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# Reforming Trade Remedies

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## REFORMING TRADE REMEDIES

*Wentong Zheng\**

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## INTRODUCTION

This is a perilous time for world trade. Having recovered from a steep decline at the outset of the 2008–2009 global financial crisis,<sup>1</sup> world trade is once again facing risks of decelerating growth amid continued weaknesses in the world economy.<sup>2</sup> Adding to these growth concerns are worrying signs that efforts to further liberalize global trade are unraveling<sup>3</sup> and nations are showing a greater tendency to resort to protectionist trade measures.<sup>4</sup> These “growing protectionist measures,” in the words of an in-

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1. World trade collapsed at the outset of the 2008–2009 global financial crisis. Beginning in the fourth quarter of 2008, all of the major economies in the world experienced a sharp decline in international trade. “The peak-to-trough decline in nominal imports for the major economies ranged from thirty percent for the [European Union (EU)] to forty-nine percent for South Africa.” Chad P. Bown, *Introduction*, in *THE GREAT RECESSION AND IMPORT PROTECTION: THE ROLE OF TEMPORARY TRADE BARRIERS* 1, 5 (Chad P. Bown ed., 2011). But world trade quickly recovered afterward, and in some countries reached or exceeded precrisis levels by 2010. *See id.* at 8–9, fig.1.2.

2. In September 2011, the World Trade Organization (WTO) revised down its 2012 growth forecast for global trade in goods from 6.5% to 5.8%. Tom Barkley & Bob Davis, *WTO Chief Warns Against Protectionism*, *WALL ST. J.* (Sept. 23, 2011), <http://online.wsj.com/article/SB10001424053111904563904576587213632564644.html>.

3. The WTO Doha Round negotiations, which had been dragging on for almost ten years, suffered another setback in April 2011, when WTO Director-General Pascal Lamy stated that “differences between countries over how much to cut manufactured goods tariffs were ‘unbridgeable.’” Doug Palmer, *Analysis: WTO Faces Tough Choices After Latest Doha Setback*, *REUTERS*, Apr. 21, 2011, available at <http://www.reuters.com/article/2011/04/21/us-trade-wto-doha-idUSTRE73K8I220110421>.

4. In November 2011, Global Trade Alert, a network of trade analysts associated with the U.K.-based think tank Center for Economic Policy Research, published a report “finding that the initial reports of the incidence of protectionism in the third quarter of 2011 were as high as the most troubling quarters in 2009—when protectionist fears were at their peak early in the global economic crisis.” Len Bracken, *Trade Analyst Organization Finds Surge in Protectionist Measures in Third Quarter*, *BLOOMBERG BNA INT’L TRADE DAILY* (Nov. 23, 2011), [http://news.bna.com/tdln/TDLNWB/split\\_display.adp?fedfid=23671834&vname=itdbulallissues&fcn=2&wsn=500914000&fn=23671834&splite=0](http://news.bna.com/tdln/TDLNWB/split_display.adp?fedfid=23671834&vname=itdbulallissues&fcn=2&wsn=500914000&fn=23671834&splite=0) (requires subscription). The same report also found that “new protectionist measures since July [2011] outnumber[ed] liberalizing measures by nearly three to one.” *Id.* The report gave a pessimistic outlook for trade liberalization, citing protectionist pressures caused by “a deteriorating macroeconomic climate.” *Id.*

fluent business-news organization covering world trade issues, are “cast[ing] a dark cloud over global trade.”<sup>5</sup>

A key component of the protectionist trade measures that are threatening to derail world economic recovery is trade remedy measures. The term *trade remedy measures* or, simply, *trade remedies*, generally refers to three types of import restrictions authorized under national and international trade laws: antidumping duties, countervailing duties, and safeguards.<sup>6</sup> Antidumping duties are additional tariffs imposed on imports that are sold at “less than fair value” and sufficiently injure a domestic industry of the importing country.<sup>7</sup> Countervailing duties are extra tariffs imposed on imports that benefit from certain subsidies conferred by foreign governments or public entities and sufficiently injure a domestic industry of the importing country.<sup>8</sup> Safeguards, or safeguard measures, are restrictions on imports imposed in the event of import surges to allow domestic industries of the importing country to make positive adjustments to import competition.<sup>9</sup> Because safeguards must be applied to all imports regardless of their source under the rules of the World Trade Organization (WTO),<sup>10</sup> I refer to them as *global safeguards* in this Article.

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5. Daniel Pruzin, *Outlook 2012: Growing Protectionist Pressures Cast Dark Cloud over Global Trade*, BLOOMBERG BNA INT’L TRADE DAILY (Jan. 23, 2012), [http://news.bna.com/tldn/TDLNWB/split\\_display.adp?fedfid=24364150&vname=itdbulallissues&wsn=500048000&searchid=17013526&doctypeid=1&type=date&mode=doc&split=0&scm=TDLNWB&pg=0](http://news.bna.com/tldn/TDLNWB/split_display.adp?fedfid=24364150&vname=itdbulallissues&wsn=500048000&searchid=17013526&doctypeid=1&type=date&mode=doc&split=0&scm=TDLNWB&pg=0) (requires subscription).

6. Alan O. Sykes, *International Trade: Trade Remedies*, in RESEARCH HANDBOOK IN INTERNATIONAL ECONOMIC LAW 62, 62 (Andrew T. Guzman & Alan O. Sykes eds., 2007).

7. See, e.g., 19 U.S.C. § 1673 (2011) (providing for the imposition of antidumping duties on imports sold in the United States “at less than . . . fair value” when such imports cause or threaten to cause “material injury” to a domestic industry or “materially retard” the “establishment of a domestic industry”); see also Council Regulation 1225/2009, art. 1.1, 2009 O.J. (L 343) 51, 53 [hereinafter EU Antidumping Regulation] (“An anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury.”).

8. See, e.g., 19 U.S.C. § 1671 (2011) (providing for the imposition of countervailing duties on imports that receive a “countervailable subsidy” from a foreign country or “a public entity within the territory” of foreign country when such imports cause or “threaten” to cause “material injury” to a domestic industry or “materially retard” the “establishment of a domestic industry”); see also *id.* § 1677(5) (defining “countervailable subsidy”).

9. See, e.g., *id.* § 2251 (providing for “presidential action” when an article of merchandise “is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly in competition with the imported article”); see also Council Regulation 260/2009, art. 16.1, 2009 O.J. (L 84) 1, 7 (providing for the imposition of certain “safeguard measures” when “a product is imported into the Community in such greatly increased quantities and/or on such terms or conditions as to cause, or threaten to cause, serious injury to Community producers”).

10. Agreement on Safeguards art. 2(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 104 [hereinafter WTO Agreement on Safeguards] (“Safeguard measures shall be applied to a product being imported irrespective of its source.”).

The use of trade remedies has become a major theme in world trade. Since the early 1980s, the major economies of the world have greatly reduced their import-tariff levels through a number of multilateral and bilateral trade agreements.<sup>11</sup> However, many of these economies have also increasingly resorted to trade remedies, “resulting in exporters being simultaneously subject to low applied tariffs on average but additional—and frequently added and removed—trade remedy tariffs.”<sup>12</sup> Between 1979 and 2007, WTO member countries initiated 205 antidumping, 26 countervailing duty, and 12 safeguard investigations per year on average, and applied 113 antidumping, 11 countervailing duty, and 7 safeguard measures per year on average.<sup>13</sup> Particularly, the use of trade remedies spiked during the 2008–2009 global financial crisis, with the number of new product-level trade remedy investigations in the first quarter of 2009 logging a 22.3% increase over the same period in 2008.<sup>14</sup> The number of new product-level trade remedy investigations in 2008 was, in turn, thirty-four percent higher than in 2007.<sup>15</sup> More ominously, the countries that actively use trade rem-

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11. For example, the Uruguay Round negotiations under the General Agreement on Tariffs and Trade (GATT) achieved “across-the-board tariff cuts for industrial countries averaging 40 percent.” ROBERT J. CARBAUGH, *INTERNATIONAL ECONOMICS* 194 (13th ed. 2011). As a result of the Uruguay Round, “[t]ariffs were eliminated entirely in several sectors, including steel, medical equipment, construction equipment, pharmaceuticals, and paper.” *Id.* The reductions in tariff levels have led Professor Raj Bhala to declare that “[t]ariffs no longer matter in international trade law.” Raj Bhala, *Rethinking Antidumping Law*, 29 *GEO. WASH. J. INT’L L. & ECON.* 1, 3 (1995). The statistics cited by Professor Bhala are convincing: average tariffs in industrial countries plummeted from 40% in 1947, when the GATT entered into force, to 6.3% in 1994 just prior to the entry into force of the Uruguay Round agreements, and further to 3.9% as a result of the Uruguay Round agreements. *Id.*

12. Chad P. Bown, *Taking Stock of Antidumping, Safeguards, and Countervailing Duties, 1990–2009*, at 2 (World Bank Dev. Research Grp., Policy Research Working Paper No. 5436, 2010), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2010/09/28/000158349\\_20100928091836/Rendered/PDF/WPS5436.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2010/09/28/000158349_20100928091836/Rendered/PDF/WPS5436.pdf).

13. WORLD TRADE ORG. [WTO], *WORLD TRADE REPORT 2009: TRADE POLICY COMMITMENTS AND CONTINGENCY MEASURES* 133 (2009) [hereinafter *WORLD TRADE REPORT 2009*], available at [https://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report09\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report09_e.pdf). *Investigations* in the trade remedies context refer to proceedings in which government authorities charged with trade remedy determinations investigate the existence of causes for trade remedies. *See, e.g.*, 19 U.S.C. § 1673a(a)(1) (2011) (providing for procedures for antidumping duty investigations). A trade remedy investigation is usually initiated through petition by parties that are generally referred to as *petitioners*. *See, e.g., id.* § 1673a(b) (providing for initiation of antidumping duty investigations by petition). The foreign exporters or producers of the subject merchandise that participate in trade remedy proceedings are generally referred to as *respondents*. *See, e.g., id.* § 1673a(b)(3)(A) (providing for methods of determining antidumping duty margins for foreign exporters and producers of the subject merchandise). A trade remedy measure will be put in place if the result of the investigation is affirmative.

14. Chad P. Bown, *The Global Resort to Antidumping, Safeguards, and Other Trade Remedies Amidst the Economic Crisis, in EFFECTIVE CRISIS RESPONSE AND OPENNESS: IMPLICATIONS FOR THE TRADING SYSTEM* 91, 94 (Simon J. Evenett et al. eds., 2009).

15. *Id.*

edies have in recent years expanded from several developed countries to include a number of developing countries, which accounted for seventy-four percent of all new trade remedy investigations conducted between the first quarter of 2008 and the first quarter of 2009.<sup>16</sup>

The increased use of trade remedies is primarily driven by one particular trade remedy instrument—antidumping, which has become known as the “most important non-tariff trade barrier.”<sup>17</sup> Between 1980 and 2003, the number of countries that had adopted an antidumping law increased from thirty-six to ninety-seven.<sup>18</sup> Between 1981 and 2001, at least 4597 antidumping investigations were initiated worldwide.<sup>19</sup> For 2007 alone, WTO members reported initiating a total of 163 antidumping investigations.<sup>20</sup> That number increased to 208 in 2008,<sup>21</sup> before falling to 153—still an elevated level—in 2011.<sup>22</sup> Fifteen WTO members reported a similar increase in the number of newly applied antidumping measures, from 107 in 2007 to 138 in 2008.<sup>23</sup> In a development consistent with the trend seen for overall trade remedy measures, developing countries have emerged in recent years as the new users of antidumping. Between 1995 and 2001, with the exception of one year, the share of antidumping investigations initiated by new-user countries exceeded fifty percent.<sup>24</sup>

In stark contrast to their popularity with governments that use them, trade remedies have been subject to scathing criticisms by economists and legal scholars. Particularly, the primary weapon in the trade remedy arsenal—antidumping—has received near-unanimous disapproval from scholars. Many commentators have criticized its lack of sound economic

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16. *Id.* at 96.

17. See Maurizio Zanardi, *Anti-dumping: What Are the Numbers to Discuss at Doha?*, 27 *WORLD ECON.* 403, 403 (2004).

18. Hylke Vandenbussche & Maurizio Zanardi, *What Explains the Proliferation of Antidumping Laws?*, 23 *ECON. POL'Y* 94, 94 (2008).

19. Zanardi, *supra* note 17, at 412–13.

20. *WORLD TRADE REPORT 2009*, *supra* note 13, at 133.

21. *Id.*

22. *Id.* at 155, chart 5; Daniel Pruzin, *WTO Chief Claims 'Significant Decline' in Worldwide Antidumping Investigation*, *BLOOMBERG BNA INT'L TRADE REP.* (Feb. 28, 2012), [http://news.bna.com/tDln/TDLNWB/split\\_display.adp?fedfid=24753837&vname=itdbulallissues&fcn=2&wsn=499861000&fn=24753837&split=0](http://news.bna.com/tDln/TDLNWB/split_display.adp?fedfid=24753837&vname=itdbulallissues&fcn=2&wsn=499861000&fn=24753837&split=0) (quoting WTO Dir.-Gen. Pascal Lamy) (requires subscription).

23. *WORLD TRADE REPORT 2009*, *supra* note 13, at 133.

24. Zanardi, *supra* note 17, at 414–18 tbl.2.

rationales,<sup>25</sup> bias in administration,<sup>26</sup> and strategic or retaliatory nature.<sup>27</sup> The clear consensus among legal scholars and economists is that antidumping is not about remedying unfair trade practices, as it purports to be, but

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25. See, e.g., DOUGLAS A. IRWIN, *FREE TRADE UNDER FIRE* 162 (3d ed. 2009) (arguing that international price discrimination is neither unfair nor a problem unless it harms competition); John J. Barceló III, *Antidumping Laws As Barriers to Trade—The United States and the International Antidumping Code*, 57 *CORNELL L. REV.* 491, 502–13 (1972) (rejecting the arguments that dumping is an “unfair trade practice,” confers an “artificial advantage,” “exploit[s] monopoly power,” and “inflict[s] injurious adjustment costs”); Bhala, *supra* note 11, at 8–21 (criticizing the economic rationales of antidumping); Reid M. Bolton, *Antidumping and Distrust: Reducing Anti-dumping Duties Under the W.T.O. Through Heightened Scrutiny*, 29 *BERKELEY J. INT’L L.* 66, 71–74 (2011) (rejecting various economic justifications for antidumping); Sungjoon Cho, *Anticompetitive Trade Remedies: How Antidumping Measures Obstruct Market Competition*, 87 *N.C. L. REV.* 357, 370–76 (2009) (criticizing the “unfair trade” rationale of antidumping); Brian Hindley, *The Economics of Dumping and Anti-dumping Action: Is There a Baby in the Bath Water?*, in *POLICY IMPLICATIONS OF ANTIDUMPING MEASURES* 25, 30 (P.K.M. Tharakan ed., 1991) (questioning the right of an importing country to take action when foreign firms charge a higher price in their home markets than in the importing country); Bernard M. Hoekman & Petros C. Mavroidis, *Dumping, Antidumping and Antitrust*, *J. WORLD TRADE*, Feb. 1996, at 27, 28–31 (arguing that antidumping laws are no longer consistent with the objectives of competition law); N. Gregory Mankiw & Philip L. Swagel, *Antidumping: The Third Rail of Trade Policy*, *FOREIGN AFF.*, July–Aug. 2005, at 107, 107–19 (critiquing the economic rationales of antidumping); Robert W. McGee, *Antidumping Laws: A Bright Future for a Bad Idea* 2–4 (Dumont Inst. for Pub. Policy Research, Paper No. 12, 1996), available at [http://heartland.org/sites/all/modules/custom/heartland\\_migration/files/pdfs/7380.pdf](http://heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/7380.pdf) (rejecting the “predatory pricing” justification for antidumping).

26. One critic has pointed out that “the antidumping process is riddled with subtle tricks and arbitrary biases that invariably favor the domestic petitioner.” IRWIN, *supra* note 25, at 160; see also Cho, *supra* note 25, at 386–89 (criticizing the procedural burdens and lack of “impartiality or other due process values” in antidumping proceedings); Michael A. Lawrence, *Bias in the International Trade Administration: The Need for Impartial Decisionmakers in United States Antidumping Proceedings*, 26 *CASE W. RES. J. INT’L L.* 1 (1994) (detailing the biases against foreign producers in U.S. antidumping proceedings as administered by the International Trade Administration of the Department of Commerce); Robert W. McGee, *The Case to Repeal the Antidumping Laws*, 13 *NW. J. INT’L L. & BUS.* 491, 496–501 (1993) (criticizing the biases against foreign producers in the administration of U.S. antidumping law).

27. See generally JOSEPH F. FRANCOIS & GUNNAR NIELS, *CTR. FOR ECON. POLICY RESEARCH, POLITICAL INFLUENCE IN A NEW ANTIDUMPING REGIME: EVIDENCE FROM MEXICO* (CEPR Discussion Paper No. 4297, 2004), available at <http://repub.eur.nl/res/pub/6694/2004-0112.pdf> (showing that antidumping investigations initiated by Mexico within twelve months after a particular country had started an antidumping investigation against Mexico are three times as likely to result in a positive outcome); Aradhna Aggarwal, *Macro Economic Determinants of Anti-dumping: A Comparative Analysis of Developed and Developing Countries*, 32 *WORLD DEV.* 1043 (2004) (using data from ninety-nine active users of antidumping to show a statistically significant and positive relationship between the number of antidumping investigations against a developing country and the number of antidumping investigations that country initiates itself); Vandenbussche & Zanardi, *supra* note 18 (using econometric studies to show that retaliatory motives are at the heart of the proliferation of antidumping law); Thomas J. Prusa & Susan Skeath, *The Economic and Strategic Motives for Antidumping Filings* (Nat’l Bureau of Econ. Research, Working Paper No. 8424, 2001) available at <http://www.nber.org/papers/w8424.pdf> (using antidumping filing data from 1980 to 1998 to demonstrate the importance of “strategic concerns,” or retaliation, in antidumping filings).

about protecting the domestic producers of the importing country.<sup>28</sup> As for countervailing duty laws, they have been criticized for their adverse impact on economic welfare,<sup>29</sup> their incoherent rules,<sup>30</sup> and their lack of a clear purpose.<sup>31</sup> Finally, the global safeguard has also been criticized for operating under many difficult conceptual and interpretative issues.<sup>32</sup> Indeed, there is perhaps no other body of law that is so frequently used and is of such impact on policy and practice yet whose major components are so widely perceived as meritless or problematic.

Consistent with their overwhelmingly negative assessments of trade remedy laws, many scholars advocate the abolition of key components of trade remedy laws, particularly antidumping laws.<sup>33</sup> Those proposals have failed to influence lawmakers and policy makers, however, as shown by the fact that trade remedies are still widely in use today, with all of their defects intact.

This Article aims to restart the debate on trade remedies by offering new perspectives on the fundamental defects of the current trade remedy regime and proposing a bold yet feasible road map for reforms. As shall become clear, the debate on trade remedies is an essential component of the broader debate on trade protectionism, an issue that has never been more important in light of the challenges facing the world economy today. Reforming trade

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28. Bhala, *supra* note 11, at 20 (“The harsh reality is that antidumping law remains a strategic weapon in the protectionist arsenal.”); Cho, *supra* note 25, at 367 (“[T]he very history of antidumping reveals that the major purpose of the antidumping statute is sheer protectionism . . . .”); J. Michael Finger, *The Origins and Evolution of Antidumping Regulation* 1 (World Bank Country Econ. Dep’t, Policy, Research & External Affairs Series Working Paper No. 783, 1991), available at [http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1991/10/01/000009265\\_3961002001146/Rendered/PDF/multi0page.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1991/10/01/000009265_3961002001146/Rendered/PDF/multi0page.pdf) (“There is little in that history to suggest that antidumping ever had a scope more particular than protecting home producers from import competition, and there is much to suggest that such protection was its intended scope.”).

