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Antidumping in Asia’s Emerging Giants

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Antidumping in Asia's Emerging Giants

Mark Wu*

Over the past decade, China and India have rapidly increased their use of antidumping laws, the world's most dominant form of trade protectionism, against their trading partners. Yet, this behavior has triggered little concern in the United States and Europe. Why? Two leading theories suggest that the recent spike in Indian and Chinese antidumping measures is temporary. Moreover, the balance of benefits under existing international legal rules continues to favor American and European producers. As a result, the United States and European Union have viewed attempts to reform global antidumping laws as against their interests.

This Article challenges this conventional wisdom. It argues that India and China's antidumping regimes pose a larger long-term threat to the global trade regime than is commonly believed. Through novel empirical tests of the two leading theories, I demonstrate why China and India's recent increase in antidumping protectionism is not temporary and not destined to level off. Instead, as more industries discover the benefits of antidumping laws and as China takes a more aggressive retaliatory stance against its trading partners, both countries' use of antidumping sanctions will likely continue to increase. To guard against this increased protectionism, this Article argues that World Trade Organization members should reverse their opposition to reforming global antidumping rules and instead enact proposals that place greater restrictions on antidumping laws. It highlights why the present moment is an opportune time for reform, but notes that the window for reform is likely to close as China and India acquire increased economic strength.

INTRODUCTION

Due to the global recession, protectionism is once again rearing its ugly head. However, since the last major recession in the 1980s, the mode of protectionism has changed dramatically. Successive rounds of trade negotiations have impaired governments' ability to rely on traditional tools, such as high tariffs, quotas, and non-tariff barriers, to protect their domestic industries. Governments instead have increasingly turned to an instrument known as antidumping. Antidumping laws allow a country to impose temporary duties on a good exported by a foreign producer that is "dumping" the good at below the price charged in the foreign producer's home market and causing injury to the domestic producer of the product. As will be discussed, because of the way certain legal terms in the international law gov-

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erning antidumping have been defined, many antidumping measures are essentially protectionist in nature.

During the past five years, antidumping duties accounted for over ninety percent of the legal contingent of protection measures enacted worldwide.¹ Within the United States and members of the European Union (“EU”), more cases have been filed under the antidumping statutes than under all other trade statutes combined.² To say that antidumping has emerged as the dominant form of trade protectionism is no exaggeration.

The international law on antidumping was drafted primarily by Americans and Europeans.³ They were among the first to take advantage of these rules⁴ and remain among the most active users of antidumping sanctions.⁵ Not surprisingly, legal studies on antidumping have tended to focus on American and European practices. To the extent that scholars study the antidumping practices of other countries, they typically examine “developing countries” as a group and draw generalized conclusions.⁶

Little attention, therefore, has been paid to the individual antidumping regimes of India and China. Yet, without question, both countries are increasingly important to world trade. The latest round of global trade talks collapsed in July 2008 because these two Asian emerging powers were unwilling to sign on to a compromise brokered by the industrialized nations that constitute the established trading powers.⁷ With the economies of the

1. Contingent protection measures are instruments authorized under existing WTO rules that permit a WTO member to raise its duties above its negotiated commitment, contingent upon certain conditions being satisfied. Besides antidumping duties, the two other main forms of contingent protection measures are safeguards and countervailing duties. See *infra* notes 63 and 65 for a further discussion of these measures. Computations are based on statistics provided by the WTO Secretariat. See WTO Statistics on Antidumping, available at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm; WTO Statistics on Safeguard Measures, available at http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm; WTO Statistics on Subsidies and Countervailing Measures, available at http://www.wto.org/english/tratop_e/scm_e/scm_e.htm.

2. Thomas J. Prusa & Susan Skeath, *Modern Commercial Policy: Managed Trade or Retaliation?*, in 2 HANDBOOK OF INTERNATIONAL TRADE 358, 359 (E. Kwan Choi & James C. Hartigan eds., 2005).

3. See DOUGLAS A. IRWIN, PETROS C. MAVROIDIS & ALAN O. SYKES, THE GENESIS OF THE GATT 144–46 (2008); see generally THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY 1389–1691 2 (Terrence P. Stewart ed., 1993).

4. See Thomas J. Prusa, *On the Spread and Impact of Antidumping*, 34 CANADIAN J. ECON. 591, 594 (2001).

5. Between 2004 and 2010, the United States and EU ranked among the top five implementers of new antidumping measures every year with the exception of one (2007 for the United States and 2010 for the EU). See World Trade Organization, *Anti-dumping Measures: By Reporting Member 01/01/1995–31/12/2010*, available at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm [hereinafter WTO Statistics on AD Measures by Reporting Member].

6. See, e.g., Aradhna Aggarwal, *Macro Economic Determinants of Antidumping: A Comparative Analysis of Developed and Developing Countries*, 32 WORLD DEV. 1043 (2004); Hylke Vandenbussche & Maurizio Zanardi, *What Explains the Proliferation of Antidumping Laws?*, 23 ECON. POL'Y 95 (2008).

7. See Stephen Castle & Mark Landler, *After 7 Years, Talks Collapse on World Trade*, N.Y. TIMES, July 30, 2008, at A1. For a more complete account of why India and China resisted U.S. entreaties, leading to the negotiations' collapse, see Paul Blustein, *The Nine Day Misadventure of the Most Favored Nations: How the WTO's Doha Round Negotiations Went Awry in July 2008* (Dec. 5, 2008), http://www.brookings.edu/~media/Files/rc/articles/2008/1205_trade_blustein/1205_trade_blustein.pdf.

traditional powers weakened by the financial crisis, global growth in the ensuing decades will increasingly depend on China and India. Much has been written about the influx of multinational corporations seeking a share of these growing markets. What has gone relatively unnoticed is how the governments of both countries are seeking to protect their domestic industries through resort to international trade law instruments. As elsewhere, the primary form of their protectionism is antidumping.

Until recently, there was little reason to pay attention to the antidumping practices of China or India. As recently as 1997, neither India nor China ranked among the top five users of antidumping sanctions.⁸ To the extent that either country acted on antidumping, it was in a defensive manner—to assist its own exporters targeted by antidumping sanctions in other countries.⁹ Today, that dynamic has shifted. Over the last decade, both India and China have been aggressive users of antidumping laws as an offensive weapon against their trading partners. Measured by the number of antidumping measures implemented between 2003 and 2010, India ranks first (at 217) and China ranks second (at 122)—ahead of all other countries, developed or developing.¹⁰

Yet, the growth of antidumping sanctions enacted by India and China has triggered little concern in the United States and Europe.¹¹ Within the mainstream media, this trend has gone unreported. Instead, the press generally focuses on currency manipulation, intellectual property, indigenous innovation policies, and other trade frictions.¹² Likewise, few scholars have considered this issue. Instead, recent legal articles have focused on the trade frictions emphasized by the press.¹³

This Article examines two questions: first, why is the rise of trade protectionism in Asia's two emerging giants not of greater concern? I argue that this is because, despite increasing India and China's antidumping actions, the existing international legal regime continues to favor the interests of U.S. and EU producers. I illustrate how they gain more from being able to

8. WTO Statistics on AD Measures by Reporting Member, *supra* note 5.

9. For example, India's Ministry of Commerce & Industry had enacted a Marketing Development Assistance Scheme; among its mandates is the provision of assistance to Indian exporters to counter antidumping cases initiated abroad. See Government of India, Ministry of Commerce & Industry, Dept. of Commerce, Marketing Development Assistance Scheme (Revised Guidelines W.E.F. 1.4.2004), at 1, available at <http://commerce.nic.in/guidelines-MDA.pdf>. For information about financing for this scheme, please see the figures reported by India's Ministry of Finance's National Informatics Centre in its compilation of the Department of Commerce's expenditures in the Union Budget. A version of the expenditures from the late 1990s is available at <http://indiabudget.nic.in/ub1998-99/eb/sbe13.pdf>.

10. WTO Statistics on AD Measures by Reporting Member, *supra* note 5.

11. See *infra* notes 94–95.

12. See, e.g., David Leonhardt, *The Real Problem with China*, N.Y. TIMES, Jan. 12, 2011, at B1; Robert J. Samuelson, *The Danger Behind China's 'Me First' Worldview*, WASH. POST, Feb. 15, 2010 at A17.

13. See, e.g., Robert W. Staiger & Alan Sykes, 'Currency Manipulation' and World Trade, 9 WORLD TRADE REV. 583 (2010); Peter K. Yu, *The Middle Kingdom and the Intellectual Property World*, 13 OR. REV. INT'L L. (forthcoming 2011); Claus D. Zimmerman, *Exchange Rate Misalignment and International Law*, 105 AM. J. INT'L L. 423 (2011).

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apply the existing global antidumping rules against India and China than vice versa. While consumers are hurt by the existing rules, their interests are too diffuse to carry much weight. From a political economy standpoint, American and European policymakers continue to view the status quo as acceptable. Therefore, they are largely complacent about India and China's growing antidumping regimes.

Second, is this complacent attitude warranted, or should Americans and Europeans be more alarmed? To answer this question, I examine several hundred Indian and Chinese antidumping cases. I test two leading theories, both of which purport to explain the governments' actions. The first theory suggests that governments use antidumping duties as a "safety valve" to alleviate the competitive pressures that domestic industries typically face after tariff cuts.¹⁴ It supposes that reliance on antidumping laws will flatten or decline once the shock of tariff cuts is absorbed. The second theory suggests that a country uses antidumping measures to retaliate against another country's application of antidumping duties against its producers.¹⁵ It supposes that use of antidumping measures will decline once an antidumping détente is reached among trading partners.

Neither theory, however, has been robustly tested with respect to India and China.¹⁶ The second part of this Article attempts to fill this gap. My results suggest that neither of the two leading theories is fully correct. The explanatory power of the "safety valve" theory is marginal, at best, in both countries. The majority of industries in both India and China have yet to seek use of antidumping laws as a safety valve. In addition, I find that the retaliation theory is partially correct, but fails to take into account the possibility of antidumping actions becoming entrenched.

This Article therefore sounds the alarm that the United States and EU have gravely underestimated the threat that India and China's antidumping regimes pose to the global trading order. Current policy is driven by the assumption that India and China's recent increase in use of antidumping measures is a passing phenomenon, destined to stabilize. This is incorrect. I suggest that Chinese and Indian antidumping actions are likely to continue increasing because: (1) the range of industries using antidumping laws in both countries is increasing; (2) China's use of antidumping sanctions as tit-for-tat retaliation is strengthening; and (3) even if the United States and EU reduce their targeting of Indian and Chinese products, the evidence does not suggest that the two Asian countries will reciprocate. As a result, I suggest that the balance of benefits in favor of the United States and EU is only

14. See *infra* Part III.A.1 and notes 136–137.

15. See *infra* Part III.B.1 and notes 170, 178. Note that the Director-General of the WTO has himself referenced this theory. See Pascal Lamy, Director-General, World Trade Org., Trade Policy Commitments and Contingency Measures, Remarks at the Launch of the WTO World Trade Report 2009 (July 22, 2009).

16. See *infra* Part III.A.1 and III.B.1.

temporary. If the United States and EU choose to simply maintain the status quo, then, in the long-run, that balance will turn in India and China's favor.

Therefore, I argue that the United States and EU need to consider dropping their long-standing intransigence against reforming the international law governing antidumping. India and China's willingness to accept Western-imposed international rules may appear relatively harmless today, but in the long run, their increased use of antidumping laws threatens to undermine the stability of the global trade regime. If the goal is to preserve the stability of the existing global trade regime, then I suggest that it is critical to reorient U.S. and EU trade policy toward embracing reform of the international laws on antidumping. The ongoing Doha Round negotiations offer a unique opportunity to do so—an opportunity that is currently being wasted.

Before proceeding, I note that this Article addresses the issues of China and India's antidumping regimes and reform of global antidumping laws from the standpoint of the United States and EU. Of course, these issues carry repercussions that extend beyond the United States and EU. As I will explain, under the current international legal standard, antidumping measures are an economically inefficient, protectionist instrument. Rising use of antidumping laws is therefore harmful to global welfare and leads to unjust distributive consequences. Why then do I focus on the United States and EU rather than global interests? The reason is because under the WTO's consensus-based approach, any change to the international law governing antidumping requires the consent of all its members.¹⁷ The parties most resistant to reform are the United States, and, to a lesser extent, the EU. Achieving meaningful legal reforms—and corresponding gains in global welfare—therefore requires convincing the United States and EU that reform is in their interests. This Article represents an effort to highlight why, given the rise of China and India, this is now the case. In other words, while I may be sympathetic to economic efficiency and distributive justice arguments for reform, I recognize the limited saliency of these arguments with policymakers. Therefore, I attempt to recast the argument by focusing instead on the interests of the parties that currently resist such arguments.

This Article is organized as follows: Part I provides an overview of antidumping law and explains its popularity as a tool for trade protectionism. Part II examines why India and China's increasing use of antidumping laws has been met with so little concern. In Part II, I offer a political economy rationale, demonstrating that the balance of benefits under the existing legal standard continues to favor U.S. and EU producers. However, there is no guarantee that this positive balance will persist into the future. In Part III, I argue that the prevailing belief in the United States and EU—that neither

17. See Marrakesh Agreement Establishing the World Trade Organization, art. X, Apr. 15, 1994, 1897 U.N.T.S. 154, 160 [hereinafter WTO Agreement].

India nor China's antidumping regimes is a long-term threat—is incorrect. I use new methodological approaches to test the applicability of the two leading theories that underlie the prevailing belief. My findings suggest that, contrary to the prevailing view, India and China's use of antidumping sanctions will likely continue to increase in the years to come. Finally, Part IV considers the policy implications of these findings and offers a series of reform proposals.

In short, this Article highlights how the rise of Asia's two emerging giants poses a challenge to the successful global regime governing international trade—a challenge that has been largely overlooked. This challenge is not direct. Interestingly, it takes the form of embracing, rather than resisting, the legal rules that the United States, EU, and other developed countries have established to benefit themselves. But unless these legal rules are reformed to take account of the impact of these emerging giants, the stability of the global trading system will be placed at increased risk.

I. THE RISE OF ANTIDUMPING

Historically, countries seeking to keep out imports relied heavily on tariffs and quotas.¹⁸ Much of the postwar effort toward liberalizing trade therefore has been focused on eliminating quotas and lowering tariffs. In the Uruguay Round, which concluded in 1994, countries agreed to cut their average tariffs on industrial products by forty percent, with even greater cuts required in several areas.¹⁹ Since then, a series of preferential trade agreements have required additional tariff cuts.²⁰

Prior to the Uruguay Round, countries that had cut tariffs could turn to non-tariff barriers to protect domestic industry. However, the Uruguay Round imposed significant restrictions on the use of non-tariff instruments.²¹ Still, the Uruguay Round did not eliminate all forms of trade protectionism. Instead, it legitimized antidumping and other contingent forms

18. Barry Eichengreen & Douglas A. Irwin, *The Slide to Protectionism in the Great Depression: Who Succeeded and Why* 1 (Nat'l Bureau of Econ. Research Working Paper No. 15142, 2009).

19. For a detailed discussion of the significant tariff concessions made by countries during the Uruguay Round, see J. MICHAEL FINGER, MERLINDA D. INGCO & ULRICH REINCKE, *THE URUGUAY ROUND: STATISTICS ON TARIFF CONCESSIONS GIVEN AND RECEIVED* (1996).

20. For discussions on the recent proliferation of preferential trade agreements, see, for example, JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* (2008); RICHARD BALDWIN & PHIL THORNTON, *MULTILATERALISING REGIONALISM: IDEAS FOR A WTO ACTION PLAN ON REGIONALISM* (2008); Denis Medvedev, *Preferential Trade Agreements and Their Role in World Trade* (World Bank Pol'y Res. Working Paper No. 4038, 2006). For a list of all existing preferential trade agreements, see World Trade Organization, Regional Trade Agreements Information System (RTA-IS), <http://rtais.wto.org/UI/PublicAllRTAList.aspx>.

21. For example, WTO members agreed to additional disciplines on technical barriers to trade, sanitary and phytosanitary measures, and rules of origin. These are listed in Annex 1A of the WTO Agreement, *supra* note 17.

of protection.²² Of these, antidumping is by far the most popular. Part I provides an overview of why is the case.

A. *The Appeal of Antidumping: A Lax Legal Standard
Sanctioning Protectionism*

The primary reason for antidumping's immense popularity is the lax legal standard governing this sanction under international law. Antidumping laws generally work as follows: a domestic industry petitions the government, alleging that foreign competitors from a certain country are "dumping" a certain product at an unfair price. The government examines the petition and decides whether to investigate. If it does, the case is adjudicated under domestic antidumping law(s). The national law must conform to the legal rules established under international law. Today, these rules are established in a WTO agreement commonly referred to as the Antidumping Agreement ("ADA").²³ WTO members whose antidumping laws and/or practices do not conform to the ADA may be subject to WTO dispute settlement proceedings.

In the early postwar period, the international rules governing when antidumping sanctions could be imposed were not particularly lax.²⁴ Thus, countries infrequently used antidumping sanctions. In fact, these sanctions were imposed almost exclusively by four trading powers—the United States, European Communities ("EC"),²⁵ Canada, and Australia—collectively known as the "traditional users" of antidumping.²⁶

Beginning in the 1970s, the four traditional users began lowering tariffs, hoping to spur other countries to follow their example.²⁷ In conjunction,

22. The two other contingent forms of protection that are most frequently used and considered in this Article are countervailing duties and safeguards. See *infra* notes 63, 65, and accompanying text.

23. Its formal name is the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, 1868 U.N.T.S. 201 [hereinafter ADA].

24. The meaning of several terms of GATT Article VI, which laid forth the rules governing the use of antidumping measures, was considered to be ambiguous; this ambiguity spurred later negotiating efforts to agree on common interpretations of these terms. See EDWIN VERMULST, *THE WTO ANTI-DUMPING AGREEMENT* 3 (2005).

25. This is the predecessor to the EU.

26. See *infra* note 62 and accompanying text. A fifth country, New Zealand, was also an earlier adopter of antidumping laws. However, it did not employ antidumping sanctions as actively as the other four countries. See Gunnar Niels & Adriaan ten Kate, *Antidumping Policy in Developing Countries: Safety Valve or Obstacle to Free Trade?*, 22 EUR. J. POL. ECON. 618, 619 (2006) (highlighting that the other four users accounted for around ninety percent of all antidumping cases between 1969 and 1993). Therefore, I do not include it in my list of traditional users of antidumping measures.

27. See, e.g., TERRENCE GUAY, *THE UNITED STATES AND THE EUROPEAN UNION: THE POLITICAL ECONOMY OF A RELATIONSHIP* 39 (1999) (noting the decline of tariff rates in non-agricultural products following the Kennedy Round of trade negotiations); Douglas A. Irwin, *Changes in US Tariffs: The Role of Import Prices and Commercial Policies*, 88 AM. ECON. REV. 1015, 1017–18 (1998) (discussing shifts in the tariff patterns of the United States); Peter Lloyd, *100 Years of Tariff Protection in Australia*, 22 (U. Melb., Dep't. of Econ., Research Paper No. 1023, 2007) (discussing Australia's across-the-board tariff cut of twenty-five percent in the early 1970s).

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they amended their domestic antidumping laws to make it easier to use these laws to protect domestic industries hurt by lowered tariffs.²⁸ To ensure that their amended domestic laws were permissible under international law, they rewrote the international legal standard to be more permissive. As a result, antidumping evolved into a form of quasi-protectionism. But because through the 1980s antidumping sanctions were used exclusively by the “traditional powers” against others and not vice versa, this quasi-protectionist legal standard was considered to be in the United States and EC’s interests.²⁹ It is this standard that, for the most part, was enshrined in the ADA.³⁰

According to the ADA, before a government can impose antidumping duties to remedy the unfair trade policy, it must make three findings. First, it must find evidence of “dumping” of a particular product, as alleged against a foreign producer.³¹ Second, it must find that a domestic producer of a “like” product was injured or that there is a threat of material injury.³² Third, it must find that dumping was the cause of the injury.³³ The first part of this inquiry is known as the “dumping investigation,” while the latter two parts are known as the “injury investigation.”

What follows below is an abbreviated introduction to the existing WTO legal standard for both of these investigations. The ensuing description is by no means a complete overview of all of the legal requirements. Instead, my aim is to help readers unfamiliar with antidumping to understand how the current international legal standard is divorced from economic theory and

28. For example, the U.S. Congress amended U.S. antidumping laws on three occasions (in 1974, 1979, and 1984). The Trade Act of 1974 allowed for a more expansive definition of dumping, which included home market sales below the average cost of production. The Trade Agreements Act of 1979 shortened the time period required for an antidumping investigation and allowed the use of “best available information” in cases where foreign producers did not cooperate in data requests. The Trade and Tariff Act of 1984 allowed the International Trade Commission to cumulate imports across all targeted countries when making an injury determination. The amended law increased the likelihood of success of petitioners, triggering a significant increase in U.S. antidumping measures from the mid-1970s onwards. See Douglas A. Irwin, *The Rise of US Anti-dumping Activity in Historical Perspective*, 28 *THE WORLD ECON.* 651, 654 (2005).

