

The Role of Non-Attribution in Determining the Use of Trade Remedies

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Abstract

In order for Member A to implement trade remedies against Member B, Member A must be satisfied that the imports of Member B have caused injury to the domestic market of Member A. In order for Member A to satisfy itself of the injurious effects of imports, Member A must perform both a causation and a non-attribution analysis. The causation analysis is intended to establish a positive link between imports and injury, whilst the purpose of the non-attribution analysis is to establish that the domestic injury was not instead caused by some factor or factors other than imports. In interpreting the relevant provisions, the Appellate Body (AB) has consistently found that injury to the domestic industry need not be the product of imports alone—that is, it may be the result of some combination of imports and other factors. Given the AB's position, many commentators have queried the utility of separating imports from other causal factors at the non-attribution stage. This article argues that these two apparently contradictory positions may be reconciled if it is implied that the causal contribution from imports must reach a *de minimis* threshold on the one hand and, by implication, a maximum level of causal contribution from other factors on the other hand.

[1.0] Introduction

WTO law offers three forms of remedies to protect a domestic industry against the injurious effects of imports: safeguard measures,¹ antidumping measures² and countervailing duties³ (collectively, 'trade remedies'). Safeguard measures temporarily restrict imports of a product so as to protect a specific domestic industry from an increase in imports of any product that is causing, or threatening to cause, serious injury to the industry.⁴ Antidumping measures, on the other hand, are introduced as a means of counteracting the injurious effects of products that are sold to another Member at 'less than the normal value of the product'.⁵

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¹ *Agreement on Safeguards*, LT/UR/A-1A/8, Signed 15 April 1994, Entered into force 1 January 1995 (Safeguards Agreement).

² *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, LT/UR/A-1A/3, Signed 15 April 1994, Entered into force 1 January 1995 (Antidumping Agreement or AD Agreement).

³ *Agreement on Subsidies and Countervailing Measures*, LT/UR/A-1A/9, Signed 15 April 1994, Entered into force 1 January 1995 (SCM Agreement).

⁴ Article 2.1 of the Safeguards Agreement.

⁵ Article VI:1 of the GATT Agreement. See generally, Richard Boltuck, 'An Economic Analysis of Dumping' 21(5) *Journal of World Trade* 45 (1987).

Finally, countervailing duties are introduced so as to protect a domestic industry from exporters or producers whose products benefit from a government subsidy that causes or threatens to cause injury to the industry in the importing country.⁶ Despite the different economic rationales for each of the trade remedies, the relevant Panels and the AB have demonstrated a willingness to draw analogies between the trade remedies provisions. This article will continue this willingness—though, in so doing, it is recognised that the Safeguards Agreement, the Antidumping Agreement and Part V of the SCM Agreement reflect very different economic rationales. Nonetheless, these differences do not affect the nature of the non-attribution and causation analyses in the provisions of the trade remedies agreements that are the subject of this article, except with respect to the *de minimis* threshold which will be discussed at Section [4.0] below.

Trade remedies serve as conditional exceptions to the principle that a Member cannot discriminate between its trading partners,⁷ which makes their use controversial, as their use can distort markets.⁸ A discussion of the economic policy implications of trade remedies is, however, beyond the scope of this article. Due to the distorting effects of trade remedies, their use is subject to the satisfaction of stringent criteria. In particular, this criteria includes a requirement to determine that it is the imports that have caused the injury to the domestic industry (the causation requirement). Additionally, there is a requirement that the injury to a Member's domestic industry was not caused by some factor other than imports (the non-attribution requirement). This article will use the term 'potentially confounding factors' to mean all of those factors that could potentially cause injury to a Member's domestic industry other than imports. Both the causation and non-attribution analyses are performed by a domestic competent authority. It is only if the analysis that is performed by the domestic competent authority is challenged by another Member that a WTO Panel or the AB would be required to review the analysis of the domestic competent authority.

As will be detailed in Section [2.0] below, the AB has been required to review the causation and non-attribution analyses of the domestic competent authority on a number of occasions. In so doing, it has consistently found that domestic injury need not be the product of imports alone. Instead, the AB has held that domestic injury may be the result of a combination of causal contributions from both imports and potentially confounding factors. Due to the AB's approach, a number of commentators have questioned the point of separating imports from potentially confounding factors.⁹

⁶ Article 15.5 of the SCM Agreement.

⁷ Specifically, the Safeguards Agreement allows Members to depart from the disciplines of Articles III and XI of the GATT 1994; and the AD Agreement and Article 15 of the SCM Agreement serve as permitted exceptions to Article II:1 of GATT 1994.

⁸ See generally, Alan O Sykes, 'International Trade: Trade Remedies', in Alan O Sykes and Andrew Guzman (eds), *Research Handbook in International Economic Law* (Cheltenham: Edward Elgar, 2007); Petros C Mavroidis, Patrick A Messerlin and M Wauters, *The Law and Economics of Contingent Protection in the WTO* (Cheltenham: Edward Elgar, 2008), in respect of Antidumping measures, see 7–29; in respect of countervailing duties, see 399–400; and in respect of safeguard measures, see 468–75; see generally, Tania Voon, 'Eliminating Trade Remedies from the WTO: Lessons from Regional Trade Agreements', *International & Comparative Law Quarterly* 59 (2010).

⁹ Douglas A Irwin, 'Causing Problems? The WTO Review of Causation and Injury Attribution in US Section 201 Cases', 2(3) *World Trade Review* 297 (2003), at 309; Andrew Sapir and Joel P Trachtman, 'Subsidization, Price Suppression, and Expertise: Causation and Precision in Upland Cotton' 7(1) *World Trade Review* 183 (2008), at 199;

Whilst this critique regarding the utility of the non-attribution limb is certainly compelling, this article argues that it is possible to reconcile the AB's approach with a meaningful non-attribution analysis. Such a reconciliation is possible if it is implied that there is a *de minimis* level of causal contribution from imports to a domestic industry and a maximum level of causal contribution from potentially confounding factors. Indeed, it will be argued in Section [3.0] that the notion of using a minimum level of causal contribution from imports and a maximum level of causal contribution from potentially confounding factors may also be implied from both the statements made by the AB in *US—Wheat Gluten* and the three-step process to determining causation and non-attribution set out therein. Before turning to consider the utility of the non-attribution analysis, this article will first consider, in Section [2.0], the approach to non-attribution and causation in the jurisprudence concerning each of the trade remedies. The conclusions that are drawn from the way in which the jurisprudence has interpreted non-attribution and causation as discussed in Section [2.0] will then go on to inform the discussion in Sections [3.0] and [4.0] regarding the role of the non-attribution analysis. Finally, section [5.0] will examine the 'breaking the causal link approach' used by the EU Commission. In so doing, it will be argued that the 'breaking the causal link approach' in fact relies on an unstated *de minimis* level of causal contribution from imports to a domestic industry and a maximum level of causal contribution from potentially confounding factors.

