of the lack of guidance under Article XIX, the party invoking Article XIX is “entitled to the benefit of any reasonable doubt” when applying its domestic embodiment of Article XIX.⁹⁵ Therefore, “it is for domestic law to set forth a standard of causation.”⁹⁶ The American causation standard is found in section 202 of the Trade Act of 1974.⁹⁷

Under section 201 of the Trade Act of 1974, any article “being imported into the United States in such increased quantity as to be a *substantial cause* of serious injury, or the threat thereof,” is subject to emergency relief under an escape clause action.⁹⁸ The Commission must “consider the condition of the domestic industry . . . and examine factors other than imports which may be a cause of serious injury.” Unlike the GATT, Congress expressly defined the causation standard for escape clause actions. For emergency relief, ‘substantial cause’ means “a cause which is important and *not less than any other cause*.”⁹⁹

Because this causation standard is explicitly stated, there are no federal

92. *Id.* at ¶ 489 (emphasis in original).

93. *See, e.g., id.* (explaining the correct causation standard the Commission should use).

94. *See* GATT, *supra* note 2, art. XIX.

95. *See Report of the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Concession under Article XIX*, ¶ 30, GATT/CP/106 (Nov. 10, 1951) (adopted Oct. 24, 1951) (unpublished report).

96. BHALA, *supra* note 8, at 975.

97. Trade Act of 1974 §202, 19 U.S.C. § 2252 (2003).

98. § 2251(a) (emphasis added).

99. § 2252(b)(1)(B) (emphasis added).

court rulings directly addressing the causation standard. Therefore, Commission Determinations and legislative history must flesh out the requirements for proper causation. In *Certain Motor Vehicles and Certain Chassis and Bodies Thereof (Motor Vehicles)*, the Commission investigated the difficult position of American automobile manufacturing in the late 1970s.¹⁰⁰ While the Commission determined the domestic industry suffered serious injury, it found increased imports were not a substantial cause of serious injury.¹⁰¹ Where “declining demand accounted for over 80 percent of the net decline in U.S. producers’ domestic shipments of both automobiles and trucks . . . as compared with less than 20 percent of the decline in the U.S. producers’ domestic shipments being attributable to imports . . .” imports were not a substantial cause of injury.¹⁰² The Commission found an industry could be simultaneously suffering from multiple injurious factors, but imports were not the substantial cause of injury.¹⁰³ In finding that imports were not a substantial cause of injury, the Commission interpreted the substantial cause language of “not less than any other cause” to mean imports must be equal to and not less than any other injurious factor. The legislative history of the Trade Act of 1974 confirms this interpretation of substantial cause.¹⁰⁴ Legislative history provides further insight into the causation standard.¹⁰⁵ The Senate Report established that the standard required a cause to be a “major factor” instead of a “substantial cause” of serious injury.¹⁰⁶ The phrase “major factor” meant, “a cause greater than all other causes combined.”¹⁰⁷

The definition of major factor, when quantified, means that more than 50 percent of the injury must be attributed to imports themselves.¹⁰⁸ Dissatisfied with this level of protection, Congress inserted the lower standard of “substantial cause” to make it easier for the President to provide relief to ailing industries.¹⁰⁹ The lower standard implies injury from imports no longer must be the major reason for injury to a domestic industry. This supports the interpretation of “substantial cause” to mean injury from imports must be equal to and not less than any other factor. “The [House Ways and Means] Committee decided that whenever serious injury, or that threat thereof, was

100. *Certain Motor Vehicles and Certain Chassis and Bodies Thereof*, USITC Pub. 1110, Inv. No. TA-201-44 (Dec. 1980) [hereinafter *Motor Vehicles*].

101. *Id.* at 9.

102. *Id.* at 14 (footnote omitted).

103. *See id.* at 15 (listing inflation, unemployment, rising interest rates, and higher energy costs as working “in unison” to bring about an economic recession which reduced demand for American automobiles in an amount equal to, if not greater than, the decrease in demand caused by foreign imports).