29. See Gary N. Horlick & Eleanor C. Shea, *The World Trade Organization Antidumping Agreement*, 29 *J. WORLD TRADE* 5, 6–7 (1995) (noting the resistance of the United States and EC to including revision of antidumping rules as a topic of negotiation during the Uruguay Round because of the benefits they derived from employing the existing legal standard as a “tool of ‘back-door’ industrial policy” and as “an escape valve for protectionist pressures.”)

30. This is not to suggest that the ADA was an exact replica of the domestic legal standard of the four traditional users. For example, prior to the ADA, U.S. antidumping duties were allowed to remain in place indefinitely. The ADA included a new requirement that duties were to expire after five years, unless a sunset review commenced in advance of the duty’s expiration found that there was continued need for the duties to remain in place. This, and other such new requirements, required the United States to amend its antidumping law following the Uruguay Round. See Uruguay Round Agreements Act, Pub. L. No. 103-465, §§ 201–234, 108 Stat. 4809, 4842–901 (1994).

31. ADA, *supra* note 23, art. 2.

32. *Id.* art. 3.

33. *Id.* art. 3.5.

prone to protectionist abuse. This lax standard is an important factor influencing the popularity of antidumping sanctions.

1. *The Dumping Investigation*

Antidumping duties are purportedly meant to act as a remedy against imports unfairly “dumped” into another market. Theoretically, such duties are economically justifiable when a foreign producer charges unfair predatory prices. Predatory pricing occurs when a firm prices a good below cost with the objective of driving away competitors and capturing a dominant market position from which it can then extract supernormal profits.³⁴ Foreign firms that engage in such behavior often enjoy the benefit of government policies that create a sanctuary market in their home country; this creates the impression that the foreign government is fostering unfair trade.³⁵ If antidumping rules were enacted with the goal of combating predatory pricing, then antidumping laws would operate as a parallel remedy to domestic antitrust laws. International law would equate “dumping” with any situation where a foreign import’s price falls below its short-run marginal cost (that is, its average variable cost).³⁶ Were this the actual legal standard, then instances of “dumping” would be relatively rare. Indeed, one study found that only two percent of the EU’s antidumping cases were plausibly targeting predatory pricing.³⁷

To make it easier to apply antidumping duties, the United States pushed for a looser legal standard for “dumping” under international law.³⁸ Instead of requiring evidence of pricing below average variable cost, international

34. In reality, a predatory pricing strategy is more difficult to implement than is sometimes suggested by proponents of antidumping. Not only must the predatory firm be able to sustain losses long enough to drive out its competitors, but the costs of entry in the market must be sufficiently high to prevent re-entry once the predatory firm raises its prices. This is not the case in many markets. Moreover, the additional profits following the elimination of competitors must be large enough to offset the earlier losses when a below-cost pricing strategy was employed.

35. A sanctuary market is one that is protected in some fashion as a result of government policies. Examples of policies that would limit competition in a market include excessively high tariffs, restrictive licensing schemes, government-mandated standards that diverge from international norms and are difficult to meet, and other non-tariff barriers. Moreover, the government policy need not be trade-related in order to create a sanctuary market. A producer may enjoy a sanctuary market as a result of unenforced (or under-enforced) competition laws or because the government provides a soft budget constraint. Whatever the cause, the sanctuary market in its home country allows the foreign producer to endure short-term losses in the overseas market, before it drives away its competitors and begins exploiting a market-dominant position.

36. Because of the difficulty in computing marginal cost, scholars have recommended substituting average variable costs as a proxy. See, e.g., Phillip Areeda & Donald F. Turner, *Predatory Pricing and Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 717 (1975).

37. PATRICK A. MESSERLIN, MEASURING THE COST OF PROTECTION IN EUROPE: EUROPEAN COMMERCIAL POLICY IN THE 2000S 354–59 (2001).

38. See Barry Eichengreen & Hans van der Ven, *U.S. Antidumping Policies: The Case of Steel*, in THE STRUCTURE AND EVOLUTION OF RECENT U.S. TRADE POLICY 67, 69–72 (Robert E. Baldwin & Anne O. Krueger eds., 1984); Robert E. Baldwin, *The Changing Nature of U.S. Trade Policy Since World War II*, in THE STRUCTURE AND EVOLUTION OF RECENT U.S. TRADE POLICY, *supra*. at 10–11.

law only requires evidence of pricing below the product's "normal value."³⁹ Normal value is a legally-constructed term defined as "the comparable price, in the ordinary course of trade, for the like product."⁴⁰ Most often, normal value equals the price charged by the foreign producer in its home market. In other words, under the existing standard, any firm that charges less for its product overseas than it does at home can be found guilty of "dumping."

However, in many instances, firms that engage in this type of pricing strategy are behaving perfectly rationally. For example, a firm may be making a strategic decision to earn less profit in an export market than its home market. This could be for a variety of reasons: the firm does not have an established reputation overseas; the firm is seeking to gain overseas market share; the competitive structure of the firm's home and export markets are different; and/or the firm is seeking to exploit differences in elasticity of demand across countries. Provided that the firm is pricing above its average variable costs, its behavior should not be considered problematic, and according to economic theory, no remedy is necessary. Moreover, the net effect for the importing country is often positive since consumers experience welfare gains from lower prices. Nevertheless, under existing WTO law, a government can impose antidumping duties in such circumstances. Not all governments will necessarily take such action. But those that do are acting as protectionists—benefiting domestic producers at the expense of domestic consumers and foreign producers, without an economic justification for doing so. And this protectionist policy is considered legally permissible, as a result of the "normal value" approach to defining dumping.

By itself, this is troubling. After all, WTO law is commonly thought to promote free trade rather than endorse protectionism.⁴¹ But it becomes even more problematic when one considers the additional complexities in the existing legal standard. What happens if the home market price fails to yield a "normal value" low enough for a government to impose antidumping duties? One would expect the law would require a negative finding of "dumping," but that is not the case.

When the conventional method (that is, the method of using home market prices as "normal value") fails to yield a positive finding, the WTO allows governments to examine whether one of three exceptions applies: (1) whether the goods are not sold in the "ordinary course of trade,"⁴² (2)

39. ADA, *supra* note 23, art. 2.1.

40. *Id.*

41. The WTO itself states that its "primary purpose is to open trade for the benefit of all." *About the WTO—A Statement by the Director-General*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm (last visited Nov. 6, 2011).

42. A product is not considered to be sold in the "ordinary course of trade" if sales "are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time." ADA, *supra* note 23, art. 2.2.1.

whether less than five percent of the goods are sold in the home market,⁴³ and (3) whether the “particular market situation” in the home market does not “permit a proper comparison.”⁴⁴ Together, these exceptions cover a broad array of circumstances. Provided that one of these amorphous exceptions applies, a government may use a different approach to calculate “normal value.” The permissible approaches include calculating “normal value” based on the price in another export market⁴⁵ and constructing normal value de novo.⁴⁶ For so-called non-market economies,⁴⁷ normal value can also be based on a third approach that uses factor costs in surrogate countries.⁴⁸ Again, these approaches are entirely divorced from economic theory⁴⁹ and written to allow governments to manipulate figures to arrive at a “normal value” that is sufficiently inflated so as to support a finding of dumping.

The net result of these various exceptions and alternative calculation methodologies is that governments have wide latitude to manipulate figures to arrive at a determination of “dumping” for rational, non-predatory behavior, which should not be punished according to economic theory. In other words, the lax legal standard for “dumping” serves a protectionist purpose.

The Appellate Body has further opined that the U.S. definition of the term “ordinary course of trade” as sales “made under conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been normal for sales of the foreign like product” is acceptable. Appellate Body Report, *United States—Anti-Dumping Measures on Certain Hot Rolled Steel Products from Japan*, ¶ 139, WT/DS/184/AB/R (July 24, 2001).

43. See ADA, *supra* note 23, art. 2.2.

44. *Id.* This exception serves as an amorphous, catch-all exception that gives wide latitude to a government to ignore home market price as a basis for “normal value” whenever it sees fit.

45. See *id.*

46. The “constructed value” methodology involves adding together estimates of (1) the cost of production in the country of origin; (2) reasonable selling, general, and administrative expenses; and (3) reasonable profits. See *id.* art. 2.4. While there are certain limits placed on how authorities arrive at these estimates, the law grants considerable leeway. Government authorities, therefore, are prone to inflate their estimates.

47. Non-market economies (“NMEs”) are countries in which the government has “a complete or substantially complete monopoly on trade and where all domestic prices are fixed by the State.” See General Agreement on Tariffs and Trade, Interpretative Note 1 *Ad Article VI*, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT], read in conjunction with ADA, *supra* note 23, art. 2.7. The most common NME target is China.

48. See GATT, *supra* note 47, Interpretative Note 1 *Ad Article VI*. For example, the United States constructs a “normal value” for products from NMEs by breaking a product’s costs down into various “factors of production” (e.g., raw materials, labor, energy, etc.). For each factor, the Department of Commerce chooses a “surrogate country” to use in estimating that factor’s cost. It then aggregates these estimates to arrive at a “normal value” that is sufficiently high to justify a finding of dumping. See generally William P. Alford, *When is China Paraguay?*, 61 S. CAL. L. REV. 79 (1987) (highlighting the absurdity of this approach).

49. For example, the inclusion of a profit estimate in the de novo “constructed value” approach illustrates why this approach runs contrary to the economic justification for antidumping laws. In a predatory pricing scenario, producers price below marginal cost and accept a near-term *loss* in order to gain long-term pricing power. Yet, the “constructed value” approach assumes that the foreign producer is enjoying profits while dumping. The approach inherently dismisses the notion of below-cost pricing, which economic theory suggests is the only instance in which antidumping duties can be justifiably applied.

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2. *The Injury Investigation*

The same problems apply to the second part of an antidumping inquiry: the injury investigation. The injury investigation has two components. First, government authorities must find proof of injury to the domestic industry that produces the like product.⁵⁰ Surprisingly, however, WTO law does not require proof of actual injury. Instead, governments are allowed to presume injury whenever certain price and volume thresholds are met. For price, the threshold is left vague; WTO law requires evidence of “significant” price undercutting or “significant” price depression.⁵¹ For volume, the threshold required is set so low that it is easily met. Only three percent of total imports for the allegedly dumped product must come from the country accused of dumping.⁵² Provided that both price and volume thresholds are met, the petitioner is granted a presumption of injury. Actual proof of economic injury, such as a demonstration of lost profits, is not necessary. Under this lax legal standard, governments can almost always find injury. Even when they cannot, the injury standard is met if there is a “threat of material injury to a domestic industry or material retardation of the establishment of such an industry.”⁵³

Second, governments must also find that dumping caused the injury.⁵⁴ Again, the legal standard is imprecise, making it easy for governments to find in favor of the plaintiffs. The ADA simply states that the injury investigation must be “based on an examination of all relevant evidence before the authorities.”⁵⁵ It lists several factors that authorities should consider, but then notes that the “list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.”⁵⁶ Furthermore, the WTO does not mandate that governments follow certain well-accepted tests for causality, such as use of direct estimation tests (for example, Grainger causality) or counterfactual analysis (i.e., a “but for” approach). Instead, a government could find causation simply because factory utilization declined, inventories went up, or cash flow decreased in the wake of cheaper foreign imports. Even if these developments occurred for reasons unrelated to trade, the ADA’s vague statutory language makes it easy for governments to find that dumped imports “caused” the injury.

50. ADA, *supra* note 23, art. 3.4.

51. *Id.* art. 3.2. The definition of “significant” is therefore subject to the interpretation of each WTO member state’s government. WTO case law has yet to rule on what would fail to meet the threshold of “significant.”

52. *Id.* art. 5.8. Furthermore, where the three percent threshold is not met, the defendant may still be liable if the cumulative volume of the allegedly dumped products from all countries accused of dumping constitutes more than seven percent of total imports of the product. *See id.*

53. *Id.* at n.9.

54. *Id.* art. 3.5.

55. *Id.*

56. *Id.* art. 3.4.

In addition, the existing WTO law does not require that dumping be the primary cause of injury, or even a significant cause. So long as any injury can be attributed to dumping, the causation requirement is met.⁵⁷ Thus, the legal standard governing the injury investigation is also susceptible to manipulation to serve protectionist interests, rather than remedying actual predatory behavior by foreign firms. Again, the WTO rules are written in a convoluted manner divorced from economics, or in the instance of causation, divergent from more prevalent legal norms. They provide great flexibility to government agencies adjudicating antidumping lawsuits to find in favor of domestic petitioners.

As a result, antidumping laws, as currently permitted by the WTO, have emerged as a “major loophole” for legally-sanctioned protectionism.⁵⁸ Very few instances in which antidumping duties are levied are justifiable on economic grounds. In the vast majority of cases, national governments are using antidumping laws not to guard against unfair trade but to protect domestic producers.⁵⁹ The complex, much-maligned WTO rules provide them with legal cover to impose this form of “backdoor protectionism.”⁶⁰

B. *Antidumping's Relative Attractiveness*

Despite this lax legal standard, until the mid-1980s, only the four traditional developed trading powers (the United States, EC, Canada, and Australia) found it necessary to apply antidumping laws in order to protect their domestic industry. Why was antidumping not embraced elsewhere? Part of the answer lies in capacity. The four traditional users who had shaped the global trade rules on antidumping were best equipped to take advantage of its specific loopholes. Many smaller, less-developed countries, on the other hand, faced capacity constraints. The complex rules underlying a national antidumping regime are difficult to draft, costly to administer, and require technical sophistication on the part of industry officials, lawyers, and bureaucrats.

Capacity is, however, not the only explanation. Many larger developing countries certainly had the capacity to implement antidumping regimes, but only a few did so. By 1983, at least twenty other countries outside of the four traditional users had adopted antidumping laws.⁶¹ Few, if any, however, actively embraced antidumping, as evidenced by the fact that the traditional users implemented ninety-nine percent of all global antidumping investiga-

57. See Appellate Body Report, *European Communities—Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, ¶ 192, WT/DS219/AB/R (July 22, 2003).

58. Brink Lindsey & Dan Ikenson, *Coming Home to Roost: Proliferating Antidumping Laws and the Growing Threat to U.S. Exports* 5 (Cato Institute Center for Trade Policy Studies, Trade Briefing Paper No. 14, 2001).

59. See *supra* text accompanying note 37.

60. Lindsey & Ikenson, *supra* note 58, at 5.

61. Maurizio Zanardi, *Anti-dumping: What are the Numbers to Discuss at Doha?*, 27 *WORLD ECON.* 403, 408 (2004).

tions in the early 1980s.⁶² Why not? Unlike the traditional users, these other countries still had other tools with which to protect their domestic industries. They could resort to some combination of high tariffs, import licenses, quotas, and other non-tariff barriers to keep their economies relatively closed. In contrast, the traditional users, having discarded many of these other tools (partially with the hope of convincing others to follow), resorted to antidumping.

It was only after the Uruguay Round that antidumping measures became a relatively attractive instrument for most developing countries. As mentioned, the Uruguay Round Agreements dramatically lowered tariffs and severely constrained the ability of countries to use non-tariff instruments to protect domestic industry. When compared to each of the other remaining legal forms of contingent protection—that is, countervailing duties and safeguards—antidumping has clear advantages.

Relative to countervailing duties,⁶³ antidumping has three advantages. First, it can be used against a much wider range of imports. A countervailing duty may only be applied against a product subsidized by a foreign government.⁶⁴ On the other hand, an antidumping case may be filed against any foreign product. Second, an antidumping case is easier to prove. A countervailing duty petitioner needs to prove the existence of an unfair subsidy. An antidumping petitioner, on the other hand, needs simply to find that the import price is lower than the “normal value,” which, as discussed above, can often be manipulated. Third, an antidumping case is more politically palatable. A positive countervailing duty case will invariably necessitate a finding that a foreign government is providing an illicit subsidy. By contrast, an antidumping case involves no finding about the foreign government’s behavior, only a finding about the foreign firm’s behavior.

Similarly, antidumping has three advantages over safeguards.⁶⁵ First, the cost of imposing antidumping duties is lower. If a government imposes a safeguard for more than three years, it must offer equivalent concessions in

62. See Prusa & Skeath, *supra* note 2, at 362. Note that while Prusa and Skeath’s statistic include New Zealand, its share of investigations is disproportionately small as the country initiated only two investigations in the early 1980s. See Ministry of Economic Development, Anti-Dumping Law and Practice in New Zealand, http://www.med.govt.nz/templates/Page_____3860.aspx (last visited Nov. 1, 2011). Consequently, I do not include New Zealand with the other four traditional users. See *supra* note 26.

63. A countervailing duty is “a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.” GATT, *supra* note 47, art. VI:3.

64. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter Subsidies Agreement].

65. A safeguard is a temporary restriction on the importation of a particular product that may be implemented when the domestic industry has been seriously injured or threatened with serious injury as a result of a surge in imports of that product. See Agreement on Safeguards, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter Safeguards Agreement].

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another product market to compensate for the cost of the safeguard.⁶⁶ By contrast, no concessions are required after the imposition of antidumping duties. Second, while the legal standard governing antidumping remains exceedingly loose, the WTO Appellate Body has substantially narrowed the circumstances in which safeguards can be invoked. In the *Korea-Dairy* case, the Appellate Body resurrected a requirement that safeguards may only be invoked to cope with developments that were unforeseen at the time that the tariff concession was negotiated.⁶⁷ This requirement is difficult to prove and has substantially limited the number of safeguard actions. Third, antidumping duties can be enacted for a longer period than safeguards. A safeguard may be kept in place for a maximum of eight years.⁶⁸ By contrast, an antidumping duty may remain in place indefinitely, so long as every five years, the government conducts a review and finds that it remains necessary.⁶⁹

In addition, antidumping duties, when challenged before the WTO, are subject to a unique standard of review. Notably, antidumping represents the only instance in WTO law where a separate standard of review is carved out for a particular trade action. The WTO limits its review to an assessment of whether “the establishment of the facts was proper and the evaluation was unbiased and objective.”⁷⁰ Provided that is the case, the WTO may not overturn the enactment of an antidumping sanction by a national government, even if it would have reached a different conclusion under de novo review. This is a more deferential standard than the usual WTO standard of review, which provides WTO panels with the authority to make their own objective assessments based on the facts of a case.⁷¹

Given these advantages, it should come as no surprise that governments vastly prefer antidumping measures to other trade instruments. The popularity of antidumping is reflected clearly in Table 1. This table illustrates how frequently WTO members have employed each of the three types of contingent protection measures since the WTO came into being in 1995.

66. See *id.* art. 8.

67. Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶¶ 80–89, WT/DS98/AB/R (Dec. 14, 1999) (ruling that the GATT Article XIX and the Safeguards Agreement are to be read cumulatively, and therefore, the “unforeseen developments” requirement of Article XIX:1(a) remained in effect). The resurrection of this requirement has been widely criticized by scholars since the Safeguards Agreement specifically did not mention “unforeseen developments,” and many national laws have ignored this requirement. See, e.g., Alan O. Sykes, *The Safeguards Mess: A Critique of WTO Jurisprudence*, 2 *WORLD TRADE REV.* 261, 265, 276–77 (2003).

68. Safeguards Agreement, *supra* note 66, art. 7.3. Developing countries may extend the safeguard for another two years. *Id.* art. 9.2.

69. See ADA, *supra* note 23, art. 11.3.

70. *Id.* art. 17.6.

71. See Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 11.3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 *I.L.M.* 112 (1994). To date, in practice, the difference in the standard of review has not played a significant role in the outcome of a WTO case. However, scholars agree that it is certainly theoretically possible. See PETROS C. MAVROIDIS ET AL., *THE LAW AND ECONOMICS OF CONTINGENT PROTECTION IN THE WTO* 265–80 (2008).

Antidumping duties account for an overwhelming ninety-one percent of the total. They are seventeen times more popular than countervailing duties, and twenty-four times more popular than safeguards. Not only is antidumping the easiest instrument to apply to a broad-reaching set of circumstances, but it is also the least costly. It is no wonder that it has emerged as the trade protection instrument of choice for most WTO members.

C. *Antidumping's Rapid Global Proliferation*

Over the past two decades, use of antidumping laws has expanded rapidly. While the international law on antidumping may have been originally drafted for the benefit of the four traditional users, it no longer exclusively benefits these countries. Between 1985 and 2000, over fifty new countries—mainly in the developing world—adopted antidumping laws.⁷² Unlike in the past, these laws were not simply put on the books, but were quickly applied. During that fifteen-year period, more than thirty countries, including India and China, initiated their first antidumping investigation.⁷³ Collectively, these countries have been branded the “new users” of antidumping.