29. See Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199, 213–29 (1989) (arguing that countervailing duties result in a net welfare loss under most circumstances).

30. See *infra* notes 253–254 and accompanying text.

31. Scholars have struggled to understand what purposes countervailing duty laws serve. Many scholars have considered, and rejected, the notion that countervailing duty laws are aimed at promoting economic efficiency through deterring the use of subsidies. See *infra* note 252 and accompanying text. It has been suggested that the purpose of countervailing duty laws is to protect the entitlement of domestic producers, but that purpose is not entirely consistent with the current rules of countervailing duty laws. See *infra* note 254 and accompanying text.

32. See *infra* note 225 and accompanying text.

33. For proposals to abolish antidumping laws, see generally Wesley K. Caine, *A Case for Repealing the Antidumping Provisions of the Tariff Act of 1930*, 13 LAW & POL’Y INT’L BUS. 681 (1981); J. Michael Finger, *Reform*, in ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT 57 (J. Michael Finger ed., 1993); McGee, *supra* note 26. For a proposal to abolish countervailing duty laws, see generally Sykes, *supra* note 29.

remedies, therefore, has far-reaching implications for the global trade agenda.

This Article proposes a redesign of the overall trade remedy regime, with an emphasis on antidumping, the linchpin of trade remedies. I argue that the persistent stalemate over antidumping reforms stems largely from the fact that the two sides in the antidumping debate have not been engaging each other. While critics of antidumping focus on the economic rationales of antidumping (or the lack thereof), supporters or sympathizers of antidumping instead defend the trade remedy instrument as an indispensable safety valve for protectionist pressures. I contend that the correct approach to antidumping falls somewhere between the views espoused by the two camps. The correct approach, as discussed below, is to recognize the potential value of antidumping in performing the safety-valve function while also examining how well antidumping performs that function. Proceeding with this line of analysis, I demonstrate that the real problem with antidumping is not that it is protectionist, but that it is protectionist in ways that are bad for trade policy. Specifically, antidumping is a faulty safety valve in that it provides arbitrary levels of protection for petitioners, results in unnecessary uncertainties for respondents, and has too low a threshold for activation (that is, too low a standard for injury determinations). Furthermore, antidumping exacerbates the democracy deficit in trade policy, as the mechanical formulas used for calculating antidumping duties deprive the trade remedy process of the democratic participation that is essential for seeking consensus and compromises on trade protectionism. In light of these defects of antidumping, the goal of antidumping reforms should be to design a trade remedy instrument that better performs the safety-valve function while facilitating the formation of societal consensus on trade protectionism through maximizing democratic participation in the trade remedy process.<sup>34</sup>

In this Article, I propose exactly such a trade remedy instrument. I propose to eliminate the unfair-pricing component of antidumping, increase the injury standard under antidumping, and require a public interest clause in the antidumping process. In all other respects, the new trade remedy instrument will inherit the existing features of antidumping. Essentially, the reform will replace antidumping with a country-specific safeguard equipped with a heightened injury standard and a mandatory public interest requirement. I demonstrate that this country-specific safeguard comports with the policy goals of trade remedies as identified in this Article. Furthermore, the country-specific safeguard proposed in this Article is politically feasible, as it preserves an effective trade-protection mechanism for petitioners and trade-policy makers. By contrast, as is demonstrated in this Article, the global safeguard currently in use could not perform the safety-valve function that the country-specific safeguard would perform. I round out my

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34. See *infra* Part I.

discussions of the country-specific safeguard by offering preemptive rebuttals to potential criticisms of the country-specific safeguard.<sup>35</sup>

I further argue that once antidumping is replaced by the country-specific safeguard proposed in this Article, countervailing duties will become unnecessary, as the country-specific safeguard will have addressed injury from all sources, including injury caused by subsidies. Therefore, to round off the reform, I argue that countervailing duties should be eliminated as a separate option for disciplining the use of subsidies and should be subsumed under the country-specific safeguard. Direct limitations on the use of subsidies through the WTO, however, may be preserved. I argue that this reform proposal is consistent with previous scholarly proposals regarding countervailing duty laws.<sup>36</sup>

The rest of the Article is organized as follows. Part I examines the fundamental defects of antidumping and identifies the goals of antidumping reforms in light of those defects. Part II discusses the details of the proposed country-specific safeguard. Part III discusses how to fit countervailing duties within the framework of the proposed country-specific safeguard.

## I. THE FUNDAMENTAL DEFECTS OF ANTIDUMPING

Before I proceed to examine the fundamental defects of antidumping, a discussion of how dumping is determined under antidumping laws is in order. To use U.S. antidumping law as an example, *dumping*, or “sales at less than fair value,”<sup>37</sup> is determined by a comparison of the sales price of an imported product in the importing country with the normal value of the imported product.<sup>38</sup> The *normal value* of an imported product is usually the price of the product sold in its home market.<sup>39</sup> For the home-market price to be used as the basis of the price comparison, the home-market price must pass a “cost test”: it must not be below the cost of production of the product.<sup>40</sup> When the home-market price fails the cost test or when the product is not sold in its home market at all, the normal value of the product will be determined by the price of the product sold in a third country<sup>41</sup> or by the *constructed value*<sup>42</sup> of the product, equal to the cost of production of the

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35. See *infra* Part II.

36. See *infra* Part III.

37. 19 U.S.C. § 1677(34) (2011).

38. *Id.* § 1677b(a).

39. *Id.* § 1677b(a)(1)(B)(i).

40. *Id.* § 1677b(b)(1). The cost of production of a product is equal to the sum of (1) “the cost of materials and of fabrication or other processing of any kind employed in [production]”; (2) “an amount for selling, general and administrative expenses”; and (3) “the cost of all containers and coverings and all other expenses incidental to placing the product in condition packed ready for shipment.” *Id.* § 1677b(b)(3).

41. *Id.* § 1677b(a)(1).

42. *Id.* § 1677b(a)(4), (e).

merchandise plus a reasonable allowance for general, selling, and administrative expenses and profits.<sup>43</sup>

### A. *The Economic Critiques of Antidumping*

A large amount of scholarship, both in economics and in law, has critiqued antidumping from economic perspectives. The economic critiques of antidumping in the existing literature focus primarily on two issues: the lack of sound economic rationales for antidumping and the welfare cost of antidumping. Since these critiques have been thoroughly laid out elsewhere, I will only provide a brief summary of them below.

#### 1. The Lack of Sound Economic Rationales for Antidumping

A central economic critique of antidumping is that it lacks sound economic rationales because dumping, as the term is defined under current antidumping laws, is indeed a reasonable business practice except under extraordinary circumstances. As discussed above, antidumping liabilities primarily arise where a product is sold in a foreign market at a price lower than the price charged domestically, a practice that economists often refer to as international price discrimination.<sup>44</sup> International price discrimination, however, is a rational, generally procompetitive response of a producer facing an overseas market with greater demand elasticity than his home market.<sup>45</sup> Antidumping liabilities will also arise if a product is sold overseas below its cost of production, when the normal value of the product is determined by the constructed-value method.<sup>46</sup> This method of ascertaining dumping, however, ignores firms' cost structures, as it is economically rational for firms to sell below the full cost of production as long as the marginal revenue from the sale exceeds the marginal cost of production.<sup>47</sup> There are many circumstances under which sales below full costs of produc-

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43. *Id.* § 1677b(e)(2)(B).

44. Alan V. Deardorff, *Economic Perspectives on Antidumping Law*, in *THE MULTILATERAL TRADING SYSTEM: ANALYSIS AND OPTIONS FOR CHANGE* 135, 135–42 (Robert M. Stern ed., 1993); *see also* KENNETH W. DAM, *THE GATT—LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 168 (1970) (discussing dumping as “price discrimination among national markets”); JACOB VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 2–3 (A.M. Kelley 1991) (1923) (defining “dumping” as “price-discrimination between national markets”); Barceló, *supra* note 25, at 500–16.

45. *See* PETER H. LINDERT & CHARLES P. KINDLEBERGER, *INTERNATIONAL ECONOMICS* 164–65 (7th ed. 1982); *see also* Barceló, *supra* note 25, at 503–06; Winston W. Chang, *Antidumping, Countervailing, and Safeguard Measures*, 1 *GITAM REV. INT’L BUS.* 1, 8–9 (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1736735](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1736735); J.A. Ordover et al., *Unfair International Trade Practices*, 15 *N.Y.U. J. INT’L L. & POL.* 323, 328 (1983).

46. 19 U.S.C. § 1677b(a)(4); *see also* EU Antidumping Regulation, *supra* note 7, art. 2.3, 2009 O.J. (L 343) at 54.

47. *See* JOHN B. TAYLOR & AKILA WEERAPARA, *PRINCIPLES OF MICROECONOMICS* 257–59 (7th ed. 2012) (describing marginal cost, marginal revenue, and profit maximization); *see also* Bhala, *supra* note 11, at 14.

tion are rational and have no adverse economic consequences, including “market expansion” dumping, “cyclical” dumping, “state-trading” dumping, and “life-cycle” dumping in high-tech industries.<sup>48</sup> The consensus among economists is that dumping is worthy of condemnation on economic efficiency grounds only if it constitutes predatory pricing, that is, pricing aimed at driving competitors out of the marketplace by charging below-cost prices and then recouping the losses afterward by charging monopolistic prices.<sup>49</sup> However, as the U.S. Supreme Court has noted, predatory pricing schemes “are rarely tried, and even more rarely successful.”<sup>50</sup> This statement appears to be well supported by empirical evidence.<sup>51</sup> At the international level, predatory pricing schemes would seem to face greater challenges.<sup>52</sup> In any event, current antidumping laws are not about predatory pricing, as no proof of predatory pricing is required for a finding of dumping.<sup>53</sup>

The only serious defense of antidumping in response to these critiques is that antidumping targets not the act of dumping by individual firms, but policies of foreign governments that allow foreign firms to earn high profits in their home *sanctuary market* and thus make it possible for those firms to

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48. See, e.g., Robert D. Willig, *Economic Effects of Antidumping Policy*, in BROOKINGS TRADE FORUM: 1998, at 57, 61–66 (Robert Z. Lawrence ed., 1998).

49. See IRWIN, *supra* note 25, at 162 (“On economic grounds, the fact that a firm charges different prices in different markets is neither unfair nor a problem unless it harms competition (such as through anticompetitive actions or predatory practices).”); Barceló, *supra* note 25, at 513 (“[T]he ‘unfair competition’ argument has validity only where anticompetitive or predatory dumping is involved.”).

50. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986). For a discussion of predatory pricing in a comparative context, see D. Daniel Sokol, *Competition Policy and Comparative Corporate Governance of State-Owned Enterprises*, 2009 BYU L. REV. 1713, 1773–1801 (2009).

51. James Bovard pointed out in 1991 that “[a]lthough the fear of predation permeates dumping laws and regulations, there [has been] no known case in the last century of any company dumping its products in a U.S. market, bankrupting American producers, and then driving up its prices and shafting American consumers for a long period.” JAMES BOVARD, *THE FAIR TRADE FRAUD* 157 (1991). A 1997 study by R.M. van Dijk on antidumping cases in Mexico found that predation by foreign exporters might have been feasible only in two out of seventy-two Mexican cases, while a 2002 study by Aradhna Aggarwal on antidumping cases in India found that predation by foreign exporters might have been feasible only in eight out of 223 Indian cases. Gunnar Niels & Adriaan ten Kate, *Antidumping Policy in Developing Countries: Safety Valve or Obstacle to Free Trade?*, 22 EUR. J. POL. ECON. 618, 622 (2006).

52. Barceló, *supra* note 25, at 502; see also Gunnar Niels, *What Is Antidumping Policy Really All About?*, 14 J. ECON. SURVS. 467, 476 (2000) (noting that several prominent scholars have dismissed the threat of predatory pricing in international markets).

53. See MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 254–55 (2005); Alan O. Sykes, *Comparative Advantage and the Normative Economics of International Trade Policy*, 1 J. INT’L ECON. L. 49, 80–81 (1998). See generally PETROS C. MAVROIDIS ET AL., *THE LAW AND ECONOMICS OF CONTINGENT PROTECTION IN THE WTO* 7–18 (2008) (discussing the diversity of rationales and evidentiary burdens for demonstrating dumping among different legal regimes).

dump in overseas markets.<sup>54</sup> The type of dumping that results from a protected home market is often referred to as *strategic dumping* in the economic literature.<sup>55</sup> From a legal point of view, this sanctuary market or strategic dumping argument is curious, as antidumping laws lack a mechanism for determining whether dumping is related to market distortions.<sup>56</sup> A sanctuary home market could certainly lead to dumping, but this does not necessarily mean that the presence of dumping indicates a sanctuary home market. Evidence of dumping on the part of individual firms, therefore, should not be taken as conclusive evidence that anticompetitive government policies, rather than other legitimate reasons, are behind the dumping.<sup>57</sup> Even if strategic dumping could be identified through antidumping investigations, antidumping duties do not provide a solution to the sanctuary market problem.<sup>58</sup> Furthermore, economists have empirically examined the occurrence of strategic dumping in several key industries and concluded that this practice was rare to begin with.<sup>59</sup>

## 2. The Welfare Cost of Antidumping

Another central economic critique of antidumping is based on the welfare cost of antidumping. Economic theories suggest that the type of price discrimination underlying dumping often leads to increased overall output and thus increased overall welfare,<sup>60</sup> although the exact impact of dumping on global welfare depends on the situation with which price discrimination is compared.<sup>61</sup> The effect of dumping on the importing country as a whole,

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54. See Communication from the United States to the WTO Negotiating Group on Rules, *Basic Concepts and Principles of the Trade Remedy Rules*, ¶ 13, TN/RL/W/27 (Oct. 22, 2002).

55. See, e.g., MAVROIDIS ET AL., *supra* note 53, at 17–18; Niels, *supra* note 52, at 475.

56. See DANIEL IKENSON, CATO INST., PROTECTION MADE TO ORDER: DOMESTIC INDUSTRY'S CAPTURE AND RECONFIGURATION OF U.S. ANTIDUMPING POLICY 4 (Trade Policy Analysis No. 44, 2010), available at <http://www.cato.org/pubs/tpa/tpa-044.pdf>; see also IRWIN, *supra* note 25, at 164.

57. IKENSON, *supra* note 56, at 4; IRWIN, *supra* note 25, at 164.

58. See Hoekman & Mavroidis, *supra* note 25, at 30 (“Antidumping is an inferior instrument to address foreign market closure as it does not deal directly with the source of the problem, i.e., the government policies which artificially segment markets, or allow this to occur.”); see also Bernard M. Hoekman & Michael P. Leidy, *Antidumping and Market Disruption: The Incentive Effects of Antidumping Laws*, in THE MULTILATERAL TRADING SYSTEM: ANALYSIS AND OPTIONS FOR CHANGE, *supra* note 44, at 155, 163 (“[Antidumping] is an inferior instrument to remedy an unfair practice because it does not address the source of the problem, which, in the context of dumping, must be those policies that artificially segment markets.”).

59. See Patrick A. Messerlin, *Competition Policy and Antidumping Reform: An Exercise in Transition*, in THE WORLD TRADING SYSTEM: CHALLENGES AHEAD 219, 224–25, 224 tbl.2 (Jeffrey J. Schott ed., 1996).

60. See Niels, *supra* note 52, at 474.

61. *Id.*; see also H.R. Varian, *Price Discrimination*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 597, 619–24 (R. Schmalensee & R.D. Willig eds., 1989).

however, is positive, as the gain to consumers outweighs the cost to import-competing producers.<sup>62</sup> One economist estimated that, based on eight antidumping duty orders in place in the United States from 1989 to 1990, “the minimum consumer cost per job created or saved by the antidumping orders was \$113,800, while the minimum cost to the economy to create an additional job was \$14,300.”<sup>63</sup> The U.S. International Trade Commission (USITC) estimated in 1991 that outstanding U.S. antidumping and countervailing duty orders as of that year imposed a net welfare cost of \$1.59 billion on the U.S. economy.<sup>64</sup> A 1999 study by three economists concluded that the net welfare cost of outstanding U.S. antidumping and countervailing duty orders was four billion dollars in 1993.<sup>65</sup>

The lack of sound economic rationales, along with the net welfare cost of antidumping, have led many economists and legal scholars to conclude that antidumping is protectionist and unsupported by purported economic justifications.<sup>66</sup> The most economically appealing way to reform antidumping, according to these scholars, is to abolish it altogether.<sup>67</sup>

### B. *Antidumping As a Faulty Safety Valve*

The economic critiques of antidumping, however, speak only of the ex post effect of antidumping on trade. These critiques lay out the case that for any *given* amount of trade, antidumping has a negative effect on trade ex post. But the critiques do not take into account the ex ante benefit of

62. See Niels, *supra* note 52, at 475; see also Deardorff, *supra* note 44, at 135.

63. Keith B. Anderson, *Antidumping Laws in the United States: Use and Welfare Consequences*, J. WORLD TRADE, Apr. 1993, at 99, 115.

64. The Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Agreements, Inv. No. 332–344, USITC Pub. 2900, at x (June 1995).

65. Michael P. Gallaway et al., *Welfare Costs of the U.S. Antidumping and Countervailing Duty Laws*, 49 J. INT’L ECON. 211, 211 (1999).

66. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 309–11 (4th ed. 1992) (describing antidumping as protectionist); Barceló, *supra* note 25, at 519–24 (describing the protectionist character of antidumping); William J. Davey, *Antidumping Laws in the GATT and the EC*, in *ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* 296–97 (John H. Jackson & Edwin A. Vermulst eds., 1989) (noting that antidumping laws are not “justified economically”); J. Michael Finger, *The Origins and Evolution of Antidumping Regulation*, in *ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT*, *supra* note 33, at 13, 34 (“Antidumping is ordinary protection with a grand public relations program.”); Mankiw & Swagel, *supra* note 25, at 107 (“[Antidumping has become] little more than an excuse for special interests to shield themselves from competition at the expense of both American consumers and other American companies.”).

67. Finger, *supra* note 33, at 57 (“The most appealing option is to get rid of antidumping laws and to put nothing in their place.”). Other scholars have espoused a similar opinion. See, e.g., BOVARD, *supra* note 51, at 160 (“The U.S. should take the lead in the dismantling of antidumping laws.”); CHARLES K. ROWLEY ET AL., *TRADE PROTECTION IN THE UNITED STATES* 268 (1995); Caine, *supra* note 33, at 724–26 (arguing that the antidumping provisions of the Tariff Act of 1930 should be repealed); Mankiw & Swagel, *supra* note 25, at 117 (“Outright repeal of U.S. antidumping laws would certainly be the best policy for the United States’ well-being . . .”).

antidumping—the potential for antidumping to facilitate *future* trade liberalizations by serving as a “safety valve” for protectionist pressures. It is this safety-valve function that provides a potential justification for antidumping despite all its defects.