104. S. REP. NO. 93-1298, at 7205 (1974).

105. *Id.*

106. *Id.* at 7204.

107. *Id.*

108. *Id.*

109. *Id.* at 7205.

found to exist by the Commission, some form of relief was justified.”¹¹⁰ This justification came at a time when American manufacturers were suffering in the global market and prior to the development of any substantive jurisprudence under the GATT. However, the former justification for the current standard is incongruent with the recent trend in TWO adjudications.

Interestingly, the Senate Report provides for a two-part causation standard test. “Substantial cause is defined in the bill to mean a cause which is important and not less than any other cause. This requires that a dual test be met—increased imports must constitute an important cause and be no less important than any other single cause.”¹¹¹ The framework requires first that increased imports be a significant cause of injury, and second that increased imports be equal to and not less than any other major factor contributing to injury of a domestic industry. The Trade Act of 1974 clearly contains a causal link element, but the sufficiency of the non-attribution element is questionable.

The definition of substantial cause as, “a cause which is important and not less than any other cause” is interpreted as the non-attribution requirement. In *Motor Vehicles*, the Commission did indeed identify many factors contributing to the injury suffered by the domestic industry before determining increased imports were not a significant cause.¹¹² This analysis tracks similarly to the non-attribution analysis under Article 4:2(b) of the AOS, but does not sufficiently meet the non-attribution requirements of the WTO. The Commission failed to separate and distinguish among multiple factors prior to determining a causal link between increased imports and injury did not exist.¹¹³ Although the early *Motor Vehicles* Commission Determination may appear outmoded, it accurately demonstrates the current practices of the Commission when determining causation in escape clause actions.¹¹⁴

The causation standards in section 201 and Article 4:2(b) appears to be congruent, but the recent pattern of Appellate Body decisions proves otherwise.

While the [Commission] requires that there be a causal link between imports and injury and that other sources of injury not be attributed to the imports at issue, the WTO has effectively established a requirement that the ITC must distinguish and weigh all of the possible alternative causes of injury other than

110. *Id.* at 7204.

111. *Id.* at 7264.

112. *Motor Vehicles*, *supra* note 100.

113. *Id.* at 15 (stating, “[a]ll of these contentions seek to isolate and weigh separately the various components of a general economic downturn. In reality, most of the factors mentioned above have worked in unison to bring about what is commonly termed a ‘recession.’”).

114. See *Apple Juice*, 51 Fed.Reg. 3266-01, 1986 WL 89506 (F.R.) (1986); *Steel Fork Arms*, 51 Fed.Reg. 5420-03, 1986 WL 88346 (F.R.) (1986); *Certain Knives*, 53 Fed.Reg. 12197-01, 1988 WL 262985 (F.R.) (1988); and *Certain Cameras*, U.S.I.T.C. Inv. No. TA-201-62, Pub. No. 2315, 1990 WL 711852 (Sept. 1990).

the imports at issue.¹¹⁵

Therefore, the section 201 causation standard fails to meet the WTO non-attribution requirement. “The focus of the non-attribution standard is on the effects of the various causes, such that the inquiry should not be whether imports alone are causing injury. Rather, the authorities should ensure that the effects from other factors are not attributed to imports.”¹¹⁶

Although the WTO adjudications indicate the requirements of a proper causation standard, the question remains of how to conduct an investigation to ensure compliance with the standard. A non-attribution standard must “[e]stablish explicitly, through reasoned and adequate explanation that injury caused by factors other than increased imports is not attributed to increased imports.”¹¹⁷ “To do so, the investigating authority should properly separate, distinguish, and assess the ‘nature and extent of the injurious effects of those other factors.’”¹¹⁸ The failure to fully analyze the impact of other factors independently from one another is the genesis of the flaw in the causation standard embodied in the Trade Act of 1974.¹¹⁹ Therefore, some form of quantitative analysis that measures the degree of harm caused by each factor is necessary. Because it is up to domestic law to define the causation standard, and since the United States has failed to meet the burden imposed under the Article 4:2(b), there have been recent proposed amendments to the Trade Act of 1974.¹²⁰