[2.0] Jurisprudence Concerning Non-Attribution and Causation with respect to Safeguards, Antidumping Measures and Countervailing Duties

[2.1] Safeguards

Article 2.1 of the Safeguards Agreement sets out the conditions under which a WTO Member may introduce safeguards. It provides that:

A Member may apply a safeguard measure to a product only if that Member has determined (...) 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.

It is important to note that the focus of Article 2.1 exclusively relates to the harm to domestic industry caused by increased imports *alone*.

Article 4 of the Safeguards Agreement sets out the process by which domestic competent authorities must determine how the threshold, 'serious injury or threat thereof' might be calculated. Article 4.2(a) and (b) provides as follows:

- (a) In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry under the terms of this Agreement, the competent

Alan O Sykes, "The Causation Requirement and "Non-Attribution"" in *The WTO Safeguards Agreement: A Commentary* (Oxford: Oxford University Press, 2006), 179; and Mavroidis, Messerlin and Wauters, above n 8, at 122.

authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.

- (b) The determination referred to in subparagraph (a) shall not be made unless this investigation demonstrates, on the basis of objective evidence, the existence of the causal link between increased imports of the product concerned and serious injury or threat thereof. 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.

For the avoidance of doubt, Article 4.2(a) is not an exhaustive list of potentially confounding factors; and, therefore, potentially confounding factors might include, but not be limited to, this list. In determining the causal link between increased imports and injury to domestic industry, it is clear that Article 4.2 has a much broader focus than Article 2.1. That is, Article 4.2 is concerned with the impact of *both* increased imports *and* the impact of potentially confounding factors on a domestic industry.

The first time that a Panel was required¹⁰ to consider whether a domestic competent authority had satisfactorily demonstrated the causal link between increased imports and ‘serious injury or threat thereof’ under the Safeguards Agreement was in *US—Wheat Gluten*.¹¹ In that case, the *US—Wheat Gluten* Panel held that a WTO Member must:

demonstrate that the increased imports, under the conditions extant in the marketplace, *in and of themselves*, cause *serious injury*. This is not to say that the imports must be the sole causal factor present in a situation of serious injury. (...) However, the increased imports must be sufficient, in and of themselves, to cause injury which achieves the threshold of ‘serious’ as defined in the Agreement. (...) In our view, where a number of factors, one of which is increased imports, are sufficient *collectively* to cause a ‘significant overall impairment of the position of the domestic industry’, but increased imports alone are not causing injury that achieves the threshold of ‘serious’ within the meaning of Article 4.2(a) of the Agreement, the conditions for imposing a safeguard measure are not satisfied.¹²

This idea that increased imports would be the sole reason to introduce safeguards will be referred to, throughout this article, as the ‘sufficiency of imports approach’. To illustrate the ‘sufficiency of imports approach’, it is helpful to think of the injury threshold as a kind of horizontal line along a y-axis. Depending on the nature of the imports, the imports will either reach this horizontal line or not. This may be seen in Figure 1 below:

¹⁰ Although causation under the Safeguards Agreement was first considered by the Panel in WTO Panel Report, *Argentina: Safeguard Measures on Imports of Footwear (Argentina—Footwear (EC))*, WT/DS121/R, adopted 25 June 1999, the Panel was not technically required to consider it. As the AB observed, the Panel had found no increased imports and no serious injury or threat thereof, and therefore it was ‘surpris[ing]’ that the Panel went on to consider causation in that Panel report: WTO Appellate Body Report, *Argentina: Safeguard Measures on Imports of Footwear (Argentina—Footwear (EC))*, WT/DS121/AB/R, adopted 14 December 1999, para 145.

¹¹ WTO Panel Report, *United States: Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (US—Wheat Gluten)*, WT/DS166/R, adopted 31 July 2000.

¹² *Ibid*, paras 8.138–8.139 (emphasis original).

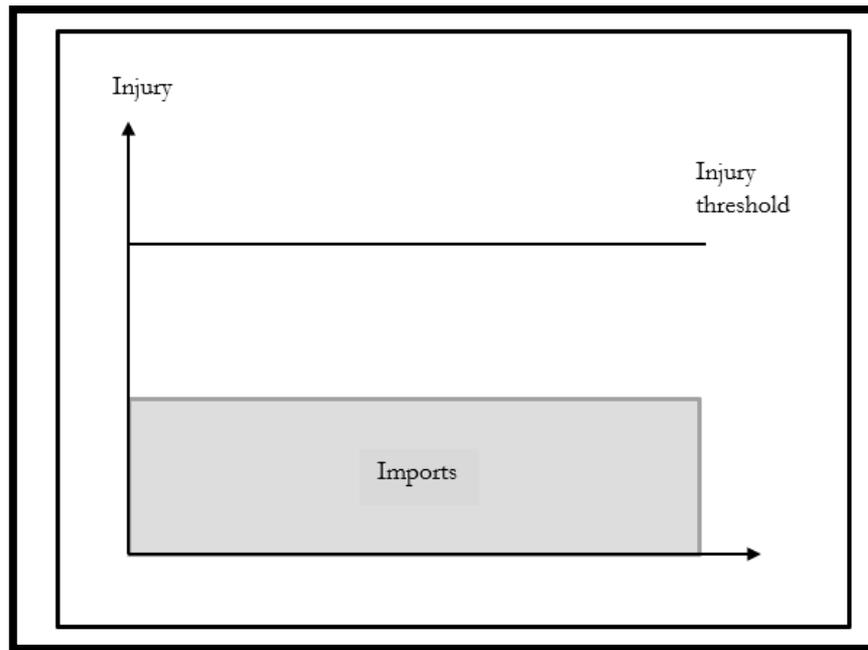


Figure 1: Graphic illustration of the ‘sufficiency of imports approach’

The *US—Wheat Gluten* Panel here reflects the ‘sufficiency of imports’ approach. That is, the Panel acknowledges that potentially confounding factors may have contributed to the injury in question, but it contends that imports must be sufficient in and of themselves to reach the threshold of ‘serious injury or threat thereof’. The *US—Lamb* Panel substantially repeated the sufficiency of imports approach in its report.¹³

Having examined the impact of the sufficiency of imports on the causation limb, it now remains to consider the impact of the sufficiency of imports approach on determining non-attribution. It will be recalled that the purpose of non-attribution in the safeguards context is to distinguish the impact of imports from potentially confounding factors. A corollary of the sufficiency of imports approach is that the non-attribution limb of Article 4.2 is rendered largely redundant. That is, the Panel in *US—Lamb* found that:

We cannot see how a causation standard that does not examine whether increased imports are both a *necessary* and *sufficient* cause for serious injury or threat thereof would ensure that injury caused by factors other than increased imports is not attributed to those imports.¹⁴

The language of the Panel in *US—Lamb* here is somewhat hard to follow. To rephrase the Panel’s statement, in their view, if the sufficiency of imports approach is used, there is no possibility that potentially confounding factors will be falsely attributed with causing injury. This is because, under the sufficiency of imports approach, only the impact of imports is counted towards the injury threshold, and therefore there

¹³ WTO Panel Report, *United States: Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (US—Lamb)* WT/DS177/R and WT/DS178/R, adopted 21 December 2000, para 7.238.