Depending on the nature of the protectionist pressure for which the antidumping safety valve could be used, commentators have distinguished three variants of antidumping safety valves: the temporary-adjustment safety valve, the political-support safety valve, and the unfair-trade safety valve.<sup>68</sup> The temporary-adjustment safety valve refers to the function of antidumping in providing temporary import restrictions that will allow domestic industries of the importing country to adjust to import competition.<sup>69</sup> The need for such a temporary-adjustment safety valve is usually discussed in the context of the global safeguard,<sup>70</sup> but scholars have examined antidumping from the perspective of safeguards<sup>71</sup> or argued that antidumping could function as a safeguard mechanism.<sup>72</sup> The political-support safety valve refers to the function of antidumping in helping politicians secure political support for trade liberalizations.<sup>73</sup> Again, the political-support safety valve is often discussed in the context of the global safeguard,<sup>74</sup> but it has been noted that the political logic of antidumping is akin to that of the global safeguard.<sup>75</sup> Finally, the unfair-trade safety valve

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68. See REEM ANWAR AHMED RASLAN, *ANTIDUMPING: A DEVELOPING COUNTRY PERSPECTIVE*, at xvi (2009); see also Niels & ten Kate, *supra* note 51, at 624–25.

69. See RASLAN, *supra* note 68, at xvi.

70. For example, a WTO dispute settlement panel once stated in a dispute concerning safeguards,

If WTO law were not to offer a safety valve for situations in which, following trade liberalization, imports increase so as to cause serious injury or threat thereof to a domestic industry, Members could be deterred from entering into additional tariff concessions and from engaging in further trade liberalization. It is for this reason that the safeguard mechanism in Article XIX has always been an integral part of the GATT.

Panel Report, *United States—Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, ¶ 7.77, WT/DS177/R (Dec. 21, 2000).

71. See generally J. Michael Finger et al., *Antidumping As Safeguard Policy* (World Bank, Policy Research Working Paper No. 2730, 2001) (discussing the weaknesses of antidumping as a safeguard mechanism).

72. See RASLAN, *supra* note 68, at xvii (arguing that antidumping laws could be used as a safeguard that serves as a temporary-adjustment safety valve).

73. See *id.* at xvi.

74. See generally Alan O. Sykes, *Protectionism As a “Safeguard”: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations*, 58 U. CHI. L. REV. 255 (1991) (using public choice theory and the economics of contracting to explain WTO rules on safeguards).

75. Alan O. Sykes, *The Economics of Injury in Antidumping and Countervailing Duty Cases*, 16 INT’L REV. L. & ECON. 5, 22 (1996) (“The nature of the remedy in [anti]dumping and subsidies cases adds . . . support to the conjecture that antidumping and countervailing duty law have a political logic akin to that of the escape clause.”).

refers to the function of antidumping in remedying unfair trade practices.<sup>76</sup> This argument apparently is a reincarnation of the argument that dumping constitutes an unfair trade practice, an argument that has been discredited as discussed above.<sup>77</sup>

Anecdotal and empirical evidence provides support for the safety-valve theories, although the evidence is not conclusive. It has been widely noted that antidumping and trade liberalization go hand in hand. It has been observed, for example, that antidumping laws were first adopted in the United States as part of a package that included both tariff reductions and administered protection mechanisms.<sup>78</sup> It has also been observed that “the number of countries with . . . antidumping laws is strongly correlated with the number of countries which are members of the GATT/WTO,”<sup>79</sup> and that “[a]s free trade agreements have reduced tariffs and outlawed most import quotas, antidumping cases have increased dramatically.”<sup>80</sup> This trend is borne out by the experience of individual countries. For example, some Latin American countries, such as Argentina and Brazil, became heavy antidumping users after they unilaterally reduced import tariffs.<sup>81</sup> More rigorous empirical studies have also confirmed the correlation between antidumping and trade liberalization. One study found that countries engaging in larger tariff concessions during the Uruguay Round initiated relatively more antidumping cases in the years following the Uruguay

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76. RASLAN, *supra* note 68, at xvi. This argument is on vivid display in a communication from the United States to the WTO in 1998: “[A]ntidumping laws administered in strict conformity with the Antidumping Agreement actually assist governments in their efforts to continue trade-liberalizing measures by providing relief to domestic industries injured by foreign firms that engage in unfair trade practices, even as international trade liberalizes.” Communication from the United States to the WTO Working Group on the Interaction Between Trade and Competition Policy, *Observations on the Distinctions Between Competition Laws and Antidumping Rules*, at 3, WT/WGTCP/W/88 (Aug. 28, 1998).

77. See *supra* Part I.A.

78. See Douglas Nelson, *The Political Economy of Antidumping: A Survey*, 22 EUR. J. POL. ECON. 554, 573 (2006) (“[I]t was only with the adoption of the Reciprocal Trade Agreements Act . . . of 1934 that antidumping became part of a system explicitly linking administered protection to liberalization.”).

79. Zanardi, *supra* note 17, at 410.

80. Richard J. Pierce, Jr., *Antidumping Law As a Means of Facilitating Cartelization*, 67 ANTITRUST L.J. 725, 734 (2000).

81. See Honório Kume & Guida Piani, *Antidumping and Safeguard Mechanisms: The Brazilian Experience, 1988–2003*, in SAFEGUARDS & ANTIDUMPING IN LATIN AMERICAN TRADE LIBERALIZATION: FIGHTING FIRE WITH FIRE 79, 79–89 (J. Michael Finger & Julio J. Nogués eds., 2006) (“Together with a gradual import liberalization process, Brazil began implementing trade defense instruments to provide temporary relief to certain sectors when they were affected by foreign competition.”); Julio J. Nogués & Elias Baracat, *Political Economy of Antidumping and Safeguards in Argentina*, in SAFEGUARDS & ANTIDUMPING IN LATIN AMERICAN TRADE LIBERALIZATION: FIGHTING FIRE WITH FIRE, *supra*, at 45, 45–48 (“[A]fter implementing trade liberalization policies in the early 1990s, Argentina initiated a record number of antidumping investigations.”).

Round.<sup>82</sup> Another study found that among a small set of developing countries that are heavy users of antidumping, an increase of one standard deviation in sectoral liberalization “increase[s] the probability of observing an antidumping filing” by about twenty-five percent.<sup>83</sup> To be sure, a correlation between antidumping and trade liberalization does not necessarily mean that the former causes the latter, or that the former is a necessary condition for the latter.<sup>84</sup> Nor does it necessarily mean that the net impact of antidumping and trade liberalization on welfare will be positive.<sup>85</sup> But anecdotal evidence does indicate that the ability to impose antidumping duties served as a quid pro quo for trade liberalization in negotiations over some of the most significant trade liberalization deals so far. For example, it has been observed that “exceptions for trade remedies” were included in the General Agreement on Tariffs and Trade (GATT) in 1947 “in part because some countries (the United States . . . in particular) would not otherwise have agreed to other aspects of [the] liberalization mandated by that agreement.”<sup>86</sup> There are also indications that the use of antidumping by Mexico since the mid-1980s “allow[ed] the Mexican government to push through its trade liberalization agenda from the mid-1980s onwards,

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82. See Robert M. Feinberg & Kara M. Reynolds, *Tariff Liberalization and Increased Administrative Protection: Is There a Quid Pro Quo?*, 30 *WORLD ECON.* 948, 960 (2007).

83. Michael O. Moore & Maurizio Zanardi, *Trade Liberalization and Antidumping: Is There a Substitution Effect?*, 15 *REV. DEV. ECON.* 601, 616–17 (2011) (examining the determinants of antidumping filings).

84. Niels & ten Kate, *supra* note 51, at 627 (“[I]t is worth noting that the apparent positive correlation between trade liberalisation (or WTO/GATT memberships) on the one hand, and [antidumping] laws and usage, on the other, says little about the causal relationship between the two.”). One empirical study shows that there is no evidence that past antidumping actions are positively correlated with later reductions in tariff barriers in a sample of twenty-three developing countries. Michael O. Moore & Maurizio Zanardi, *Does Antidumping Use Contribute to Trade Liberalization in Developing Countries?*, 42 *CAN. J. ECON.* 469, 469 (2009).

85. Some commentators have suggested that antidumping may have a net positive effect on welfare. See Simon P. Anderson & Nicolas Schmitt, *Nontariff Barriers and Trade Liberalization*, 41 *ECON. INQUIRY* 80, 95 (2003) (suggesting that “tariff liberalization [is] associated with an overall trade expansion despite the endogenous emergence of [nontariff barriers]” such as quotas and antidumping measures); Jorge Miranda et al., *The International Use of Antidumping: 1987–1997*, *J. WORLD TRADE*, Oct. 1998, at 5, 60 (suggesting that there may be welfare gains from antidumping if it is a quid pro quo for general trade liberalization).

86. Tania Voon, *Eliminating Trade Remedies from the WTO: Lessons from Regional Trade Agreements*, 59 *INT’L & COMP. L.Q.* 625, 629 (2010); see also DAM, *supra* note 44, at 99, 107 (“[The escape clause’s] justification is that the presence of such a clause encourages cautious countries to enter into a greater number of tariff bindings than would otherwise be the case.”); TREBILCOCK & HOWSE, *supra* note 53, at 312–13 (“[T]he clause, in addition to being a prerequisite for essential U.S. participation, encouraged trade liberalization more generally.”); *WORLD TRADE REPORT 2009*, *supra* note 13, at 26–30, 39 (“[T]he reason for introducing contingency measures . . . is . . . to allow governments to address future developments that are unpredictable . . .”).

culminating in the adoption of the North American Free Trade Agreement (NAFTA).<sup>87</sup>

As seen from the above discussions, the safety-valve theories defend antidumping on a different level than the economic critiques criticize it. The safety-valve theories implicitly concede that the “unfair trade” rhetoric of antidumping should not be taken at face value. According to proponents of the safety-valve theories, the real focus of antidumping is not “fair” or “unfair” trade, but “acceptable vs. unacceptable levels of trade.”<sup>88</sup> In other words, when the real utility of antidumping lies with its function as a safety valve, the question of fair or unfair trade becomes irrelevant. This contrasts with the approach taken by the critics of antidumping, who have basically taken the economic rationales for antidumping at their face value.<sup>89</sup> In this sense, the two sides in the antidumping debate have never engaged each other; the stalemate over antidumping will continue unless they do.

I argue in this Article that one way for the two sides in the antidumping debate to engage each other is for opponents of antidumping to step back and acknowledge the potential value of antidumping as a safety valve, and for supporters of antidumping to step back and acknowledge that antidumping may not be the best safety valve available. Proceeding with this line of analysis, I demonstrate below that antidumping is a faulty safety valve: one that provides arbitrary levels of protection for petitioners, results in unnecessary uncertainties for respondents, and has too low a threshold for activation. Identifying antidumping’s defects is the first step toward reforming antidumping in a manner that makes it a better safety valve.

### 1. Arbitrary Levels of Protection for Petitioners

The first defect of antidumping as a safety valve is that the level of protection it provides for domestic industries is arbitrary. The reasons for this conclusion are twofold. First, as summarized above, dumping is not inherently wrong from an economic perspective.<sup>90</sup> The amount of the antidumping duties imposed to counter dumping, therefore, is also meaningless from an economic perspective.<sup>91</sup> Second, the level of protection provided by antidumping is arbitrary because it is dictated by something that is only tangentially related to the extent of injury to domestic industries. As summarized above, antidumping is based on the notion that international price discrimination or below-cost pricing constitutes unfair trade. Consequently, the amount of antidumping duties is determined by

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87. Niels & ten Kate, *supra* note 51, at 626 & n.31.

88. Andreas F. Lowenfeld, *Fair or Unfair Trade: Does it Matter?*, 13 CORNELL INT’L L.J. 205, 218–19 (1980); *see also* Finger, *supra* note 33, at 59.

89. *See supra* Part I.A (discussing critiques of antidumping).

90. *See supra* notes 45–48 and accompanying text.

91. For the same reason, it has been argued that the question of fair or unfair trade is not the real focus of antidumping. *See supra* notes 28, 88 and accompanying text.

the so-called margin of dumping,<sup>92</sup> defined as the difference between the export price of the product under investigation and its normal value.<sup>93</sup> The dumping margin, however, is not a precise gauge of the extent of injury to domestic industries. This is implicitly recognized by the WTO Antidumping Agreement, which recommends that WTO members set the amount of antidumping duties at an amount “less than the [dumping margin] if such lesser duty would be adequate to remove the injury to the domestic industry.”<sup>94</sup> The European Union, a jurisdiction that has implemented this *lesser duty rule*, explicitly requires the *injury margin*, or the amount of duties that would be adequate to remove injury, to be based on the *underselling margin*, that is, the margin by which an imported product undersells the domestic like product.<sup>95</sup> It appears that if the goal of antidumping is to remove injury to domestic industries, the level of protection domestic industries are entitled to should be no more than the underselling margin. But in order to obtain import protection through antidumping, domestic industries have to jump through the legal hoop that requires the calculation of the dumping margin. To be sure, the dumping margin and the underselling margin are not entirely uncorrelated: the more an imported product is “dumped,” the more likely it will undersell the domestic like product of the importing country. But in general, it will only be a coincidence if the dumping margin exactly matches the underselling margin. Therefore, except under rare circumstances, basing the amount of antidumping duties on the dumping margin will lead to either higher or lower duties than are necessary to remove injury to domestic industries.

To illustrate the second reason why antidumping provides arbitrary levels of protection for petitioners, consider the hypothetical scenario shown in Table A below. Suppose there are two respondents whose products are under antidumping investigation. Respondent A sells its product, Product A, for

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92. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 9.3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201 [hereinafter WTO Antidumping Agreement].

93. *Id.* art. 2.1–2.

94. *Id.* art. 9.1.

95. EU antidumping rules provide that “[t]he amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry.” EU Antidumping Regulation, *supra* note 7, art. 9.4, 2009 O.J. (L 343) at 62. The European Commission calculates the injury margin by comparing the difference between the export price of the product under investigation and the actual selling price of the EU product (referred to as “price undercutting”), or the difference between the export price of the product under investigation and the target price of the EU product, namely, the fictitious price at which EU producers could sell their product in the absence of dumped imports (referred to as “price underselling”). YAN LUO, ANTI-DUMPING IN THE WTO, THE EU, AND CHINA: THE RISE OF LEGALIZATION IN THE TRADE REGIME AND ITS CONSEQUENCES 130–32 (2010). The term *underselling* used in this Article encompasses both the term undercutting and the term underselling currently used in EU antidumping law.

\$90 in the importing country and for \$95 in its home country, resulting in a dumping margin of \$5 (\$95–\$90). Respondent *B* sells its product, Product *B*, for \$95 in the importing country and for \$105 in its home country, resulting in a dumping margin of \$10 (\$105–\$95). The domestic like product of the importing country is sold for \$100. The underselling margins for Product *A* and Product *B*, therefore, are \$10 (\$100–\$90) and \$5 (\$100–\$95), respectively. Because Product *A* undersells the domestic like product more than Product *B* does, the petitioner will want to keep Product *A* out of the market more than it wants to keep Product *B* out of the market. It happens, however, that the dumping margin for Product *A* (\$5) is lower than the underselling margin (\$10), while the dumping margin for Product *B* (\$10) is higher than the underselling margin (\$5). Basing the amount of antidumping duties on the dumping margin will lead to a mismatch between the level of protection provided under antidumping and the level of protection the petitioner needs. In this hypothetical scenario, the petitioner will receive a higher level of protection against a respondent that poses less of a threat to it (that is, Respondent *B*), and a lower level of protection against a respondent that poses more of a threat to it (that is, Respondent *A*).

TABLE A  
THE MISMATCH BETWEEN THE DUMPING MARGIN  
AND THE UNDERSELLING MARGIN

	Export Price	Home-Market Price	Dumping Margin	Price of Domestic Like Product	Underselling Margin
Product <i>A</i>	90	95	5	100	10
Product <i>B</i>	95	105	10	100	5

The arbitrariness of the levels of protection antidumping provides for petitioners means that, contrary to conventional wisdom, petitioners are not the almost-guaranteed winner under antidumping. Antidumping proceedings have a very high probability of resulting in positive findings of dumping. Between 1990 and 2000, for example, the U.S. Department of Commerce issued only three negative dumping determinations out of a total of nearly four hundred cases.<sup>96</sup> What really matters to petitioners, however, is not just that an antidumping proceeding results in a positive finding of dumping, but more importantly that an antidumping proceeding results in high antidumping duty rates against the most competitive foreign producers, that is, foreign producers that sell at the lowest prices. Under the current antidumping regime, however, petitioners can achieve the latter only by chance, because, as illustrated in Table A above, the foreign producers that sell at the lowest prices do not necessarily have the highest dumping margins.

96. Bruce A. Blonigen & Thomas J. Prusa, *Antidumping* 5, 22–23 (Nat'l Bureau of Econ. Research, Working Paper No. 8398, 2001), available at <http://www.nber.org/papers/w8398.pdf>.

The results of a recent antidumping investigation, reproduced in Table B below, provide a perfect example of this disadvantage of antidumping for petitioners. In this antidumping investigation, concerning multilayered wood flooring from China, the highest antidumping duty rate was 58.84%, applicable to all producers from China that were not receiving an individualized antidumping duty rate. The three largest exporters (by volume) of the subject merchandise, shown in the top three rows in Table B,<sup>97</sup> received an antidumping duty rate of 3.98%, 2.63%, and 0%, respectively. This antidumping case will by all means be included in the official statistics as one in which the petitioners were successful in petitioning for antidumping protection, but the level of protection the petitioners obtained in this case was little more than symbolic. After incurring all of the expenses associated with an antidumping proceeding,<sup>98</sup> the petitioners were able to impose only negligible or even zero amounts of antidumping duties on products of the three largest exporters from China, exporters that presumably posed the greatest threat to the petitioners. The reason for this, again, is that the dumping margin of a foreign producer is not a reliable indicator of the foreign producer's threat to domestic industries.

TABLE B  
ANTIDUMPING DUTY RATES IN MULTILAYERED WOOD  
FLOORING FROM THE PEOPLE'S REPUBLIC OF CHINA:  
FINAL DETERMINATION OF SALES AT LESS THAN FAIR VALUE<sup>99</sup>

Exporter/Producer	Weighted Average Margin
Zhejiang Layo Wood Industry Co., Ltd.	3.98
The Samling Group	2.63
Zhejiang Yuhua Timber Co., Ltd.	0
74 Separate-Rate Producers	3.31
PRC-Wide Entity	58.84

97. The U.S. Department of Commerce selected the three largest Chinese exporters (by volume) of the subject merchandise as the mandatory respondents pursuant to 19 U.S.C. § 1677f-1(c)(2)(B) (2011). Multilayered Wood Flooring from the People's Republic of China, 76 Fed. Reg. 30,656, 30,658 (Dep't of Commerce May 26, 2011) (prelim. determination).

98. The costs of filing an antidumping petition, including the costs for legal counsel, consultants, and lost management time in the gathering and analysis of information, were estimated to be between one hundred and fifty thousand and five hundred thousand dollars in 1988, and that number would likely be at least three times as high today. JEFFREY L. KESSLER & SPENCER WEBER WALLER, *INTERNATIONAL TRADE AND U.S. ANTITRUST LAW* § 14:2 (2d ed. 2006).

99. Multilayered Wood Flooring from the People's Republic of China, 76 Fed. Reg. 64,318, 64,323-24 (Dep't of Commerce Oct. 18, 2011) (final determination).

## 2. Unnecessary Uncertainties for Respondents

The second defect of antidumping as a safety valve is that antidumping duties are overly unpredictable and result in unnecessary uncertainties for respondents. As I will detail below, the root cause of the unpredictability of antidumping duties is, once again, the requirement that the amount of antidumping duties be determined by the dumping margin.