THE TRADE LAW REFORM ACT OF 2007 ESCAPE CLAUSE CAUSATION STANDARD

In 2007, the House of Representatives introduced a bill to protect ailing domestic industries after the repeated losses that were sustained by the United States before the WTO. On January 29, 2007, Representative Phil English (PA-3) introduced House Resolution 708.¹²¹ The short title for the act is the Trade Law Reform Act of 2007 (“Reform Act”).¹²² Secondary sponsors of the bill included Representative Thaddeus McCotter (MI-11) and Representative John McHugh (NY-23).¹²³ Although the bill is currently referred to the House

115. Daniel Pickard, *The Future of Section 201: Safeguard Actions in International Trade Law in Light of WTO Review*, 14 METRO. CORP. COUNSEL 10, (2006).

116. Youngjin Jung & Ellen Jooyeon Kang, *Toward an Ideal WTO Safeguards Regime—Lessons from U.S.-Steel*, 38 INT’L LAW. 919, 942 (2004).

117. *Id.* (citing *US-Line Pipe*, *supra* note 86).

118. *Id.* (citing *US-Line Pipe*, *supra* note 86, at ¶ 215).

119. *See id.* (“Rather than separating out the injurious effects of each of these factors from that of increased imports, [the United States] merely analyzed the relative causal importance of these factors . . . by determining whether any factor is a more important cause of injury than increased imports in accordance with domestic law.”).

120. *Id.*

121. Trade Law Reform Act of 2007, H.R. 708, 110th Cong. (2007).

122. H.R. 708 § 1(a).

123. The Library of Congress, H.R. 708 – Cosponsors, <http://thomas.loc.gov/cgi->

Committee on Ways and Means, this article examines the causation standard of the Reform Act because predecessor bills that were not enacted use identical causation standard language.¹²⁴ Additionally, the Reform Act follows in the tradition of its predecessors by lowering the causation standard to provide greater protection to American industries.¹²⁵

The stated purpose of the Reform Act is “[t]o amend United States trade laws to address more effectively import crises, and for other purposes.”¹²⁶ Representative English’s comments after the *Steel Products* decision summarize Congress’ frustration with the WTO’s repeated adverse rulings: “Right now, our domestic manufacturers have been taking a terrible beating. Our outdated trade laws are costing America thousands of jobs. Congress needs to act now to create a level playing field for U.S. employers to compete in the global marketplace”¹²⁷ To make the playing field level, the representatives hoped to lower the causation standard once again.

The Reform Act substantially amends the Trade Act of 1974, especially section 201. Under the test for positive adjustments, “section 201(a) of the Trade Act of 1974 is amended by striking ‘be a *substantial cause* of serious injury or the threat thereof,’ and inserting ‘*cause* or threaten to cause serious injury.”¹²⁸ Furthermore, the Competitiveness Act amends the causation standard of section 202 so that “the term ‘cause’ refers to a cause that contributes significantly to serious injury, or the threat thereof, to the domestic industry but need not be equal to or greater than any other cause.”¹²⁹ This language indicates increased imports of any degree are likely sufficient to invoke escape clause provisions. Imports could pose less harm than any other cause of injury, yet still satisfy the causal link element. However, this diverges from the “genuine and substantial relationship” standard interpreted by the Appellate Body.¹³⁰ Under the Reform Act, increased imports that are insubstantial in comparison to other factors seriously harming a domestic industry will permit escape clause relief under United States law, yet fail

bin/bdquery/z?d110:HR00708:@@P.

124. 2007 FD H.R. 708 (NS), Federal Bill Tracking (stating referred to the Committee on Ways and Means); *see also* Restoring America’s Competitiveness Act of 2006, H.R. 5043, 109th Cong. (2006) (amending “section 201 of the Trade Act of 1974 by striking ‘be a substantial cause of serious injury, or the threat thereof,’ and inserting ‘cause or threaten to cause serious injury.’”); *and* Trade Law Reform Act of 2006, H.R. 2259, 109th Cong. (2006) (same).