Table 2 highlights the dramatic shift in the composition base of users of antidumping law. Whereas the four traditional users (the United States, EU, Canada, and Australia) once accounted for ninety-seven percent of all antidumping cases filed, they now account for a mere twenty-seven percent. Antidumping's global proliferation began in the late 1980s. In the seven years immediately preceding the Uruguay Round's completion (1987–1994), the antidumping caseload of new users rose more than thirteen-fold. A number of developing countries—Argentina, Brazil, Mexico, South Africa, South Korea, and Turkey—began to experiment with antidumping measures.

Only after the Uruguay Round, for the reasons explained earlier, did use of antidumping laws really take off in the developing world. Since the WTO's inception in 1995, new users have initiated over 2,300 antidumping investigations and enacted more than 1,500 antidumping measures. India, China, and scores of other developing countries have joined the antidumping “club.” Indeed, the rise of the new users of antidumping is a phenomenon that has captured the attention of trade policymakers and scholars (mainly economists). Yet, the majority of scholarship on this phenomenon has examined the behavior of new users as a collective group.⁷⁴ As a result,

72. See Zanardi, *supra* note 61, at 408.

73. Besides India and China, other first-time initiators of an antidumping investigation include Argentina, Brazil, Chile, Colombia, Costa Rica, Czech Republic, Ecuador, Egypt, Guatemala, Indonesia, Israel, Lithuania, Malaysia, Mexico, Nicaragua, Panama, Paraguay, Peru, Philippines, Poland, Russia, Singapore, Slovenia, South Africa, South Korea, Taiwan, Thailand, Trinidad and Tobago, Turkey, Ukraine, and Venezuela. Computation based on information provided in *id.* at 414–16.

74. See sources cited *supra* note 6.

much of what we presume to be true about India and China's relatively new antidumping regimes is based not on country-specific research, but rather on findings about the new users collectively.

I suggest that this is a mistake. Among the new users, India and China stand out. There is clear reason to consider them separately. Most scholars researching the new users of antidumping examine the statistics for the group as a whole. If one does this, then the level of antidumping use by new users appears to be fairly consistent since the Uruguay Round. In the first seven years following the Agreement (1995–2001), new users (including India and China) initiated 1,153 antidumping cases. In the next seven years (2002–2008), they initiated roughly the same amount—1,123 cases. However, if we separate out India and China, as I have done in Table 2, then we reach a different conclusion. What Table 2 shows is that, excluding India and China, use of antidumping measures by this subgroup of new users has actually declined. New initiations by new users (excluding India and China) for the period 2002–2008 fell by twenty-three percent as compared to 1995–2001. Only in India and China is the use of antidumping sanctions still rising.

Indeed, over the past decade, India and China have rapidly ascended to the top tier of users of antidumping laws. This ascension can be seen in the annual WTO ranking of the leading initiators of antidumping cases. India ranked as the top initiator of cases in eight of the nine years between 2001 and 2009.⁷⁵ China ranked in the top three between 2002 and 2005, and since has ranked in the top five in two more years.⁷⁶ Among other WTO members, only the EU appears with such frequency.

The WTO also annually ranks its members by the number of new antidumping measures levied against trading partners. This statistic differs from new initiations in that not every case results in the levying of duties, and, furthermore, many cases require one to two years to adjudicate. Therefore, while there is expected overlap between the members on the new initiation and new measures list, those on each list for a given year do differ. Again, the results from the annual rankings are striking. Since 2000, India has ranked first in all but one year.⁷⁷ Next to India, since 2003, China has placed in the top five more frequently than any other WTO member.⁷⁸

India and China's new antidumping regimes are modeled largely on international norms. Rather than challenging the legal standard originally put in place by the United States and EU, India and China have readily embraced

75. The exception was 2004, when India ranked fifth. See World Trade Organization, *Anti-dumping Initiations: By Reporting Member 01/01/1995–31/12/2010*, available at http://www.wto.org/english/tratop_e/adp_e/ad_init_rep_member_e.pdf [hereinafter WTO Statistics on AD Initiations by Reporting Member].

76. The two additional years are 2006 and 2009. *Id.*

77. The exception was 2006, when India ranked third. See WTO Statistics on AD Measures by Reporting Member, *supra* note 5.

78. *Id.*

it.⁷⁹ This is true of both the substantive and procedural elements of the law. Both countries' laws have adopted the international practice of giving their government authorities wide latitude to arrive at a "normal value" sufficient to justify a positive dumping finding, by sanctioning multiple calculation methodologies for normal value.⁸⁰ Both also define injury broadly, as permitted under Article 3 of the ADA,⁸¹ and both employ a flexible definition of causation.⁸² They also impose numerous procedural requirements enumerated under WTO law, based largely on U.S. and EU practice.⁸³

Not only are India and China's antidumping laws modeled on Western norms, but their legal institutions that oversee application of the laws also follow the Western example. However, in this regard, the two countries have chosen to replicate different models. In India, all antidumping cases are determined by a single entity, the Directorate General of Antidumping and Allied Duties ("DGAD") within the Ministry of Commerce and Industry.⁸⁴ This is based on the European model.⁸⁵ In contrast, China has copied the

79. Antidumping actions in India are governed by the Antidumping Rules, officially known as the Customs Tariff (Identification, Assessment, and Collection of Antidumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, Gazette of India, section II(3)(i) (Jan. 1, 1995) [hereinafter India AD Rules]. The Rules were amended on four occasions between 1999 and 2003. See DIRECTORATE GEN. OF ANTI-DUMPING & ALLIED DUTIES, DEP'T OF COMMERCE, ANNUAL REPORT 2005–06 13 (India). Antidumping actions in China are governed by the Regulations of the People's Republic of China on Anti-Dumping (promulgated by the Standing Comm. Nat'l People's Cong., April 6, 2004, effective July 1, 2004) (Lawinfochina) (China) [hereinafter China AD Regulations]. Earlier versions of these regulations were enacted in 1997 and 2002.

80. The provisions in Chinese law stipulating how normal value is to be calculated are laid out in China AD Regulations, *supra* note 79, art. 4. Indian law details how normal value is to be calculated in Annexure I, entitled "Principles Governing the Determination of Normal Value, Export Price and Margin of Dumping," to India AD Rules, *supra* note 79. It also offers an explanation of the various methodologies through which normal value is calculated in DIRECTORATE GENERAL OF ANTI-DUMPING AND ALLIED DUTIES, MINISTRY OF COMMERCE & INDUSTRY, ANTI-DUMPING—A GUIDE (India), at 3–4, available at http://www.commerce.gov.in/traderemedies/Anti_Dum.pdf [hereinafter DGAD AD Guide].

81. Compare India AD Rules, *supra* note 79, Rule 11, and China AD Regulations, *supra* note 79, art. 7, with ADA, *supra* note 23, at art. 3 n.9.

82. For the factors to be considered in the causation determination in India, see India AD Rules, *supra* note 79, Rule 11(2). For China, see Rules on Investigations and Determinations of Industry Injury for Anti-Dumping (promulgated by the St. Econ. and Trade Comm'n, Dec. 13, 2002, effective Jan. 15, 2003) (China), art. 9 [hereinafter China AD Investigation and Injury Determination Rules].

83. See, e.g., India AD Rules, *supra* note 79, Rule 5(3) (standing), Rule 6(1) (notice); China AD Regulations, *supra* note 79, art. 17 (standing); Provisional Rules on Initiation of Antidumping Investigations (promulgated by the Ministry of Foreign Trade & Econ. Cooperation, Feb. 10, 2002, effective Mar. 13, 2002) (China), arts. 37–39 [hereinafter China Provisional AD Initiation Rules] (notice).

84. India's Antidumping Rules require the central government to appoint a "Designated Authority" whose function is to conduct all antidumping investigations and to make recommendations for the amount of antidumping duties to be levied when appropriate. The Designated Authority must be "a person not below the rank of a Joint Secretary to the Government of India. . . ." India AD Rules, *supra* note 79, Rules 3–4. Since April 1998, the head of DGAD has functioned as the Designated Authority. Prior to that, the Designated Authority still resided within the Ministry of Commerce & Industry, but not within a directorate focused exclusively on antidumping.

85. All antidumping complaints in the EU are investigated by a single entity, the Directorate General Trade ("DG Trade") in the European Commission. For more information about its handling of antidumping complaints, see *Trade Defence: Anti-Dumping*, Directorate Gen. for Trade, <http://ec.europa.eu/trade/tackling-unfair-trade/trade-defence/anti-dumping/> (last updated June 23, 2011). In both the EU and India, the entity's recommendation is later reviewed by a larger body before formal approval. In

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United States and Canadian model of having separate entities in charge of the dumping and injury investigations.⁸⁶ The Bureau of Fair Trade for Imports and Exports (“BOFT”) handles the former, while the Bureau of Industry Injury (“BII”) handles the latter.⁸⁷ Naturally, India’s administrative process more closely follows the EU’s, while China’s follows the United States’ and Canada’s.

India and China’s antidumping regimes now impact much of the world. Between 1995 and 2010, exporters from a total of fifty-five WTO members have been targeted with an antidumping investigation by India.⁸⁸ A significant number of countries have had exporters defend more antidumping cases in India than in any other country.⁸⁹ Several large trading powers fall into this category, including the United States, EU, and China.⁹⁰ A smaller number of WTO members (twenty-four) have had to defend antidumping lawsuits in China. However, China now ranks as the second leading instigator of antidumping investigations for producers in the EU, Japan, Korea, Singapore, and the United States.⁹¹

India, that body is the Ministry of Commerce & Industry, while in the EU, that body is the European Council, as advised by the Antidumping Advisory Committee.

86. In the United States, the responsibilities are split between the Department of Commerce’s International Trade Administration and the International Trade Commission. For more information about how the process is handled in the United States see U.S. INT’L TRADE COMM’N, PUB. NO. 4056, ANTI-DUMPING AND COUNTERVAILING DUTY HANDBOOK (13th ed. 2008). In Canada, the responsibilities are split between the Canadian Border Services Agency’s Antidumping and Countervailing Directorate and the Canadian International Trade Tribunal. For an overview of how the process is handled in Canada, see *What You Should Know About Dumping and Subsidy Investigations*, CAN. BORDER SERVS. AGENCY, <http://www.cbsa.gc.ca/sima-lmsi/brochure-eng.html> (last modified May 28, 2011). In both countries, the former entity handles the dumping investigation, while the latter entity handles the injury investigation. China has adopted a similar division of adjudicatory responsibilities.

87. The two entities originally belonged to different ministries. BOFT was part of the Ministry of Foreign Trade and Economic Cooperation (“MOFTEC”), while BII was part of the State Economic and Trade Commission (“SETC”). In 2003, as part of a governmental reorganization, MOFTEC and SETC were both merged into a newly-created Ministry of Commerce. See Decision of the First Session of the Tenth National People’s Congress on the Plan for Restructuring the State Council (Mar. 10, 2003) (Lawinfochina) (China). Thus, one difference between the Chinese model and the American/Canadian model is that while the adjudicatory responsibilities are split, the entities responsible for each part now belong to the same ministry.

88. The number of WTO members whose exporters have had to defend antidumping cases between 1995 and 2010 in India is the highest in the world, above that for the United States (fifty-four) and the EU (fifty-three). This analysis is based on my own computations of figures reported to the WTO. See World Trade Organization, *Anti-dumping Initiations: By Reporting Member vs. Exporting Country From 01/01/1995–31/12/2010*, available at http://www.wto.org/english/tratop_e/adp_e/ad_init_rep_exp_e.pdf [hereinafter WTO Statistics on AD Initiations by Reporting Member vs. Exporting Country].

89. Through 2010, only twenty-nine of the fifty-five WTO members targeted by India have been subject to twenty or more total antidumping investigations globally. Of this group, for twelve of the twenty-nine WTO members (slightly more than two-fifths), India was the leading instigator of antidumping investigations. This analysis is based on my own computations of figures reported to the WTO. See *id.*

90. In addition, India is the leading instigator of antidumping investigations against a number of Asian exporters including Korea, Taiwan, Hong Kong, Singapore, Malaysia, Indonesia, and Thailand. See *id.*

91. This ranking is from data for the time period 1995–2010. For the United States, China ties for second with Brazil; for Japan, China ties for second with India. See *id.*

Despite the fact that India and China now play such a prominent role, few scholars have focused extensively on the antidumping regimes of either country. Legal scholarship has been limited to confirming that the laws, for the most part, conform to the WTO Antidumping Agreement.⁹² The other characteristics that have been attributed to the regimes are largely extrapolated from trends observed of the “new users” as a group, rather than a detailed examination of either individual antidumping regime.⁹³

Among the mainstream public in the United States and Europe, the growing proliferation of antidumping laws worldwide, and their increased use by India and China, has drawn almost no attention. Even those who are aware of the trend, interestingly, remain seemingly untroubled by this phenomenon. When discussing trade conflicts with China, rarely does the issue of antidumping laws ever surface.⁹⁴ This is even more the case with India.⁹⁵

The United States and EU's lack of concern about India and China's rising use of antidumping laws is reflected in their negotiating policy at the WTO. When launching the Doha Round in 2001, the WTO included a Negotiating Group on Rules, with antidumping as one of the key areas for negotiations.⁹⁶ This grew out of a concern that the rapid growth of antidumping is having a negative protectionist impact on global trade. During the past decade, over 100 comments and proposals have been submitted to scale back the existing permissive WTO legal standard.⁹⁷ Yet the traditional

92. See generally ANTI-DUMPING LAWS AND PRACTICES OF THE NEW USERS (Junji Nakagawa ed., 2006); XIN ZHANG, INTERNATIONAL TRADE REGULATION IN CHINA 178–236 (2006); Kermit W. Almstedt & Patrick M. Norton, *China's Antidumping Laws and the WTO Antidumping Agreement*, 34 J. WORLD TRADE 75 (2000); Thomas Weishing Huang, *The Gathering Storm of Antidumping Enforcement in China*, 36 J. WORLD TRADE 255 (2002); Wei Huo, *Introduction and Critical Analysis of Anti-dumping Regime and Practice in China Pending Entry of WTO: Transition Toward a WTO-Modeled Trade Legal Mechanism*, 36 J. INT'L L. 197 (2002).

93. See, e.g., NATIONAL BOARD OF TRADE, SWEDEN, THE USE OF ANTIDUMPING IN BRAZIL, CHINA, INDIA AND SOUTH AFRICA—RULES, TRENDS AND CAUSES 66–70 (2005) (noting that determinants of antidumping in China and India include trade liberalization, import competition, and retaliation); Niels & ten Kate, *supra* note 26, at 620–21, 624–27 (2006) (discussing the retaliation and safety valve theories as rationales for antidumping growth in developing countries, including India and China).

94. The White House devoted only four paragraphs of its latest forty-page report on Chinese trade barriers to the issue of antidumping. Issues of concern raised were the lack of transparency and procedural fairness, vagueness in certain portions of the law, and the untested judicial review process. Interestingly, the report did not express any alarm over China's emergence as a “significant user of antidumping.” See OFFICE OF THE U. S. TRADE REPRESENTATIVE, EXECUTIVE OFFICE OF THE PRESIDENT, NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 61–62 (2010).

95. See Trade Policy Review Body, *Trade Policy Review: India—Minutes of the Meeting—Addendum*, 12–26, 51–59 WT/TPR/M/182/Add. 1 (July 20, 2007) [hereinafter TPR India] (listing questions of concern from the United States and EU for India's WTO trade policy review). Neither the United States nor the EU raised any concerns about the upsurge in India's use of antidumping. The only countries to raise questions were South Korea and Canada. See *id.* at 60–97.

96. See World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 28, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

97. List of Proposals Encompassing Negotiations on Antidumping Reform Made During the Rules Negotiation, WTO DOCUMENTS ONLINE, http://docsonline.wto.org/gen_home.asp?language=1&_=1 (follow “Simple Search” hyperlink; then search “Document Symbol” for “TN/RL”; then follow “Search” hyperlink).

users, and the United States in particular, remain adamantly opposed to any change in the current standard.⁹⁸ Despite the rise of Indian and Chinese antidumping, and despite the fact that developed countries are no longer the dominant users of antidumping, the United States and EU insist on preserving the status quo.

Why are the United States and EU not more open to legal reforms to constrain India and China's ability to use antidumping measures? After all, it is widely presumed that access to China and India's burgeoning domestic markets will become increasingly critical for the growth of export-oriented multinational businesses.⁹⁹ To the extent that India and China are increasingly using antidumping laws to protect their domestic producers, it would appear that this should be cause for alarm.

II. WHAT UNDERLIES THIS COMPLACENCY?

At a moment when Asia's two emerging economic powerhouses are rapidly embracing the world's most widely used protectionist instrument, why are the United States and EU not more concerned? The reason is not that the United States and EU have yet to experience the impact of this phenomenon. American and European firms now defend against more antidumping complaints in India than anywhere else in the world.¹⁰⁰ China ranks second for Europeans, and among the top five for Americans.¹⁰¹

In Part II, I offer two main explanations for United States and EU's complacency. First, from a rule-of-law perspective, India and China's laws are not problematic. By and large, these countries' laws comply with their legal obligations under the WTO's ADA. Second, from a political economy perspective, U.S. and EU policymakers have not yet had reason to view China and India's antidumping rise as a threat. Instead, the balance of benefits under the existing law continues to favor the United States and EU. I expound briefly on the first explanation before focusing on the second.

A. *Compliance with International Law*

As Part I discussed, the legal standard governing the international trade law on antidumping was shaped by the United States and EU to serve their interest in creating a legally-sanctioned protectionist instrument. As this instrument was frequently used against China and, to a lesser extent, India, some were concerned that as these developing countries rose in prominence,

98. See *infra* notes 213–218 and accompanying text.

99. See Nouriel Roubini, *Are There Bright Spots Amid the Global Recession?: A Snapshot of the Better Economies*, FORBES, Aug. 6, 2009, <http://www.forbes.com/2009/08/05/recession-china-india-qatar-poland-brazil-opinions-columnists-nouriel-roubini.html>.

100. Computations based on WTO statistics. See WTO Statistics on AD Initiations by Reporting Member vs. Exporting Country, *supra* note 88.

101. Computations based on WTO statistics. *Id.*

they would seek to eliminate, or at the very least pare back, the permissive legal standard. Instead, as noted earlier, India and China have readily accepted and embraced the existing WTO legal standard, as defined by the traditional powers. The antidumping rules that one faces in New Delhi or Beijing are relatively similar to those faced in Brussels or Washington.

This is not to suggest that Indian or Chinese antidumping laws are near-exact replicas of American or European antidumping laws. Some differences do exist. For example, outsiders have criticized both countries' laws as falling short in their transparency requirements.¹⁰² Parties may not have access to their opponents' written rejoinders, or the basis for the authorities' decision may be unclear.¹⁰³ Yet, neither of these is a direct violation of a legal obligation under existing WTO law.¹⁰⁴ On other dimensions, India and China's laws exceed WTO requirements. China requires that authorities consider the public interest before imposing duties,¹⁰⁵ while India requires solicitation of consumer input.¹⁰⁶ U.S. law, by contrast, has no such requirement.

On balance, the differences mentioned above are not significant. They reflect differences in the technical approach, rather than an altogether different attitude toward antidumping. From an overall rule-of-law perspective, then, both India and China are in compliance with their WTO treaty obligations. Both have readily implemented, rather than challenged, the existing international legal standards originally drafted to serve American and European interests. As a result, the United States and EU have not viewed India and China's antidumping regimes as problematic.¹⁰⁷ The prevailing attitude among American and European policymakers appears to be that so

102. See ZHANG, *supra* note 92, at 192; V. Lakshmi Kumaran, *The 10 Major Problems with the Anti-Dumping Instrument in India*, 39 J. WORLD TRADE 115, 118 (2005); Tian Yu, *The 10 Major Problems with the Anti-Dumping Instrument in China*, 39 J. WORLD TRADE 97, 98–99 (2005).

103. See ZHANG, *supra* note 92, at 192; Yu, *supra* note 102, at 99.

104. Article 6.4 of the ADA states, "The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in [Article 6.5], and that is used by the authorities in an antidumping investigation, and to prepare presentations on the basis of this information." ADA, *supra* note 23, art. 6.4. It does not mention written rejoinders to the opposing party's presentation.

Article 6.9 of the ADA states, "The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures." *Id.* art. 6.9. Indian and Chinese decisions reveal the "essential facts" but may not disclose the reasoning or interpretation of these facts. This, however, is not required under the existing language.

105. See China AD Regulations, *supra* note 79, art. 37.

106. Indian law requires input from "industrial users of the article under investigation" and "representative consumer organizations in cases where the article is commonly sold at the retail level." India AD Rules, *supra* note 79, Rule 6(5).