¹⁴ *Ibid*, para 7.241 (emphasis original).

is no possibility that potentially confounding factors could falsely be attributed with causing injury. In this sense, the interpretation of the Safeguard Panels does not treat the non-attribution and causation elements in Article 4.2(a) and (b) as separate considerations, but fuses them together into one analysis. Accordingly, on the Panels' interpretation, the non-attribution analysis is largely a *fait accompli* depending on the result of the causation analysis. Indeed, it is revealing that the *US—Wheat Gluten* Panel speaks in its report of 'read[ing] together' the two requirements in Article 4.2(a) and (b).¹⁵

The AB disagreed with the sufficiency of imports approach taken by the Safeguard Panels, leading it to overturn both the non-attribution and causation limbs of the Panel reports. Specifically, the AB in *US—Wheat Gluten* said that:

The language in the first sentence of Article 4.2(b) does *not* suggest that increased imports be *the sole* cause of the serious injury, or that '*other* factors' causing injury must be excluded from the determination of serious injury. To the contrary, the language of Article 4.2(b), as a whole, suggests that '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.*¹⁶

It is convenient to call this approach by the short-form, 'multi-factorial approach'. An illustration of the 'multi-factorial approach' may be seen graphically below:

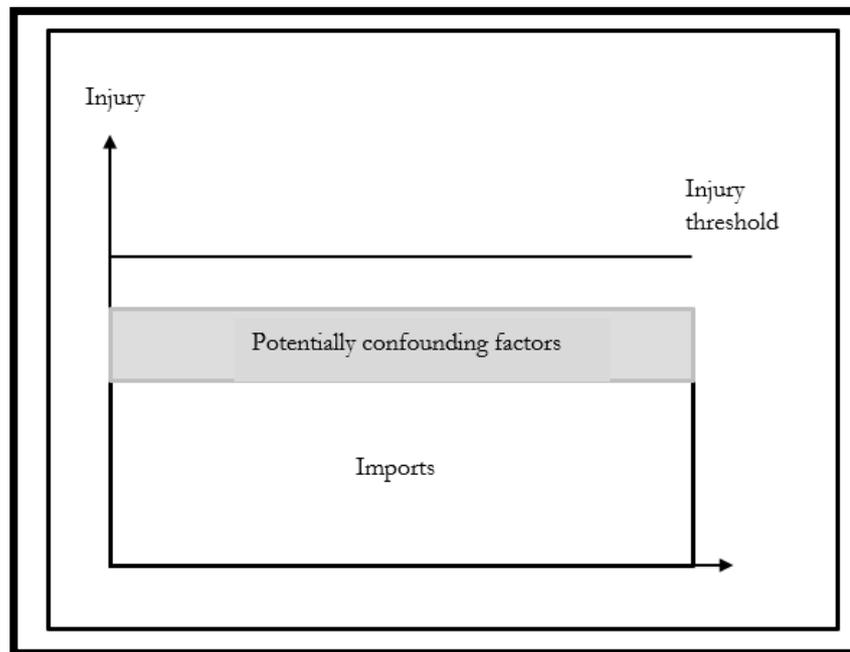


Figure 2: *Graphic illustration of the 'multi-factorial approach'*

¹⁵ Panel Report, *US—Wheat Gluten*, above n 11, para 8.138.

¹⁶ WTO Appellate Body Report, *United States: Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (US—Wheat Gluten)*, WT/DS166/AB/R, adopted 22 December 2000, para 67 (emphasis original).

A comparison of Figures 1 and 2 above confirms that it is easier to reach the injury threshold when the multi-factorial approach is used than when the sufficiency of imports approach is used. This is because, under the multi-factorial approach, *both* imports *and* potentially confounding factors might be combined together to reach the injury threshold. The sufficiency of imports approach, however, would require that the injury threshold is reached using imports *alone*. It follows from this that causation is more easily made out using the multi-factorial approach. In this sense, the question of which approach to use has profound policy implications. That is, if the injury threshold approach is easier to reach using the multi-factorial approach, this means, in turn, that safeguard measures (and their concomitant trade-distortive effects) will be easier to justify than when the sufficiency of imports approach is used.

The AB repeated this multi-factorial approach to interpreting Article 4.2 in its *US—Lamb* report. It confirmed that ‘the *Agreement on Safeguards* does not require that increased imports be “sufficient” to cause, or threaten to cause, serious injury.’¹⁷ A second effect of the AB’s approach in both *US—Wheat Gluten* and *US—Lamb* is that domestic competent authorities must separate and distinguish the harm caused by increased imports from those caused by potentially confounding factors.¹⁸ The purpose of this process is to assist with carrying out the non-attribution analysis—namely, ensuring that harm caused by potentially confounding factors is not falsely attributed to the harm produced by increased imports.¹⁹ In contrast to the fused interpretation of non-attribution and causation discussed in relation to Safeguard Panel reports above, the AB distinguished non-attribution and causation as *separate* analyses in its reports.

[2.2] Antidumping Measures

Mirroring Article 2.1 of the Safeguards Agreement, Article 3.1 of the Antidumping Agreement also provides that, before implementing an antidumping measure, a domestic competent authority should determine whether there is a causal link between the dumped imports and harm to domestic industry. Article 3.1 of the Antidumping Agreement provides as follows:

A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

As with Article 2.1 of the Safeguards Agreement, Article 3.1 of the Antidumping Agreement is exclusively focused on the injury inflicted on domestic industry by imports alone—in this case, dumped imports.

¹⁷ WTO Appellate Body Report, *United States: Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (US—Lamb)*, WT/DSS177/AB/R; WT/DS178/AB/R, adopted 1 May 2001, para 170.

¹⁸ Appellate Body Report, *US—Wheat Gluten*, above n 16, para 68. This process was reaffirmed in Appellate Body Report, *US—Lamb*, above n 17, paras 167–168; WTO Appellate Body Report, *United States: Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (US—Line Pipe)*, WT/DS202/AB/R, adopted 15 February 2002, para 215.

¹⁹ Appellate Body Report, *US—Wheat Gluten*, above n 16, para 69; Appellate Body Report, *US—Lamb*, above n 17, para 179–180.

Article 3 of the Antidumping Agreement sets out the process by which such injury is to be determined. Further mirroring Article 4.2 of the Safeguards Agreement, Article 3.5 of the Antidumping Agreement contains a provision that is also directed at performing a non-attribution and causation analysis simultaneously. Article 3.5 of the Antidumping Agreement provides:

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

As with Article 4.2 above, this article will continue to use the term ‘potentially confounding factors’ as a short-form for causal factors other than dumped imports, such as those described in Article 3.5 (but not limited to them).