125. *Compare* Trade Act of 1974, S. REP. NO. 93-1298 (1974), *as reprinted in* 1974 U.S.C.A.N. 7186, 7204, 1974 WL 11696 (lowering the causation standard by requiring imports to be a substantial cause of serious injury in place of a major cause of serious injury), *with* H.R. 708 § 201(b)(1) (lowering the causation standard by requiring imports to be a cause of serious injury in place of a substantial cause of serious injury).

126. H.R. 708.

127. News Conference on the Trade Law Reform Act with Rep. Phil English, Rep. Sander Levin, and Rep. Benjamin Cardin, FEDERAL NEWS SERVICE, July 16, 2003.

128. H.R. 708 §201(a) (emphasis added) (citation omitted).

129. H.R. 708 §201(b).

130. *See* Bhala & Gantz, *supra* note 28, at 625

before a WTO adjudicatory body.

Even more alarming, the Reform Act does not resolve the tougher problem of non-attribution as required for a successful escape clause action under WTO standards. Because little to no benefit can accrue to a domestic industry in the long run under the Reform Act, it should be interpreted as outright protectionist legislation. Another modification to the Trade Act of 1974 confirms this notion: presidential action under section 203 would allow for nearly unbridled discretion in choosing remedies for import injuries.¹³¹ The President could implement a potentially damaging trade remedy if it achieved any benefit, no matter how minute. Due to limited judicial review, the results could be disastrous.¹³² Industries and lobbies would reap substantial benefits at the expense of American citizens. These modifications are inapposite to the binding objectives of the GATT and the WTO, and would ultimately fail when challenged by other Member countries. To avoid this disastrous result, other sustainable initiatives must be sought.

CAUSATION STANDARD: A PUBLIC POLICY FOCUS

The causation standard of the Trade Act of 1974 fails to meet the non-attribution requirements of AOS Article 4:2(b). To remedy this problem, there are two possible solutions. The first solution requires the United States to include a proper non-attribution standard by implementing an econometric analysis to ensure that effects of other factors are not attributed to increased imports. The second solution requires the United States to convince the Appellate Body the current line of jurisprudence is unworkable and a lower causation standard ought to be implemented. This would require the Appellate Body to abandon its current line of reasoning and align its jurisprudence with American law. Either option proves difficult to implement.

As noted in *Lamb Meat*, there is no test that requires separate findings and reasoned conclusions for proper application of an escape clause measure.¹³³ Nonetheless, a competent authority attempting to satisfy the non-attribution requirement set forth by recent Appellate Body jurisprudence will be unable to do so without a proper econometric analysis: “the WTO has effectively established a requirement that the [Commission] must distinguish and weigh all of the possible alternative causes of injury other than the imports at issue.”¹³⁴ The manner in which a competent authority must weigh and

131. See H.R. 708 § 201(c)(1)(A) (changing the President’s discretion threshold “by striking ‘and provide greater economic and social benefits and costs’ and inserting ‘and will not have an adverse impact on the United States clearly greater than the benefits of such action’”).

132. See *Corus Group PLC v. Bush*, 26 Ct. Int’l Trade 937, 941 (2002) (citing *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985)).

133. See Appellate Body Report, *United States—Safeguard Measures on Imports of Fresh, Chilled, or Frozen Lamb Meat from New Zealand and Australia*, ¶ 178, WT/DS177/AB/R; WT/DS178/AB/R (Apr. 12, 2001) (adopted May 1, 2001).

134. Pickard, *supra* note 115, at 10.

distinguish alternatives is not contained in the AOS. Although “an econometric model or quantification is not mandatory, it is quite difficult to imagine how the standard can be met without one.”¹³⁵ To comply with the requirements of the AOS Article 4:2(b), section 201 of the Trade Act of 1974 arguably requires an econometric-based non-attribution standard in place of lowering the causal-link standard.