107. See *supra* notes 94 and 95. Also note that despite the large numbers of antidumping measures implemented by India and China, no WTO case has ever been brought against India's antidumping laws and a case was not brought against China's laws until 2010. See List of Anti-dumping Dispute Settlements, WTO DOCUMENTS ONLINE, http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm (follow "Anti-dumping (Article VI of GATT 1994)" hyperlink).

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long as India and China are willing to play by “our” legal rules, there is no need to be perturbed by the rise of their antidumping regimes.

B. The Existing Balance of Benefits

A second, and arguably more important, reason for U.S. and EU complacency is that the status quo international legal rules still work to the advantage of American and European producers. At present, despite the rapid increase in Indian and Chinese antidumping investigations, the costs arising from these investigations still pale in comparison to the benefits that the United States and EU derive from the existing global antidumping regime. Therefore, the United States and EU are understandably reluctant to change the global regime while it still operates in their favor.

Although a wide range of industries now export to China and India, very few have been subject to an antidumping case. To date, the costs of India and China’s antidumping measures have been borne by a limited set of American and European producers. By far, the industry most negatively affected is the chemicals industry, which accounts for more than half of all Indian and Chinese antidumping cases against the United States or EU. Other American industries targeted include the newsprint, steel, vitamins, paper, and textiles. Other European industries targeted include paper, steel, vitamins, rubber, and potato starch.

For these industries, the cost of rising antidumping use is real. Depending on the magnitude of the duties imposed, consumers’ price sensitivity, and other factors (for example, quality), antidumping duties can seriously depress the exports of the affected product into India or China. Tables 3 and 4 illustrate the impact on select products impacted by Indian and Chinese antidumping measures. For these producers, a decline of over thirty to fifty percent in value is not altogether uncommon; some lose virtually their entire market share as a result of the antidumping measure (for example, newsprint in China, vitamin C in India). Through raising tariffs and therefore prices, antidumping duties often succeed in enticing domestic consumers to switch away from the targeted foreign import.

However, the vast majority of American and European firms exporting to India and China have yet to be targeted by an antidumping case. For them, the rise of India and China’s antidumping regimes remains a costless or low-cost event.¹⁰⁸ In fact, American and European producers are disproportionately under-targeted. The EU accounts for over fifteen percent of India’s imports, but is targeted by less than eight percent of India’s antidumping measures. Similarly, the United States accounts for over eight percent of India’s imports, but is targeted by less than five percent of its antidumping

108. Exporters not targeted by an antidumping case may nonetheless incur additional costs if they hire personnel to monitor the changes in antidumping law or to fend off potential complaints.

measures.¹⁰⁹ The same pattern holds true with regard to China for the EU, which accounts for over twelve percent of China's imports, but is targeted by less than eight percent of its antidumping measures.¹¹⁰

In fact, the primary targets of India and China's rapidly growing antidumping regimes are not the United States or EU, but other Asian economies. More than half of China's and India's antidumping sanctions are targeted against other Asian economies.¹¹¹ Both countries' leading targets include Japan, Korea, and Taiwan.¹¹² India's largest target is China itself.¹¹³ Not unsurprisingly, India and China's newly ascendant antidumping regimes have received more attention in Asia than in the United States or Europe.

On the other hand, U.S. and EU producers continue to derive considerable benefits from their use of existing WTO rules on antidumping, especially against imports from China and India. While a disproportionately small share of Chinese and Indian antidumping sanctions is targeted at the United States and EU, the exact opposite is true of the U.S. and EU regimes. Currently, 19.2% of U.S. imports are from China.¹¹⁴ Yet, in the past seven years (2004–2010), over half of all U.S. antidumping sanctions have been targeted against China.¹¹⁵ The second most frequently targeted country is India,¹¹⁶ which astonishingly does not even rank among the United States' top ten importers. The top two targets of EU antidumping sanctions are also China and India.¹¹⁷ In the past five years, almost half of all EU antidumping sanctions were aimed at Chinese products. Since 1995, the EU has applied more than seven times as many antidumping sanctions against China than China has against the EU; the United States, more than three times as many. Clearly, both the United States and EU continue to rely heavily on an-

109. Indian import statistics and market share are based on figures reported by India's Department of Commerce. See Export Import Data Bank Version 6.0—Tradestat, <http://commerce.nic.in/eidb/default.asp> (last updated July 10, 2011). Note that the percentage of imports is based on value, while the percentage of antidumping measures is based on quantity. I do this because it is difficult to measure antidumping measures by value. Because the size of the antidumping sanctions against European and American producers is not disproportionately larger than those against other countries' producers, this difference in the unit of measure does not present an issue.

110. Chinese import statistics and market share are based on figures reported in NATIONAL BUREAU OF STATISTICS OF CHINA, CHINA STATISTICAL YEARBOOK 2008 717–20 (2008). The United States was disproportionately under-targeted during 2007–2008, but that is no longer the case.

111. Computations based on WTO statistics. See World Trade Organization, *Anti-dumping Measures: Reporting Member vs. Exporting Country 01/01/1995–31/12/2010*, available at http://www.wto.org/english/tratop_e/adp_e/ad_meas_rep_exp_e.pdf [hereinafter WTO Statistics on AD Measures by Reporting Member vs. Exporting Country].

112. *Id.*

113. *Id.*

114. See U.S. Census Bureau, U.S. Goods Trade: Imports & Exports by Related-Parties 2010 4 (2011), available at http://www.census.gov/foreign-trade/Press-Release/2010pr/aip/related_party/rp10.pdf.

115. See WTO Statistics on AD Measures by Reporting Member vs. Exporting Country, *supra* note 111.

116. *Id.*

117. *Id.*

tidumping to protect domestic industries against increasingly competitive Chinese and Indian producers.

To illustrate how much the existing global legal regime works in favor of U.S. and EU producers, I calculate the volume of trade affected by the U.S. and EU antidumping measures targeting Indian and Chinese goods versus the volume of trade affected by India and China's measures targeting U.S. and EU goods.¹¹⁸ Table 5 shows my results. The annual gaps are sizeable, and, over time, they appear to be growing. In 2008, the United States and EU opened new antidumping investigations into over \$7 billion worth of Chinese and Indian imports. In comparison, India and China opened new investigations into less than \$700 million worth of U.S. and EU imports. While more trade is being subject to Indian and Chinese antidumping inquiries over time, it is nowhere close to the trade volume affected by U.S. and EU antidumping investigations.

Table 5 makes clear that, at present, the existing global antidumping rules clearly work in favor of American and European producers. The United States and EU gain considerably more from being able to use antidumping laws to protect their domestic firms from their Chinese and Indian competitors than they lose from allowing China and India to take advantage of the same rules against their exporters. As a result, the United States and EU see little incentive to seek reform. While they may not like the increasing amount of trade affected by Indian and Chinese antidumping measures, at present it is still a small price to pay for the continued ability to target Indian and Chinese exporters under loose global antidumping rules.

This narrative is reinforced once we consider political factors. The beneficiaries of antidumping measures against Chinese and Indian producers are dispersed across a wide range of industries. Protected products range from thermal paper, farmed shrimp, and garment hangers in the United States¹¹⁹ to plastic bags, hand trucks, and ironing boards in the EU.¹²⁰ Several of the American beneficiaries are struggling domestic industries—such as steel,

118. Because China, India, and the EU do not report the volume of trade affected for each antidumping measure, I computed the trade volume figures manually for each antidumping case. I only examined cases that ultimately resulted in the imposition of an antidumping measure, with the exception of 2008 where I also considered outstanding cases. My figures are based on the value of the imports of the HS-6 product code(s) affected by the antidumping measure in the year that the antidumping investigation began, as reported in the U.N. Comtrade database. For a discussion of the HS-6 classification system, see *infra* Part III.A.2. These figures may overstate the impact of the antidumping measure to some extent, but because HS-6 level is the most detailed level of trade volume data available for all four economies, I use it to ensure consistency.

119. See WTO Committee on Anti-dumping Practices, *Semi-Annual Report Under Article 16.4 of the Agreement—United States*, 10–21, 24–27, G/ADP/N/209/USA (Apr. 7, 2011) [hereinafter US Semi-Annual Report on Antidumping (Apr. 7, 2011)].

120. See WTO Committee on Anti-dumping Practices, *Semi-Annual Report Under Article 16.4 of the Agreement—European Union*, 14–21, G/ADP/N/209/EU (Mar. 28, 2011) [hereinafter EU Semi-Annual Report on Antidumping (Mar. 28, 2011)].

sugar, and textiles—based in politically influential states.¹²¹ Similarly, many of the beneficiaries of EU antidumping duties against China and India are also politically sensitive constituencies (for example, the footwear industry and strawberry farmers).¹²² For many of these industries, antidumping lawsuits are a matter of life or death. Indeed, it often represents their only hope to gain some time to make the necessary improvements in order to fend off lower-cost foreign competition. They therefore lobby heavily in support of the existing regime. Governments gain political goodwill when enacting antidumping duties to protect these industries.

By contrast, those negatively affected by the antidumping duties levied by China and India have exerted little political pressure for reform. As noted earlier, their numbers are limited. The chemicals industry, a powerful lobbying force and the industry most heavily affected by India and China's growing antidumping regime, has not, in fact, pushed for reform of the international law on antidumping. This is because its interests are conflicted, rather than clearly aligned in favor of reform. While it suffers the costs of increased antidumping overseas, the chemicals industry is also a major beneficiary of the antidumping duties imposed in its home market (that is, in the United States and EU).¹²³ Thus, there is not a significant industry-led political lobbying force drawing attention to the negative trade impact of Chinese and Indian tariffs.

Furthermore, public choice theory explains why consumers, who are hurt by rising prices caused by antidumping tariffs, do not pressure their governments for reform. The negative welfare cost of antidumping duties is diffused across a large number of consumers; the cost borne by any individual consumer is therefore small. Consequently, consumers have not organized politically in favor of limiting application of antidumping duties.¹²⁴ An-

121. The executive branch is often aware of the need to placate economic interests in sensitive political districts. See, e.g., Wendy L. Hansen, *The International Trade Commission and the Politics of Protectionism*, 84 AM. POL. SCI. REV. 21, 28 (1990); Douglas Nelson, *The Political Economy of Antidumping: A Survey*, 22 EUR. J. POL. ECON. 554, 565–71 (2006). For additional discussion about how political factors influence U.S. antidumping, see, for example, Michael O. Moore, *Rules or Politics? An Empirical Analysis of ITC Antidumping Decisions*, 30 ECON. INQUIRY 446, 452 (1992); Mustapha Sadni-Jallab, *The Political Influence of European and American Antidumping Decisions: Some Empirical Evidence*, 6 ECON. BULLETIN 1, 4 (2007).

122. For a discussion of how political factors influence European antidumping policy, see Simon J. Evenett & Edwin Vermulst, *The Politicisation of EC Anti-dumping Policy: Member States, Their Votes and the European Commission*, 28 THE WORLD ECON. 701 (2005); Angelika Eymann & Ludger Schuknecht, *Antidumping Enforcement in the European Community*, in ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT 221 (J.M. Finger, 4th ed., 1996). See also Min Shu, *Market Integration and Trade Protectionism: The Political Economy of Anti-Dumping Governance in the EU*, Presentation to Ass'n of Pacific Rim Res. Univs. (Nov. 8, 2007).

123. For numerous examples of antidumping duties imposed against foreign imports of chemicals to the benefit of U.S. and EU domestic chemicals manufacturers, see US Semi-Annual Report on Antidumping (Apr. 7, 2011), *supra* note 119, and EU Semi-Annual Report on Antidumping (Mar. 28, 2011), *supra* note 120.

124. See BRINK LINDSEY & DANIEL J. IKENSON, ANTIDUMPING EXPOSED: THE DEVILISH DETAILS OF UNFAIR TRADE LAW (2003) (arguing that because the technical details of the law are inscrutable, lobbying is limited to import-competing producers). Note, however, that the situation varies somewhat between the United States and the EU. In the EU, consumer groups have sought to make their opposi-

tidumping decisions therefore focus primarily on producers' welfare, consumer welfare, and the public interest as a whole, rarely factor into the equation.¹²⁵

As a result, from a political economy standpoint, U.S. and EU governments, to date, have had little reason to seek reform of the existing international law on antidumping. While a few exporters suffer some cost from the rise of India and China's antidumping regimes, the increased costs have not been large enough to generate widespread concern. These costs, on an aggregate level, continue to fall well short of the immense benefits that American and European domestic industries enjoy under the existing WTO legal standard. Because the existing balance of interests still tilts heavily in their producers' favor, India and China's newfound willingness to embrace antidumping has not prompted alarm in the United States and EU.

III. WHAT EXPLAINS INDIA AND CHINA'S ANTIDUMPING USE?

From an immediate standpoint, India and China's growing use of antidumping laws may not trigger a need for the United States or EU to revisit the existing international law on antidumping. But will this continue to hold true into the foreseeable future? After all, patterns of antidumping use are subject to change over time. Were India and China to continue expanding their use of antidumping sanctions, it is possible that, at some point, the existing net advantage could come undone.

Therefore, the two-part explanation offered in Part II is incomplete. Underlying U.S. and EU trade policy on antidumping reform must also be a sense that neither India nor China's antidumping regime is destined to become a long-term threat.¹²⁶ In other words, the United States and EU expect that neither India nor China will continue to ramp up its use of antidumping measures to the point of upsetting the existing net advantage or the existing legal order.

tion known in individual antidumping proceedings and have pressed the European Court to affirm their right to be considered as an interested party in such proceedings. See Case T-256/97, *Bureau Européen des Unions de Consommateurs v. Comm'n*, 2000 E.C.R. II-101. However, even EU consumer groups have not politically mobilized to seek overall reform of antidumping laws. See Dirk De Bièvre & Jappe Eckhardt, *The Political Economy of EU Anti-Dumping Reform* 12 (Euro. Centre for Int'l Pol. Econ., Working Paper No. 03/2010, 2010), available at <http://www.ecipe.org/publications/ecipe-working-papers/the-political-economy-of-eu-anti-dumping-reform/PDF> (highlighting the inefficacy of the Bureau Européen des Unions de Consommateurs during efforts by the European Commission to reform its antidumping laws, as evidenced by its failure to even formulate a position paper on the proposals).

125. See Bernard M. Hoekman & Petros C. Mavroidis, *Dumping, Antidumping, and Antitrust*, 30 J. WORLD TRADE 27 (1996) (finding that even in the EU, where there is a statutory requirement to consider the public interest, the Commission has never imposed antidumping duties because consumers' interests outweighed producers' interests).

126. This is assuming that U.S. or EU trade policy is not fully captured by pro-antidumping industries, and that policymakers are not applying an unrealistic discount factor for time periods outside the immediate short term.

Why do scholars and policymakers possess such an expectation? And is it correct? Part III examines these two questions. Two theories inform expectations about how much India and China are inclined to apply antidumping duties. One theory posits that developing countries turn to antidumping in response to tariff cuts, in order to provide a safety valve to at-risk domestic industries threatened by the lowered tariffs. The other theory posits that developing countries use antidumping measures as a retaliatory instrument against those who target them. Scholars and policymakers have assumed, perhaps too readily, that both theories apply to India and China.

The belief in the applicability of these two theories plays an important role in shaping the United States and EU's expectation that the recent dramatic rise in India and China's use of antidumping measures will level off. The safety valve theory suggests that the recent increase in Indian and Chinese antidumping is a unique event, triggered by the historic tariff cuts required by the Uruguay Round and China's WTO accession. As industries adjust, the need for antidumping should dissipate. And because no new concessions are likely in the near future, the theory suggests that neither India nor China will need to increase its use of antidumping measures anytime soon. The retaliation theory further bolsters this belief. It suggests that the two countries' use of antidumping sanctions is a response to others' use of antidumping sanctions against them. To the extent that the United States and EU seek to temper Indian and Chinese antidumping sanctions, they simply need to dial back their own use of antidumping sanctions. In other words, the theory conjectures that a policy of antidumping détente will effectively contain India and China; so long as the United States and EU do not escalate tensions unnecessarily, neither India's nor China's regime is bound to become a long-term threat.

But are these beliefs correct? I contend that scholars and policymakers have been far too willing to accept the implications of these theories, without having tested them robustly. In Part III, I attempt to fill this gap. By engaging in a more detailed test of both theories, I find evidence that the prevailing beliefs about the drivers of India and China's recent antidumping growth are not entirely correct. Only a subset of Indian and Chinese industries has learned to take advantage of antidumping laws. Most have yet to do so. And only India, and not China, has chosen so far to use antidumping measures regularly as a retaliatory weapon. Even then, India's retaliation is selective, and its use of antidumping measures does not necessarily subside once its retaliation strategy succeeds.

All of this should be disconcerting because it suggests that the United States and EU have gravely underestimated the threat posed by India and China's antidumping regimes. Even if no further tariff cuts are enacted and others' targeting of India and China recedes, my findings suggest that India and China's use of antidumping measures will continue to rise in the years to come. This will be for any number of reasons, including: (1) more Indian

and/or Chinese industries discovering the benefits of antidumping laws; (2) China deciding to take a more aggressive retaliatory stance; and/or (3) both countries becoming increasingly reliant on antidumping laws, even when it is no longer needed for retaliation purposes. In other words, I highlight the likelihood that today's positive balance of benefits will disappear tomorrow.

Part III is organized as follows: I start with my examination of the safety valve theory. I provide an overview of the theory and explain why scholars and policymakers have come to believe that it applies to India and China. Then, I briefly discuss the shortcomings of the existing tests of the theory and explain my own empirical strategy. Finally, I focus on my findings, which run contrary to the conventional belief that India and China's use of antidumping sanctions is not likely to increase. I then repeat this sequence with my examination of the retaliation theory, before concluding with a short summary.

A. *The Safety Valve Theory*

1. *An Overview*

As mentioned above, one widely-accepted explanation for the increase in antidumping activity in developing countries, including India and China, is the "safety valve" theory.¹²⁷ This theory suggests that antidumping acts as a way to secure and maintain domestic support for trade liberalization. During the course of a trade negotiation, a government will encounter situations where it is seeking to offer a greater trade concession than its domestic industry is willing to undertake. The industry may have significant political clout, which it could exercise to block the government from offering such a concession. To avoid a political confrontation, the safety valve theory suggests that the government and domestic industry cut a deal. Industry agrees to the tariff concession. In exchange, the government agrees that if the domestic industry is severely harmed by increased foreign competition resulting from the lowered tariff, it will enact antidumping duties that will temporarily raise tariffs, thereby minimizing or eliminating the concession. As a result, the industry sees the tariff concession not as permanent, but as temporarily reversible if it becomes unbearable. In return for its political acquiescence, the industry acquires a "safety valve."¹²⁸

127. See, e.g., Niels & ten Kate, *supra* note 26. Several works provide the foundation for this theory. See KYLE BAGWELL & ROBERT W. STAIGER, *THE ECONOMICS OF THE WORLD TRADING SYSTEM* (2002); Harry G. Johnson, *Optimum Tariffs and Retaliation*, 21 *REV. ECON. STUD.* 142-53 (1953); see also Kyle Bagwell & Robert Staiger, *Protection Over the Business Cycle*, 3 *ADVANCES IN ECON. ANALYSIS & POL'Y* 1 (2003).

128. The theory suggests that antidumping increases a country's *ex ante* willingness to lower tariffs. Consequently, trade agreements contain greater tariff concessions than would be the case without global antidumping laws. Some have further argued that "the safety valve argument is potentially even more dramatic: without AD, [developing] countries might not even have embarked on the path towards free trade in the first place." Niels & ten Kate, *supra* note 26, at 626.

According to the theory, following periods of trade liberalization, antidumping activity spikes. To obtain a temporary reprieve from the shock of tariff cuts, domestic industries will trigger the “safety valve” through antidumping more frequently than before tariff cuts were implemented. This provides various industries with additional time to adjust to the heightened foreign competition. Once they do, the need for a “safety valve” diminishes, and antidumping complaints lessen. Thus, the theory suggests that the level of antidumping activity will ebb and flow, following patterns of tariff cuts and industry adjustment.

The safety valve theory has been widely assumed to explain India and China's increasing use of antidumping laws because, on an aggregate level, it has correctly predicted the timing of the recent increase. India enacted major tariff cuts in the 1990s, in conjunction with the Uruguay Round.¹²⁹ Soon thereafter, Indian antidumping complaints soared.¹³⁰ Similarly, China dramatically cut tariffs following its WTO accession in December 2001.¹³¹ Chinese antidumping complaints then skyrocketed between 2002 to 2003 as domestic industries struggled with increased foreign competition.¹³²

Moreover, the safety valve theory also correctly predicted the aggregate level of Indian and Chinese antidumping following the initial spike. According to the theory, the level of antidumping use is likely to be highest in the period immediately following a tariff cut. Over time, as domestic industry adjusts to increased competition, the need for a safety valve diminishes. Barring any further tariff cuts, antidumping levels should then stabilize. And, in fact, this is the pattern that Indian and Chinese use of antidumping measures has followed.¹³³ Upon cursory examination, the theory seems to make sense.