The *US—Hot Rolled Steel Panel* was the first to interpret Article 3.5 of the Antidumping Agreement. The Panel found that the AB report in *US—Wheat Gluten* bore ‘directly and substantially’ on its analysis.²⁰ Accordingly, the Panel followed it explicitly when it rejected the sufficiency of imports approach to interpreting Article 3.5.²¹ Embracing the multi-factorial approach of the AB in *US—Wheat Gluten* instead, then, the *US—Hot Rolled Steel Panel* nonetheless did not follow the AB’s insistence that domestic competent authorities rigorously separate and distinguish potentially confounding factors from dumped imports for the purposes of non-attribution. This departure from the AB report is not unreasonable given that the AB report concerned Article 4.2 of the Safeguards Agreement, rather than Article 3.5 of the Antidumping Agreement. Instead, the *US—Hot Rolled Steel Panel* agreed with the analysis in the *US—Atlantic Salmon Panel* report, where the latter had said that the domestic competent authority was not required to have ‘identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports’.²² Accordingly, the *US—Hot Rolled Steel Panel* held that it was sufficient that the domestic competent authority had simply examined other known factors causing injury simultaneously and estimated their likely harm.²³

²⁰ WTO Panel Report, *United States: Antidumping Measures on Certain Hot-Rolled Steel Products from Japan (US—Hot Rolled Steel)*, WT/DS184/R, adopted 23 August 2001, para 7.258.

²¹ *Ibid*, paras 7.258–7.261.

²² WTO Panel Report, *United States: Imposition of Antidumping Duties on Imports of Fresh and Chilled Atlantic Salmon for Norway (United States—Salmon)*, ADP/87, adopted 27 April 1994 [555] quoted in Panel Body Report, *US—Hot Rolled Steel*, above n 20, para 7.254.

²³ WTO Panel Report, *US—Hot Rolled Steel*, above 20, paras 7.254–7.257.

While the multi-factorial approach adopted in relation to causation by the *US—Hot Rolled Steel* Panel was not appealed, the Panel’s interpretation of the non-attribution limb of Article 3.5 of the Antidumping Agreement was appealed and ultimately overturned. The AB in *US—Hot Rolled Steel* held that the non-attribution analysis ‘[l]ogically (...) involve[d] separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports.’²⁴ In direct contradiction to the *US—Hot Rolled Steel* Panel’s approval of the *US—Atlantic Salmon* Panel’s analysis of non-attribution, the AB found that non-attribution ‘requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports.’²⁵ Finally, the AB acknowledged that its own approach to non-attribution in *US—Wheat Gluten* and *US—Lamb* ‘fortified’ its interpretation²⁶ despite the difference in drafting between the provisions.²⁷ The Panel²⁸ and AB²⁹ in *EC—Tube or Pipe Fittings* followed the analysis of the non-attribution and causation limbs performed by the AB in *US—Wheat Gluten* and *US—Lamb*.

[2.3] Countervailing Duties

In strikingly similar language to Article 3.5 of the Antidumping Agreement, Article 15.5 of the SCM Agreement also requires that a causal link be drawn between the subsidy/subsidies and the injury to the domestic industry. Like Article 4.2 of the Safeguards Agreement and Article 3.5 of the Antidumping Agreement, Article 15.5 of the SCM Agreement also mandates that a non-attribution and causation analysis be performed. Article 15.5 provides as follows:

It must be demonstrated that the subsidized imports are, through the effects⁴⁷ of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, inter alia, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

⁴⁷ As set forth in paragraphs 2 and 4.

²⁴ WTO Appellate Body Report, *United States: Antidumping Measures on Certain Hot Rolled Steel Products from Japan (US—Hot Rolled Steel)*, WT/DS184/AB/R, adopted 24 July 2001, para [223].

²⁵ *Ibid*, at para 226.

²⁶ *Ibid*, at para 229.

²⁷ *Ibid*, at para 230.

²⁸ WTO, Panel Report, *European Commission: Antidumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil—Report of the Panel (EC—Tube or Pipe Fittings)*, WT/DS219/R, adopted 7 March 2003.

²⁹ WTO Appellate Body Report, *European Commission: Antidumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil—Report of the Appellate Body (EC—Tube or Pipe Fittings)*, WT/DS 219/AB/R, adopted 22 July 2003.

Given that Articles 15.2 and 15.4 are incorporated by cross-reference into Article 15.5, and that the two subparagraphs will also be discussed below, these two subparagraphs are also set out here:

15.2 With regard to the volume of the subsidized imports, the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the subsidized imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

15.4 The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

Benitah argues that there are two potential interpretations of the way in which the causal link in Article 15.5 should be drawn. The first interpretation is premised on the idea that, by examining the factors mentioned in Articles 15.2 and 15.4, a fact-finder will simultaneously establish *both* the existence of an injury to the industry *and* the fact that the injury is caused by the subsidised imports ‘through the effects of subsidies’.³⁰ To put it another way, according to this reading of Article 15.5, Articles 15.2 and 15.4 establish the process of determining *both* the existence of an injury *as well as* a causal relationship between subsidised imports and that injury. Benitah claims that, under this approach, the first sentence of Article 15.5 is rendered otiose, since ‘the determination of the existence of an injury as set forth in Article[s] 15.2 and 15.4 of the SCM Agreement, is at the same time a demonstration of the causal relationship between the subsidized imports and the injury, through the effects of the subsidies.’³¹

A second consequence of the first interpretation is that it renders the non-attribution requirement of Article 15.5 of the SCM Agreement incoherent, as Benitah acknowledges.³² That is, the non-attribution element of Article 15.5 is based on the idea that the notion that the injury may have been caused by potentially confounding factors—that is, factors other than the subsidised imports. It is illogical, then, to see Articles 15.2 and 15.4 as containing the process of establishing the existence of injury, since this interpretation would imply that the injury could only have been caused ‘through the effects of subsidies’. Therefore, this first interpretation would not only render the first sentence of Article 15.5 otiose, but it

³⁰ Marc Benitah, *The Law of Subsidies under the GATT/WTO System* (London: Kluwer Law International, 2001) 285; Marc Benitah, ‘From Economic Complexity to Legal Indeterminacy: Causality between Subsidy and Injury’ 33(1) *Journal of World Trade* 87 (1999), at 89.

³¹ Benitah, *The Law of Subsidies under the GATT/WTO System*, above n 30, at 284; Benitah, ‘From Economic Complexity’, above n 30, at 89.

³² Benitah, *The Law of Subsidies under the GATT/WTO System*, above n 30, at 288.

would also make the process of non-attribution contained in Article 15.5 redundant as well. In short, the first interpretative approach would be at odds with both the non-attribution and causation limbs of Article 15.5.