If an econometric analysis must be added, it is difficult to imagine how it could realistically operate during the timeframe in which the Commission must make an import injury determination. “Assuring that injury caused by other sources is not erroneously attributed to imports is a concept that appears deceptively simple in theory but [is] complex in practice, since competent authorities operate in strict time limitations, and at times, with insufficient data.”¹³⁶ The time lag from when data is initially collected to when it is reported and analyzed may be lengthy. Due to the limited amount of data available at the time in which the Commission makes a decision, it is nearly impossible for an econometric analysis to yield results accurate enough to be reliable.

Relevant and reliable economic data is not available for several months after the injury begins. This delay in reporting effectively renders an escape clause action useless if it cannot be invoked until accurate data is received. In emergency situations, any delay can have a significant impact on ailing domestic industries and their workers. In fact, “[t]here is widespread agreement that carrying out an econometric analysis for causation is very difficult”¹³⁷ and that “this type of separation and quantification of possible causes of injury is ‘realistically impossible.’”¹³⁸ Furthermore the drafters of section 201 never intended to include a mathematical analysis.¹³⁹ Realizing the difficulty in application and time constraints involved with math-based analyses, Congress explicitly rejected such an approach. Therefore, under the current legislative framework, the United States would be unable to meet a non-attribution requirement based on an econometric analysis.

The Appellate Body’s current reasoning of the non-attribution standard has made it impossible to meet the escape clause requirements. The original drafters could not have intended this because they foresaw a need to provide some relief to contracting parties harmed by their commitments under the GATT. Giving deference to the language selected by the original drafters suggests that it is not the causation standard that is problematic, but the

135. Jung & Kang, *supra* note 116, at 942 (footnote omitted).

136. *Id.*

137. Jung & Kang, *supra* note 118, at 942 (footnote omitted).

138. Pickard, *supra* note 117, at 10 (alternation in original).

139. See Trade Act of 1974, S. REP. NO. 93-1298 (1974), as reprinted in 1974 U.S.C.A.N. 7186, 7264, 1974 WL 11696 (“The Committee recognizes that ‘weighing’ of causes in a dynamic economy is not always possible. It is not intended that a mathematical test be applied by the Commission.”).

investigatory process developed by the Appellate Body. To avoid the problems inherent in an econometric analysis for injury determinations and to provide a realistic working model for future escape clause actions, it may be necessary to petition the Appellate Body to reverse its current line of reasoning.

A second option to resolve the non-attribution requirement for the causation standard under Article 4:2(b) of the AOS would require the Appellate Body to rethink its position on the causation standard by relaxing its requirements for successful implementation. In essence, this would bring the AOS in line with the Trade Act of 1974. Although difficult, such a change would not be unprecedented. “The second best approach is to expect the panels and Appellate Body to take a different stance towards [the AOS], as it did in the past in *Shrimp Turtle* and *Asbestos* by reinterpreting and relaxing the conditions to meet Article XX of the GATT.”¹⁴⁰ This may be the more viable of the two options. By lessening the standards required for escape clause actions, the WTO would encourage Members to use the AOS to facilitate temporary protection measures instead of implementing other non-tariff barriers to trade. More active participation in the WTO process would further the goals of the WTO and the GATT, while simultaneously ensuring continued viability of the treaty. Additionally, it would guarantee the participation of the United States.

Escape clause relief is a critical measure that is necessary to increase participation in global trade treaties because it appeases domestic protectionist forces which may block a country from participation in the treaty if a means of recourse is not available. Article 4:2(b) has been essentially rendered useless by current Appellate Body interpretations. “Despite the significant number of [M]embers who have attempted to implement safeguard measures, not one has yet been successful in WTO dispute settlement cases. The Panel and [Appellate Body] have concluded in every case that the causal link between increased imports and serious injury to domestic industry is non-existent.”¹⁴¹ Because no Member has been successful in its attempt to invoke an escape clause measure, the Appellate Body, through its line of reasoning, runs the risk that Members will resort to other non-tariff barriers to trade to exercise their perceived right to protect their industries from harm. Non-tariff barriers, including quotas, are widely seen as more trade distorting than tariffs¹⁴² because “quotas do not generate revenues, they provide an adjustable protection . . . , they lack transparency, they are difficult to deal with in

140. Jung & Kang, *supra* note 116, at 943 (footnotes omitted). See also Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998); Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001).