How then does the safety valve theory contribute to the existing complacent attitude harbored by Americans and Europeans toward these emerging antidumping regimes? The theory portrays the increase in antidumping sanctions as a unique event, driven by recent tariff cuts, rather than as part of a longer-term trend. In so doing, it suggests that the harm from Indian and Chinese antidumping actions is not likely to increase. Instead, the costs are likely to decline for two reasons: first, as domestic industries adjust to the last round of tariff concessions, the need for antidumping diminishes; and second, the stalled Doha Round of global trade talks shows no sign that

129. Rajesh Chadha et al., *Computational Analysis of the Impact on India of the Uruguay Round and the Doha Development Agenda Negotiations*, in *INDIA AND THE WTO* 13, 16 (Aaditya Mattoo & Robert M. Stern eds., 2003).

130. WTO Statistics on AD Initiations by Reporting Member, *supra* note 75.

131. For a comprehensive list of the tariff concessions required of China as a result of its WTO accession, see http://trade.ec.europa.eu/doclib/docs/2003/september/tradoc_113817.pdf.

132. WTO Statistics on AD Initiations by Reporting Member, *supra* note 75.

133. In both India and China, the number of new investigations each year has stabilized at approximately forty to sixty percent of the record level set in 2002, with some variance in an individual year. *See id.*

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any additional concessions will be required in the near future. Therefore, subscription to the safety valve theory fosters the belief that India and China's antidumping regimes are not a long-term threat. Instead, the theory suggests that the benefits of the global antidumping regime will continue to work to the United States and EU's advantage.

While the theory holds intuitive appeal,¹³⁴ it has not been well-tested with respect to India and China.¹³⁵ What exists are: (1) a few studies looking at patterns of antidumping use across developing countries, which include India and/or China;¹³⁶ and (2) a few studies examining antidumping use in a specific industry in India or China.¹³⁷ Simply because a pattern holds across a set of developing countries does not necessarily mean that it applies to both India and China individually. Nor can one necessarily extrapolate a pattern from a single industry to apply to an entire country. Finally, simply because the theory correctly predicts the timing of antidumping activity in the aggregate does not mean that industries are actually relying on antidumping laws as a safety valve. As I discuss below, decisions about whether to initiate an antidumping case are not made based on aggregate national data, but rather at the product level. The theory has yet to be tested robustly at that level.

This Article aims to fill this gap. Does the safety valve theory genuinely explain what has driven the recent spike and subsequent leveling in Indian and Chinese antidumping? Have the two countries' governments been imposing antidumping duties in order to grant domestic industries a temporary reprieve from tariff cuts? And if so, does the lack of additional tariff cuts in the foreseeable future mean that antidumping levels in both countries are likely to drop?

134. The safety valve theory also offers a plausible explanation for why antidumping laws were not immediately used in either India or China after they emerged on the books. In both countries, the laws came into effect before the countries were required to enact massive tariff cuts. Thus, domestic industry did not need to trigger a "safety valve" immediately.

135. Most country-specific examinations have been made in Latin American countries, as they were among the earliest developing countries to embrace antidumping. See generally SAFEGUARDS AND ANTIDUMPING IN LATIN AMERICAN TRADE LIBERALIZATION (J. Michael Finger & Julio J. Nogués eds., 2006).

136. See Chad P. Bown, *The WTO and Antidumping in Developing Countries*, 20 ECON. & POL. 255 (2008) (cross-country panel data analysis of twenty-eight industries in each of nine countries, including India); Aggarwal, *supra* note 6, at 1052 (cross-country panel data analysis of seventy developing countries, including India and China, with data at the country-wide level).

137. Empirical studies generally supportive of the safety valve theory have been conducted of: (1) India's pharmaceutical industry, see Nisha Malhotra & Shavin Malhotra, *Liberalization and Protection: Antidumping Duties in the Indian Pharmaceutical Industry*, 11 J. ECON. POL'Y REFORM 115 (2008); and (2) China's chemicals industry, see Chad P. Bown, *China's WTO Entry: Antidumping, Safeguards, and Dispute Settlement* 26–32 (Nat'l Bureau of Econ. Research, Working Paper No. 13349, 2007). For a supportive non-empirical study, see Shavin Malhotra et al., *Extent of Protection via Antidumping Law: A Case Study of the Vitamin C Industry in India*, 39 J. WORLD TRADE 925 (2005).

2. *Empirical Strategy*

To test whether the safety valve theory actually applies to India and China, I make two moves. First, rather than focusing on whether data aggregated at the national level supports the theory, I ask whether data disaggregated at the *product level* offers support.¹³⁸ This focus on product-level data is important for two reasons: First, governments make commitments to cut tariffs on specific products, rather than generally across-the-board. Second, antidumping duties are also generally applied to specific products, rather than to goods from certain countries. Therefore, any analysis about whether to seek to use antidumping duties as a safety valve is conducted at the product level by potential litigants.

The second move that I make is to examine product-level data not only on a national level, but also at the *industry* level. Why is this necessary? As I will discuss later, one important difference between India and China as compared to other countries is that their antidumping cases are concentrated in only a few industry sectors. This raises an interesting question: why have some sectors relied on antidumping laws, but not others? Is it that the conditions warranting use of antidumping measures do not hold true in these other sectors? Or is it that these other sectors, for whatever reason, have not yet learned to use antidumping laws to their benefit? If the latter is true, then this raises the possibility that the expected future decline may not be correct. Instead, antidumping measures may continue to increase as more sectors learn to rely on antidumping laws. By examining product-level data on an industry-by-industry basis, I test whether this is true.

To perform my analysis, I build a database containing information for each of the more than 4,500 HS-6 product lines for China and 4,300 HS-6 product lines for India over an eleven-year period, 1996–2006.¹³⁹ Use of HS-6 product-level data obviates the problem of earlier studies, which were not able to examine whether support for the safety valve theory can be found

138. One other study, which occurred concurrently with my project, has examined data at a product-specific level, but only with respect to India. See Chad P. Bown & Patricia Tovar, *Trade Liberalization, Antidumping and Safeguards: Evidence from India's Tariff Reform*, 96 J. DEV. ECON. 115 (2011). Bown and Tovar's study tackles a slightly different research question. It estimates the structural determinants of India's import protection using the Grossman and Helpman model. Bown and Tovar find that products that were subject to larger tariff cuts between 1990 and 1997 have a greater likelihood of being associated with the subsequent re-imposition of import protection through one of the WTO's safeguard exceptions, which include antidumping.

139. HS-6 refers to the product-level data that exist at the six-digit level of the Harmonized System ("HS") classification system. I focus on this type of data for several reasons: first, most governments also use the HS system for their antidumping investigations, and apply duties on products according to their HS classification. Second, the WTO and most governments use the HS system to track product-level data about tariffs rate, imports and exports, trade quantities, unit prices, etc. Therefore, the HS system offers a straightforward method for analyzing the relationship between antidumping cases, tariff rates, and other trade factors. Third, HS-6 data allows consideration of product-level data at a detailed level, as evidenced by the fact that both China and India had over 4,000 observations per year. One drawback of using HS-6 data is that several variables (*e.g.*, size and employment) are not tracked using this classification. I discuss later how I attempt to minimize the impact of omitted variable bias in my regressions.

at the level at which tariff and antidumping decisions are actually made, namely the product level. For each HS-6 product line, I assemble the following information by year: the applied and committed tariffs, the quantity of imports, the value of imports, and the average unit price of the imports. Each HS-6 product line is also matched to an industry sector. Because the data are contained in a variety of sources that do not perfectly line up, I attempt to reconcile the data as necessary; in the process, I discard a limited amount of irreconcilable data.¹⁴⁰ This assembled database then allows me to consider the safety valve theory using product-level data and to perform analyses on an industry-by-industry basis.

I proceed in three steps: first, I test whether the safety valve theory generally applies for India and China, when tested with product-level data. Importantly, the safety valve theory does not suggest that every tariff cut necessarily triggers a greater possibility of an offsetting antidumping duty. Instead, it hypothesizes that an antidumping case may be triggered in one of two scenarios. The first is one in which the industry is already facing worrisome conditions at the time of the tariff cut (for example, rising imports, falling prices, or an exogenous shock). The tariff cut is expected to make things worse under these circumstances. Rather than wait for these effects to take hold, the industry immediately seeks a “safety valve” in order to mitigate the impact of the tariff cut. A second scenario is one where the industry only seeks antidumping duties as a “safety valve” after already experiencing the negative impact of the tariff cut. However, if the product is not already under threat at the time of the cut and the cut does not trigger an increased competitive threat, then the theory suggests that domestic producers will not need a safety valve following a tariff cut.

Therefore, if the safety valve theory actually applies, we should expect to see a higher probability of an antidumping investigation being initiated for products where a tariff cut is either preceded by or accompanies: (a) a surge in the quantity of imports; and/or (b) a decline in the average unit price of the product. I use a regression to test for this effect. My unit of observation is the HS-6 product line by year. I create a binomial variable with a value of one if an antidumping investigation was commenced in that year for that product, and a default value of zero if no antidumping investigation was triggered. This serves as my dependent variable. My explanatory variables are the change in tariff, change in import quantity, and change in unit price, each over a one-year period. This is because the safety valve theory suggests that petitioners are usually responding to adverse changes over a short-term

140. Specifically, I gather data from the WTO Secretariat; the United Nations Commodities Trade Statistics Database, *available at* <http://comtrade.un.org/db/>; the World Bank's Global Antidumping Database, *available at* <http://econ.worldbank.org/ttbd/gad/>; India and China's antidumping reports; and case decisions. Each of these sources reports using the HS-6 product level classification scheme. However, this scheme undergoes periodic revision, leading to reconciliation problems.

rather than extended period.¹⁴¹ For all three explanatory variables, I consider the change on a percentage, rather than absolute, basis.¹⁴² For the change in import quantity and change in unit price, I employ a one-year lag.¹⁴³ For the change in tariffs, I consider the variable both with and without a one-year lag.¹⁴⁴

In testing for robustness, I control and minimize the impact of any sector-specific effects by including industry dummy variables. This is an attempt to address potential omitted variable bias, by controlling for factors such as the size of the industry, industry employment, the degree of industry concentration, the degree to which the industry is politically organized, etc. I also include year dummy variables to control and minimize the impact of any time-specific effects. Finally, for India, I also include a control variable associated with the years that the Bharatiya Janata Party (“BJP”), the Hindu nationalist party, is in power. This is to control for any effect that a change in government may have had on the initiation of antidumping cases.

After testing whether the safety valve theory applies to the product-level data overall, I then proceed to the second step of considering whether support for the theory exists when the data is considered on an industry-by-industry basis. As mentioned, only a few industries in both countries are using antidumping laws. The safety valve theory suggests that these industries have had greater need for a safety valve. I examine whether this supposition can be supported by analyzing whether the industries using antidumping laws have, on average, experienced larger tariff cuts, larger import increases, and/or larger unit price declines than non-use industries. If such a finding is in fact the case, this would lend additional support for the safety valve theory. If not, it would suggest that other factors may play a more important role.

Finally, I perform a third analysis: examining those industries that have not made use of antidumping laws. At issue is the question of whether the

141. I also tested the safety valve theory considering the change over three-year and five-year periods, as well as against the baseline year in which the tariff liberalization took effect. I did not find support for the theory when using these variables.

142. Because I gathered data on both an absolute and percentage basis, I ran early versions of my regressions using both forms of data. I found possible support for the safety valve hypothesis only when considering the change in tariffs on a percentage, and not absolute, basis.

143. This is to take into account the fact that a petitioner, when filing an antidumping petition, most likely is only aware of the previous year's figures on the change in unit price and import quantity, and often does not yet have sufficient visibility into the current year.

144. Unlike changes in unit price and import quantity, firms are aware of the change in tariffs in advance because the tariff reduction has already been pre-set in a negotiated schedule that is part of a trade agreement. Thus, there is not necessarily a need to apply a lag for the change in tariffs, as a petitioner may not be operating off of the previous year's information. However, a lag may still be useful. In the two scenarios noted above, a lag is not needed for the first scenario (where an industry seeks a safety valve immediately) but should be employed in the second scenario (where an industry waits to experience the negative impact of lower tariffs before seeking the safety valve). Interestingly, I find that the safety valve theory is only supported when considering the variable on a lagged basis for India, but not China. See *infra* Part III.A.3. This suggests that the safety valve theory operates differently in the two countries.

non-use is because (a) the industry has not had need for antidumping measures, or alternatively, (b) the industry has not yet taken advantage of antidumping laws. If the latter is correct, then this suggests that the implication that scholars and policymakers are drawing from the safety valve theory—that antidumping levels are likely to decline—may be wrong. For as more industries seek antidumping duties, the level of antidumping activity may actually increase.

To test this question, I do the following: based on an examination of the circumstances surrounding past antidumping cases, I calculate some of the average conditions that trigger the need to seek antidumping duties. For each industry that has yet to use antidumping laws, I examine what percentage of that industry's tariff lines meet these conditions. This allows me to determine in what percentage of the industry's tariff lines the need for increased protection may have existed. Granted, this is a crude measure, as I am comparing the tariff lines with the *average* conditions. Certainly, the need for antidumping duties may exist even when these conditions are not met; on the other hand, satisfaction of these conditions does not necessarily trigger the filing of an antidumping case. Nevertheless, this approach allows one to develop a general impression of whether or not the industry may have had need for increased protection through antidumping. If the percentage of tariff lines that meet the average conditions is low, then this suggests that the industry's non-use of antidumping laws to date is because the industry has had little need for antidumping measures. However, if the percentage is high, then this suggests that the non-use to date may have been driven by other factors, and not by a lack of necessity. In that circumstance, I perform the analysis again using a more stringent set of conditions in order to further validate the finding.¹⁴⁵ As necessary, I offer some hypotheses as to what may be acting as an impediment to the industry's willingness to file antidumping cases, and the implications for future antidumping activity levels should such impediments disappear.

Overall, my goal is to answer two questions: first, does the safety valve theory have explanatory power, once examined using product-level data and at an industry level? Second, is the implication drawn from the theory—that India and China's future use of antidumping measures is bound to decline—necessarily correct? Or might that conclusion be wrong, especially if certain industries have reason to turn to antidumping laws, but have yet to do so?

3. *Results*

a. *India*

For India, I find minimal support for the safety valve theory in my overall regression. Instead, the willingness to seek protection via antidumping laws appears to vary by industry. Only a select number of Indian industries are

145. The specific conditions applied are spelled out in *infra* Part III.A.3(a), (b).

taking advantage of antidumping laws; a sizeable number of industries have yet to do so. However, the conditions experienced by many of the industries that are not using antidumping laws do not differ significantly from those that are already using antidumping laws. This suggests that, despite the recent rapid rise in number of Indian antidumping cases, use of antidumping laws in India is still in a nascent stage.

I begin by examining whether the safety valve theory holds true when tested using product-level data for India as a whole. My regression results are shown in Table 6. I find support for the safety valve theory in the initial simplified model prior to the inclusion of any control variables (column 1). The decline in a product's tariff rate and unit price play a statistically significant role in affecting the probability of an antidumping case being initiated for that product.¹⁴⁶ However, once industry dummy variables are introduced as a control (column 2), support for the theory weakens. And once a control for time is introduced (column 3), support disappears. This is also true if a control for the years that the BJP is in power is introduced in lieu of a control for time (column 4). My findings therefore suggest that the safety valve theory has minimal explanatory power once other control factors are introduced. In addition, interactions between tariff change and the other key explanatory variables are not significant (column 5).

Moreover, the marginal effects estimators suggest that the explanatory power of the theory, if any, is minimal. The estimators are of such a low magnitude that the variables, even if statistically significant, do not have much of an impact. In a situation where the tariff rate for a given product is cut in half, the probability that an antidumping case will be filed for that product increases by somewhere between one-fiftieth to one-hundredth of a percent (i.e., .01% to .02%). In other words, the impact is close to negligible.¹⁴⁷

Table 6 offers two other insights. First, politics appears to matter. Indian industries were more likely to bring antidumping cases during the years when the BJP was in power. Why? Possibly because the BJP officials at the Ministry of Commerce in charge of reviewing antidumping petitions were much more sympathetic to the need to protect Indian domestic industry than their successors from the Congress Party.¹⁴⁸ In India, as in other de-

146. While the change in the quantity of imports is also statistically significant, its coefficient suggests that any impact from this factor is negligible. Interestingly, the sign is the opposite of what one would expect. One would think that a domestic industry is more likely to bring an antidumping lawsuit when there is a large growth in imports of a product following a tariff cut (i.e., the sign would be positive). Instead, the opposite holds. However, the small coefficient suggests that the variable is largely unimportant to the decision of whether to initiate an antidumping case.

147. I further considered the possibility that there may be additional industry-specific marginal effects by running separate regressions in which I included interactions between my key explanatory variables and my industry dummies. However, I found that these interacted variables were not significant. This suggests that there are not additional industry-specific effects at work that are not captured in the marginal effects estimators.

148. Thanks to Arvind Panagariya for bringing this explanation to my attention.

mocracies, politics plays an important role in obtaining trade protection from the government.¹⁴⁹

Second, industry is an important factor in determining the initiation of an antidumping case. Indeed, an examination of who is filing Indian antidumping cases shows that only a few industries are taking advantage of India's antidumping laws. Close to two-thirds of Indian antidumping cases were filed by three industries: chemicals, plastics, and steel.¹⁵⁰ These three industries, along with synthetic textiles and machinery, account for over ninety percent of all of India's antidumping cases.¹⁵¹ The disproportionate share of cases filed by the chemicals industry, in particular, has been well-noted. Chemical products constitute only six to eight percent of Indian imports; yet, the chemicals industry is the leading petitioner for antidumping investigations and accounts for over forty percent of India's antidumping cases.¹⁵² Moreover, the chemical industry has been highly successful in using antidumping laws to move Indian consumers away from foreign to domestic products.¹⁵³

Why is it that certain Indian industries are taking advantage of antidumping laws while others are not? The safety valve theory suggests that these industries have a greater need for the safety valve that antidumping duties can provide than those industries that do not use antidumping laws. Is this in fact the case? Table 7 presents the average annual percentage change in tariffs, imports, and unit price on an industry-by-industry basis. The ten Indian industries that are repeat users of antidumping laws are highlighted in bold. My results suggest that, on the whole, these industries did not experience greater tariff declines, import surges, or price pressure than the non-use industries. For example, thirteen non-use industries experienced, on average, both greater tariff cuts and import surges than the chemicals industry, which is the leading petitioner for antidumping sanctions. Thus, the safety valve theory is not of much use in explaining why some industries use antidumping laws, while others do not.

This, however, is not to suggest that the need for a safety valve does not motivate any Indian antidumping cases. On the whole, the industries that use antidumping laws do tend to bring cases in situations where a tariff cut was accompanied by a sharp import surge. Products for which cases were

149. One study has suggested that the process of obtaining trade protection is much more politicized in India than in the United States. See Oliver Cadot et al., *Endogenous Tariffs in a Common-Agency Model: A New Empirical Approach Applied to India* (Jan. 2007) (unpublished paper), available at <http://works.bepress.com/ocadot/10/>.

150. World Trade Organization, *Anti-dumping Sectoral Distribution of Initiations: By Reporting Member 01/01/1995–31/12/2010* (last visited Oct. 2, 2011), available at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm [hereinafter WTO Statistics on AD Sectoral Distribution of Initiations by Reporting Member].

151. *Id.*

152. See Prakash Narayanan, *Anti-dumping in India—Present State and Future Prospects*, 40 J. WORLD TRADE 1081, 1088–89 (2006).

153. Malhotra & Malhotra, *supra* note 137, at 120–22.

initiated experienced, on average, a tariff cut of approximately five percent and an import surge of nearly fifty percent over a one-year period. In other words, certain individual cases may indeed be triggered, in part, by a need for a safety valve for a given product. What my results suggest, however, is that the safety valve theory fails to offer significant explanatory power for why antidumping cases are initiated for certain products, but not others. Instead, industry appears to be playing the dominant role. Moreover, the safety valve theory also fails to explain why certain industries are using antidumping laws, while others are not.

What, then, is happening in those Indian industries that are not taking advantage of India's antidumping laws? Are these industries not initiating antidumping proceedings because most of the products they export have not needed additional protection? Or do these industries simply not, for whatever reason, rely on antidumping laws to gain protection for their products that are in fact threatened by foreign competition? My findings suggest that for a sizeable proportion of Indian industries, the latter is true.