Another difficulty with this approach that was not raised by Benitah, but is nonetheless significant, is the fact that the last sentence of both Articles 15.2 and 15.4 expressly provide that the factors listed therein are not exhaustive. Specifically, Article 15.2 provides that '[n]o one or several of these factors can necessarily give decisive guidance' and similarly, Article 15.4 provides that '[t]his list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance'. It follows from this that the factors set out in Articles 15.2 and 15.4 were never intended to be a prescriptive method for determining the existence of an injury. Instead, the last sentence of both Articles 15.2 and 15.4 would seem to suggest that the factors set out therein are only illustrative of the kinds of inquiries that a fact-finder needs to make when determining the existence of an injury. This being the case, whether a fact-finder considers any or all of the factors listed in Articles 15.2 and 15.4 would seem to depend on the case at hand. This fluidity would seem to go against the idea that assessing the factors enumerated in Articles 15.2 and 15.4 is the process by which injury is determined. Therefore, when the importance of the last sentence of Articles 15.2 and 15.4 are borne in mind, it is contended that the first interpretative approach is difficult to sustain.

The second interpretive approach, Benitah claims, is that the factors set out at Article 15.2 and 15.4 'must allow one to apprehend the effects of the subsidy, and this is natural as the effects of the subsidy are *transmitted* through these factors.'³³ In other words, the factors listed in Articles 15.2 and 15.4 are *indicative* of the injury caused by the effects of the subsidies, but an analysis of these factors will not *in and of itself* allow a fact-finder to conclude that an injury has taken place. Instead, under this approach, a fact-finder has a legal obligation to use a methodology that takes account of the factors set out in Articles 15.2 and 15.4.³⁴ This interpretation has the advantage of not rendering the first sentence of Article 15.5 redundant. Benitah claims the most serious drawback of this approach is that '*the literal meaning of footnote 47 is stretched to its limits*' in the sense that it must be assumed that the factors listed in those articles were chosen for their ability to capture the effect of the subsidy.³⁵ Again, however, the fact that the last sentences of Articles 15.2 and 15.4 explicitly provide that the factors listed are not exhaustive surely mitigates against Benitah's concern.

Another significant factor that weighs heavily in favour of the second interpretative approach that was not raised by Benitah is the parallel between the drafting of Article 3.5 of the Antidumping Agreement and Article 15.5 of the SCM Agreement. The WTO strives for consistency of interpretation between the Antidumping Agreement and Part V of the SCM Agreement. The *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the*

³³ Benitah, 'From Economic Complexity', above n 30, at 91 (emphasis original).

³⁴ Benitah, *The Law of Subsidies under the GATT/WTO System*, above n 30, at 285–86; Benitah, 'From Economic Complexity', above n 30, at 91.

³⁵ Benitah, *The Law of Subsidies under the GATT/WTO System*, above n 30, at 286 (emphasis original).

Agreement on Subsidies and Countervailing Measures recognises ‘the need for the consistent resolution of disputes arising from antidumping and countervailing duty measures’.³⁶ This need for consistency in interpretation between the two agreements was also recognised by the Panel in *US—DRAMs*.³⁷ Indeed, Nedumpara concludes with respect to the antidumping and countervailing duties jurisprudence that ‘despite their almost separate and wholly unconnected evolution and existence, the injury and causality requirements of antidumping and countervailing duties investigations have nearly merged and look almost indistinguishable now.’³⁸ The Panels in both *Thailand—H-Beams* and *Egypt—Steel Rebar* confirmed that the list of factors in Articles 3.2 and 3.4 of the Antidumping Agreement are ‘illustrative’ of injury only, and are not a mandatory list of considerations in the process of determining injury.³⁹ It is highly likely that this interpretation would also be given to Articles 15.2 and 15.4 of the SCM Agreement, particularly given the last sentence of those articles. In light of these considerations, it is argued that the second interpretative approach of Article 15.5 of the SCM Agreement put forward by Benitah is the better view.

The Panel in *EC—Countervailing Measures on DRAM Chips* also noted the parallel between the drafting of Article 15.5 of the SCM Agreement and Article 3.5 of the Antidumping Agreement,⁴⁰ despite the fact that Article 15.5 of the SCM Agreement is concerned with countervailing duties and Article 3.5 concerns antidumping measures. Indeed, as Miranda observes, except for the different characterisation of the imports at issue, the only difference between the two articles is that the language in the footnote to Article 15.5 of the SCM Agreement is incorporated into the body of the text of Article 3.5 of the Antidumping Agreement.⁴¹ The Panel therefore held that, due to this similarity, Panels are required to separate and distinguish the injury caused by factors other than subsidised imports.⁴² Certainly, in *EC—Countervailing Measures on DRAM Chips*, the Panel held that it was not satisfied that the EC’s investigating authority had adequately separated and distinguished the injurious effects of overcapacity from the injurious effects of the subsidised imports, ‘let alone [provided] a satisfactory explanation of the nature and extent of the injurious effects of the factor “overcapacity”, as distinguished from the injurious effects of the

³⁶ The *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*, <https://www.wto.org/english/docs_e/legal_e/41-dadp3_e.htm> accessed 23 October 2017.

³⁷ WTO Panel Report, *United States: Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea (US—DRAMs)*, WT/DS296, adopted 21 February 2005, para 7.351.

³⁸ James J Nedumpara, *Injury and Causation in Trade Remedy Law: A Study of WTO Law and Country Practices* (Singapore: Springer, 2016), 54.

³⁹ WTO Panel Report, *Thailand: Antidumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland (Thailand—H-Beams)*, WT/DS122/R, adopted 28 September 2000, para 7.274 and WTO Panel Report, *Egypt: Definitive Antidumping Measures on Steel Rebar from Turkey (Egypt—Steel Rebar)*, WT/DS211/R, adopted 8 August 2002, para 7.115.

⁴⁰ WTO Panel Report, *European Communities: Countervailing Measures on Dynamic Random Access Memory Chips from Korea (EC—Countervailing Measures on DRAM Chips)*, WT/DS299/R, adopted 17 June 2005, para 7.404.

⁴¹ Jorge Miranda, ‘Causal Link and Non-Attribution as Interpreted in WTO Trade Remedy Disputes’ 44(4) *Journal of World Trade* 729 (2010), at 729.

⁴² WTO Panel Report, *EC—Countervailing Measures on DRAM Chips*, above n 40, para 7.404.

subsidized imports.⁴³ Nonetheless, the Panel resisted stipulating a specific methodology by which future investigating authorities might perform these requirements.⁴⁴

Unlike the safeguards and antidumping contexts, the jurisprudence in the context of Article 15.5 of the Subsidies and Countervailing Measures Agreement (SCM Agreement) has not yet addressed whether a subsidy must be the sole cause of the injury, or whether the causal link might be composed of some combination of subsidy/subsidies and potentially confounding factors. In other words, the jurisprudence is yet to clarify whether what this chapter has called the ‘sufficiency of imports’ approach or the ‘multi-factorial approach’ applies in this context. Despite the lack of explicit guidance on this point, it is suggested that it is highly likely that future Panels that were required to make a determination on this point would follow the ‘multi-factorial approach’ favoured in the antidumping context. This contention is made because of the similarity in drafting between Article 3.5 of the Antidumping Agreement and Article 15.5 of the SCM Agreement, as well as the desire for a consistent interpretation between the two agreements. In short, all three of the trade remedies would seem to require the use of the multi-factorial approach.