Basing the amount of antidumping duties on the dumping margin makes antidumping duties overly unpredictable because the dumping margin itself is overly unpredictable. To calculate the dumping margin for a producer, a large amount of pricing and cost information is needed. In antidumping proceedings in the United States, for example, the pricing and cost information necessary for the calculation of a product's normal value and export price or constructed export price—values required to determine the dumping margin<sup>100</sup>—include, among others, the price of the foreign like product in the exporting country or a third country,<sup>101</sup> the cost of production of the producer,<sup>102</sup> packing and moving expenses,<sup>103</sup> import and export duties and countervailing duties,<sup>104</sup> commissions and selling expenses for selling the product in the importing country,<sup>105</sup> adjustments for different quantities of sale,<sup>106</sup> adjustments for different physical characteristics of the foreign like product,<sup>107</sup> adjustments for different circumstances of sale,<sup>108</sup> and adjustments for different levels of trade.<sup>109</sup> These prices and costs fluctuate on a regular basis and are not easily predictable. For producers whose products are subject to an antidumping investigation but whose dumping margins are

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100. 19 U.S.C. § 1677(35)(A) (2011); *see id.* § 1677a(a), (b) (defining the terms “export price” and “constructed export price,” respectively).

101. *Id.* § 1677b(a)(1) (explaining that the price of the foreign like product in the exporting country or a third country is necessary to determine normal value).

102. In the United States, the producer's cost of production is needed both to determine whether to disregard a sales price for the foreign like product in the determination of normal value, *id.* § 1677b(b), and for the purpose of determining whether to use the constructed value of the imported merchandise as the normal value, *id.*; *see id.* § 1677b(e) (defining the term “constructed value”).

103. In the United States, these costs and expenses need to be adjusted to determine export price and constructed export price, *id.* § 1677a(c), and to determine the price of the foreign like product in the exporting country or a third country, *id.* § 1677b(a)(6).

104. These duties need to be adjusted to determine export price and constructed export price. *Id.* § 1677a(c).

105. These expenses need to be adjusted to determine constructed export price. *Id.* § 1677a(d).

106. These adjustments need to be made to determine the price of the foreign like product. *Id.* § 1677b(a)(6)(C)(i).

107. These adjustments need to be made to determine the price of the foreign like product. *Id.* § 1677b(a)(6)(C)(ii); *see also id.* § 1677(16)(B), (C).

108. These adjustments need to be made to determine the price of the foreign like product. *Id.* § 1677b(a)(6)(C)(iii).

109. These adjustments need to be made to determine the price of the foreign like product. *Id.* § 1677b(a)(7).

not individually assessed,<sup>110</sup> the task of predicting or estimating their antidumping liabilities is even more challenging, as their dumping margins depend not on their own prices and costs, but on the prices and costs of other producers.<sup>111</sup>

Antidumping duties are particularly unpredictable when they are assessed on a retrospective basis. The WTO Antidumping Agreement allows two ways of assessing antidumping duties: retrospective and prospective.<sup>112</sup> The United States currently employs a retrospective assessment system, wherein the dumping margin found in an antidumping investigation only determines the amount of cash deposits collected to cover antidumping liabilities for future entries of imports;<sup>113</sup> the final antidumping duties for such imports are not assessed until an administrative review is conducted to determine the actual amount of antidumping duties for the review period.<sup>114</sup> To be sure, this retrospective system is faithful to the notion that the amount of antidumping duties is determined by the dumping margin because, by definition, the dumping margin for a particular entry of imports can be determined only after the entry is made and all of the information that is necessary for the calculation of the dumping margin becomes available. But precisely because of its retrospective nature, this system of assessing antidumping duties leads to a great deal of unpredictability for the parties involved in the importation process. At the time of making an entry of imports, importers and foreign producers have no way of knowing the actual amount of antidumping duties they will owe on the entry; they will not have that information for months or even years after a purchasing decision has to be made.<sup>115</sup>

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110. U.S. antidumping law generally requires the antidumping administering authority to individually determine the dumping margin for each known exporter and producer of the subject merchandise in an antidumping investigation. *Id.* § 1677f-1(c)(1). However, when “it is not practicable to make individual dumping margin determinations . . . because of the large number of exporters and producers involved in the investigation,” U.S. antidumping law allows the antidumping administering authority to selectively examine a limited number of exporters and producers. *Id.* § 1677f-1(c)(2).

111. The dumping margins for the exporters and producers not individually investigated will generally be determined by the “all-others rate,” *id.* § 1673(c)(1)(B)(i), which is the weighted average of the dumping margins established for exporters and producers individually investigated, *id.* § 1673d(c)(5)(A).

112. See WTO Antidumping Agreement, *supra* note 92, art. 9.3.1–2.

113. In the United States, the collection of cash deposits begins on the finding of an affirmative preliminary determination of dumping. 19 U.S.C. § 1673b(d)(1)(B) (2011). Cash deposits will continue to be collected for future entries of imports if an affirmative final determination of dumping is made and a final antidumping order is issued. *Id.* § 1673d(c)(1)(B)(ii).

114. *Id.* § 1675(a)(1), (2)(c).

115. In 2010, the U.S. Department of Commerce, at the request of the U.S. Congress, solicited public comments on the relative advantages and disadvantages of retrospective versus prospective antidumping and countervailing duty systems. Report to Congress: Retrospective Versus Prospective Antidumping and Countervailing Duty Systems; Request for Comment and Notice of a Public Hearing, 75 Fed. Reg. 16,079 (Mar. 31, 2010). Among the comments sub-

The unpredictability of antidumping duties is somewhat reduced, but not entirely eliminated, by having a prospective system of assessing antidumping duties, which is employed by essentially all WTO members other than the United States.<sup>116</sup> Under a prospective system of assessing antidumping duties, the dumping margin calculated in an antidumping investigation determines the final amount of antidumping duties that will be assessed for future entries of imports, unless and until a new “changed circumstance” or “interim” review changes the final amount of antidumping duties going forward.<sup>117</sup> A prospective system of assessing antidumping duties allows the parties involved in the importation process to know exactly what their antidumping liabilities will be for a particular entry of imports at the time of the entry, thereby affording them the certainty they need to make purchasing decisions.<sup>118</sup> A prospective system, however, can only provide predictability in the short term. Since under a prospective system the amount of antidumping duties is still pegged to the dumping margin and the dumping margin could be updated by future reviews, the final amount of antidumping duties importers will owe on imports could change any time a new review is conducted.<sup>119</sup> Under a prospective system, therefore,

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mitted by U.S. importers and foreign producers, one of the most complained-about aspects of the retrospective system was its unpredictability for importers and foreign producers. *See, e.g.*, Letter from Kevin M. Burke, President & CEO, Am. Apparel & Footwear Ass’n, to Ronald K. Lorentzen, Deputy Assistant Sec’y of Commerce for Imp. Admin., U.S. Dep’t of Commerce (Apr. 20, 2010), *available at* <http://ia.ita.doc.gov/download/rvp/cmts-20100420/aafa-rvp-cmt-20100420.pdf> (“The uncertainty generated by the current U.S. system for the collection of antidumping and countervailing duties is a matter of great concern to our members.”); Letter from Robert J. McHale, Dir. of Metal Purchases, Alcoa Inc., to Ronald K. Lorentzen, Deputy Assistant Sec’y of Commerce for Imp. Admin., U.S. Dep’t of Commerce (Apr. 20, 2010), *available at* <http://ia.ita.doc.gov/download/rvp/cmts-20100420/alcoa-rvp-cmt-20100420.pdf> (calling the U.S. system an “untenable situation” because of the uncertainty and fear it creates). For all of the public comments on this subject matter, *see Relative Advantages and Disadvantages of Retrospective Versus Prospective Antidumping and Countervailing Duty Systems: Public Comments Received April 20, 2010*, U.S. IMPORT ADMIN., <http://ia.ita.doc.gov/download/rvp/cmts-20100420/rvp-cmt-20100420-index.html> (last updated Dec. 3, 2010).

116. INT’L TRADE ADMIN., RELATIVE ADVANTAGES AND DISADVANTAGES OF RETROSPECTIVE AND PROSPECTIVE ANTIDUMPING AND COUNTERVAILING DUTY COLLECTION SYSTEMS: REPORT TO CONGRESS 10 (2010), *available at* <http://ia.ita.doc.gov/download/rvp/rvp-final-report-to-congress-20101119.pdf>.

117. *Id.*

118. Technically, importers and foreign producers only face predictability as to the ceiling of their antidumping liabilities. The WTO Antidumping Agreement requires member countries that operate a prospective system of assessing antidumping duties to provide a prompt refund if the importer requests a refund review and if the refund review demonstrates that the amount of antidumping duties assessed at the time of the entry exceeded the actual dumping margin. WTO Antidumping Agreement, *supra* note 92, art. 9.3.2; INT’L TRADE ADMIN., *supra* note 116, at 11. Under a prospective system, therefore, importers could have their antidumping duties reduced retrospectively through a refund review. But even this partial predictability helps importers and foreign producers make sound purchasing decisions.

119. The periodic updating of antidumping duties is explicitly permitted under Article 11.2 of the WTO Antidumping Agreement. WTO Antidumping Agreement, *supra* note 92, art. 11.2.

importers are able to know their antidumping liabilities for the immediate short term but are not able to know their antidumping liabilities for the medium and long terms.

The unpredictability of antidumping duties results in unnecessary uncertainties for respondents in antidumping proceedings and anyone that conducts business with them. Once a foreign producer is subject to an antidumping investigation or has been found guilty of dumping, importers will hesitate to do business with that producer because the antidumping liability could increase and shift to them with little warning or due process.<sup>120</sup> The lack of long-term predictability will also hinder respondents' ability to conduct long-term business planning and make long-term business commitments.<sup>121</sup> These uncertainties are completely unnecessary for the goals of trade remedies. To protect domestic industries from import competition, additional tariffs in the form of fixed antidumping duties should be sufficient, provided that the antidumping duties are set at a large-enough level to remove injury to domestic industries.

### 3. Low Threshold for Activation

The third defect of antidumping as a safety valve is that it has too low a threshold for activation. Under antidumping laws, antidumping duties can be imposed only if the dumped imports cause or threaten to cause "material injury" to a domestic industry or cause "material retardation" of the establishment of such an industry.<sup>122</sup> But as discussed below, this *material-injury standard* is too low and results in too many false positives in antidumping proceedings.

Current international trade rules embody a low injury standard for antidumping. The GATT 1947, the first international agreement to set forth a material-injury standard for antidumping, did not define what constitutes material injury.<sup>123</sup> The 1967 Antidumping Code,<sup>124</sup> negotiated in the GATT Kennedy Round to implement the antidumping provisions of the GATT 1947, set a high standard for determining injury in antidumping investigations by requiring that dumped imports be "demonstrably the principal

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120. See BOVARD, *supra* note 51, at 146–48.

121. See *Administration of the Antidumping Act of 1921: Hearings Before the Subcomm. on Trade of the H. Comm. on Ways & Means*, 95th Cong. 188–91 (1978) (statement of Am. Imps. Ass'n, Inc.) (arguing that contingent antidumping liabilities adversely affect long-term business relationships).

122. General Agreement on Tariffs and Trade art. VI:6, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 190 [hereinafter GATT 1994] (setting forth the injury requirement for the imposition of antidumping and countervailing duties); e.g., WTO Antidumping Agreement, *supra* note 92, art. 3 n.9 (defining the term "injury").

123. MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 418 (2d ed. 2006).

124. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *done* June 30, 1967, 19 U.S.T. 4348, 651 U.N.T.S. 320, *reprinted in* 32 Fed. Reg. 14,962 (Oct. 28, 1967).

cause” of material injury.<sup>125</sup> It also required antidumping authorities to weigh the effect of the dumping against all other factors that, taken together, may have been adversely affecting the industry in question.<sup>126</sup> However, by the time the 1967 Antidumping Code was superseded by the 1979 Antidumping Code<sup>127</sup> as a result of the GATT Tokyo Round negotiations, the “principal cause” requirement and the requirement that the effect of dumping be weighed against other factors were removed.<sup>128</sup> The 1979 Antidumping Code only required that dumped imports “cause” the injury and that injuries caused by other factors not be attributed to the dumped imports.<sup>129</sup> The subsequent WTO Antidumping Agreement, signed in 1994, adopted this relaxed injury standard almost verbatim.<sup>130</sup>

Consistent with international antidumping rules, national antidumping laws currently require a low injury standard as well. Under U.S. antidumping law, for example, material injury is defined as harm that “is not inconsequential, immaterial, or unimportant.”<sup>131</sup> This tautological definition is supplemented with a list of statutory factors that should be considered in making material-injury determinations,<sup>132</sup> but the statute provides no guidance on how severe the injury has to be before it can be considered material. The statute also requires the material injury to be “by reason of” imports or sales of the subject merchandise.<sup>133</sup> Under the case law, however, the “by reason of” standard only requires a finding that imports of the subject merchandise are *a* cause of the injury, not that they are a primary or substantial cause of the injury.<sup>134</sup>

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125. *Id.* art. 3(a).

126. *Id.*

127. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade art. 16(5), *done* Apr. 12, 1979, 31 U.S.T. 4919, 1186 U.N.T.S. 2 [hereinafter 1979 Antidumping Code].

128. *See id.* art. 3. These requirements were removed as a concession in exchange for the United States’ agreement to adopt a material-injury test in countervailing duty investigations. Peter D. Staple, Note, *Implementing “Tokyo Round” Commitments: The New Injury Standard in Antidumping and Countervailing Duty Laws*, 32 STAN. L. REV. 1183, 1192–94 (1980).

129. 1979 Antidumping Code, *supra* note 127, art. 3(4).

130. WTO Antidumping Agreement, *supra* note 92, art. 3.5.

131. 19 U.S.C. § 1677(7)(A) (2011).

132. The factors that should be considered in making material-injury determinations include

the volume of imports of the subject merchandise, the effect of imports of that merchandise on prices in the United States for domestic like products, . . . the impact of imports of such merchandise on domestic producers of domestic like products . . . [and] such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports.

*Id.* § 1677(7)(B).

133. *See id.* § 1673.

134. *See* Bhala, *supra* note 11, at 51–52; Cho, *supra* note 25, at 379.

Many commentators have criticized the low injury standard in anti-dumping proceedings as evidence of the protectionist nature of antidumping.<sup>135</sup> But those criticisms do not respond to the safety-valve theories of antidumping because, according to those theories, antidumping is useful precisely because of its ability to provide protection. A more appropriate criticism of the low injury standard in antidumping proceedings is not that it results in protection, but that it results in protection where protection is not warranted. Under antidumping laws, firms whose injury is not primarily or substantially caused by imports may still be able to successfully petition for antidumping duties as long as they can demonstrate that imports somewhat contributed to the injury. This injury standard is too low to ensure that only firms that are sufficiently injured by imports will obtain antidumping protection.

### C. Antidumping and the Democracy Deficit

Besides being a faulty safety valve, antidumping faces another fundamental problem: it reduces trade remedies to numerical formulas that deprive the trade remedy process of the democratic participation that is essential for seeking consensus and compromises among vying interest groups. As discussed below, this democracy deficit in antidumping hinders the process by which societal preferences on trade protectionism are formed and has implications for the broader trade agenda.

While the word democracy has many connotations, the element of democracy that is most applicable to international relations is participatory democracy, that is, “the democratic right of citizens to have knowledge of and participate in decisions that will affect their interests.”<sup>136</sup> A lack of participatory democracy is of particular concern to trade policy as “trade policy is more subject to capture by special interest groups than is ordinary law-making.”<sup>137</sup>

Many scholars have criticized the democracy deficit in trade policy, broadly defined.<sup>138</sup> Many of the institutions established under international

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135. See, e.g., Barceló, *supra* note 25, at 513–17 (arguing that an injury test based on injury to competitors is invalid and such a test, even with a substantial-injury requirement, contains strong elements of protectionist bias); Cho, *supra* note 25, at 377–80 (arguing that the injury test in antidumping cases protects competitors rather than competition itself and makes it easier for antidumping authorities to find injuries even when such injuries do not exist).

136. Robert F. Housman, *Democratizing International Trade Decision-Making*, 27 CORNELL INT’L L.J. 699, 702–03 (1994) (defining the word democracy in the context of international trade decision making).

137. See Jeffery Atik, *Democratizing the WTO*, 33 GEO. WASH. INT’L L. REV. 451, 459 (2001).

138. See, e.g., DANIEL C. ESTY, *GREENING THE GATT* (1994) (discussing the tension between trade and the environment and laying out a framework for greater accommodation of environmentalist goals under the GATT); Patti Goldman, *The Democratization of the Development of United States Trade Policy*, 27 CORNELL INT’L L.J. 631 (1994) (advocating the

trade agreements, such as the GATT, the WTO, and the NAFTA, to name just a few, have been criticized as lacking an avenue for public participation in the formulation of their rules or in their activities.<sup>139</sup>

What is missing from the scholarly discourse on the democracy deficit in trade policy, however, is discussions of the democracy deficit in trade remedy instruments like antidumping. As in the case of the formulation of trade rules under international trade agreements, the determination of antidumping duty rates affects a diverse range of domestic interests in the importing country: domestic manufacturers of products competing with the imports subject to antidumping investigation will favor the imposition of antidumping duties, while importers, consumers, and downstream users of the imports will oppose it.<sup>140</sup> The decision to impose antidumping duties will result in tradeoffs among these interests, and the amount of antidumping duties will determine the extent of the tradeoffs. If antidumping is nothing more than “ordinary protection,” as the economic critiques of antidumping have established,<sup>141</sup> and if democratic principles are to apply to antidumping proceedings, the logical conclusion is that all of the parties whose interests are affected by the imposition of antidumping duties should have a say in the determination of antidumping duties.<sup>142</sup>

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formulation of U.S. trade policies in accordance with democratic principles applicable to domestic environmental, health, and safety policies); Housman, *supra* note 136 (criticizing the undemocratic nature of international trade decision making); Mark Ritchie, *Democratizing the Trade Policy-Making Process: The Lessons of NAFTA and Their Implications for the GATT*, 27 CORNELL INT’L L.J. 749 (1994) (criticizing the lack of democratic participation in the drafting of the North American Free Trade Agreement [NAFTA]); Andrea K. Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. PA. J. INT’L ECON. L. 587 (1998) (criticizing the lack of individual participation in the dispute settlement mechanisms of international trade organizations); Paul Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 NW. J. INT’L L. & BUS. 681 (1996) (arguing that international lawmaking raises distinctive problems of accountability that affect international law’s legitimacy); *see also* Atik, *supra* note 137, at 454–55 (criticizing the democracy deficit in the WTO).

139. *See* Atik, *supra* note 137, at 454–63 (criticizing the lack of democracy in the WTO); Housman, *supra* note 136, at 703–15, 721–27 (criticizing the lack of democracy under the GATT and the NAFTA); Ritchie, *supra* note 138, at 749–51 (criticizing the lack of public participation in the negotiations of the NAFTA and the GATT).

140. That consumers and downstream users are adversely affected by the imposition of antidumping duties can be illustrated by the large number of comments submitted by parties belonging to those two groups in response to the Department of Commerce’s solicitation of public comments on the relative advantages and disadvantages of retrospective versus prospective antidumping and countervailing duty systems. *See supra* note 115.

141. *See supra* note 66 and accompanying text.