141. Yang Guohua, *U.S.-China WTO Roundtable: Are Safeguard Measures Permitted under the World Trade Organization System?*, 17 TEMP. INT'L & COMP. L.J. 175, 178 (2003).

142. See BHALA, *supra* note 8, at 345.

negotiations, and they create opportunities for corruption.”¹⁴³ If non-tariff barriers are used, the entire WTO treaty could be undermined.

Moreover, the current dispute settlement procedures do little to deter a Member from using a flawed escape clause causation standard for temporary import relief or from erecting non-tariff barriers in violation of its WTO obligations. If a Member files a complaint against another Member using these procedures, the adjudicatory process can easily last more than two years.¹⁴⁴ This permits the violating Member to obtain the desired results of the temporary protection measure even if it must subsequently remove the trade distorting measure. Due to the temporary nature of escape clause actions, the cost of complying with the Appellate Body causation standard is far outweighed by the marginal benefit of a few extra months of protection obtained through compliance.¹⁴⁵ Therefore, there is an incentive for Members to knowingly violate the current causation standard and to litigate through the appeals stage because the final outcome in all material respects is identical. To resolve the problem with the current causation standard, the Appellate Body must reinterpret the causation standard, as there are no other viable options for resolving the non-attribution standard problems currently facing Members who wish to adopt escape clause measures.

CONCLUSION

It is indisputable that escape clause provisions, which allow Members to enact protectionist measures to shield ailing domestic industries, run contrary to the goals and purposes of trade liberalization and harmonization under the GATT and WTO. Nonetheless, the escape clause remains an integral element of the multilateral framework. Many Members, fearful of the harmful effects of trade liberalization, may not sign a multilateral agreement without such a remedy available. Indeed, escape clause measures are standard in all American foreign trade agreements and have been for over three-quarters of a century. Therefore, a proper understanding and interpretation of the correct procedure for invoking such actions is necessary to ensure global participation in the GATT and WTO.

A recent trend in jurisprudence, developed by the Appellate Body of the WTO, highlights the necessity of proper causation for a successful escape clause action. No country has been able to satisfy the causation requirements under the auspices of the WTO dispute settlement regime. The United States,

143. *Id.*

144. See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 20-21, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, General Agreement on Tariffs and Trade—Multilateral Trade Negotiations, 33 I.L.M. 112, 125 (1994) (noting the period from establishing a panel to adopting a report shall not exceed 9 months and the period from implementing panel recommendations shall not exceed 15 months).

145. See AOS, *supra* note 26, at art. 7 (permitting safeguards for four years).

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as a proponent and major user of the escape clause, has been unable to meet the non-attribution branch of the causation standard. In return, congressmen and commentators alike have begun to reflect on the modern reality of such actions. In the United States, the response has traditionally been to lower the causal link standard. This action is completely inadequate and ignores the recent line of failed American cases due to proper non-attribution requirements.

Although no test has been proposed or is required by the WTO, most commentators agree a successful action cannot be brought without using a sophisticated econometric analysis for proper separation of various factors contributing to the harm of a domestic industry of a Member. However, commentators nearly unanimously agree such a test is unworkable due to the lack of information available to competent authorities when investigating injury complaints. By endorsing a de facto test that is impossible to implement, the Appellate Body has effectively rendered the escape clause useless, which may lead to Members taking protectionist measures into their own hands, leading to the possible demise of the WTO. The best solution would be for the Appellate Body to relax the causation standard of the escape clause provision by providing for a realistic and practical framework, which takes into consideration the political sensitivity involved in dealing with ailing domestic industries. In doing so, participation in the WTO will be encouraged, preventing Members from unilaterally usurping the goals and purposes of the GATT and WTO.