[2.4] Recapitulation of the Treatment of Non-Attribution and Causation in relation to Safeguards, Antidumping Measures and Countervailing Duties

Having surveyed the jurisprudence concerned with non-attribution and causation in the provisions, it is useful to distil the main features of the AB’s position on non-attribution and causation. First, all of the provisions require both a non-attribution as well as a causation analysis in order to determine whether it is the import causing injury to an industry and not some potentially confounding factor. The non-attribution analysis involves separating and distinguishing the injurious effects of imports from potentially confounding factors.

Second, Article 4.2 of the Safeguards Agreement and Article 3.5 of the Antidumping Agreement have both been interpreted using what this chapter has called the ‘multi-factorial approach’. That is, the provisions are to be interpreted in such a way that the injurious effects of the imports and the potentially confounding factors are *combined* for the purpose of determining whether the respective thresholds of injury have been reached. The jurisprudence in relation to countervailing measures has not yet considered the question of whether the ‘multi-factorial approach’ or the ‘sufficiency of imports approach’ applies. Nonetheless, given the desire for a consistent resolution of disputes concerning antidumping measures and countervailing duties, it is likely that the ‘multi-factorial’ approach will also be used to interpret Article 15.5 of the SCM Agreement. With this survey of the jurisprudence in view, this article now turns to consider the seeming incompatibility between the multi-factorial approach affirmed by the AB and the utility of having a non-attribution test.

⁴³ Ibid, para 7.421.

⁴⁴ Ibid, para 7.405.

[3.0] The Role of the Non-Attribution Analysis in the Face of the Multi-Factorial Approach

Having seen that the AB has consistently found in favour of the multi-factorial approach, this article now turns to consider the apparent incompatibility between the multi-factorial approach and a non-attribution analysis. That is, on the one hand, the multi-factorial approach requires that the causal contribution of imports be *combined* with the causal contribution of potentially confounding factors; and, on the other hand, a non-attribution analysis is aimed at separating imports from potentially confounding factors. A number of scholars have commented on this ostensible contradiction.

Irwin, for example, writing in the safeguards context, has said that '[n]on-attribution requires the authorities to separate and distinguish the sources of injury but otherwise plays no substantive role in the proceedings and cannot affect the end result.'⁴⁵ Similarly, Sapir and Trachtman have said that:

The AB's position on non-attribution in the safeguards setting has always been incoherent: the AB believes that separation is required, but cannot articulate a purpose for separation given that (in its view) there is no need to determine that the increased imports (in that context) are sufficient on their own to cause serious injury.⁴⁶

Also writing in the safeguards context, Sykes has said that '[i]f increased imports need not suffice to cause serious injury (...) but must simply have made some contribution to injury, what is the point of the non-attribution requirement?'⁴⁷ Finally, writing in the antidumping context, Mavroidis et al also contend on what seems to have been the same assumption that:

While there is an obligation to separate and distinguish the nature and extent of the injury caused by other factors, it appears that the [AB] holds the view that there is no need to somehow quantify and deduct the injury caused by other factors from the injury caused by the dumped imports to determine whether the dumped imports alone were sufficient to cause material injury. What the goal of separating and distinguishing these other factors' effects then is, remains an open question.⁴⁸

Despite this ongoing concern in the literature, it is suggested that a non-attribution analysis is only at odds with the multi-factorial approach if injury to the industry must be caused by 100% imports. One way of resolving this inconsistency is to infer that the *de minimis* threshold of import-induced injury is less than 100%. That is, it might be inferred that there is some tolerance for those injuries to industry that were the product of a *combination* of imports and potentially confounding factors. Indeed, the idea that a *de minimis* threshold that is lower than 100% import-induced may be inferred from the AB's insistence on a multi-factorial approach. It is worth repeating that the AB has said that 'the language in the first sentence of

⁴⁵ Irwin, above n 9, at 309.

⁴⁶ Sapir and Trachtman, above n 9, at 199.

⁴⁷ Alan O Sykes, 'The Causation Requirement and "Non-Attribution"' in *The WTO Safeguards Agreement: A Commentary* (Oxford: Oxford University Press, 2006) at 179.

⁴⁸ Mavroidis, Messerlin and Wauters, above n 8, at 122 (footnotes omitted).

Article 4.2(b) does *not* suggest that increased imports be *the sole* cause of the serious injury, or that “*other factors*” causing injury must be excluded from the determination of serious injury.⁴⁹ It surely follows from the AB’s statement that the test for non-attribution must be something less than 100% import-induced, though the AB has not explicitly stated what this *de minimis* threshold is. This tolerance for some level of causal contribution by potentially confounding factors would seem to reflect a more realistic view of harm to industry. That is, it is unrealistic that harm to industry would purely and solely be caused by imports alone. Instead, it is logical that those harms inflicted on an industry would be the result of a combination of injurious effects inflicted by both imports and potentially confounding factors.

Indeed, the idea that injury to an industry need not be caused by 100% imports can also be seen in US domestic law. For example, in the US safeguards context, the Senate Finance Committee has held that the USITC need only ‘assure themselves’ that imports are a substantial cause.⁵⁰ This is a different standard to Article 4.2 of the Safeguards Agreement; but nonetheless, it indicates that, in US domestic law, imports need not be the sole cause of injury to domestic industry. Moreover, in the context of countervailing duties, the United States’ countervailing duty legislation provides that countervailing duties may be imposed where an industry is materially injured ‘by reason of imports’.⁵¹ The USITC does not need to determine whether subsidised imports are the principal cause of material injury—rather, only that the subsidised imports contributed to the injury.⁵² In sum, under US domestic law, there is no requirement that injury to industry be the product of imports alone in the context of safeguards and countervailing duties.

Similarly, in EU domestic law, there is also some allowance for the causative role of potentially confounding factors in bringing about injury to industry in the antidumping context. First, the investigation into causality at the EU level involves both a positive test and a negative test. The positive test, namely, Article 3(6) of Regulation 1225/2009,⁵³ does not specifically require injury to be caused ‘through the effects of dumping’. Accordingly, it is sufficient to make an injury determination when the volume and/or price levels of the dumped imports indicate that dumping was a significant cause of injury, even though there may be more significant causes than the dumping.⁵⁴ The negative causality test is set out in Article 3(7) of the same regulation. It provides that: ‘known factors other than the dumped imports which at the same time are injuring the Community industry shall also be examined to ensure that injury caused by these other factors is not attributed to the dumped imports under paragraph 6’. In other words, the EU domestic law

⁴⁹ Appellate Body Report, *US—Wheat Gluten*, above n 17, para 67 (emphasis original).

⁵⁰ *Ibid.*, at 120.

⁵¹ 19 US Code §1671(a)(2).

⁵² ER Easton and WE Perry, ‘Countervailing Duty Investigations’, in CR Johnston Jr (ed), *Law and Practice of United States Regulation of International Trade* (New York: Oceana Publications, 1989), at 44. For an overview of the law concerning the determination of causation in respect of Antidumping cases under US law, see generally, William D Degrandis, ‘Proving Causation in Antidumping Cases’ 20(2) *International Lawyer* 563 (1986).