For each of the Indian industries that have not yet filed antidumping cases, I analyze the percentage of its tariff lines that satisfy the average conditions that have triggered the filing of a case in other industries, as noted above (i.e., larger than five percent tariff cut, plus larger than fifty percent import surge). My results are shown in column 1 of Table 8. In almost all of the industries, more than one-third of the product tariff lines meet the conditions. Moreover, in nearly a dozen industries, more than half of their tariff lines satisfy the criteria. For example, in both the footwear and tobacco industries, over sixty seven percent of the products experienced negative effects from trade liberalization similar to those experienced, on average, by the products for which antidumping duties were sought.

These findings suggest that the reason that many Indian industries have yet to take advantage of antidumping laws is not because their products have no need for increased protection. In order to further validate this conclusion, I perform my analysis again, but this time using a more stringent set of criteria. I inquire into the percentage of tariff lines that meet the following conditions: a tariff cut of eight percent or more over a one-year period, accompanied by at least a doubling of import quantities. My results are shown in column 2 of Table 8. In the vast majority of non-use industries, at least one in every four tariff lines meets the more stringent criteria. And in nearly a dozen industries, at least one-third of the tariff lines meet the criteria. Given that a sizeable proportion of their products are experiencing strong negative fallout from tariff cuts, it cannot be the case that such industries are not using antidumping laws because their products have not had a need for increased protection.

Table 8 therefore confirms that there are a large number of Indian industries currently not taking advantage of India's antidumping laws that would clearly benefit from doing so. Why, then, are only some Indian industries

using antidumping laws while the majority is not? One reason is because, as suggested, the Indian antidumping petition process is politicized. A prospective antidumping petitioner must politically organize to convince the government to act on its petition. Because India's antidumping regime is still fairly young, only a few industries to date have succeeded in mobilizing the resources needed to utilize the regime to their benefit.

One study analyzing eighty Indian industry sectors found that only one-sixth of the sectors had organized themselves to be able to attempt to influence trade policy.¹⁵⁴ Among the few organized sectors are the industries that most actively use antidumping laws, such as chemicals and machinery. These industries tend to have concentrated market structures, which make it easier for them to organize.¹⁵⁵

However, over time, the ability to politically organize in order to influence trade policy will spread to less-concentrated industries. As more sectors decide to lobby for antidumping sanctions, the user base of Indian antidumping laws will grow and become more diversified. Since my results suggest that tariff cuts play only a minimal role in motivating Indian firms to seek protection through initiation of antidumping proceedings, even if no major additional tariff cuts are required of India in upcoming years, the number of Indian antidumping cases is likely to continue to grow. Industry conditions as well as political factors are likely to be as, if not more, important. Therefore, we cannot assume that the recent increase in Indian antidumping cases is a unique event triggered by the massive tariff liberalization of the 1990s. Despite the rapid growth of cases already witnessed, Indian industry's use of antidumping laws is likely to continue increasing in the years to come.

b. China

For China, I also find evidence that the explanatory power of the safety valve theory is by itself minimal, and that the willingness to use antidumping laws varies widely by industry. As was true for India, only a small segment of Chinese industries are using antidumping laws to alleviate pressures from tariff cuts. Even more than India, the vast majority of Chinese industries has not yet begun to use antidumping laws. Thus, even in the absence of further tariff cuts, use of antidumping laws in China is also likely to increase.

I first test for whether the safety valve theory applies to product-level data for China as a whole. My regression results are shown in Table 9. I find support for the safety valve theory even after controls are added for industry-specific effects (column 2) and time-specific effects (column 3). My findings

154. See Cadot et al., *supra* note 149, at 12.

155. One study has found that the market structure of Indian industries that use antidumping is highly concentrated. See Aradhna Aggarwal, *Antidumping Law and Practice: An Indian Perspective* 29–31 (Indian Council for Res. on Int'l Econ. Rels. Working Paper No. 85, 2002).

suggest that the probability of an antidumping case is higher for products that face a larger tariff cut, after having already experienced pricing pressure.¹⁵⁶ Moreover, unlike in the analysis of Indian tariff cuts, the interaction of Chinese tariff cuts with import surges and unit price declines are significant (column 4).

However, again, an examination of the marginal effects estimators suggests that the explanatory power of the safety valve theory is negligible. While the key variables of interest are statistically significant, their impact is of a very small magnitude. Even in the extreme scenario where the price of a given product has dropped by fifty percent and the tariff is cut down to one-tenth of its original level, the probability of an antidumping case increases by less than one-billionth of a percent. In other words, the safety valve effect is again close to non-existent.¹⁵⁷

What, then, is happening? Table 9 suggests that the key factor impacting the probability of an antidumping case is industry. An examination of Chinese antidumping cases reveals that only a few Chinese industries are taking advantage of China's antidumping laws. In particular, the chemical industry alone is responsible for bringing over sixty percent of all antidumping cases. This is a highly disproportionate share, given that chemicals account for only six percent of China's imports.¹⁵⁸ Indeed, the top two industries—chemicals and plastics—account for over eighty percent of China's antidumping cases. When compared to other WTO members, this intense concentration of cases in one to two industries is highly unusual. In the EU, for example, the top industry (steel) accounts for only thirty six percent of antidumping cases since 1995, while in Australia, the top industry (plastics) accounts for only twenty nine percent.¹⁵⁹ Even in the United States, whose statistics are skewed by a large number of antidumping cases brought by the steel industry in 2001, the top two industries (steel and chemicals) account for a smaller percentage of antidumping cases.¹⁶⁰

In fact, only six Chinese industries have sought antidumping sanctions on a repeated basis. Besides chemicals and plastics, the other four industries that have taken such action are paper, rubber, steel, and synthetic fibers.

156. Unlike with the data on India, the key variables of interest are significant only if the percentage change in tariffs variable is not lagged. This suggests that the safety valve operates differently than in India, as Chinese industries trigger it immediately to mitigate the impact of tariff cuts, rather than only after experiencing the negative impact.

157. Again, I also ran separate regressions in which I included interactions between my key explanatory variables and industry dummies. With the exception of the steel industry, I found no additional industry-specific marginal effects.

158. See ZHONGGUO TONGJI NIANJIAN, *supra* note 110, at 712–16.

159. Computations are based upon information reported by the member states to the WTO. See WTO Statistics on AD Sectoral Distribution of Initiations by Reporting Member, *supra* note 150.

160. The top two industries account for sixty seven percent of all U.S. antidumping cases between 1995 and 2010. If one excludes a set of outlier cases brought by the U.S. steel industry between November 2000 and October 2001, the percentage drops to sixty percent. Computations are based on information reported by the member states to the WTO. See *id.*; WTO Committee on Anti-dumping Practices, *Semi-Annual Report Under Article 16.4 of the Agreement—United States*, G/ADP/N/85/USA (Mar. 18, 2002).

Why then have these industries turned to antidumping laws, while others have not?

Table 10 shows, on an industry level, the average percentage change in tariffs, imports, and unit price experienced since China began liberalizing its trade regime. The six industries that have repeatedly sought to initiate antidumping investigations are highlighted in bold. My results demonstrate that the industries that use antidumping remedies have not, on average, experienced greater tariff cuts, import surges, or pricing pressure than the non-use industries. Therefore, the safety valve theory fails to offer an explanation for why some Chinese industries rely on antidumping laws, while others do not.

Again, this is not to suggest that the need for a safety valve does not motivate any Chinese antidumping cases. Through examining the facts of individual cases, I find that five of the six industries brought antidumping investigations primarily for products following an import surge and a tariff cut.¹⁶¹ Chinese products subject to an antidumping case experienced, on average, a tariff decline of seven percent and an import surge of twenty percent. Thus, certain individual cases do appear to be motivated, in part, by industry need for a safety valve. However, what my findings suggest is that the theory, on the whole, fails to explain why antidumping remedies are sought for some products but not others. It also fails to explain why certain Chinese industries take advantage of antidumping laws while others do not.

Why are the vast majority of Chinese industries not seeking antidumping remedies? Do they not need protection for their products? Or have they not yet learned how to take advantage of China's antidumping laws? My findings suggest that the latter is the primary reason for Chinese industries' limited use of antidumping laws. As was the case with India, I analyze the percentage of each non-use industry's tariff lines that satisfies the average conditions that triggered the filing of a case in other industries (i.e., greater than 7 percent tariff cut, plus a greater than 20 percent surge in import quantity). My results are shown in column 1 of Table 11. In over a dozen industries, at least one-third of the product tariff lines meet these criteria. This suggests that many more Chinese industries could benefit from antidumping duties for their products. Only in a few sectors—e.g., minerals, animal fodder, metals, and starches and enzymes—does it appear that the industry had little need for increased protection from foreign competition.

Again, I apply a more stringent set of criteria to see if it alters my results. This time, I determine the percentage of tariff lines that meet the following conditions: a tariff cut of ten percent or more over a one-year period, and an increase in import quantities of fifty percent or more. Note that this set of

161. The one industry for which this was not true was the synthetic fibers industry. That industry is frequently targeted by other WTO members, including the United States and EU. Therefore, it may be the case that more of the antidumping cases initiated by the synthetic fibers industry reflect retaliatory action rather than a need for a safety valve from increased foreign competition.

criteria sets a higher bar than the average conditions that have triggered an antidumping case in each of the five industries already utilizing China's antidumping laws. My results are shown in column 2 of Table 11. In the majority of non-use industries, at least one in every four tariff lines meets the more stringent criteria. These include some important export sectors for the United States and EU, such as transportation equipment and animal products. Only in a few additional industries (e.g., headgear, wool and yarn, and tanning and dyes) does the need for increased protection diminish substantially when the more stringent criteria are applied. Overall, the analysis further validates the finding that a large number of Chinese industries currently not in the practice of filing antidumping cases could benefit from increased trade protection for a sizeable percentage of its products.

Why is it, then, that so few Chinese industries take advantage of antidumping laws? And in particular, why have Chinese antidumping cases been so concentrated in the chemicals sector? Some political science scholars have speculated that it is because the sector is large, highly concentrated, predominantly state-owned, less involved in joint-venture agreements, and primarily focused on production for the domestic market.¹⁶² Yet, the chemical industry is not the only Chinese industry that fits this description. Chinese government officials themselves admit that they too are puzzled by the question of why more industries have not sought protection through antidumping sanctions. One official privately conjectured that the dominance of the chemicals industry may be due to the fact that it is well-organized and has close ties to China's relatively small antidumping bar. As a result, firms in this sector are well aware that they will more than recoup the costs of their legal fees through the benefits received from a successful antidumping litigation. Other sectors, however, do not yet understand this dynamic or are daunted by the prospect of incurring large legal fees for an uncertain result. This is especially true in a country where the practice of seeking protectionism (or any other recourse) through the legal regime is fairly new and not a well-established element of many companies' practices. Furthermore, even if awareness exists, the industry association may not be well-organized enough to coordinate sector-wide support for a case.

In recent years, the Chinese government has begun an outreach program to industries not using antidumping laws to try to build awareness of these laws and their potential benefits.¹⁶³ However, the government has not ac-

162. See, e.g., Scott Kennedy, *China's Porous Protectionism: The Changing Political Economy of Trade Policy*, 120 POL. SCI. Q. 407, 423 (2005).

163. This program involves formal workshops organized by the Ministry of Commerce and other non-government entities with ties to the government, as well as more informal channels. The purpose of the outreach is to build awareness of how international trade laws on antidumping work in general, rather than focusing specifically on China's own antidumping laws. The goal is to increase Chinese companies' awareness of how to guard against antidumping litigation overseas, as well as how to seek action against foreign importers which they suspect of engaging in unfair trade practices.

tively encouraged industries to initiate more antidumping cases.¹⁶⁴ Nor has the government exercised its legal power to bring an antidumping case ex officio.¹⁶⁵ Nevertheless, despite the government's restraint, its outreach program should result in a more diversified base of antidumping sanctions petitioners over time. Therefore, it is likely that, as awareness of antidumping sanctions increases, so too will the volume of cases.

My results challenge the belief that, absent further required tariff cuts, the number of antidumping cases will decline over the coming years. In fact, only a small fraction of Chinese industries have begun to take advantage of antidumping laws to relieve pressure from foreign competitors. As more Chinese industries learn to take advantage of antidumping laws over time, the initiation of antidumping cases by Chinese industries and the negative impact of sanctions on foreign importers are destined to increase.

Just how large is this potential impact? Recall from Part II that at present, the net advantage is in the range of four to six billion dollars per year (see Table 5). Once more Chinese industries ramp up their use of antidumping laws, this advantage is likely to quickly disappear. If only six industries were likely to (according to Table 11) file cases against only ten percent of the products that meet the average conditions, that would amount to over \$7.5 billion of affected products.¹⁶⁶ Thus, the tide could quickly turn on American and European producers. The likelihood that this will happen becomes even greater once the growth trajectories of the Chinese and Indian economies are factored into consideration. According to recent economic forecasts, China will continue growing at an annual rate of seven to eight percent through 2020, meaning that its economy will nearly triple in size by 2020.¹⁶⁷ Imports are also expected to grow at approximately the same rate, with imports of higher-value products (many of which are produced in the United States and EU) expected to grow at an even faster rate. By contrast, the U.S. economy is forecasted to grow at an annual rate of only two percent.¹⁶⁸ Therefore, as the growth rate of imports into the Chinese market outpaces that of the U.S. and EU markets, the relative impact of increased Chinese antidumping sanctions will become more significant over time. In fact, the actual impact on U.S. and EU producers over the next decade could

164. Confidential interview with a Chinese government official (Apr. 2008).

165. See China AD Regulations, *supra* note 79, art. 18 (allowing for ex officio initiations "in special circumstances").

166. This calculation is based on the existing volume of trade for the *average* tariff line meeting the antidumping conditions for the industry.

167. See, e.g., Louis Kuijs, *China Through 2020—A Macroeconomic Scenario* (World Bank China Office Research Working Paper No. 9, 2010), available at http://siteresources.worldbank.org/CHINAEXTN/Resources/318949-1268688634523/medium_term_scenario.pdf. India is also projected to grow at over eight percent per year through 2015. See Economist Intelligence Unit, COUNTRY FORECAST: INDIA 7–8 (Sept. 2011).

168. See Economist Intelligence Unit, COUNTRY FORECAST: UNITED STATES OF AMERICA 9–10 (Sept. 2011).

increase as much as fifty to eighty percent from the calculation suggested above.¹⁶⁹

As in the case of India, China's growing use of antidumping sanctions is not a passing event, sparked by its WTO accession. Instead, what we are witnessing is only the beginning of a movement by Chinese and Indian firms to take greater advantage of the international trade laws that their competitors have long used against them.

B. *The Retaliation Theory*

1. *An Overview*

The other theory that has been embraced as an explanation for India and China's growing use of antidumping laws is the retaliation theory. Over the past decade, several studies have concluded that the increased use of antidumping sanctions by developing countries is partially attributable to a desire to retaliate against other countries' imposition of antidumping sanctions against their producers.¹⁷⁰ The retaliation theory proposes that a viable antidumping regime acts as a deterrence threat: if you use antidumping laws to protect your domestic industry against our products, then we will use antidumping laws against you. By showing that it is willing to retaliate, a country hopes to deter its trading partners from using antidumping laws against the country's exporters.

The retaliation theory is assumed to apply to India and China¹⁷¹ because again, upon cursory examination, it appears to make sense. Both countries are targeted in antidumping lawsuits with high frequency. Since the WTO's creation in 1995, China has been the top annual target of antidumping sanctions worldwide.¹⁷² India usually ranks among the top ten.¹⁷³ For fourteen of its trading partners (including the United States and the EU), China is the country most frequently targeted by antidumping sanctions.¹⁷⁴ India ranks

169. The size of the impact differs depending on a number of assumptions made in the model, such as the discount rate, the exchange rate, and the timing of when China's economy will shift from its current fast-paced growth to a more moderate-paced growth, assuming that this shift will occur.

170. See Aryashree Debapriya & Tapan Kumar Panda, *Anti-dumping Retaliation—A Common Threat to International Trade*, 7 GLOBAL BUS. REV. 297 (2006); Robert M. Feinberg & Kara M. Reynolds, *The Spread of Antidumping Regimes and the Role of Retaliation in Filings*, 72 SOUTHERN ECON. J. 877 (2006); Bruce A. Blonigen & Chad P. Bown, *Antidumping and Retaliation Threats*, 60 J. INT'L ECON. 249, 253–54, 261–71 (2003); Prusa & Skeath, *supra* note 2.

171. See, e.g., Vandenbussche & Zanardi, *supra* note 6, at 107.

172. World Trade Organization, *Anti-dumping Measures: By Exporting Country 01/01/1995–31/12/2010*, available at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm [hereinafter WTO Statistics on AD Measures by Exporting Member].

173. The two exceptions are 1995 and 2005. *Id.*

174. China is the leading target of antidumping measures implemented between 1995 and 2010 by Argentina, Australia, Brazil, Canada, Colombia, Egypt, the EU, India, Korea, Peru, South Africa, Taiwan, Thailand, Trinidad and Tobago, Turkey, the United States, and Venezuela. It is also tied as the leading target of antidumping actions implemented between 1995 and 2010 by Israel, Jamaica, Japan, Pakistan, the Philippines, Poland, and the Ukraine, although none of these countries has imposed more than six antidumping measures against any one country. See *id.*

among the top five targets for seven of its trading partners, and is second (behind China) for the EU.¹⁷⁵

Furthermore, the use of antidumping measures against India and China is growing. China has always been the top target worldwide, but the frequency with which it is targeted by other countries has increased dramatically. An astonishing thirty five percent of all global antidumping sanctions between 2005 and 2009 were targeted at China, compared with only eighteen percent in the prior five-year period.¹⁷⁶ India's share has also increased, albeit not to the same degree.¹⁷⁷ Intuitively, it seems logical that as more Chinese and Indian industries face antidumping sanctions imposed by other countries, these industries will pressure their respective governments to respond in kind. Hence, the retaliation theory appears to offer a reasonable explanation for the recent growth in Indian and Chinese antidumping measures.

By characterizing India and China's use of antidumping measures as responsive and retributive rather than offensive, the retaliation theory advances the belief that neither India nor China are likely to increase their use of antidumping measures in the future. Instead, the theory suggests that the two countries' recent embrace of antidumping sanctions is an attempt to signal to trading partners that the theory will not sit by idly while their trading partners enact protectionist measures against their goods. Furthermore, the retaliation theory suggests that if India and China's trading partners decide to refrain from using antidumping sanctions, India and China will also refrain from the use of these sanctions. Thus, acceptance of this theory has further contributed to the belief that the two countries' regimes are not necessarily long-term threats regarding antidumping sanctions.

However, while the retaliation theory has an intuitive appeal, it also has not been well-tested with respect to either country. Like the safety valve theory, many previous studies only examine patterns across a group of developing countries that includes India and China.¹⁷⁸ Again, the fact that a pattern holds across a group of developing countries does not necessarily mean that it applies individually to India and China. Moreover, most studies have not considered the issue of timing, but instead have only considered whether a country, once it is targeted by an antidumping sanction, responds at any point with a sanction of its own.¹⁷⁹ Yet basic game theory suggests that the timing of a retaliatory response is important to the credibility of any such

175. India is the leading target of antidumping actions by Indonesia. It is tied for the second most targeted country in antidumping actions by Egypt and the EU, the third most targeted country by Brazil and South Africa, fourth by Turkey, and tied for fifth by the United States. *See id.*

176. Author's computations based on WTO Statistics on AD Measures by Exporting Member, *supra* note 172.

177. India's share has grown from 3.7% in 1995–99 to 4.1% in 2005–09. Author's computations based on *id.*

178. *See* Aggarwal, *supra* note 6; Prusa & Skeath, *supra* note 2; Vandenbussche & Zanardi, *supra* note 6.

179. *See, e.g.,* Prusa & Skeath, *supra* note 2; Blonigen & Bown, *supra* note 170.

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retaliation. Effective tit-for-tat behavior generally requires that the retaliatory action occur right after the initial breach. Otherwise, the retaliating party risks the possibility that the other party will not consider the two acts to be linked.¹⁸⁰

This project therefore aims to fill this empirical gap. Does the retaliation theory actually explain India and China's behavior in utilizing antidumping sanctions? Do we see evidence of broad retaliation, or does retaliation take place only under select circumstances? Is this another instance where one of the beliefs underlying existing U.S. and EU policy is incorrect?

2. *Empirical Strategy*

In examining whether the retaliation theory actually holds, I consider the respective responses of India and China to each of the antidumping measures levied against them to which they had the ability to respond in kind. I derive a list of the antidumping measures from data available from the WTO's semi-annual reports as well as the World Bank's Global Antidumping Database version 5.0. For India, I consider all antidumping measures levied against the country from 1986 onwards, and for China from 1996 onwards. Prior to those dates, neither country had enacted legal regulations to effectuate its antidumping laws, and hence did not possess the means to retaliate.