142. J. Michael Finger, Francis Ng, and Sonam Wangchuk have made a similar argument. They contend that antidumping serves the function of a safeguard, and that “the key characteristic of a sensible safeguard procedure is that it treats domestic interests that would be harmed by an import restriction equally with those domestic interests that would benefit.” Finger et al., *supra* note 71, at 10. They further argue that “[t]he ‘morality’ of the foreign interest is irrelevant—the issue is the plus and minus on the domestic economy.” *Id.*

However, antidumping as it is currently formulated prevents meaningful participation by all stakeholders in antidumping proceedings. Aside from procedural and institutional idiosyncrasies that have been known to favor petitioners,<sup>143</sup> one particular aspect of antidumping poses the ultimate hurdle to democratic participation. That aspect is none other than the *dumping-margin requirement*, that is, the requirement that the amount of antidumping duties be tied to the dumping margin.

The dumping-margin requirement leads to democracy deficit in antidumping proceedings primarily for two reasons. First, the requirement that the amount of antidumping duties be tied to the dumping margin turns antidumping into a mechanical number-crunching process that is devoid of the rich political and socioeconomic contexts in which trade policy usually operates.<sup>144</sup> Under the dumping-margin requirement, the only thing that matters for antidumping purposes is how the numbers stack up: the amount of antidumping duties is dictated by the difference between the export price and the normal value, with complex formulas governing the calculation of both.<sup>145</sup> To be sure, the WTO Antidumping Agreement only mandates that the amount of antidumping duties not exceed the dumping margin.<sup>146</sup> But with the whole idea of antidumping centered on the notion that the dumping margin provides a quantifiable measure of the extent of “unfair trade,” basing the final amount of antidumping duties on anything other than the dumping margin would contradict the calculation of the dumping margin in the first place. As a result, the formulas under which antidumping duties are calculated are not amenable to flexible adjustments that take account of parties’ varied circumstances. When trade policy is relegated to mechanical formulas, it loses the ability to accommodate competing interests through a process for negotiating bargains and compromises. Even if antidumping could find a way to overcome the procedural and institutional biases in favor of petitioners, it would still be unable to take account of the interests of all stakeholders in a meaningful manner because the amount of antidumping duties would be determined by a number—the dumping margin, a number

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143. See *supra* note 26.

144. See *supra* Part I.B. It has been recognized that trade-policy decisions overlap with a large range of political, economic, and social agendas. See STEPHEN D. COHEN ET AL., *FUNDAMENTALS OF U.S. FOREIGN TRADE POLICY: ECONOMICS, POLITICS, LAWS, AND ISSUES* 3–24 (2d ed. 2003).

145. The Antidumping Manual published by the Import Administration of the International Trade Administration of the Department of Commerce provides a detailed description of the formulas by which the export price and the normal value are calculated in U.S. antidumping proceedings. See IMP. ADMIN., U.S. DEP’T OF COMMERCE, *ANTIDUMPING MANUAL* ch. 7 (2009), available at <http://ia.ita.doc.gov/admanual/index.html>.

146. WTO Antidumping Agreement, *supra* note 92, art. 9.3. And under the lesser duty rule, the WTO Antidumping Agreement explicitly allows the amount of antidumping duties to be lower than the dumping margin “if such a lower duty amount would be adequate to remove the injury to the domestic industry.” *Id.* art. 9.1.

that is also economically meaningless.<sup>147</sup> To be sure, some scholars have called for the inclusion of a public interest clause in antidumping laws,<sup>148</sup> and certain jurisdictions, such as Canada,<sup>149</sup> the European Union, and Australia,<sup>150</sup> do have such a clause in their antidumping statutes. But with the dumping margin at the center of antidumping, a public interest clause could at most enable a binary policy choice—antidumping duties versus no antidumping duties.<sup>151</sup> It would not be able to allow investigating authorities to incrementally adjust the amount of antidumping duties in a way that does not threaten the centrality of the dumping-margin requirement. The same can also be said of other proposals to enhance public participation in antidumping proceedings.<sup>152</sup>

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147. See *supra* Part I.A for discussions on the lack of economic justifications for antidumping.

148. See, e.g., Claude Barfield, *Anti-dumping Reform: Time to Go Back to Basics*, 28 *WORLD ECON.* 719, 729–30 (2005) (arguing that antidumping analysis should be expanded to include an assessment of the costs and benefits of individual actions across the entire economy); Marco C.E.J. Bronckers, *Rehabilitating Antidumping and Other Trade Remedies Through Cost-Benefit Analyses*, *J. WORLD TRADE*, Apr. 1996, at 5, 23–29 (arguing that a cost-benefit analysis should be made mandatory for antidumping and other trade remedy measures); Sungjoon Cho, *A Dual Catastrophe of Protectionism*, 25 *NW. J. INT'L L. & BUS.* 315, 343 (2005) [hereinafter Cho, *Dual Catastrophe*] (arguing that the antidumping statute should be amended to include a public interest clause); Finger, *supra* note 33, at 69–74 (arguing for substituting a “national economic interest test” for the injury test in antidumping proceedings). *But cf.* Sungjoon Cho, *Beyond Doha’s Promises: Administrative Barriers As an Obstruction to Development*, 25 *BERKELEY J. INT'L L.* 395, 414–15 (2007) [hereinafter Cho, *Administrative Barriers*] (suggesting that developed countries use a public interest clause to exempt developing countries from antidumping duties).

149. See Finger, *supra* note 33, at 71–72 (describing the public interest provision in Canadian antidumping law).

150. See Cho, *supra* note 25, at 400 (commenting on the public interest clause in EU and Australian antidumping laws).

151. The EU antidumping law, for example, only provides a binary choice when it comes to the weighing of public interest (or “community interest” in EU law parlance) in antidumping proceedings. The EU Antidumping Regulation provides that “[m]easures, as determined on the basis of the dumping and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures.” EU Antidumping Regulation, *supra* note 7, art. 21.1, 2009 O.J. (L 343) at 70. Under this provision, the European Commission has the discretion not to impose antidumping duties where the public interest does not support them but does not have the discretion to impose, say, half of the amount of antidumping duties that would otherwise be imposed. Even with this limited set of policy options, the public interest clause in EU antidumping law is hard to implement and has had little practical impact. See Hoekman & Mavroidis, *supra* note 25, at 46–47.

152. For example, Professor Sungjoon Cho proposed to require the Department of Commerce to conduct a mandatory interagency consultation and a mandatory public hearing before the imposition of final antidumping duties. See Cho, *Dual Catastrophe*, *supra* note 148, at 343–44. These consultations and hearings would not have an impact on the amount of antidumping duties if the amount of antidumping duties were still required to be based on the dumping margin.

Second, the dumping-margin requirement leads to democracy deficit because the “unfair trade” label affixed to dumping deprives the antidumping process of honest debates on protectionism and its consequences. The idea that dumping is unfair and antidumping duties are needed to “level the playing field” allows politicians and import-competing industries to take the “rhetorical high ground” in debates on trade policy.<sup>153</sup> Even the word dumping itself carries a derogatory connotation.<sup>154</sup> By focusing on the “unfair” nature of the dumped imports, antidumping allows domestic interest groups to appeal to the superficial righteousness of protecting domestic producers from import competition<sup>155</sup> and shields the real questions about trade protectionism from being scrutinized and debated in a meaningful manner. Domestic petitioners, for instance, do not have to admit their high costs when they can lay the blame on “unfair” foreign imports.<sup>156</sup> The question of what effect antidumping has on consumers and downstream users also becomes much less relevant when the overriding concern is about the “fairness” of the imports. With this “unfair trade” rhetoric hijacking the antidumping process, there are no honest debates on whether and at what costs the importing country needs trade protection in the form of antidumping duties. As a result, even if the procedural and institutional barriers to democratic participation in antidumping proceedings were removed, the ensuing democratic participation would still not be meaningful because the debates would not focus on the true reasons for trade protection.

The adverse impact of the democracy deficit in antidumping cannot be overstated. Not only does it deprive stakeholders of their right to participate in decisions that affect their interests, it also hinders the accomplishment of one broader goal: the goal of fostering informed consensus on trade protectionism. If a country decides to keep high import tariffs to protect its domestic industries after carefully weighing the costs and benefits of such a policy, although that policy will be unfortunate for free trade, at least the country will have gone through an informed process to arrive at that policy. A protectionist trade policy made on the basis of an informed consensus merely means that the time for free trade has not come yet. In that scenario, because there is a process permitting open and honest debate on free trade and protectionism, the necessary conditions for forming a future societal preference for free trade are preserved even though the process initially results in adverse policy outcomes.<sup>157</sup> In antidumping proceedings, however,

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153. See Pierce, *supra* note 80, at 735.

154. Michael Kabik, *The Dilemma of “Dumping” from Nonmarket Economy Countries*, 6 EMORY INT’L L. REV. 339, 345 (1992).

155. See Niels, *supra* note 52, at 485.

156. MICHAEL O. MOORE, ANTIDUMPING REFORM IN THE DOHA ROUND: A PESSIMISTIC APPRAISAL 19 (paper presented at “The Economics of the Doha Round and the WTO,” Univ. of H.K., Dec. 16–17, 2005), available at [http://home.gwu.edu/~mom/ad\\_reform\\_doha.pdf](http://home.gwu.edu/~mom/ad_reform_doha.pdf).

157. This conclusion finds support in the international political economy literature on trade-preference formations. As is noted by an international political economy scholar, “determining the societal interests at stake” is the first step for “governments decid[ing] to engage

the process for open and honest debate on trade protectionism is compromised by the dumping-margin requirement and the “unfair trade” rhetoric associated with it. If a country decides to impose high antidumping duties to protect its domestic industries, it will not be because the country as a whole has decided that the benefits of trade protectionism outweigh its costs. Instead, it will be because the dumping-margin formulas used by the investigating authority happen to have produced a high dumping margin. A fundamental problem with antidumping, therefore, is that it hinders the process for seeking and reaching an informed consensus on trade protectionism, a process that is crucial for the broader trade agenda.<sup>158</sup>

## II. A REFORM PROPOSAL: REPLACING ANTIDUMPING WITH A COUNTRY-SPECIFIC SAFEGUARD

The foregoing discussions set out the fundamental defects of antidumping. As summarized above, the economic critiques of antidumping demonstrate that antidumping lacks sound economic justifications. The economic critiques, however, fail to see through the rhetoric of antidumping and, as a result, do not respond to the argument that the real utility of antidumping lies in its role as a safety valve for protectionist pressures. This Article breaks new ground by acknowledging this potential safety-valve function and then proceeding to examine how well antidumping performs that function. I argue that antidumping is indeed a faulty safety valve in that it provides arbitrary levels of protection for petitioners, results in unnecessary uncertainties for respondents, and has too low a threshold for activation. This Article also breaks new ground by discussing the democracy deficit in the context of antidumping, a problem that has larger ramifications for trade policy.

The identification of the aforementioned defects of antidumping is the starting point for antidumping reforms. Ideally, a sound reform proposal should address all of the above defects: it should remove the economic irrationality of antidumping, make antidumping a better safety valve, and reduce the democracy deficit in the antidumping process. In the meantime, the reform proposal must be politically feasible in order to have a realistic chance of approval.

Fortunately, there does exist a trade remedy instrument that reasonably accomplishes all of the policy objectives identified above. Below, I propose to replace antidumping with that trade remedy instrument. Specifically, I propose to eliminate the unfair-pricing component of antidumping, increase

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in free trade [versus] protectionism.” CORNELIA WOLL, *FIRM INTERESTS: HOW GOVERNMENTS SHAPE BUSINESS LOBBYING ON GLOBAL TRADE* 25–26 (2008) (surveying discussions of trade-preference formations in the international political economy literature).

158. For example, in the 1990s, after the conclusion of the NAFTA, the United States made “only limited efforts to pursue bilateral free trade agreements due to a lack of political consensus on such agreements.” See C. O’Neal Taylor, *Of Free Trade Agreements and Models*, 19 *IND. INT’L & COMP. L. REV.* 569, 573 (2009).

the injury standard under antidumping, and require public interest to be taken into account in the antidumping process. As shall become clear below, the result of these reform measures would be to replace antidumping with a country-specific safeguard equipped with a heightened injury standard and a mandatory public interest clause.

### A. Major Elements of the Reform Proposal

#### 1. Eliminating the Unfair-Pricing Component of Antidumping

The reform proposal put forward in this Article starts with a simple proposition: since there are no economic justifications for the unfair-pricing component of antidumping,<sup>159</sup> that component of antidumping should be eliminated altogether. Under this reform proposal, investigating authorities will only need to investigate the amount of injury caused by imports, not whether the imports are being dumped.

The proposal to eliminate the unfair-pricing component of antidumping, however, should not be equated with a proposal to abolish antidumping. There have been many past proposals for the wholesale abolition of antidumping laws, with one prominent economist famously suggesting that “[t]he most appealing option is to get rid of antidumping laws and to put nothing in their place.”<sup>160</sup> Many scholars have also recommended replacing antidumping with antitrust provisions on predatory pricing.<sup>161</sup> But since antidumping is not intended to be a defense against predatory pricing,<sup>162</sup> proposals to replace antidumping with antitrust are essentially the same as proposals to “repeal[] antidumping and replac[e] it with nothing.”<sup>163</sup> One fundamental problem with these repeal proposals is that they are not politically feasible. As is widely noted, efforts to completely abolish antidumping

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159. See *supra* Part I.A.

160. Finger, *supra* note 33, at 57. For other proposals to abolish antidumping, see Caine, *supra* note 33, at 681 (advocating the repeal of the antidumping provisions of the Tariff Act of 1930); McGee, *supra* note 26, at 561 (“The antidumping laws must be repealed, the sooner the better.”).

161. See, e.g., GABRIELLE MARCEAU, ANTI-DUMPING AND ANTI-TRUST IN FREE-TRADE AREAS 51 (1994) (arguing that antidumping law should be replaced by domestic antitrust law); John J. Barceló III, *The Antidumping Law: Repeal It or Revise It*, 1 MICH. Y.B. INT’L LEGAL STUD. 53, 66–67 (1979) (arguing that “protection should not take the form of a special antidumping law” and that “the existing domestic antitrust laws are entirely adequate to protect against the threat of predation from foreign dumpers”); Barfield, *supra* note 148, at 722–23 (“[I]f political considerations were not present, the most economically sensible (and equitable) course would be to treat allegations of price discrimination and below-cost pricing as potential infractions against a country’s competition policy regime.”).

162. See *supra* note 53 and accompanying text.

163. Finger, *supra* note 33, at 60.

face steep hurdles because of the political influence of domestic interest groups favoring antidumping.<sup>164</sup>

The proposal put forward here differs from the previous repeal proposals in that it preserves a meaningful trade-protection mechanism for petitioners and trade-policy makers. It eliminates the unfair-pricing component of antidumping, but petitioners will still be able to receive temporary relief from imports if they can demonstrate a sufficient level of injury. In other words, the proposed trade remedy instrument is all about injury, not about “unfair trade.” The name antidumping would become a misnomer, as the proposed trade remedy instrument would not target dumping anymore. In essence, the proposed trade remedy instrument is a safeguard, as it provides temporary trade protection in the event of injury regardless of whether the underlying cause of the injury is fair or unfair.

## 2. A Higher Injury Standard

With the proposed safeguard centered on injury, the key aspect of the reform proposal is its standard for determining that injury. As discussed above, the material-injury standard under current antidumping laws does not specify what level of injury will be considered material and does not require that imports be a primary or substantial cause of injury.<sup>165</sup> As discussed above, not only does this injury standard favor petitioners, but it also may lead to the activation of the antidumping safety valve when it should not be activated.<sup>166</sup>

To make antidumping a better safety valve in terms of being able to identify industries that truly deserve trade protection, I propose a higher injury standard for the new safeguard that will replace antidumping. The injury standard under the proposed safeguard has two components. First, it requires petitioners to suffer at least a *significant* amount of injury or threat of injury before they can invoke the safeguard. The amount of injury or threat of injury can no longer be just “inconsequential, immaterial, or unimportant” as under current U.S. antidumping law.<sup>167</sup> Second, the injury standard under the proposed safeguard requires that imports be at least a *substantial* cause of the injury or threat of injury to petitioners. Merely showing that imports are *a* cause of the injury, as permitted under current antidumping laws,<sup>168</sup> will no longer be deemed sufficient. Consistent with

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164. See Cho, *supra* note 25, at 401 (“[R]epealing . . . the current antidumping statute [in the United States] appears [to be] politically infeasible considering the strong protectionist support within Congress.”); see also Cho, *Administrative Barriers*, *supra* note 148, at 414 (noting that proposals to repeal antidumping remain “an academic undertaking” because of “the strong political appeal of antidumping measures”); Finger, *supra* note 33, at 57 (“[S]traightforward repeal of antidumping would likely be difficult to achieve.”).

165. See *supra* notes 123–134 and accompanying text.

166. See *supra* Part I.B.3.

167. 19 U.S.C. § 1677(7)(A) (2011).

168. See *supra* notes 127–130, 133–134 and accompanying text.

the basic goal of the new safeguard, these two injury requirements would prevent unnecessary protection of industries that do not suffer significant injuries caused by imports.

In terms of language, the proposed safeguard can borrow language from the current global safeguard's injury standard. The global safeguard, spelled out in Article XIX of the GATT 1994 and the WTO Agreement on Safeguards, requires that increased imports cause or threaten to cause "serious injury" to domestic producers.<sup>169</sup> This "serious injury" language captures, approximately, the injury standard proposed for the new safeguard in terms of both the extent of injury and the causal link between imports and injury. As for the extent of injury, the WTO Agreement on Safeguards defines the term "serious injury" as "a significant overall impairment in the position of a domestic industry."<sup>170</sup> The Appellate Body of the WTO has indicated that this *serious-injury standard* is a "very high one," "much higher" than the material-injury standard used in the Antidumping Agreement, the Agreement on Subsidies and Countervailing Measures, and the GATT 1994.<sup>171</sup> The Appellate Body justified this interpretation of the serious-injury standard by citing the "extraordinary nature" of the global safeguard and by pointing out that "the application of a safeguard measure does not depend upon 'unfair' trade actions, as is the case with antidumping or countervailing measures."<sup>172</sup> But since the distinction between "fair" and "unfair" trade in antidumping is fictitious, antidumping is indeed no less "extraordinary" than the global safeguard, with both being "ordinary protection" for domestic producers.<sup>173</sup> It would be appropriate, therefore, for the antidumping-converted safeguard to require the same extent of injury as the global safeguard.

As for the causal link component of the injury standard, Article 4.2(b) of the WTO Agreement on Safeguards states that a serious-injury determination under the global safeguard requires a causal relationship between increased imports and injury, and that factors other than imports must not be attributed to increased imports in the determination of the causal relationship.<sup>174</sup> WTO case law has interpreted this causal relationship to require "a

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169. GATT 1994, *supra* note 122, art. XIX:1(a); WTO Agreement on Safeguards, *supra* note 10, art. 2(1).

170. WTO Agreement on Safeguards, *supra* note 10, art. 4(1)(a).

171. Appellate Body Report, *United States—Safeguard Measures on Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, ¶ 124, WT/DS177/AB/R, WT/DS178/AB/R (May 1, 2001) [hereinafter *US—Lamb*]; *Technical Information on Safeguard Measures: Causation*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/safeg\\_e/safeg\\_info\\_e.htm](http://www.wto.org/english/tratop_e/safeg_e/safeg_info_e.htm) (last visited Nov. 16, 2012).

172. *US—Lamb*, *supra* note 171, ¶ 124 (quoting Appellate Body Report, *Argentina—Safeguard Measures on Imports of Footwear*, ¶ 94, WT/DS121/AB/R (Dec. 14, 1999)).