⁵³ Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, OJ (L 343) 51; see Annex 1.

⁵⁴ Van Bael & Bellis, *EU AD and Other Trade Defence Instruments*, 5th ed, (London: Kluwer Law International, 2011), at 335.

provides for some form of non-attribution analysis, and then allows a causal link to be drawn between imports and injury, even where potentially confounding factors have also played some causative role. This survey of US and EU domestic law has shown that there are contexts in which injury to industry need not be caused by 100% imports.

If WTO law would allow for causal contributions from both imports and potentially confounding factors, it follows that the non-attribution analysis must achieve two outcomes. It must: (1) separate harm caused by imports from harm caused by potentially confounding factors; and (2) allocate to imports and potentially confounding factors a percentage that reflects their causal contribution to injury. Indeed, these two outcomes appear to be consistent with the three-step approach to non-attribution and causation proposed by the AB in *US—Wheat Gluten*⁵⁵ in the safeguards context. In that case the AB said that the non-attribution and causation analysis should involve: (1) distinguishing the injurious effects of imports from the injurious effects caused by other factors; (2) attributing the level of injury caused by imports on the one hand vis-à-vis potentially confounding factors; and (3) as a final step, determining whether a causal link exists between imports and injury to industry, ‘and whether this causal link involves a genuine and substantial relationship of cause and effect between those two elements’.⁵⁶ Therefore, the idea of non-attribution being a two-step process that is followed by a final causation analysis is consistent with the three-step approach set out by the AB in *US—Wheat Gluten*.

The idea that the non-attribution analysis might include the allocation of percentage weightings to imports on the one hand and potentially confounding factors on the other is in keeping with the conception of non-attribution discussed by the Panel in *EC—Countervailing Measures on DRAM Chips*⁵⁷:

In our view, it does not suffice for an investigating authority merely to ‘check the box’. An investigating authority must do more than simply list other known factors, and then dismiss their role with bare qualitative assertions, such as ‘the factor did not contribute in any significant way to the injury’, or ‘the factor did not break the causal link between subsidized imports and material injury.’ In our view, an investigating authority must make a better effort to quantify the impact of other known factors, relative to subsidized imports, preferably using elementary economic constructs or models. At the very least, the non-attribution language of Article 15.5 requires from an investigating authority a satisfactory explanation of the nature *and extent* of the injurious effects of the other factors, as distinguished from the injurious effects of the subsidized imports.⁵⁸

Here, the panel suggests that it is not sufficient simply to separate imports from potentially confounding factors; but that inquiry ought also to be had into the *level* of causal contribution. To this end, the emphasis of ‘nature *and extent* of the injurious effects of the other factors’ is significant.

⁵⁵ Appellate Body Report, *US—Wheat Gluten*, above n 17, para 69.

⁵⁶ *Ibid.*

⁵⁷ WTO Panel Report, *European Communities: Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 17 June 2005, para 7.405.

⁵⁸ *Ibid.* (emphasis original).

In order for a non-attribution analysis not only to disaggregate the injurious effects of imports vis-à-vis potentially confounding factors, but also to allocate percentage contributions to them, it follows that the non-attribution analysis must rely on the use of quantitative tests. That is, a quantitative test would be more appropriate than a qualitative test in determining how responsibility for an injury to an industry should be apportioned. Indeed, the panel in *EC—Countervailing Measures on DRAM Chips* even suggests that the non-attribution analysis should draw upon ‘economic constructs or models’. To this end, some econometric tests have already been developed along these lines, largely in the context of trade remedy investigations involving section 201 of the US 1974 Trade Act.⁵⁹ These existing econometric tests might be adapted to the WTO context; or alternatively, panels have the ability, under Article 13.2 of the DSU⁶⁰, to consult econometricians regarding the design of appropriate quantitative tests. Having established in this section that a useful non-attribution analysis can be reconciled with the multi-factorial approach if the *de minimis* threshold for injury to industry is less than 100%, it now remains to discuss at what level the *de minimis* threshold ought to be set.

[4.0] The *De Minimis* Threshold

Section [2.0] discussed the idea that the AB has consistently found that an injury to an industry may be the product of a *combination* of imports and potentially confounding factors—ie, the multi-factorial approach should be used. Section [3.0], in turn, then posited that this multi-factorial approach might be reconciled with a useful non-attribution analysis if the *de minimis* threshold for including import-induced injury was something less than 100%. Section [3.0] also considered that the non-attribution analysis involved two separate steps: (1) separating imports from potentially confounding factors; and (2) apportioning causal responsibility for injury to imports vis-à-vis potentially confounding factors based on econometric tests. This section will discuss what an appropriate *de minimis* threshold might be for import-induced injuries. That is, whilst it is suggested that the *de minimis* threshold ought to be something less than 100%, it is unclear at what level it should be set.

Given that the idea of having a *de minimis* threshold that is less than 100% has never explicitly been endorsed by the AB, it follows that the AB has never actually prescribed a *de minimis* threshold for the causation analysis of any of the trade measures. It is likely that antidumping measures would have a lower

⁵⁹ See generally, Gene Grossman, ‘Imports as a Cause of Injury: The Case of the US Steel Industry’ 20 *Journal of International Economics* 201 (1986); Kenneth Kelly, ‘The Analysis of Causality in Escape Clause Cases’ 37(2) *The Journal of Industrial Economics* 187 (1988); Dukgeun Ahn and William J Moon, ‘Alternative Approach to Causation Analysis in Trade Remedy Investigations: “Cost of Production” Test’ 44(5) *Journal of World Trade* 1023 (2010); Robert S Pindyck and Julio J Rotemberg, ‘Are Imports to Blame? Attribution of Injury under the 1974 Trade Act’ 30 *Journal of Law & Economics* 101 (1987); Irwin, above n 9; and David Sharp and Kenneth Zantow, ‘Attribution of Injury in the Shrimp Antidumping Case: A Simultaneous Equations Approach’ 6(5) *Economic Bulletin* 1 (2005); and Thomas J Prusa and David C Sharp, ‘Simultaneous Equations in Antidumping Investigations’ 14(1) *The Journal of Financial Economics* 63 (2001).

⁶⁰ *Understanding on Rules and Procedures Governing the Settlement of Disputes*, LT/UR/A-2/DS/U/1 Signed 15 April 1994, Entered into force 1 January 1995 (DSU).

de minimis threshold than in the safeguards context because antidumping measures are generally less trade-restrictive than safeguard measures.⁶¹ It is also possible that the AB would wish to retain some level of flexibility as to the *de minimis* threshold depending on the nature of the case at hand. Retaining such flexibility, however, would be at the cost of legal certainty. Either way, it would be helpful to have some indication from the AB as to how the *de minimis* threshold might be set in relation to each of the trade remedies.