Unlike previous studies, I use a more limited definition of retaliation.¹⁸¹ I consider the country to have engaged in retaliation only if, within one year of being subject to a new antidumping measure, the government responded by opening its own antidumping investigation against producers from the country that targeted it.¹⁸² The one year limitation is meant to effectively capture the country's tit-for-tat retaliatory acts, while ignoring unrelated subsequent antidumping actions against trading partners that had previ-

180. In addition, if the game is not one in which the parties take turns making their respective moves, but rather one in which a party can make multiple moves in a given round (the latter of which best characterizes the processes involved in antidumping investigations and sanctions), then by not retaliating immediately, the unresponsive party risks that its opponent will remain undeterred for an extended period of time and commit multiple breaches, thereby unnecessarily raising the costs associated with deterrence.

181. For example, Prusa & Skeath, *supra* note 2, consider a country to have retaliated if, after it has been targeted with antidumping, it responds with its own investigation at any point *ever* during the nineteen year period (1980–1998) captured by their dataset. Blonigen & Bown, *supra* note 170, also consider responses over the same period when defining retaliation.

182. Note that the petition for the antidumping investigation is usually filed by an industry, although the government may exercise its *ex officio* powers to open an investigation without an industry petition. See *supra* note 165 and accompanying text. Also, recall that the government retains full discretion whether or not to open an investigation. Therefore, the industry petition on which the government is acting may have been one that was filed prior to antidumping action by the foreign government, but for which the foreign government's action provides the trigger for initiating the investigation. The specific ministry within the government that decides to initiate a retaliatory investigation is the Ministry of Commerce & Industry in India and the Ministry of Commerce in China. For more information, see *supra* notes 84, 87 and accompanying text.

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ously targeted that country. I consider the time period of one year to be adequate for the following reason: antidumping investigations generally require twelve to eighteen months to complete.¹⁸³ Thus, by the time a year passes from the end of a foreign antidumping case, the domestic industry will have had over two years to prepare a retaliatory case for the government agency. If it has not acted within this time period, it is unlikely to seek retaliation.¹⁸⁴

I do not mean to suggest that retaliatory considerations factor into every decision to proceed with an antidumping investigation. In some instances, an investigation would have proceeded regardless of whether or not retaliation was a motivation, and any proximity in timing is purely coincidental; unfortunately, one shortcoming of my methodology is that such cases cannot be effectively sorted out. In most cases, however, the following scenario is likely: a potential antidumping case against a country has been presented to the government by a domestic industry, but the government has been reluctant to act on the industry's request. A foreign government's decision to use antidumping sanctions against the country's exporter(s), however, brings an end to the government's reluctance. In response to foreign antidumping sanctions against its exporter(s), the government proceeds with an antidumping investigation against the foreign country.¹⁸⁵ It is this phenomenon that I am capturing and classifying as "retaliation."

In my initial tests, I adopt the classic assumption that, in order for a tit-for-tat strategy to be effective, retaliation must take place after each breach. In other words, I assume that each new antidumping action against India or China requires a unique retaliatory action by the targeted country. I then relax this assumption and consider the possibility that the country may in fact retaliate only after the occurrence of a series of antidumping actions against it. In this subsequent test, I adopt a looser definition of retaliation, and consider each antidumping measure that the country takes to be in response to all of the antidumping measures taken against that country within the past year. As I will explain, I ultimately find that while using the relaxed assumption yields a higher retaliation rate, it does not alter my conclusions.

183. Article 5.10 of the ADA requires that antidumping investigations "shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation." ADA, *supra* note 23, art. 5.10.

184. In devising my test, I examined whether my results would be materially different if I expanded the time period to eighteen months or to two years, and found that they would not.

185. Another version of this scenario is that an industry association has been contemplating an antidumping case against goods from a particular country, but has not formally made a request to begin such an investigation because it is uncertain whether it has sufficient backing from policymakers for its request to be granted. Upon observing that the country against which it is contemplating initiation of an antidumping case has enacted an antidumping duty of its own, the industry association recognizes that its odds of success have increased, due to the desire of some policymakers to retaliate. The industry then proceeds with the case, triggering an investigation by the government.

Finally, retaliation is notoriously difficult to capture correctly. Governments are often reluctant to admit that a retaliatory motive underlies their legal determinations, even if that is the case.¹⁸⁶ Additionally, a country may respond to an antidumping sanction through some form of retaliation other than antidumping sanctions. A country's use of antidumping sanctions may also be in retaliation for an adverse action that did not involve use of antidumping sanctions. Therefore, if upon finding that another government's imposition of an antidumping duty is not met by a tit-for-tat antidumping action, I also consider whether the retaliation may have taken a different form, such as a countervailing duty, safeguard, or the filing of a WTO case against the antidumping duty. Similarly, if a case initiation does not appear to be in retaliation to another country's antidumping measure, I also consider whether it may be in retaliation to a different form of contingent protection measure. However, to constrain my test, I purposely limit the scope of my retaliation considerations to only trade-related measures.

3. *Results*

a. *India*

The results of my test of the retaliation theory for India offer a prime example of how, by failing to properly disaggregate data, one can obscure certain relevant dynamics. On the whole, I find that in only forty four percent of the instances where another country imposes an antidumping sanction against India does India "retaliate" by commencing an antidumping investigation of its own against that country. Moreover, I find that the prevalence of retaliation in recent years (2005 to the present) is roughly the same as it was in the period immediately following the Uruguay Round trade liberalization (1995–1999). Based only on consideration of the results in aggregate, one might conclude that India engages in sporadic retaliation and that its propensity to retaliate has not grown over time. These conclusions, however, are incorrect.

In fact, the story is much more complicated. Table 12 presents my results broken down by (a) the type of country levying the antidumping measure against India, and (b) the time period in which the antidumping measure was levied. I separate India's trading partners into three categories: the traditional users of antidumping sanctions (the United States, EU, Canada, and Australia); Asian new users; and other new users. I also consider four time periods: pre-1995 (before the Uruguay Round was completed); 1995–1999 (immediately after the Uruguay Round trade liberalization); 2000–2004; and 2005–2008. I find that India's propensity to retaliate var-

186. For example, a Chinese government official conveyed to me that China would never officially state that retaliation was a consideration in an antidumping decision. Nevertheless, officials who handle the antidumping investigation and adjudication are aware of the need for "balance," especially if another country has imposed a significant number of antidumping measures against China.

ies widely depending on the category of country levying the antidumping measure and the time period.

India engages in a strategy of selective retaliation. Since 1995, India has been much more likely to retaliate with its own antidumping investigation if the WTO member that targeted it with an antidumping measure was the United States, EU, another traditional user, or an Asian neighbor. However, India is not likely to retaliate against other countries. Between 1995 and 1999, other “new users” levied fourteen different antidumping duties against Indian exporters, but India did not once retaliate. India’s retaliation rate went up to twenty six percent in the subsequent five years, but has since declined once more. Since 2005, India has responded in only two of fifteen instances.¹⁸⁷ Two countries—Argentina and Egypt—have enacted antidumping duties against India on repeated occasions, but India has not sought to retaliate against these countries.

Additionally, when it comes to the traditional antidumping sanctions users or Asian countries, India’s behavior is very different. As Table 12 shows, India’s retaliation rate against these countries is significantly higher. Since 1999, every time the United States or EU has enacted an antidumping duty against India, India has responded with an antidumping duty of its own. India has applied the same tit-for-tat retaliation strategy toward its Asian neighbors (China, Indonesia, South Korea, Taiwan, and Thailand). No wonder, then, that Americans and Europeans have formed the impression that India’s increase in use of antidumping sanctions has been fueled, in part, by a desire to retaliate.

For the most part, India’s tit-for-tat retaliation strategy has been quite successful as a deterrent. Over the past eight years, new antidumping measures against India by the traditional users have declined by over eighty percent, while those by its Asian neighbors have declined by over sixty percent.¹⁸⁸

However, my findings suggest that the retaliation theory, as understood, is not entirely accurate. Why? The theory predicts that once other countries’ use of antidumping measures against India declines, India’s use of antidumping sanctions should also decline since the need to engage in tit-for-tat retaliation will decrease. However, a remarkable decline in new antidumping measures against India in recent years has not triggered a recip-

187. Following South Africa’s levying of an antidumping duty against Indian polyethylene terephthalate (PET) in October 2005, India initiated an antidumping investigation against South African acetone. *See* Imports of Acetone Originating in or Exported From European Union, Chinese Taipei, Singapore, South Africa and USA, No. 14/4/2006-DGAD (Ministry of Commerce & Indus. Sept. 7, 2006) (initiation notification). Additionally, following Turkey’s antidumping duty against Indian fittings in September 2006, India initiated an antidumping investigation against Turkish hydrogen peroxide. *See* Imports of Hydrogen Peroxide from China PR, Indonesia, Korea ROK, Turkey, and EU, No. 14/17/2006-DGAD (Ministry of Commerce & Indus. July 20, 2007) (initiation notification).

188. These figures reflect a comparison of the number of antidumping measures levied against India by each category of countries in the period from 2005 to 2008 versus the period from 2001 to 2004.

rocal decline in Indian use of antidumping sanctions. In other words, there has not been mutual cessation. While India may still occasionally use antidumping sanctions to retaliate, and while this strategy may be successful, retaliation no longer appears to drive India's antidumping policies.

This fact is most clearly evident from an examination of Indian antidumping actions against China. Between 2008 and 2010, China initiated no new antidumping cases against India. Yet India initiated thirty-seven new antidumping cases against China. Similarly, in 2010, India opened six antidumping cases against the United States, in the absence of any U.S. action against India. Twenty-four other economies have also been targeted by India since 2006 without having targeted India first.¹⁸⁹ India's antidumping actions therefore have been primarily offensive. The vast majority of cases were not retaliatory.¹⁹⁰

My findings, therefore, suggest that the understanding of India's use of antidumping sanctions posited by the retaliation theory is incomplete. India does use antidumping sanctions as retaliation. But India no longer levies antidumping sanctions only when it needs to retaliate. Like the United States and EU before it, some Indian industries have grown accustomed to the protectionist benefits of antidumping sanctions. They now trigger offensive cases to disadvantage foreign competitors.

Therefore, even if the United States or EU decreases its use of antidumping sanctions against India, as both have done in recent years, this will not necessarily precipitate a commensurate decrease in India's use of antidumping sanctions against the United States or EU. In fact, in each of the past four years, India has targeted more American and European products with new antidumping investigations than vice versa. When it comes to India, the balance of benefits under the existing global antidumping regime has already swung in India's favor. Since 2005, India has launched antidumping inquiries into over \$250 million worth of American and European products, while the United States and EU have investigated less than \$30 million worth of Indian products. Regardless of U.S. and EU antidumping policy stance toward India, India is likely to continue aggressively using antidumping sanctions in the years to come.

b. China

My findings also suggest that the retaliation theory, as applied to China, is largely incorrect. Unlike with India, through 2008, there is no support for the idea of China engaging in tit-for-tat retaliation. Only in approximately one of every eight instances in which China has been targeted with a new

189. All calculations are based on information supplied by the World Bank's Global Antidumping Database, *supra* note 140.

190. I also considered the possibility that India may be using antidumping to retaliate against other types of trade measures besides antidumping, but found that not to be the case.

antidumping sanction does China retaliate by initiating a new antidumping investigation against the country targeting it.¹⁹¹

Disaggregating the data by year and type of country yields a few additional insights, but does not fundamentally change this conclusion. Table 13 shows my results. Like India, China is more likely to retaliate against the United States, EU, and other traditional users of antidumping sanctions. However, even against this group, China engages in retaliatory behavior only one-fourth of the time. Between 2005 and 2008, the rate of retaliation declined further to only ten percent. For other Asian neighbors, the retaliation rate is even lower—thirteen percent overall, and seven percent for 2005–2008. Thus, it cannot be said that China, at least through 2008, has adopted a policy of retaliating when antidumping sanctions are levied against it. This is true even when the country targeting China is an important export market and a key trading partner, such as the United States, EU, or South Korea.

Table 13 also shows that China virtually never retaliates when the country targeting it is a non-Asian country that only recently embraced antidumping sanctions.¹⁹² The only such instance in which China did retaliate was following a Mexican antidumping duty against Chinese steel chains in December 2002.¹⁹³ Outside of that incident, China has never engaged in what could be considered a retaliatory action against a non-Asian country that is considered to be a “new user” of antidumping sanctions. Since the WTO’s Antidumping Agreement went into effect in 1995, a sizeable number of countries have repeatedly enacted antidumping duties against China—Turkey, most notably, has enacted sixty-two separate antidumping measures; Argentina, thirty-two measures; Brazil and Peru, twenty-four measures each; and South Africa, eighteen measures. China has not undertaken any retaliatory antidumping action against any of these countries. This inaction strongly supports the proposition that China has yet to embrace any type of tit-for-tat retaliation strategy for deterrence.

I next consider the possibility that China may retaliate through another trade instrument besides antidumping sanctions. I fail to find support for this. Not only does China not use other forms of contingent protection to retaliate against antidumping sanctions, but China’s pattern of non-retaliation appears also to extend to these other instruments. For example, between

191. Even using the more relaxed assumption that each antidumping action is against all, rather than just one, of the antidumping actions against China in the past year, I find that the retaliation rate increases to only twenty nine percent. This still does not suggest that China utilizes a retaliation strategy most of the time.

192. This is true even when one adopts the relaxed assumption that a retaliatory action may be in response to a series of antidumping measures, rather than only one antidumping measure. Adoption of this assumption does not change the percentages in Table 16.

193. China responded with an antidumping investigation against Mexican ethanolamine in May 2003. That case resulted in the imposition of a seventy four percent duty against Mexico. See WTO Committee on Anti-dumping Practices, *Semi-Annual Report Under Article 16.4 of the Agreement—China*, at 4, G/ADP/N/126/CHN (Feb. 22, 2005).

2003 and 2009, ten countries initiated more than twenty-five safeguard proceedings against China.¹⁹⁴ China itself did not enact any new safeguards. Also, between 2005 and 2009, nineteen countervailing duties were levied against China.¹⁹⁵ Again, China did not enact any countervailing duties of its own.¹⁹⁶ Even considering the possibility that China may use other forms of trade retaliation, I find no evidence that the retaliation theory applies broadly to China.

Instead, I find that China's antidumping policy, especially with respect to the United States and EU, is driven by larger geopolitical concerns. Table 13 shows that in the years immediately following China's accession to the WTO in 2001, when targeted with an antidumping sanction by a traditional user, China responded with its own antidumping investigation almost half the time. This frequency, however, was not nearly high enough to establish a credible retaliation threat necessary to deter others from continuing to use antidumping sanctions against Chinese products.

Antidumping measures against China continued to grow between 2001 and 2004.¹⁹⁷ However, after 2004, China's policy shifted abruptly. As Table 13 shows, in the ensuing period, China's willingness to retaliate declined sharply to ten percent, or lower than what it had been prior to its WTO accession. Indeed, between March 2006 and November 2008, China did not initiate any new antidumping cases against the United States or the EU. Even as U.S. and European antidumping action against China rose to the highest levels in recent years, the country continued to exercise restraint.¹⁹⁸

What explains this unwillingness to retaliate? China's restraint appears to have been driven by its concern over the record trade surplus it was running in its bilateral trade with the United States and EU in 2006 and 2007. To avoid accusations that the trade gap was due to Chinese protectionist policies, the government decided not to proceed with any new antidumping actions, despite requests from domestic industries.¹⁹⁹ China, in other words, chose to prioritize its larger geopolitical concerns above its need to protect domestic industries. Between March 2006 and November 2008, China lim-

194. See Chad P. Bown, *China Specific Transitional Safeguards*, Version 5.0, July 2009, available at http://people.brandeis.edu/~cbown/global_ad/csg/.

195. World Trade Organization, *Countervailing Measures: By Exporting Country 01/01/1995 to 30/06/2010*, available at http://www.wto.org/english/tratop_e/scm_e/scm_e.htm.

196. World Trade Organization, *Countervailing Measures: By Reporting Member 01/01/1995 to 30/06/2010*, available at http://www.wto.org/english/tratop_e/scm_e/scm_e.htm. Note that China enacted its first countervailing duty in 2010. See WTO Committee on Subsidies and Countervailing Measures, *Semi-Annual Report Under Article 25.11 of the Agreement—China*, G/SCM/N/212 (Sept. 6, 2010).

197. WTO Statistics on AD Measures by Exporting Member, *supra* note 171.

198. The EU initiated nine new antidumping investigations against China in 2006; the United States initiated twelve in 2007. At the time, both set a record for the number of new investigations targeted against one country in a given year. See World Bank's Global Antidumping Database, *supra* note 140.

199. Confidential interview with Chinese government official (Apr. 2009). The official noted that while there was no official government policy forbidding the initiation of an antidumping investigation against producers from the United States or EU, this stance factors heavily in the decision not to proceed with investigation requests from Chinese domestic industries.

ited its use of antidumping sanctions to target only its Asian neighbors with whom it did not have problems in its bilateral trade relationship. With all others, China effectively refrained from retaliating, even when its exporters were targeted with multiple antidumping cases overseas.

My results, therefore, suggest that the prevailing belief—that retaliation is driving China's increased use of antidumping sanctions—is wrong. Unlike India, China's use of antidumping sanctions, at least through 2008, was not systematically motivated by retaliation. The growth in China's use of antidumping sanctions between 2001 and 2008 cannot be attributed to a more aggressive retaliatory strategy. On the contrary, through 2008, the Chinese government has exercised considerable restraint in responding to the vast number of antidumping actions targeting it. It has done so even in the face of pressure from domestic industry to stand up to other governments' protectionist use of antidumping sanctions.

The finding that the retaliatory theory does not explain recent Chinese antidumping actions should concern U.S. and European policymakers. It suggests that the existing status quo is not necessarily a long-term equilibrium. Instead, the positive balance of benefits that currently exists is due to Chinese restraint. Although plenty of countries use antidumping sanctions to protect their domestic markets against Chinese markets, China has been wary of doing the same in retaliation. But it is not clear how long this restraint is likely to last. As will be discussed below, there are already signs that this restraint is fading.

China is likely aware of India's strategy of using retaliation as a deterrence.²⁰⁰ But because, through 2008, China prioritized avoidance of trade friction with key trading partners, it has refrained from adopting such a strategy. Yet, this restraint is starting to fade. The Great Recession has significantly impacted Chinese exporters, making them increasingly sensitive to antidumping measures.²⁰¹ Moreover, increasing nationalist tendencies are giving rise to calls for China to take a tougher stance against countries applying protectionist policies against Chinese goods.²⁰² In short, the Chinese government is facing strong internal pressures to increasingly use antidumping measures as a method of retaliation.

Already, we are witnessing signs that China's trade policy on antidumping retaliation is shifting to a more aggressive stance. Three recent incidents

200. China has, in fact, openly threatened retaliation against other countries' use of antidumping measures against its manufacturers in the past. See *China Calls EU Anti-Dumping Measures Illegal, Threatens Retaliation*, FORBES.COM, Oct. 5, 2006, <http://www.forbes.com/feeds/afx/2006/10/05/afx3068713.html>.

201. Glenn Kessler, *Plunge in Exports Reverberates Across Asia*, WASH. POST, Dec. 23, 2008, at A1; Sharon LaFraniere, *20 Million Migrants Have Lost Jobs, China Says*, N.Y. TIMES, Feb. 2, 2009, <http://www.nytimes.com/2009/02/02/world/asia/02iht-china.1.19860807.html>.

202. See, e.g., Mei Xinyu, *Maoyi baofu de dingwei yu xuanzhe* [Trade Retaliation's Orientation and Choice], <http://meixinyublog.blog.163.com/blog/static/510835902009813114435703/> (Sept. 13, 2009, 23:44 CST).

give cause for alarm. First, in June 2009, China retaliated against the filing of a U.S. antidumping case against Chinese steelmakers by initiating its own antidumping investigation against U.S. steelmakers.²⁰³ To emphasize its displeasure with the United States and its newfound willingness to escalate trade tensions, China launched its retaliatory case during U.S. Treasury Secretary Timothy Geithner's visit to Beijing.²⁰⁴ China also demonstrated its increasing astuteness regarding American electoral politics by specifically targeting steelmakers in Ohio and Pennsylvania, two states critical to the Democratic Party.²⁰⁵ Second, in late July 2009, China responded to EU antidumping duties against Chinese fasteners (e.g., screws and bolts) by filing a complaint against the EU at the WTO.²⁰⁶ China had already retaliated earlier by launching its own antidumping investigation against European screws and bolts.²⁰⁷ But the WTO case was intended to send a stronger signal to Brussels, as it represented the first time that China had taken action against the EU at the WTO.²⁰⁸ To further convey its displeasure, China's state news agency then issued an English-language release criticizing the EU of engaging in "beggar-thy-neighbor protectionism" and making "an irresponsible move that has abused trade defense rules."²⁰⁹ Finally, in September 2009, China responded to increased U.S. tariffs on Chinese tires by opening antidumping investigations into U.S. automotive parts and chicken meat.²¹⁰ Recent actions therefore suggest that Chinese policy is shifting from restraint toward retaliation.