173. See Finger, *supra* note 66, at 34 ("Antidumping is ordinary protection with a grand public relations program.")

174. WTO Agreement on Safeguards, *supra* note 10, art. 4.2(b).

genuine and substantial relationship of cause and effect”<sup>175</sup> and has required investigating authorities to distinguish the injury caused by increased imports from that caused by other factors.<sup>176</sup> This causal relationship, however, does not require that “increased imports *on their own* must be capable of causing serious injury.”<sup>177</sup>

It is important to note that there are flaws with the causation analysis under both the serious-injury standard under the global safeguard and the material-injury standard under antidumping. The causation analysis under the global safeguard has been criticized for substituting correlation or coincidence for causation and for trying to determine the causal effect of imports when import quantities are simultaneously determined along with other variables.<sup>178</sup> Similar criticisms have been directed at the causation analysis under the material-injury standard under antidumping as well.<sup>179</sup> While suggesting that the new safeguard borrow the injury standard currently used by the global safeguard, I do not aim to resolve these issues that have long plagued the causation analysis under the global safeguard. Nor do I aim to propose ways to improve the causation analysis under current antidumping laws. The limited goal of this Article regarding injury is to identify an area where an improvement can be readily made—that is, to elevate the injury standard under antidumping from material injury to serious injury while leaving the complexities surrounding the determination of injury to future case-law development.

It is also important to note that the new safeguard proposed in this Article does not borrow all of the elements of the injury standard currently used under the global safeguard. Specifically, the new safeguard will not require that the serious injury be caused by “increased quantities of imports” as a result of “unforeseen developments” as the global safeguard does.<sup>180</sup> As was

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175. See Appellate Body Report, *United States—Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, ¶ 69, WT/DS166/AB/R (Dec. 22, 2000).

176. *Id.* ¶ 68.

177. *Id.* ¶ 70.

178. See Alan O. Sykes, *The Persistent Puzzles of Safeguards*, 7 J. INT’L ECON. L. 523, 557–58 (2004) (criticizing the causation analysis under the global safeguard).

179. See Presley L. Warner, *Canada-United States Free Trade: The Case for Replacing Antidumping with Antitrust*, 23 LAW & POL’Y INT’L BUS. 791, 807–08 (1992) (describing criticisms by Ronald Cass and Alan Sykes of the injury-causation analysis in U.S. antidumping and countervailing duty proceedings).

180. Article XIX of the GATT 1994 states:

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

pointed out by Professor Alan Sykes, this requirement under the global safeguard suffers many conceptual problems that threaten the coherency of the global safeguard.<sup>181</sup> As Sykes argued, the Appellate Body of the WTO has not established a clear “baseline against which the existence of ‘increased quantities’ [of imports] . . . [would be] assessed.”<sup>182</sup> Nor has it provided any guidance for many important questions surrounding the phrase “unforeseen developments,” for example, “At what point in time must the events in question have been unforeseen . . . ?”<sup>183</sup> Furthermore, an issue that has so far escaped scholarly attention is the apparent self-contradiction of the unforeseen-developments requirement: the trade negotiators must not have foreseen the developments necessitating a specific global safeguard measure, but the fact that the global safeguard is in place at all indicates that the trade negotiators did foresee the possibility of the use of global safeguard measures in certain situations. By discarding this requirement of the global safeguard, the new safeguard proposed in this Article will be able to avoid these conceptual problems.

### 3. No Nondiscrimination Requirement

One defining feature of the new safeguard proposed in this Article is that it does not require nondiscrimination as to the source of imports as the global safeguard does.<sup>184</sup> The new safeguard, therefore, can be imposed on a

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GATT 1994, *supra* note 122, art. XIX:1(a) (emphasis added). The WTO Agreement on Safeguards, which was entered into to implement Article XIX of the GATT 1994, dropped the phrase “unforeseen developments” from its text. The WTO Agreement on Safeguards only 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.

WTO Agreement on Safeguards, *supra* note 10, art. 2(1) (emphasis added) (footnote omitted). Subsequent WTO cases have revived the unforeseen-developments requirement by interpreting Article 2(1) of the WTO Agreement on Safeguards to require a finding that the serious injury was a result of “developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated.” See Appellate Body Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶ 89, WT/DS98/AB/R (Dec. 14, 1999) (quoting *Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Concession Under the Terms of Article XIX*, ¶ 9, GATT/CP/106 (Mar. 27, 1951)).

181. See Sykes, *supra* note 178, at 539–42.

182. *Id.* at 541.

183. *Id.* at 540.

184. WTO Agreement on Safeguards, *supra* note 10, art. 2(2) (“Safeguard measures shall be applied to a product being imported irrespective of its source.”).

country-by-country basis as antidumping duties can. For this reason, the new safeguard can be officially referred to as a *country-specific safeguard*.

The concept of a country-specific safeguard is not new in the framework of the GATT/WTO. In the 1960s and 1970s, country-specific safeguards were adopted when Eastern European countries such as Hungary, Poland, and Romania joined the GATT.<sup>185</sup> Currently, the WTO allows the use of a “China safeguard”—a country-specific safeguard against imports from China put in place because of a special obligation China undertook on its accession to the WTO.<sup>186</sup> These country-specific safeguards, however, can only be used against imports from specific countries. What this Article proposes is essentially a generally available country-specific safeguard that could be used against imports from any WTO member.

It should be noted that this Article was not the first to propose a generally available country-specific safeguard. During the GATT Tokyo Round negotiations in the 1970s on a Safeguards Code, “a number of GATT contracting parties, notably the European Community, took the position that a new Safeguards Code ought to authorize protectionist measures” to be applied selectively to target countries responsible for the market disruption that necessitates the safeguards.<sup>187</sup> But efforts to allow the selective use of GATT safeguards “met with strong resistance from developing countries . . . [and] [n]o agreement could be reached” because of the selectivity issue.<sup>188</sup> Marco C.E.J. Bronckers subsequently argued that “the traditional interpretation of [the] non-discrimination [requirement under GATT Article XIX] condone[d] selectivity to a considerable extent,” that selectivity should be explicitly recognized to “improve equity, both in official safeguard actions as well as in ‘grey area’ measures,” and that “a recognition of selectivity could unblock the negotiations on a new Safeguards Code.”<sup>189</sup>

What distinguishes the country-specific safeguard proposal put forward in this Article from past selective-safeguard proposals are the contexts of those proposals. The selective safeguards proposed in the past were not proposed to replace antidumping; instead, they were proposed as stand-alone

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185. Dukgeun Ahn, *Restructuring the WTO Safeguard System*, in *THE WTO TRADE REMEDY SYSTEM: EAST ASIAN PERSPECTIVES* 11, 22 n.38 (Mitsuo Matsushita et al. eds., 2006).

186. See Protocol on the Accession of the People’s Republic of China art. 16, *opened for signature* Nov. 10, 2001, WT/L/432 [hereinafter *China Accession Protocol*] (providing for a “transitional product-specific safeguard mechanism.”). China’s agreement to allow this so-called China safeguard is one of many special obligations China undertook on its accession to the WTO in 2001. For a general overview of China’s “WTO-plus” obligations, see Julia Ya Qin, “WTO-Plus” *Obligations and Their Implications for the World Trade Organization Legal System*, 37 *J. WORLD TRADE* 483 (2003).

187. M.C.E.J. BRONCKERS, *SELECTIVE SAFEGUARD MEASURES IN MULTILATERAL TRADE RELATIONS: ISSUES OF PROTECTIONISM IN GATT EUROPEAN COMMUNITY AND UNITED STATES LAW* 4 (1985).

188. *Id.*

189. *Id.* at 5.

reform measures to improve GATT safeguards.<sup>190</sup> If adopted, the selective safeguards would be applied in addition to, not in lieu of, antidumping. It is not surprising, therefore, that developing countries opposed the selective use of GATT safeguards, because that use would only add to the significant disadvantages those countries were already facing. By contrast, the country-specific safeguard proposed in this Article would replace antidumping. If adopted, the country-specific safeguard would be applied in lieu of, not in addition to, antidumping. Countries whose products are likely to be subject to antidumping and safeguard measures will not automatically oppose the selectivity of the country-specific safeguard, because the selectivity of the country-specific safeguard will replace the selectivity of antidumping and will in all likelihood be a lesser evil for those countries for the reasons presented in this Article.

#### 4. No Compensation Requirement

Another important feature of the country-specific safeguard proposed in this Article is that it will not require compensation as the global safeguard does in certain situations.<sup>191</sup> A WTO member that imposes a country-specific safeguard would not have to provide compensation to countries affected by the safeguard as long as the safeguard is otherwise consistent with the WTO. This feature of the country-specific safeguard is intended to replicate the current practice under antidumping, which does not require compensation.<sup>192</sup>

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190. Jan Woznowski comments that “[t]here were no negotiations, as such, of antidumping during the Tokyo Round,” but that negotiations on the Subsidies Code during the Tokyo Round “resulted in a number of amendments to the Kennedy Round Antidumping Code.” These amendments imposed more discipline on the users of antidumping. There were no negotiations aimed at eliminating antidumping during the Tokyo Round. Jan Woznowski, *Anti-dumping Negotiations in the GATT and the WTO: Some Personal Reflections*, in *OPPORTUNITIES AND OBLIGATIONS: NEW PERSPECTIVES ON GLOBAL AND U.S. TRADE POLICY* 89, 91–92 (Terence P. Stewart ed., 2009).

191. Under the WTO Agreement on Safeguards, a country imposing a global safeguard is required to “endeavour to maintain a substantially equivalent level of concessions and other obligations to that existing under GATT 1994 between it and the exporting . . . [countries] which would be affected” by the imposition of the global safeguard. WTO Agreement on Safeguards, *supra* note 10, art. 8(1). If the country imposing the global safeguard and the affected exporting countries cannot reach an agreement on an adequate means of trade compensation, the “affected exporting [countries]” are authorized “to suspend . . . the application of substantially equivalent concessions or other obligations under GATT 1994, to the trade of the [country] applying the safeguard measure” upon providing a timely notice to the WTO. *Id.* art. 8(2). This “right of suspension,” however, “[should] not be exercised for the first three years that a safeguard measure is in effect . . . [if] the safeguard has been taken as a result of an absolute increase in imports . . .” *Id.* art. 8(3).

192. There are no compensation requirements under the WTO Antidumping Agreement. *See* WTO Antidumping Agreement, *supra* note 92.

### 5. “Tariffs Only” and the Determination of Tariffs

Under the country-specific safeguard proposed in this Article, countries will only be allowed to impose extra tariffs on imports subject to the safeguard. They will not be allowed to impose quantitative restrictions such as quotas on such imports. Again, this proposal is intended to ensure continuity with antidumping, which is a tariff-only remedy. In addition, this proposal is consistent with the WTO’s preference for tariffs over quantitative restrictions. The disfavoring of quantitative restrictions by the WTO is most explicitly expressed in Article XI of the GATT 1994, which generally prohibits quantitative restrictions on imports and exports.<sup>193</sup> The rationales for the preference for tariffs over quantitative restrictions are multifold: while tariffs allow the most efficient competitor to supply imports, “quantitative restrictions usually have a trade distorting effect, their allocation can be problematic, and their administration may not be transparent.”<sup>194</sup> Given these detrimental effects of quantitative restrictions and the long-standing efforts by the world trade community to phase them out,<sup>195</sup> it would be a sensible policy for the country-specific safeguard proposed in this Article to eliminate quantitative restrictions. The global safeguard, by contrast, still permits the use of quantitative restrictions in definitive safeguard measures.<sup>196</sup>

The next question is how the amount of extra tariffs will be determined under the country-specific safeguard. By virtue of the elimination of the dumping-margin requirement, the country-specific safeguard will have no set formulas by which to calculate the amount of extra tariffs. The amount of extra tariffs under the country-specific safeguard will be as high as the

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193. Under Article XI of the GATT 1994, except under rare circumstances, WTO members are required not to institute or maintain quantitative restrictions on imports and exports, “through quotas or import or export licenses or other measures.” GATT 1994, *supra* note 122, art. XI.

194. See Panel Report, *Turkey—Restrictions on Imports of Textile and Clothing Products*, ¶ 9.63, WT/DS34/R (May 31, 1999) [hereinafter *Turkey—Textiles*]; see also Chad P. Bown & Rachel McCulloch, *Nondiscrimination and the WTO Agreement on Safeguards*, 2 *WORLD TRADE REV.* 327, 346–47 (2003) (“[S]afeguards applied through quantitative restrictions discriminate in favor of suppliers whose market shares have been falling and against suppliers whose market shares have been rising.”).

195. “Participants in the Uruguay Round negotiations recognized the overall detrimental effects of non-tariff border restrictions” that had long been used in sectors such as agriculture and textiles and clothing and tried to devise mechanisms to phase out those restrictions. Those efforts were reflected in a number of Uruguay Round agreements, including the GATT 1994 Understanding on Balance-of-Payments Provisions, the Agreement on Safeguards, the Agreement on Agriculture, and the Agreement on Textiles and Clothing. *Turkey—Textiles*, *supra* note 194, ¶ 9.65.

196. The WTO Agreement on Safeguards requires provisional safeguard measures to “take the form of tariff increases.” See WTO Agreement on Safeguards, *supra* note 10, art. 6. But there is not a similar requirement for definitive safeguard measures. See Proclamation No. 7529, 67 Fed. Reg. 10,553, 10,555 (Mar. 7, 2002). The global safeguard imposed by the United States on certain steel products in 2002, for example, consisted of both tariff measures and tariff rate quotas. *Id.*

political “market” in the importing country can bear, subject to a general requirement that the amount of extra tariffs be no more than necessary to remedy or prevent serious injury to domestic industries.<sup>197</sup>

There are two reasons for not specifying a formula for the calculation of the amount of extra tariffs under the country-specific safeguard. First, the use of any formulas in calculating the amount of extra tariffs will require after-the-fact data and will therefore invite the uncertainty problem that the country-specific safeguard is designed to avoid.<sup>198</sup> Second, as explained in more detail below, by not specifying a formula for calculating extra tariffs, the country-specific safeguard will break from the number-crunching process of antidumping and return trade remedies to a context-rich political process that emphasizes bargaining and compromise among conflicting interests.

## 6. A Mandatory Public Interest Clause

The country-specific safeguard proposed in this Article will have a mandatory public interest clause. Specifically, investigating authorities will be required to provide adequate opportunities for all parties affected by the country-specific safeguard to submit their views and evidence on the proposed safeguard and will be required to take into account such views and evidence in deciding whether the imposition of the safeguard would be in the public interest. Both the global safeguard and the China safeguard currently have such a public interest clause.<sup>199</sup> But as discussed above, a public interest clause for antidumping would be fundamentally at odds with the centrality of the dumping-margin requirement in antidumping.<sup>200</sup> Because there is no dumping-margin requirement under the country-specific safeguard, however, a public interest clause would be as good a fit for the country-specific safeguard as it is for the global safeguard and the China safeguard. Along with the elimination of the dumping-margin requirement, the public interest clause is intended to transform the trade remedy process

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197. The global safeguard has a similar requirement. Under the global safeguard, a country can apply safeguard measures “only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.” See WTO Agreement on Safeguards, *supra* note 10, art. 5(1).

198. See *supra* Part I.B.2.

199. WTO Agreement on Safeguards, *supra* note 10, art. 3(1) (“[The global safeguard] investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, as to whether the application of a safeguard measure would be in the public interest.”); China Accession Protocol, *supra* note 186, art. 16(5) (“Prior to application of a measure pursuant to paragraph 3, the WTO Member taking such action shall provide reasonable public notice to all interested parties and provide adequate opportunity for importers, exporters and other interested parties to submit their views and evidence on the appropriateness of the proposed measure and whether it would be in the public interest.”).

200. See *supra* text accompanying notes 148–152.

from a mechanical one based on formulas and number-crunching to a political one based on bargaining and compromise.

### 7. Fixed Duration, but No Limits on Frequency of Use

The country-specific safeguard proposed in this Article will be required to have a fixed duration. Under antidumping, an antidumping order is required to “be terminated on a date not later than five years from its imposition . . . .”<sup>201</sup> An antidumping order may remain in force after the five-year period is over if the investigating authority determines “that the expiry of the [order] would be likely to lead to continuation or recurrence of dumping and injury.”<sup>202</sup> What this amounts to is a maximum period of five years for antidumping orders with possible extensions by five-year increments. Similarly, the country-specific safeguard proposed to replace antidumping will be required to have a duration not exceeding a maximum period of time. For the sake of continuity, the maximum period of time allowed for the country-specific safeguard could be five years, as under antidumping (assuming no continuation of antidumping orders). The duration of the country-specific safeguard, however, can be shorter than the maximum period of time. To give importers and foreign producers a maximum level of certainty, the exact duration of a country-specific safeguard will be required to be fixed and made public at the time of the safeguard decision.

Once the fixed duration of a country-specific safeguard lapses, an importing country will be allowed to impose a new country-specific safeguard on the same products for subsequent periods of time not exceeding five years each, provided that the injury standard continues to be met. What this Article proposes, therefore, is a fixed duration for each country-specific safeguard measure but no limits on how many times a country-specific safeguard measure can be applied to the same products. This contrasts with the global safeguard, which has limits on the frequency of its use for the same products.<sup>203</sup>

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201. WTO Antidumping Agreement, *supra* note 92, art. 11.3.

202. *Id.*

203. Under the WTO Agreement on Safeguards, a global safeguard may not be reintroduced for a period of time at least as long as that during which a measure was previously in place, “provided that the period of non-application is at least two years.” WTO Agreement on Safeguards, *supra* note 10, art. 7(5). The limited exception to this rule is that a global safeguard

with a duration of 180 days or less may be applied again to the import of a product if: at least one year has elapsed since the date of introduction of a [global safeguard] on the import of that product . . . and such a [global safeguard] has not been applied on the same product more than twice in the five-year period immediately preceding the date of introduction of the measure.

*Id.* art. 7(6).

### B. *Why the Country-Specific Safeguard?*

In this Section, I will demonstrate that the country-specific safeguard proposed in this Article reasonably addresses the fundamental defects of antidumping identified in Part I and, at a minimum, represents a net improvement over antidumping. I will first argue that the proposed country-specific safeguard is superior to antidumping in ways that are important for trade policy. I will then discuss the political feasibility of the proposal.

#### 1. The Advantages of the Country-Specific Safeguard over Antidumping

The country-specific safeguard proposed above is superior to antidumping in every aspect in which antidumping is lacking. Specifically, the country-specific safeguard is based on sound economic principles, is a better safety valve, and, most importantly, reduces the democracy deficit in trade remedies.

The first advantage the proposed country-specific safeguard holds over antidumping is that it is based on sound economic principles. By eliminating the unfair-pricing component of antidumping, the country-specific safeguard would not require a finding of dumping, which, as discussed earlier, is an economically meaningless concept in the vast majority of circumstances.<sup>204</sup> Given the central role antidumping currently plays in trade remedies, the elimination of the unfair-pricing component of antidumping would go a long way toward restoring the economic rationales for trade remedies. Moreover, the heightened injury standard under the country-specific safeguard is also consistent with the economics of antidumping, as the only economically sound justification for antidumping is that it may serve as a safety valve for protectionist pressures.<sup>205</sup> The heightened injury standard under the country-specific safeguard would shift the focus of trade remedies from “unfair trade” to injury, where it should be.