It has been seen that the *raison d'être* for having a *de minimis* threshold is that only those injuries to industry that received a minimum level of causal contribution from imports (and, concomitantly, a maximum amount of causal contribution from potentially confounding factors) should be included in the final causation analysis. So, for example, if the *de minimis* threshold of causal contribution from imports to injury to industry is 90%, those injuries that were found, after a non-attribution analysis, to be the product of less than 90% imports (and thus, more than 10% potentially confounding factors) would be excluded from the causation analysis at the final stage. If, on the other hand, the *de minimis* threshold for the non-attribution test is 50%, then those injuries that were produced by 50% imports (or more) and 50% potentially confounding factors (or less) would not be discarded.

Self-evidently, the lower the *de minimis* threshold, the more injuries would go on to be included in the causation analysis at the final stage. Moreover, the more injuries that are included in the causation analysis, the greater the likelihood, in turn, that the threshold of 'serious injury or threat thereof' would be reached and the causal link between imports and injury would be made out. From the perspective of the domestic competent authority trying to make out this causal link, then, the lower the *de minimis* threshold, the easier it is to demonstrate causation. The easier it is to determine causation, the easier it is, in turn, to justify the use of trade remedies. For this reason, the *de minimis* threshold must be set with great care. It must balance the practical reality that injuries to industry are generally inflicted by a combination of imports and potentially confounding factors against the ease of justifying the introduction of trade remedies. It will be suggested that this tension is also evident in the EU Commission's 'breaking the causal link' approach to be discussed in the next section.

[5.0] 'Breaking the Causal Link' Approach

The EU Commission has extensively used the 'breaking the causal link' approach, which also relies on the notion of having a minimum level of injury by subject imports and a maximum level of injury by potentially confounding factors. This approach involves, as a first step, making a provisional assessment as to whether there is a causal link between imports and the domestic injury. Then, as a second step, the fact-finder must turn to consider whether any potentially confounding factors could have broken this causal link. In this

⁶¹ Mavroidis, Messerlin and Wauters, above n 8, 465–66.

sense, the ‘breaking the causal link’ is an inversion of the three-step process proposed by the AB in *US—Wheat Gluten*, wherein non-attribution is performed first before turning to causation in the final step.

Implicit in the ‘breaking the causal link’ approach is that the point at which the causal link is broken is the point at which the percentage of potentially confounding factors exceeds its maximum, and, concomitantly, that imports fell short of reaching their *de minimis* threshold. For example, in *Commission Implementing Regulation (EU) 2018/1013 of 17 July 2018*,⁶² the Commission made a preliminary determination that there was a causal link between the increase of steel imports and a threat of serious injury to the EU.⁶³ It then went on to examine potentially confounding factors that might have broken the causal link—including, global overcapacity⁶⁴ and imports from the European Economic Area.⁶⁵ The Commission determined, however, that these potentially confounding factors were insufficient to have broken the causal link between steel imports and injury to the EU, and accordingly, provisional safeguard measures were implemented.⁶⁶ To put this another way, the potentially confounding factors did not exceed the maximum level of injury to ‘break’ the causal link between the subject imports and injury to industry.

In contrast, in *Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013*, the Commission made a preliminary determination that there was a causal link between the dumped imports of biodiesel from Argentina and the injury suffered by the Union industry.⁶⁷ This conclusion, however, was revisited by the Commission in *Commission Implementing Regulation (EU) 2018/1570 of 18 October 2018*.⁶⁸ In the latter case, the Commission found that, during the investigation period almost half of all imports into the Union came from Indonesia at a price lower than Union prices as well as Argentinian prices.⁶⁹ Moreover, the exponential increase of import volumes from Indonesia as well as their market share significantly contributed to the material injury to the Union industry.⁷⁰ Finally, the Commission found that the Union industry was at overcapacity and that the Union had inflicted some injuries on itself.⁷¹ Accordingly, the Commission concluded that it could not establish that there was ‘a genuine and substantial causal relationship between the dumped imports from Argentina and the material injury suffered by the Union industry’.⁷²

It would seem to be implicit in the reasoning of *Commission Implementing Regulation (EU) 2018/1570 of 18 October 2018*⁷³ that the point at which the causal link between the dumping of Argentinian biodiesel

⁶² imposing provisional safeguard measures with regard to imports of certain steel products [2018] OJ L 181/39 (70)–(81).

⁶³ Commission Implementing Regulation (EU) 2018/1013 of 17 July 2018, OJ 2018 L 181/39 (70)–(77).

⁶⁴ Ibid (79).

⁶⁵ Ibid (80).

⁶⁶ Ibid (96).

⁶⁷ Council Implementing Regulation (EU) No 1194/2013 of 19 November 2013, OJ 2013 L 315/2, Recital 189.

⁶⁸ Commission Implementing Regulation (EU) 2018/1570 of 18 October 2018, OJ 2018 L 262/40 (82)–(95).

⁶⁹ Ibid (83).

⁷⁰ Ibid (83).

⁷¹ Ibid (84).

⁷² Ibid (85).

⁷³ Ibid (82)–(95).

and the injury to the Union industry occurred was the point at which the potentially causal factors exceeded the maximum threshold (and, by implication, that the dumping of Argentinian biodiesel fell short of the *de minimis* threshold). In this sense, even though the ‘breaking the causal link’ approach performs the causation analysis before the non-attribution analysis, it also appears to be premised on this same idea of having some kind of maximum threshold of potentially causal factors and minimum threshold of imports. Indeed, it is difficult to imagine a model of causation and non-attribution that would not adopt this approach. The EU Commission has not actually explicitly prescribed the threshold at which the potentially confounding factors is exceeded; but the above case suggests that one does, in fact, exist.

[6.0] Conclusion

Before one Member can implement trade remedies against another, it is critical that the Member satisfies itself that the harm to its domestic industry was the result of imports, as opposed to potentially confounding factors. The performance of a non-attribution and causation analysis is central to this process. That is, non-attribution seeks to distinguish the causative impact of imports from potentially confounding factors, whilst the causation analysis aims to draw a positive link between the imports and harm to industry. Nonetheless, it has been seen that several commentators have queried the utility of a robust non-attribution analysis in the face of the AB’s insistence that injury to the domestic industry need not be the result of imports alone. In short, commentators question the point of separating imports from potentially confounding factors, if the two are then later combined.

This article has sought to resolve this apparent contradiction by proposing that there is an implied *de minimis* threshold of causative contributions from imports and a maximum causal contribution from potentially confounding factors. Such an approach relies on the use of econometric tests as a means of separating the causal contributions of imports from potentially confounding factors and allocating responsibility to each accordingly. It was seen in Section [3.0] that this would seem to square with the three-step approach to non-attribution and causation set out by the AB in *US—Wheat Gluten*. Moreover, Section [5.0] argued that the ‘breaking the causal link’ approach used by the EU Commission would appear also to rely on the idea of having an implied *de minimis* threshold. Specifically, it was seen how an excessive causal contribution from potentially confounding factors might break the causal link between imports and injury to industry. Under this approach, neither domestic competent authority has actually prescribed a precise maximum or minimum threshold. Nonetheless, one may be implied by the nature of the reasoning in these cases.