The second advantage the proposed country-specific safeguard holds over antidumping is that it is a better safety valve than antidumping. Despite its economic infirmities, one redeeming feature of antidumping is that it potentially serves as a safety valve that can be used to ease protectionist pressures. But as discussed earlier, antidumping is a faulty safety valve: it provides arbitrary levels of protection for petitioners, results in unnecessary uncertainties for respondents, and has too low a standard for activation.<sup>206</sup> The country-specific safeguard proposed in this Article is a superior safety valve to antidumping in each of these aspects. First, unshackled from the need to base the amount of extra tariffs on the dumping margin, or, for that matter, on any mechanical formulas, the country-specific safeguard will be able to provide a level of protection that is tailored to the level of threat posed by imports. This will enable petitioners to avoid the situation illustrat-

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204. See *supra* Part I.A.

205. See *supra* text accompanying notes 68–87.

206. See *supra* Part I.B.

ed by Table B in Part I.B.1, where a foreign producer that causes a high level of injury will get away with a low amount of antidumping duties because it manages to produce a low dumping margin.<sup>207</sup> Second, the country-specific safeguard provides much-needed certainty for respondents. No matter how high the safeguard tariffs might be, they will be fixed for the duration of the safeguard and will be made known at the time of the safeguard decision. There is no need to adjust the amount of the safeguard tariffs as time goes by because it is no longer tied to a metric, like the dumping margin, that varies over time.<sup>208</sup> Finally, the country-specific safeguard will have a better activation mechanism than antidumping because of its higher injury standard. The higher injury standard under the country-specific safeguard will reduce instances of false positives by ensuring that the country-specific safeguard will be invoked only when imports cause serious injury.<sup>209</sup>

The third and perhaps the most important advantage the country-specific safeguard holds over antidumping is that it will reduce the democracy deficit in the trade remedy process. With the dumping-margin requirement removed and a public interest clause in place, the country-specific safeguard will be better able to take account of the interests of all parties affected in determining whether to impose the safeguard and in determining the level of safeguard tariffs. Even without the public interest clause, the country-specific safeguard would still be able to expand the public's participation in the trade-protection process. This is because under the country-specific safeguard, parties arguing against trade protection will no longer be accused of supporting unfair trade, and politicians and investigating authorities will no longer have the political cover they enjoy under antidumping for protectionist tariffs.<sup>210</sup> This will elevate the bargaining position of consumers and downstream users of imports in the broader public discourse on trade protectionism to where it should be—a level that is equal with that of domestic producers. Consequently, the ensuing public debate on trade protectionism will focus on the real questions: questions about whether the country should engage in trade protectionism and who should bear the cost of that protectionism.

Seen in this light, the most valuable contribution the country-specific safeguard makes to the trade remedy process is to provide a forum where interest groups compete to have their interests translated into trade policy. The society as a whole will sort out its collective preference or nonpreference for free trade through this trade-protection process. A trade remedy process with maximum democratic participation will help level the playing field that is currently tilted in favor of parties against free trade and thus help promote trade liberalization.<sup>211</sup> Even if it does not result in trade liberalization, it will

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207. *See supra* Table B.

208. *See supra* Part I.B.2.

209. *See supra* Part I.B.3.

210. *See supra* text accompanying notes 153–158.

211. *See supra* text accompanying notes 157–158.

at least channel the debates on trade liberalization in the direction of informed consensus. By contrast, antidumping delays, if not prevents, the formation of a societal consensus on trade liberalization by deflecting public debates away from questions about trade protectionism and its cost for society. In this sense, antidumping is self-perpetuating: the democracy deficit in antidumping leads to a societal bias against trade liberalization, and the societal bias against trade liberalization in turn lends support to the use of antidumping.<sup>212</sup> The country-specific safeguard proposed in this Article can help break this cycle by forcing societies to engage in open and honest debates on trade protectionism.

## 2. The Political Feasibility of the Country-Specific Safeguard

Not only does the country-specific safeguard proposed in this Article represent a net improvement over antidumping, but it is politically feasible, making antidumping reforms a goal well within reach even in today's not-so-ideal political environment for trade.<sup>213</sup>

A key reason for the political feasibility of the proposed country-specific safeguard is that it preserves an effective trade-protection mechanism that could be readily used in the event of a sufficient level of injury to domestic industries. Compared to the global safeguard, the country-specific safeguard is much more user friendly: it does not require nondiscrimination or compensation, and petitioners can invoke it as many times as they can prove injury. Although petitioners will have to meet a higher injury standard and will lose the "unfair trade" cover they have been enjoying under antidumping, they will benefit from not having to demonstrate dumping, an exercise that, as analyzed in Part I.B.1, does not always favor them. In short, petitioners will not be asked to give up antidumping for nothing; instead, they will get something in return that they can rely on in the event of injury.

Not only will petitioners still have a meaningful trade-protection mechanism under the country-specific safeguard, but they may even be better off under the country-specific safeguard than under antidumping. As illustrated in Tables A and B in Part I.B.1, under antidumping petitioners have to take their chances with how the dumping-margin calculations will come out for the respondents; it is not guaranteed that the respondents that cause large amounts of injury will receive high antidumping duty rates.<sup>214</sup> The realization by petitioners that it might be in their self-interest to favor the country-specific safeguard over antidumping would be crucial to the political feasibility of the country-specific safeguard.

Another key reason for the political feasibility of the country-specific safeguard is its incremental nature. To be sure, the proposed country-specific safeguard is nothing short of revolutionary in terms of its reconception of the nature of trade remedies: it eliminates the concept of "unfair" trade rem-

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212. See *supra* Part I.C.

213. See *supra* notes 1–5 and accompanying text for discussions on growing protectionist pressures and deteriorating support for free trade.

214. See *supra* Part I.B.1 and Table A.

edies in exchange for a no-fault regime that forces importing countries to engage in honest debates on trade protectionism. But the proposed country-specific safeguard is also incremental because all of its major elements are already in use by various existing trade remedy instruments. As discussed earlier, the country-specific nature of the safeguard is modeled after the China safeguard,<sup>215</sup> the higher injury standard of the safeguard is already being practiced in some respects under the global safeguard,<sup>216</sup> a public interest clause is already found in both the global safeguard and the China safeguard,<sup>217</sup> and all other elements of the safeguard—the “tariff only” requirement, no nondiscrimination, no compensation, and no limits on frequency of use—are essentially inherited from current antidumping laws.<sup>218</sup> All else being equal, this incremental nature of the reform proposal will increase its chance of approval.

The political feasibility of the country-specific safeguard, however, does not mean that all petitioners will heartily accept the reform proposal. The point is that the country-specific safeguard is the most feasible of all possible alternatives and points in the right direction for trade remedy reforms. With a reasonable amount of prodding and compromise, the goals of trade remedy reforms are at least theoretically achievable under this reform proposal.

### *C. Why Not the Global Safeguard?*

A discussion of why antidumping should be replaced by the country-specific safeguard proposed in this Article would be incomplete without a discussion of why the same outcome could not be achieved by replacing antidumping with a safeguard that is already in use: the global safeguard. Indeed, some commentators have suggested doing just that—replacing antidumping with the global safeguard.<sup>219</sup> In this Section, I will argue that many problematic features of the global safeguard prevent it from becoming an effective replacement for antidumping. I will further argue that those problematic features of the global safeguard lead to a mismatch between the design of the global safeguard and the kind of trade protection demanded by

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215. China Accession Protocol, *supra* note 186.

216. See *supra* notes 169–173 and accompanying text.

217. See *supra* note 199 and accompanying text.

218. See *supra* Part II.A.3–5, 7.

219. See Barfield, *supra* note 148, at 730–31 (advocating for replacing antidumping with the global safeguard); see also Caine, *supra* note 33, at 718–24 (arguing that the “escape clause” is a better approach to regulating the effects of import competition). *But see* GREG MASTEL, ANTIDUMPING LAWS AND THE U.S. ECONOMY 101–02 (arguing against replacing antidumping with the global safeguard). J. Michael Finger, Francis Ng, and Sonam Wangchuk have also called for replacing antidumping with a more effective safeguard mechanism, observing that the “key characteristic of a sensible safeguard procedure is that it treats domestic interests that would be harmed by an import restriction equally with those domestic interests that would benefit.” Finger et al., *supra* note 71, at 10.

petitioners, a mismatch that can be bridged by the country-specific safeguard.

First, the global safeguard has only been used sparsely throughout its history. As noted earlier, between 1979 and 2007, WTO member countries initiated twelve global safeguard investigations per year on average, and applied seven global safeguard measures per year on average.<sup>220</sup> To put those numbers in perspective, the corresponding numbers for antidumping actions during that period were 205 and 113, respectively—roughly sixteen times the numbers for the global safeguard.<sup>221</sup>

Not only have WTO members not utilized the global safeguard as frequently as they have utilized antidumping, but they have also been having a difficult time utilizing the global safeguard in a WTO-consistent manner. As of late 2012, WTO members have initiated WTO dispute settlement proceedings concerning twenty-three global safeguard measures since the establishment of the WTO.<sup>222</sup> The WTO ruled on nine out of these twenty-three disputes, and in each one of the nine cases, the WTO found the global safeguard in question to not have been applied in accordance with WTO rules.<sup>223</sup> In striking down these global safeguard measures, however, the WTO dispute settlement panels and the Appellate Body failed to articulate coherent principles for the use of the global safeguard, confounding the already “difficult conceptual and interpretive issues” arising under the texts of

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220. WORLD TRADE REPORT 2009, *supra* note 13, at 133.

221. *Id.*

222. A list of WTO dispute settlement proceedings concerning the global safeguard can be found at the WTO's website. WTO Secretariat, *Disputes by Agreement*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A18](http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A18) (last visited Nov. 16, 2012). This tally counts separate proceedings initiated by different countries against the same global safeguard measure as one WTO dispute. This tally does not include cases in which a request for consultation was filed but a dispute settlement panel was not requested.

223. The WTO ruled on five disputes concerning global safeguard measures prior to March 2002: *Korea—Dairy*, *Argentina—Footwear*, *US—Wheat Gluten*, *US—Lamb*, and *US—Line Pipe*. See *id.* In each of the five disputes the WTO held that the application of the global safeguard in question was inconsistent with WTO rules. See Yong-Shik Lee, *Safeguard Measures: Why Are They Not Applied Consistently with the Rules?: Lessons for Competent National Authorities and Proposal for the Modification of the Rules on Safeguards*, 36 J. WORLD TRADE 641, 642–43 (2002). Four more disputes over global safeguard measures have been decided by the WTO since March 2002, and the WTO dispute settlement panel or the Appellate Body ruled against the country imposing the global safeguard measure in each one of the disputes. WTO LEGAL AFFAIRS DIV., ONE-PAGE CASE SUMMARIES: ARGENTINA—PRESERVED PEACHES (2012), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds238sum\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds238sum_e.pdf); WTO LEGAL AFFAIRS DIV., ONE-PAGE CASE SUMMARIES: CHILE—PRICE BAND SYSTEM (2012), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds207sum\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds207sum_e.pdf); WTO LEGAL AFFAIRS DIV., ONE-PAGE CASE SUMMARIES: US—STEEL SAFEGUARDS (2012), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/1pagesum\\_e/ds248sum\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds248sum_e.pdf); WTO Secretariat, *Dominican Republic—Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds415\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds415_e.htm) (last updated June 6, 2012).

Article XIX of the GATT and the WTO Agreement on Safeguards.<sup>224</sup> These conceptual and interpretive issues include, among others, issues concerning the standard of review, the demonstration of unforeseen developments, the nondiscriminatory application of the global safeguard, the demonstration of increases in imports, and the determination of serious injury and causation.<sup>225</sup>

Aside from the lack of clarity in the rules interpreting the requirements of the global safeguard, a more fundamental problem with the global safeguard lies with some of its requirements. Several of the requirements of the global safeguard—specifically the nondiscrimination requirement, the compensation requirement, and the use-frequency restrictions—make the global safeguard unable to provide the kind of import relief desired by petitioners and trade-policy makers in many, if not most, situations. First, the nondiscrimination requirement forces import restrictions under the global safeguard to be applied to all imports, irrespective of their source.<sup>226</sup> Disturbances to patterns of world trade, however, often come from particularized sources, necessitating trade remedies that target a specific country.<sup>227</sup> The global safeguard's nondiscrimination requirement, therefore, ties the hands of petitioners and trade-policy makers in selecting responding countries in trade remedy proceedings. Second, the global safeguard's compensation requirement limits the options available to trade-policy makers in imposing trade remedies, as trade-policy makers might be reluctant to impose a global safeguard measure if the consequence is the suspension of concessions by countries affected by the safeguard. Third, the restrictions on the use frequency of the global safeguard reduce the ability of trade-policy makers to use the global safeguard on an as-needed basis.<sup>228</sup> Many of the market forces underlying disturbances of world trade, such as changes in

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224. Sykes, *supra* note 178, at 524.

225. Lee, *supra* note 223, at 643–66.

226. An importing country might have some leeway in not applying a global safeguard measure to products from countries with which it has signed a free trade agreement. Many regional free trade areas (FTAs) have provisions exempting products of FTA parties from global safeguard measures. It is not clear, however, whether such exemptions are legal under WTO rules. Article XXIV of the GATT, which governs customs unions and FTAs, is silent as to whether FTA partners can or must be excluded from global safeguard measures. To address this issue, “the WTO dispute settlement body has relied on an invented concept of ‘parallelism’ that requires the imports included in the injury determination correspond to those covered by the [global] safeguard measure.” Ahn, *supra* note 185, at 20–21.

227. For example, a particularized source of disturbances to patterns of world trade since the early 1990s has been the rise of China as a manufacturing power due to its relatively low costs of labor. With increasingly large amounts of cheap imports coming from China, petitioners demand a trade remedy instrument that can be used to limit imports from China alone. This demand arguably lies behind the adoption of the China safeguard in the China Accession Protocol. Chad P. Bown & Meredith A. Crowley, *China's Export Growth and the China Safeguard: Threats to the World Trading System?*, 43 *CAN. J. ECON.* 1353, 1354 (2010); see China Accession Protocol, *supra* note 186.

228. See *supra* note 203 and accompanying text.

technology and costs of labor, persist over a long period of time. The restrictions on the use frequency of the global safeguard, however, make the global safeguard capable of being applied only temporarily and intermittently. This causes yet another gap between what is desired by petitioners and trade-policy makers and what the global safeguard can offer.

For supporters of free trade, the stringent requirements of the global safeguard may be desirable because they will reduce the utilization of the global safeguard. The fact that the utilization of the global safeguard will be reduced, however, does not necessarily mean that the overall level of trade protection will be reduced. Under the reasonable assumption that countries always face pressures to protect domestic industries,<sup>229</sup> the inability to effectively use the global safeguard will force petitioners and trade-policy makers to turn to other more convenient trade remedy instruments. As has been pointed out, one of the main reasons why the global safeguard has been underutilized is that protectionist efforts have been directed at antidumping, which is far more user friendly for petitioners.<sup>230</sup> For the same reason, efforts to “strengthen” the global safeguard have been considered “academic” because of the availability of a more convenient way of seeking and granting trade protection, that is, antidumping.<sup>231</sup> Similarly, when it comes to reforming antidumping, it should be borne in mind that any reform proposals will operate in a “second-best world” where protectionist pressures “inevitably” exist and manifest themselves in the trade remedy process.<sup>232</sup> Seen in this light, proposals to replace antidumping with a trade remedy instrument as inflexible as the global safeguard are simply not feasible. Indeed, the fact that antidumping has been the preferred trade remedy instrument at a time when the global safeguard has always been available shows that proposals to replace antidumping with the global safeguard will not go very far.<sup>233</sup>

This is not to say, however, that the goal of trade remedy reforms is to devise a trade remedy instrument that requires the least of petitioners and trade-policy makers. If that were the goal of the reforms, maintaining the status quo would perhaps be the best reform strategy. The goal of trade remedy reforms is instead to devise a trade remedy instrument that is demanding enough as to matters that are important for trade policy, while at the same time maintaining the political feasibility of the reforms. This Article proposes such a trade remedy instrument in the form of a new country-specific safeguard.

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229. Chad Bown makes a similar assumption in his discussion of why the global safeguard has been unpopular. Chad P. Bown, *Why Are Safeguards Under the WTO So Unpopular?*, 1 *WORLD TRADE REV.* 47, 49 (2002).

230. *Id.* (“[F]or the period of 1987–1994, while only eighteen global safeguard measures were imposed, over 700 definitive antidumping measures were imposed worldwide, after the initiation of 1586 antidumping investigations by GATT contracting parties.”).

231. See Finger, *supra* note 33, at 58–59.

232. Bown, *supra* note 229, at 49.

233. See *supra* text accompanying notes 220–221.

An alternative conceptualization of the reform proposal is to see it as a reconfiguration of the existing global safeguard. Some of the requirements of the global safeguard, such as the serious-injury standard and the public interest clause, will be preserved because they are important for ensuring the intellectual integrity of trade remedies, making trade remedies function as a more efficient safety valve, and democratizing the trade remedy process. As discussed earlier, all of these goals are of great significance for trade policy. Some other requirements of the global safeguard, such as the nondiscrimination requirement, the compensation requirement, and the use-frequency restrictions, add to the burdens placed on users of the global safeguard but do not materially advance the aforementioned goals. Under the proposal put forward in this Article, those requirements will be abandoned for the sake of reducing resistance to the reform proposal. The final reform package may not be ideal, but it is a reasonable compromise that takes account of both principles and feasibility.

#### *D. Rebutting Potential Criticisms*

In this Section, I offer preemptive rebuttals to three potential criticisms of the country-specific safeguard proposed in this Article: that the country-specific safeguard violates the most favored nation (MFN) principle of the WTO, will lead to trade wars, and will politicize the trade remedy process.

##### 1. The Country-Specific Safeguard and the MFN Principle

The MFN principle is a fundamental principle of the WTO that prohibits WTO members from discriminating among their trading partners. The MFN principle is embodied in many of the most important WTO agreements, including the GATT 1994,<sup>234</sup> the General Agreement on Trade in Services,<sup>235</sup> and the Agreement on Trade-Related Aspects of Intellectual Property Rights.<sup>236</sup> Because the country-specific safeguard proposed in this Article can be applied on a country-by-country basis, the first potential criticism of the proposal is that it violates the MFN principle. As a matter of fact, the

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234. See GATT 1994, *supra* note 122, art. I:1 (“[A]ny advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”).

235. See General Agreement on Trade in Services art. II:1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 401 [hereinafter GATS] (“With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country.”).

236. See Agreement on Trade-Related Aspects of Intellectual Property Rights art. 4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 401 (“With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.”).

China safeguard, a country-specific safeguard currently in use, is already subject to this criticism.<sup>237</sup>

The responses to the MFN criticism are twofold. First, the country-specific safeguard proposed in this Article is no worse than antidumping in terms of meeting the MFN requirement. Like the country-specific safeguard, antidumping is applied on a country-by-country basis. Antidumping may be considered an exception to the MFN principle because it targets “unfair” trade practices.<sup>238</sup> But as discussed earlier, the notion that dumping is unfair is a myth.<sup>239</sup> Antidumping, therefore, is also a violation of the MFN principle, albeit in disguise.

Second, it is not unprecedented for the WTO to recognize exceptions to the MFN principle. The General Agreement on Trade in Services, for example, explicitly allows member countries to designate exemptions from their MFN obligations.<sup>240</sup> Another example of WTO-sanctioned exceptions to the MFN principle is none other than the China safeguard. Indeed, it could be argued that a generally available country-specific safeguard like the one proposed in this Article mitigates the MFN concerns arising under the China safeguard. Instead of targeting a specific WTO member like the China safeguard does, the country-specific safeguard proposed in this Article puts all WTO members on an equal footing and therefore can be said to be nondiscriminatory in that sense.

## 2. The Country-Specific Safeguard and Trade Wars

A second potential criticism of the country-specific safeguard proposed in this Article is that it will lead to trade wars. Because petitioners are not required to demonstrate dumping, and because there are no nondiscrimination and compensation requirements under the country-specific safeguard, critics may argue that petitioners and policy makers will be tempted to seek and grant the safeguard on a selective and retaliatory basis.

The responses to the “trade wars” criticism are threefold. First, there are reasons to believe that replacing antidumping with the country-specific

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237. See Bown & Crowley, *supra* note 227, at 1354–55 (arguing that “many characteristics of the China safeguard are at odds with core WTO principles” such as most favored nation treatment and reciprocity); see also NICHOLAS R. LARDY, *INTEGRATING CHINA INTO THE GLOBAL ECONOMY* 81–86 (2002) (describing the “onerous” nature of the restrictions placed on China as a condition of WTO membership); Tracy Elizabeth Dardick, *The US-China Safeguard Provision, the GATT, and Thinking Long Term*, 6 *CHI. J. INT’L L.* 467, 473 (2005) (“The [China safeguard] actively violates both the mission and the specific requirements of the WTO as expressed in the GATT.”).

238. See PHILIP BENTLEY & AUBREY SILBERSTON, *ANTI-DUMPING AND COUNTERVAILING ACTION: LIMITS IMPOSED BY ECONOMIC AND LEGAL THEORY* 5 (2007) (“‘Dumping’ is another circumstance in which an exception to the MFN principle . . . can be made.”).

239. See *supra* Part I.A.1.

240. See GATS, *supra* note 235, art. II:2 (“A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.”).

safeguard would not lead to more trade remedy actions. Despite it being user friendly for petitioners in some respects, the country-specific safeguard does pose a higher hurdle for petitioners because of the higher serious-injury standard and public interest clause. The serious-injury standard will ensure that only firms that suffer serious injury substantially caused by imports are entitled to relief and will help winnow out frivolous filings. The public interest clause will ensure that any decisions to impose the country-specific safeguard will be made with a higher degree of political accountability than under antidumping. The fact that trade-policy makers will lose the “unfair trade” cover and will be held more accountable for the adverse effects of the safeguard on society as a whole will reign in the tendency to abuse the safeguard. These predictions are supported by the track record of the one country-specific safeguard currently in use, the China safeguard. In the United States, since the inception of the China safeguard, seven petitions for import relief have been filed under the U.S. statute implementing the WTO’s China-safeguard provisions.<sup>241</sup> In five out of the seven petitions, the USITC determined that the action in question met the injury standard of the China safeguard.<sup>242</sup> Among the five petitions for which the USITC made a positive injury determination, only one petition was approved for final relief by the President of the United States.<sup>243</sup> As in the case of the global safeguard, the relatively small number of petitions filed for relief under the China safeguard likely has to do with the availability of a much more convenient trade remedy instrument—antidumping. If antidumping were indeed replaced by the country-specific safeguard, the protectionist pressures currently gravitating toward antidumping would instead be channeled through the country-specific safeguard, and the utilization of the country-specific safeguard would be greater—perhaps much greater—than the current utilization of the China

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241. A listing of the China safeguard petitions can be found on the website of the U.S. International Trade Commission at *Trade Remedy Investigations—Completed Investigations: Safeguard Investigations*, U.S. INT’L TRADE COMM’N, [http://www.usitc.gov/trade\\_remedy/731\\_ad\\_701\\_cvd/investigations/completed/index.htm#safeguard](http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/completed/index.htm#safeguard) (last visited Nov. 16, 2012) [hereinafter *Completed Investigations*]. One petition filed in August 2002 concerning pedestal actuators from China is not included in the list. See *Pedestal Actuators from China*, 67 Fed. Reg. 54,822 (Int’l Trade Comm’n Aug. 26, 2002) (Institution and Scheduling of an Investigation Under Section 421(b) of the Trade Act of 1974).

242. See *Certain Passenger Vehicle and Light Truck Tires from China*, Inv. No. TA-421-7, USITC Pub. 4085 (July 2009) (positive injury determination); *Circular Welded Non-alloy Steel Pipe from China*, Inv. No. TA-421-6, USITC Pub. 3807 (Oct. 2005) (positive injury determination); *Uncovered Inner Spring Units from China*, Inv. No. TA-421-5, USITC Pub. 3676 (Mar. 2004) (negative injury determination); *Certain Ductile Iron Waterworks Fittings from China*, Inv. No. TA-421-4, USITC Pub. 3657 (Dec. 2003) (positive injury determination); *Certain Brake Drums and Rotors from China*, Inv. No. TA-421-3, USITC Pub. 3622 (Aug. 2003) (negative injury determination); *Certain Steel Wire Garment Hangers from China*, Inv. No. TA-421-2, USITC Pub. 3575 (Feb. 2003) (positive injury determination); *Pedestal Actuators from China*, Inv. No. TA-421-1, USITC Pub. 3557 (Nov. 2002) (positive injury determination).

243. See Proclamation No. 8414, 74 Fed. Reg. 47,861 (Sept. 17, 2009); see also *Completed Investigations*, *supra* note 241.

safeguard. But the fact that the President of the United States denied relief under the China safeguard in four out of five cases indicates that petitioners would still have hurdles to overcome under the country-specific safeguard and that the country-specific safeguard is not bound to open a floodgate of frivolous cases.

Second, even if the country-specific safeguard were to lead to trade wars, the importing countries would have gone through a more open and fair process for weighing the costs and benefits of those trade wars.<sup>244</sup> In this sense, the aim of the reform proposed in this Article is not necessarily to reduce instances of trade protectionism (although that may be an incidental result) but to strengthen the process through which trade remedy decisions are being made while minimizing the adverse impacts of trade remedies during that process.

Third, even if import relief were to be sought and granted under the country-specific safeguard for retaliatory purposes, this would be no worse than the status quo under antidumping. Studies have established strong evidence that retaliatory motives are a significant factor behind antidumping filings across jurisdictions.<sup>245</sup> Retaliatory motives have also been shown to be at the heart of the proliferation of antidumping regimes.<sup>246</sup> What is currently happening with antidumping is already little more than trade wars. There is not much room, if at all, for the country-specific safeguard proposed in this Article to further exacerbate the current situation.

### 3. The Country-Specific Safeguard and Politicizing the Trade Remedy Process

A third potential criticism of the country-specific safeguard proposed in this Article is that it will politicize the trade remedy process. This criticism asserts that although the dumping-margin requirement is not economically justifiable, it does constrain petitioners' abilities to impose antidumping duties. According to this criticism, eliminating the dumping-margin requirement will transform the antidumping process into a pure lobbying contest that will almost always favor the politically powerful, typically petitioners. The country-specific safeguard, therefore, may exacerbate, not alleviate, the biases in the trade remedy process.

The response to this criticism is that transforming antidumping from a number-crunching process to a political process is precisely the point of the reform proposed in this Article. Granted, the dumping-margin requirement under antidumping forces importing countries to play by the rules when seeking antidumping duties. But, as analyzed in Part I.B.1, the rules importing countries are required to play by have little to do with what antidumping

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244. See *supra* Part II.A.6.

245. See *supra* note 27.

246. See *Vandenbussche & Zanardi, supra* note 18, at 94.

is really about.<sup>247</sup> Metaphorically, importing countries can be said to be required to roll the dice to determine the outcome of an antidumping proceeding. While this dice-rolling process equally constrains petitioners' abilities to impose antidumping duties, it has little to do with the reasons why antidumping should or should not be imposed. Nor does the dice-rolling process promote meaningful debate about why antidumping should or should not be imposed. Therefore, although antidumping does constrain importing countries' abilities to impose antidumping duties, it does so in a process that does not inform trade policy.

As for concerns that the country-specific safeguard will exacerbate biases in trade remedy proceedings, the response is that the validity of the country-specific safeguard does not depend on the elimination of biases in trade remedy proceedings. The point of the proposal in this Article is to remove the political cover for those biases, force those biases into the open, and promote honest debate about whether those biases should be maintained. The proposal may result in more biases, but, circumstances permitting, those biases would have manifested themselves in other ways in the trade remedy process and other trade-policy settings.

### III. ROUNDING OFF THE REFORM: WHAT TO DO WITH COUNTERVAILING DUTY LAWS

While the focus of this Article has so far been on antidumping, any reform of trade remedies has to involve the reform of countervailing duty laws, another important component of trade remedy laws.<sup>248</sup> Governed by Article VI of the GATT 1994 and the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement),<sup>249</sup> national countervailing duty laws allow importing countries to impose extra tariffs on imports to offset certain subsidies conferred on such imports when they cause or threaten to cause material injury to domestic industries.<sup>250</sup> The imposition of countervailing duties by importing countries is one of two mechanisms for disciplining the use of subsidies: the other mechanism is direct limitations on subsidy practices by WTO rules.<sup>251</sup>

The replacement of antidumping by the country-specific safeguard proposed in this Article would pose a challenge for the continued application of countervailing duty laws. In the current trade remedy regime, antidumping and countervailing duties are thought to address different "unfair" trade

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247. See *supra* Part I.B.1.

248. See Sykes, *supra* note 6.

249. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

250. See *id.* arts. 15, 19; Wentong Zheng, *The Pitfalls of the (Perfect) Market Benchmark: The Case of Countervailing Duty Law*, 19 MINN. J. INT'L L. 1, 4–5 (2010).

251. See Sykes, *supra* note 6, at 102.

practices, with antidumping duties targeting dumping by individual firms and countervailing duties targeting government-conferred subsidies. If both antidumping and countervailing duties are found to be warranted, they can be superimposed on each other because, again, they address different underlying trade issues. But as discussed above, the country-specific safeguard proposed in this Article is not about “unfair trade.” Instead it is all about injury: it is intended to address the injury to domestic industries caused by imports, regardless of whether the injury is caused by dumping, subsidies, or anything else. It would be logically inconsistent, therefore, to have both a country-specific safeguard that addresses injury caused by all sources and a countervailing duty law that addresses injury caused by a particular source, that is, subsidies.

But the very reason why the country-specific safeguard poses a challenge for the continued application of countervailing duty laws suggests a way out of the dilemma: since the country-specific safeguard already addresses injury caused by imports due to all sources, countervailing duty laws should be subsumed under the country-specific safeguard. In other words, once the country-specific safeguard is adopted, countervailing duties should be eliminated as an option for disciplining illegal subsidies. The practical outcome of this proposal will be the replacement of both antidumping and countervailing duty laws by the country-specific safeguard. In other words, what is currently dealt with under antidumping and countervailing duty laws will be dealt with under one unified trade remedy instrument: the country-specific safeguard, which focuses on injury caused by imports regardless of the specific source of the injury.

Although the elimination of countervailing duties as a separate mechanism of disciplining illegal subsidies is required by simple logic, it happens that it has sound policy justifications as well. Like antidumping laws, countervailing duty laws have been subject to intense scholarly criticisms. First and foremost, it is not clear what the goal of countervailing duty laws is, as its ostensible goal—promoting economic efficiency through deterring the use of market-distorting subsidies—has been rejected by many scholars.<sup>252</sup>

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252. See generally John J. Barceló III, *Subsidies and Countervailing Duties—Analysis and a Proposal*, 9 LAW & POL’Y INT’L BUS. 779 (1977) (describing the actual functions of countervailing duty laws); Richard Diamond, *A Search for Economic and Financial Principles in the Administration of United States Countervailing Duty Law*, 21 LAW & POL’Y INT’L BUS. 507 (1989) [hereinafter Diamond, *Economic and Financial Principles*] (examining U.S. countervailing duty law); Richard Diamond, *Economic Foundations of Countervailing Duty Law*, 29 VA. J. INT’L L. 767 (1988) [hereinafter Diamond, *Economic Foundations*] (describing the historical background of countervailing duty laws and their effect on economic efficiency); Charles J. Goetz et al., *The Meaning of “Subsidy” and “Injury” in the Countervailing Duty Law*, 6 INT’L REV. L. & ECON. 17 (1986); Warren F. Schwartz, *Zenith Radio Corp. v. United States: Countervailing Duties and the Regulation of International Trade*, 1978 SUP. CT. REV. 297; Warren F. Schwartz & Eugene W. Harper, Jr., *The Regulation of Subsidies Affecting International Trade*, 70 MICH. L. REV. 831 (1972); Sykes, *supra* note 29, at 213–29; Alan O. Sykes, *Second-Best Countervailing Duty Policy: A Critique of the Entitlement Approach*, 21 LAW & POL’Y INT’L BUS. 699 (1989).

Second, the substantive rules under countervailing duty laws have been criticized as being incoherent. If countervailing duty laws are to be justified on economic efficiency grounds, that justification is belied by the fact that countervailing duty laws do not “distinguish [between] efficient subsidies and inefficient subsidies.”<sup>253</sup> The current rules of countervailing duty laws are also not entirely consistent with alternative justifications such as the protection of the entitlement of domestic producers.<sup>254</sup> Third, it has been established that the imposition of countervailing duties results in a net welfare loss for the importing country under most circumstances.<sup>255</sup> In light of these issues, Alan Sykes has called for the abolition of countervailing duty laws altogether.<sup>256</sup> The outright abolition of countervailing duty laws, however, is politically infeasible, the same way the outright abolition of antidumping laws is politically infeasible. Using the country-specific safeguard as a replacement for countervailing duty laws will accomplish the same goal as the outright abolition of countervailing duty laws but will offer a path of lesser resistance toward that goal, as the country-specific safeguard will provide petitioners with a meaningful trade-protection mechanism in the event of serious injury to domestic industries.

It is worth noting, however, that this Article does not propose to eliminate all international discipline for the use of subsidies. Direct limitations on the use of subsidies under WTO rules, enforced through the WTO dispute settlement mechanism, should be preserved as an option for countering the use of subsidies. This means that only Part V of the SCM Agreement, which deals with countervailing measures imposed by national governments,<sup>257</sup> would be unnecessary under the proposal put forward in this Article. Part III of the SCM Agreement, which deals with subsidies “actionable” before the WTO Dispute Settlement Body,<sup>258</sup> would be left intact.

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253. See Sykes, *supra* note 252, at 699.

254. The “entitlement theory” of countervailing duty laws was first formulated by Charles Goetz, Lloyd Granet, and Warren Schwartz, *see* Goetz et al., *supra* note 252, at 19, and then was expanded by Richard Diamond, *see* Diamond, *Economic and Financial Principles*, *supra* note 252, at 518; *see also* Diamond, *Economic Foundations*, *supra* note 252, at 776. Richard Diamond explained that the entitlement theory allows countervailing duties to be imposed only if a foreign subsidy lowers the marginal costs of production of the subsidy recipients and thus “adversely affect[s] the entitlement of . . . [domestic] producers.” Diamond, *Economic Foundations*, *supra* note 252, at 784–85. But as Diamond demonstrated, many of the methodologies adopted in countervailing duty proceedings are incongruous with this principle. *See* Diamond, *Economic and Financial Principles*, *supra* note 252, at 566–605.

255. See Sykes, *supra* note 29, at 213–29.

256. See *id.* at 263 (“[A]bolition of the countervailing duty laws might best serve the national economic interest.”).

257. Part V of the SCM Agreement sets out the principles and procedures WTO members must follow in conducting countervailing investigations. *See* SCM Agreement, *supra* note 249, arts. 10–23.

258. Part III of the SCM Agreement outlines the principles and procedures WTO members must follow in challenging actionable subsidy measures before the WTO Dispute Settlement Body. *See id.* arts. 5–7.

The rationales for preserving the WTO route for tackling subsidies are threefold. First, a subsidy may affect market competition not just in the country that applies a countervailing duty measure, but also in the subsidizing country or third countries.<sup>259</sup> Tariffs imposed under the country-specific safeguard will counter the effects of subsidies in the country that imposes the safeguard but will not alleviate the effects of subsidies in the subsidizing country or third countries.<sup>260</sup> Only direct limitations on the use of subsidies could address the latter effects. Second, as Alan Sykes points out, direct limitations on the use of subsidies under WTO rules are likely to be more effective than countervailing duty measures in deterring wasteful subsidy practices.<sup>261</sup> Unlike countervailing duty measures, which are “uncoordinated, unilateral, [and] may simply divert subsidized goods to markets that do not employ them . . . , [a] successful WTO challenge to a subsidy practice, assuming that the losing country complies with the ruling, will indeed lead to the elimination of the subsidy.”<sup>262</sup> Third and finally, preserving the WTO’s role in disciplining subsidies—and therefore a large portion of today’s subsidy rules—will contribute to the political feasibility of the reform proposal and the smooth transition from the current trade remedy regime to the proposed trade remedy regime.

#### CONCLUSIONS

This Article examines the fundamental defects of the current trade remedy regime and proposes a roadmap for reforms. It argues that the fundamental problem with the current trade remedy regime lies in the way it offers import protection. This Article argues that the current trade remedy regime, chiefly through antidumping, provides arbitrary levels of protection for petitioners, results in unnecessary uncertainties for respondents, and has too low a threshold for activation. The current trade remedy regime also ex-

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259. This fact is recognized by the SCM Agreement. Under the SCM Agreement, one of the requirements for challenging a subsidy before the WTO is that the subsidy causes “adverse effects to the interests of [the complaining WTO member].” *Id.* art. 5. One way to show “adverse effects” is to demonstrate that the subsidy in question causes “serious prejudice to the interests of [the complaining member].” *Id.* art. 5(c). “Serious prejudice,” in turn, may arise not only when “the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market,” *id.* art. 6.3(c), but also when “the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member,” *id.* art. 6.3(a), or when “the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market,” *id.* art. 6.3(b).

260. This is because tariffs raise the price of a subsidized product only in the importing country, not in the subsidizing country or a third country.

261. See Alan O. Sykes, *The Economics of WTO Rules on Subsidies and Countervailing Measures* 25 (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 186, 2003), available at [http://www.law.uchicago.edu/files/files/186.aos\\_.subsidies.pdf](http://www.law.uchicago.edu/files/files/186.aos_.subsidies.pdf).

262. *Id.* at 24–25.

acerbates the democracy deficit in trade policy and, as a result, impedes the process through which societal consensus on trade protectionism is formed. This Article then puts forward a proposal to reform trade remedies. Under the proposal, antidumping and countervailing duties will be replaced by a new country-specific safeguard with a higher injury standard and a mandatory public interest clause. This country-specific safeguard eliminates the need to examine dumping, subsidies, or any other “unfair” practices and instead focuses on the injury caused by imports to domestic industries. The removal of the false “unfair trade” rhetoric, along with the heightened injury standard and the mandatory public interest clause, will transform the current trade remedy regime into one that better serves as a safety valve and reduces democracy deficit in the trade remedy process.

This is not to say, however, that trade remedy reforms will be easy. Many steps will need to be taken to implement the proposal put forward in this Article. Members of the WTO will need to negotiate a new agreement on the use of the country-specific safeguard and will need to abolish or revise the Antidumping Agreement and the SCM Agreement. Then, approval of the reforms at the national level will need to be secured in order to enact the changes into law. It is almost certain that there will be many obstacles to the goal of trade remedy reforms, but identifying a reform strategy that is both principled and feasible—as done in this Article—is the important first step toward accomplishing that goal.