If China actually were to adopt an effective tit-for-tat retaliation strategy along the lines of India, its level of use of antidumping sanctions would

203. See WTO Committee on Anti-dumping Practices, *Semi-Annual Report Under Article 16.4 of the Agreement—China*, at 5, G/ADP/N/188/CHN (Sept. 9, 2009).

204. Kris Maher, *China Probes Imports of U.S. Steel*, WALL ST. J., June 2, 2009, at B3.

205. The American companies identified in the petition filed by Chinese steelmakers as allegedly dumping were AK Steel Holding Corp. of West Chester, OH and Allegheny Technologies Inc. of Pittsburgh, PA. *Id.*

206. Request for Consultations by China, *European Communities—Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/1 (Aug. 4, 2009).

207. The anti-dumping investigation against European producers of certain iron or steel fasteners was initiated on December 29, 2008. See WTO Committee on Anti-dumping Practices, *Semi-Annual Report Under Article 16.4 of the Agreement—China*, at 2, G/ADP/N/180/CHN (Mar. 10, 2009). This investigation resulted in preliminary antidumping duties being levied against European producers in December 2009 and final antidumping duties levied in June 2010. See WTO Committee on Anti-dumping Practices, *Semi-Annual Report Under Article 16.4 of the Agreement—China*, at 2, G/ADP/N/202/CHN (Oct. 1, 2010).

208. China since has launched a second offensive case against the EU related to the EU's imposition of antidumping duties against its producers. See Request for Consultations by China, *European Communities—Anti-dumping Measures on Certain Footwear from China*, WT/DS405/1 (Feb. 8, 2010). For a full list of WTO dispute settlement cases, please visit the WTO's Dispute Settlement Gateway at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

209. This release is displayed prominently on the Ministry of Commerce's website. See *E.U. Anti-dumping Harms Both China and E.U.*, XINHUA NEWS, Aug. 17, 2009, <http://preview.english.mofcom.gov.cn/aarticle/counselorsreport/asiareport/200908/20090806461763.html>.

210. See, e.g., Keith Bradsher, *China Moves to Retaliate Against U.S. Tire Tariff*, N.Y. TIMES, Sept. 14, 2009, at A1; Ian Johnson, *China Strikes Back on Trade*, WALL ST. J., Sept. 14, 2009, at A1. See also Terrence Poon et al., *China Seeks Talks at WTO over Tire-Import Tariff*, WALL ST. J., Sept. 15, 2009, at A5.

likely rise more than ten-fold. Assuming that the average size of the Chinese antidumping measure stayed the same, such an increase would effectively erase the four to six billion dollars annual difference in new antidumping measures between China and the United States and EU.

The problem therefore is not, as the retaliation theory suggests, that Chinese use of antidumping sanctions is rising because China is fighting back against those trade partners that levy antidumping sanctions against it. Rather, the level of China's use of antidumping sanctions is rising despite its retaliatory restraint. The key question is how much more China's use of antidumping sanctions will increase if and when China finally decides to abandon this restraint. This is because, as the Indian example illustrates, even if the United States and EU were to then curb their use of antidumping sanctions against China, there is no guarantee that China would return to a more restrained position once its domestic industries have grown accustomed to antidumping protection. As one Chinese expert predicted, if and when China eventually decides to retaliate, it has the potential to become the world's most active user of antidumping sanctions.²¹¹

C. Summary

Part III has demonstrated how, by failing to engage in robust testing of whether the safety valve or retaliation theories apply to India and China's use of antidumping sanctions, American and European policymakers have drawn the wrong conclusions about the two country's antidumping regimes. U.S. and European policymakers have come to believe that the growth in India and China's use of antidumping sanctions has been motivated by (a) their need to provide a safety valve to domestic industries, and (b) their desire to retaliate when targeted by others. My analysis, however, suggests that these theories are not fully correct. To date, in both countries only select industries have taken advantage of the opportunity to use antidumping duties to adjust to increased foreign competition. Most industries have yet to start seeking antidumping remedies. Moreover, while India has demonstrated a capacity to retaliate, its application of a tit-for-tat retaliation strategy has been limited to a select group of WTO members (that is, the United States, EU, and its Asian neighbors). Data on China, on the other hand, offer no evidence that the country retaliates through antidumping measures.

These misinformed beliefs about the safety valve and retaliation theories, as applied to India and China, have convinced scholars and policymakers that the recent increase in use of antidumping sanctions in both countries is temporary and destined to level off. The prevailing view is that the level of India and China's use of antidumping sanctions will naturally subside pro-

211. Interview with the Associate Dean of one of China's leading universities for international economic affairs (May 2008).

vided that (a) no further tariff cuts are required in the near-term (which is likely to be true, given the obstacles remaining in the Doha Round), and (b) others show restraint in their targeting of India and China through antidumping sanctions. Consequently, the United States and EU have assumed that India and China's newly-ascendant antidumping regimes are not a long-term threat.

My findings suggest that this assumption is wrong and that India and China's use of antidumping measures will not stabilize. Instead, I find several reasons why their use will continue to grow. First, a large number of industries in both countries have yet to discover the utility of antidumping duties. As more of these industries learn to take advantage of antidumping laws, the number of antidumping sanctions is likely to continue to increase. This is true even if no additional tariff cuts are required, for several of these industries have yet to seek antidumping measures in response to the last round of tariff cuts. Second, China has only begun to use antidumping measures as an instrument for retaliation. As a result, the number of antidumping cases China initiates will grow significantly since it is the country most frequently targeted by others. Third, as my findings for India reveal, once a country has grown accustomed to the benefits of antidumping sanctions, it is difficult for it to alter its policy. Thus even if the country's original motivation in levying antidumping sanctions was retaliation, the frequency of its use of antidumping sanctions will not necessarily decline once other countries stop levying antidumping sanctions against it.

Therefore, one cannot assume that the recent spike in Indian and Chinese use of antidumping measures is a passing event, destined to eventually level off. Nor can the United States or EU assume that the positive balance of benefits that prevails today is likely to continue. Instead, my findings suggest that the likely scenario is that Indian and Chinese antidumping activity will continue to grow, regardless of whether the Doha Round succeeds and regardless of how much the United States and EU refrain from levying antidumping sanctions against India and China. Contrary to the prevailing belief, both India and China's antidumping regimes do represent a potential long-term threat.

IV. POLICY IMPLICATIONS

If India and China's use of antidumping sanctions as a protectionist instrument is not destined to subside, then how should the United States and EU respond? At present, the international legal standard still works to the United States and EU's advantage, with the overall balance of benefits still favoring American and European producers. But Part III raised the possibility that, in the longer-run, this balance may tilt in favor of Indian and Chinese producers. Before it does, the United States and EU should consider

reforming the WTO law on antidumping in order to head off such a possibility.

Such a move would constitute a major change in U.S. trade policy. Historically, the United States has consistently defended the existing legal standard as necessary to ensure “fair” trade.²¹² Prior to the start of the Doha Round negotiations in 2001, the U.S. Congress sent a clear message that it adamantly opposed any future trade deal requiring antidumping reform. The House of Representatives passed a resolution, by a vote of 410 to 4, advising the President not to agree to major revisions to the current regime.²¹³ A bipartisan group of sixty-two Senators also signed a letter to the President calling antidumping sanctions “a critical element of U.S. trade policy” and warning that the United States should not “use its trade laws as bargaining chips in trade negotiations nor agree to any provisions that weaken or undermine [such] laws.”²¹⁴

Despite vocal Congressional opposition, then-U.S. Trade Representative Robert Zoellick agreed to open negotiations on antidumping in 2001, in part because developing countries made it clear that a new round of WTO talks could not proceed unless antidumping was added to the set of negotiations issues.²¹⁵ In the intervening decade, however, little progress has been made.²¹⁶ Over twenty countries have submitted proposals for negotiators to consider.²¹⁷ Few have been agreed upon. Because all WTO members must agree to any new amendment, U.S. intransigence has effectively blocked most proposals. Most countries rightly view the United States as the major impediment to serious antidumping reform.²¹⁸

212. See, e.g., Communication from the United States to the Working Group on the Interaction Between Trade and Competition, at 3, WT/WGTCP/W/88 (Aug. 28, 1998) (“The antidumping rules are a practical, albeit indirect, response to these trade-distorting policies. . . . [T]he antidumping rules simply seek to remove unfairness and create a ‘level playing field’ for producers and workers.”).

213. H.R. Res. 262, 107th Cong. (2001).

214. Letter from Senator Max Baucus to President George W. Bush (May 7, 2001), available at <http://usinfo.org/wf-archive/2001/010507/epf108.htm>.

215. Vivian C. Jones, *WTO: Antidumping Issues in the Doha Development Agenda* 10 (Cong. Res. Service Report RL32810, Apr. 20, 2006).

216. In a status update, the chair of the negotiating group, Guillermo Valles Games, noted that consultations to date had failed to yield any “significant signs of convergence on the major ‘political’ issues” and that little progress had been made on the issues since 2008. Communication from the Chairman, Negotiating Group on Rules, at 1, TN/RL/W/254 (Apr. 21, 2011); see also *Divisions Persist on Antidumping Draft Text*, BRIDGES WEEKLY TRADE NEWS DIGEST, Jan. 30, 2008 (highlighting the lack of progress up to 2008).

217. Proposals may be searched for under the document series TN/RL/W in the WTO database.

218. The U.S. Congress has continued to express its displeasure with any potential reforms. In legislation granting the Executive Branch authority to negotiate trade agreements, Congress made clear that it expected the White House to “preserve the ability of the United States to enforce rigorously its trade laws, including the antidumping . . . laws, and avoid agreements that lessen the effectiveness of domestic and international disciplines on unfair trade.” Trade Act of 2002, Pub. L. No. 107–210, § 2102(b)(14)(A). In addition, the U.S. Senate passed a resolution in 2005 calling on U.S. trade negotiators to reject a number of specific proposals which would moderately restrict antidumping. Michael O. Moore, *Antidumping Reform in the WTO: A Pessimistic Appraisal*, 12 PAC. ECON. REV. 357, 373–74 (2007).

In this section of the Article, I switch over to considering the real-world policy implications of my research. If, as I have argued, India and China's use of antidumping sanctions is likely to continue growing, then the current U.S. policy intransigence is a mistake. For, at some point in the not-so-distant future, the permissive nature of the existing international legal rules on antidumping may inflict more harm than benefit for the United States. Therefore, it behooves U.S. policymakers to seek reform of the international trade laws on antidumping—to make antidumping duties harder to enact and therefore less prone to protectionist abuse.

The obvious question is: why reform the rules now? Why not continue to enjoy the permissive legal standard for a few more years, and push for reform only when the costs actually come to outweigh the benefits? I suggest that this would be a high-risk strategy. We are at a unique historical juncture for antidumping legal reforms for three reasons:

First, the issue itself is already on the negotiating table. If the Doha Round talks do not succeed, it is unlikely that another serious attempt will be made in the near future.²¹⁹

Second, there is broad support for reform across regions. A diverse group of fifteen countries—including Brazil, Japan, Mexico, South Korea, Turkey, and others—have formed a coalition to push for more restrictive antidumping rules.²²⁰ Even the EU, which has traditionally resisted reforms, has recently softened its opposition,²²¹ and has openly questioned whether its approach to antidumping needs to be reconsidered in light of changes in the global economy.²²²

Third, and perhaps most importantly, at present both India and China support antidumping reform, despite having become active users of the practice.²²³ Because use of antidumping sanctions is still fairly new in both

219. Pascal Lamy, Director-General of the World Trade Org., Chairman's Opening Remarks at the Informal Trade Negotiations Committee Meeting (Apr. 29, 2011), *available at* http://www.wto.org/english/news_e/news11_e/tnc_dg_infstat_29apr11_e.htm (warning of the consequences of failure of the Doha Round negotiations, including "a loss of interest by political leaders in many quarters, an erosion of the rules-based multilateral trading system, [and] a creeping return to the law of the jungle").

220. The "Friends of Antidumping" coalition also includes Chile, China, Colombia, Costa Rica, the EU, Hong Kong, India, Israel, Norway, Singapore, Switzerland, Taiwan, and Thailand. Jones, *supra* note 214, at 9–10.

221. *See, e.g.*, Submission from the European Communities Concerning the Agreement on Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement) to the Negotiating Group on Rules, TN/RL/W/13 (July 8, 2002).

222. *See generally* Commission of the European Communities, Europe's Trade Defence Instruments in a Changing Global Economy: A Green Paper for Public Consultation, COM (2006) 763 final (Dec. 6, 2006).

223. *See* Jones, *supra* note 215, at 9–10 (noting that China and India are part of a coalition of developed and developing WTO member countries favoring antidumping reform). In addition, during critical junctures of the negotiations, India and China have joined with others in issuing statements pressing the Chair of the Negotiating Group to go further in pressing for antidumping reform, particularly with respect to the issue of zeroing, in order to advance the Doha Round negotiations. *See, e.g.*, Prohibition of Zeroing: Statement of Brazil; Chile; China; Colombia; Costa Rica; Hong Kong, China; India; Indonesia; Israel; Japan; Korea; Mexico; Norway; Pakistan; Singapore; South Africa; Switzerland; Separate Customs

countries, their domestic industries have yet to develop an entrenched interest in preserving the existing rules. Moreover, for both countries, the costs of imposing antidumping sanctions currently run higher than its benefits. Over time, however, my analysis suggests that this equation is likely to shift. India and China's support for greater reforms will weaken as their domestic industries discover that the existing antidumping rules offer a loose legal standard that provides them with significant benefits.²²⁴ If the United States and EU wait to seek reform, by the time they are ready to do so India and China may well resist such change.

Therefore, if we are to reform the international law on antidumping, now is the time to do so. The United States and EU are understandably reluctant, as the existing antidumping rules work to their producers' advantage today. But this study cautions that, without reforms, this will unlikely be true in the long-run as India and China expand their use of antidumping sanctions against the United States and EU. Instead of being myopically focused on near-term interests, as Congress has been, U.S. policymakers need to recognize that U.S. long-term interests are best served by a less-permissive international legal standard governing the imposition of antidumping sanctions. Moreover, from a negotiating standpoint, it makes sense to seek reforms now. While the rules are perceived to be to their advantage, the United States and EU can extract concessions in other areas in return for agreeing to reforms. And in negotiating from a position of strength, the United States and EU will be better able to dictate the outcome of the reform proposals.

The case for reform becomes even more convincing once one considers national welfare, more fully defined, as well as general global welfare. Antidumping, as an economically-inefficient instrument, is not welfare-maximizing, either at the national or global level. On the domestic front, public choice theory explains why antidumping trade policy has been captured by producers. But if consumer welfare is brought back into the picture, then enacting reforms that further restrict countries' ability to levy antidumping sanctions becomes a welfare-enhancing move, even today, when the existing standard works to U.S. producers' advantage. From a global standpoint, antidumping duties trigger welfare-distorting effects that are often most harmful to developing countries. Frequently, the sanctions result in not only overall welfare loss, but welfare transfers from producers in developing countries to those in developed countries. Even countries not directly targeted are affected by trade-distortion effects. Reforms serve to minimize such distortions, increase global welfare, and increase distributive justice.

What specific reforms should the United States and EU be seeking? In Part IV.A below, I identify several proposals worth considering, divided into

Territory of Taiwan, Penghu, Kinmen, and Matsu; Thailand; and Viet Nam, TN/RL/W/215 (Jan. 31, 2008).

224. See Alan V. Deardorff & Robert M. Stern, *A Centennial of Anti-dumping Legislation and Implementation: Introduction and Overview*, 28 *THE WORLD ECON.* 633, 636 (2005).

two categories.²²⁵ The first are a set of “no regret” proposals. These are a series of less-controversial actions that will help curb the discretionary power of India and China to impose antidumping measures, at minimal cost to the existing U.S. antidumping regime. The second are a set of more radical reforms. They will have a much larger impact on restraining India and China, but will require major changes in U.S. antidumping practice.

My aim is not to argue that the proposals that follow must be implemented, or even that they are of the highest priority. Rather, it is to show that existing U.S. policy intransigence is not well considered. At the very least, a series of actions can be taken at little cost to constrain India and China's ability to use antidumping sanctions.

A. “No Regret” Proposals

I begin by highlighting three proposals that would not require major changes to existing U.S. and EU law, and would not impact existing U.S. practice. Therefore, I believe each could be easily supported by the United States and EU.

1. Increasing Transparency Requirements

One often-criticized element of India and China's antidumping regime is the lack of transparency.²²⁶ Because foreign defendants lack full insight into their opponents' rebuttals and the rationale underlying the relevant authorities' rulings, their ability to challenge a loss in further judicial or WTO proceedings is severely hampered. The existing transparency requirements in the ADA, however, are limited.²²⁷ India and China's practices, while criticized, are largely compliant with their treaty obligations.²²⁸ Therefore, one obvious set of reforms that the United States and EU should advocate is to

225. Note that I do not consider the possibility of eliminating antidumping altogether, a change many academics have advocated. See, e.g., MAVROIDIS ET AL., *supra* note 71, at 288; J. Michael Finger & Andrei Zlate, *Antidumping: Prospects for Discipline from the Doha Negotiations*, 6 J. WORLD INV. & TRADE 531, 544 (2005). This is for two reasons. First, it falls outside the scope of the mandate given to the Negotiating Group on Rules, which states that any changes should preserve “the basic concepts, principles, and effectiveness” of the existing WTO agreements on antidumping. See World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 28, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002). Second, it is unlikely to command sufficient political support from the domestic legislatures of all WTO members to be enacted.

226. See ZHANG, *supra* note 92; Kumaran, *supra* note 101; Yu, *supra* note 101.

227. For examples of existing transparency requirements, see ADA, *supra* note 23, arts. 6, 12, Annex I, II.

228. Note, however, that a number of Chinese practices have been challenged by the EU and United States in three pending WTO cases in which these issues have not yet been adjudicated. See Request for Consultations by the European Union, *China—Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/1 (July 28, 2011); Request for Consultations by the European Union, *China—Provisional Anti-Dumping Duties on Certain Iron and Steel Fasteners from the European Union*, WT/DS407/1 (May 12, 2010); Request for Consultations by the United States, *China—Anti-Dumping and Countervailing Duty Measures on Boiler Products from the United States*, WT/DS427/1 (Sept. 20, 2011).

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increase transparency requirements. In particular, four transparency-related changes are worth advancing:

First, Article 6.4 of the ADA should be amended to clarify that all parties are entitled to see all non-confidential information considered by the adjudicating authorities. Today, parties are entitled to see only information “relevant to the presentation of their cases.”²²⁹ After making their presentation to the investigating authority, defendants are routinely denied access to additional facts submitted by the complainant through written rejoinders or other channels. This places defendants at an obvious disadvantage, which the proposed amendment would eliminate.

Second, Article 6.2 should be amended to provide defendants with an opportunity to respond to any rejoinders filed by a petitioner. At present, only the domestic petitioner is afforded an opportunity to rebut the foreign defendant’s arguments. This amendment provides both parties with such an opportunity.

Third, Annex 2 of the ADA should be amended to require that when authorities find the submissions of a party to be inadequate, they must explain where deficiencies exist and then allow the party to submit additional information or explain why the requested information is not available. At present, the rules only suggest, but do not require, such a procedure. Mandating this change would eliminate the discretionary ability of authorities to reject evidentiary submissions without explanation.

Fourth, Article 12.2 should be further clarified to require that the investigating authorities, when explaining the rationale for their decision, must reveal the information on which the decision was based, including the relevant data, the methodology for calculating dumping, and the factors behind the causation and injury decisions. This is particularly a problem with Chinese decisions, which can be quite terse. Furthermore, a provision should be added that when a party finds the explanation given by the adjudicating authority in its ruling to be inadequate, it may state what “relevant” information is missing and request that the information be released. The adjudicating authority should then have to either comply with the request or explain why it cannot do so.

These proposals will have limited impact on the United States, EU, and most developed countries, as their antidumping procedures are already fairly transparent and their decisions are already quite detailed. However, they would force India, China, and other developing countries to be more forthcoming about how they make decisions regarding levying antidumping sanctions. They would also give foreign defendants more opportunities to understand the nature of the charges against them and to defend their case. By presenting the proposals under the banner of “ensuring transparency,” they will be difficult for WTO members to oppose.

229. ADA, *supra* note 23, art. 6.4.

2. *Eliminating the Material Retardation Provision*

In addition, the United States and EU should consider amending the lax injury standard under the existing law. Remarkably, authorities may currently find injury to have occurred in an industry where a country has *no* domestic producers. So long as the foreign producers' actions cause "material retardation of the establishment of such an industry," the injury requirement is met.²³⁰

The "material retardation" clause is rarely invoked by developed countries because, in most instances, they are not industry followers. Since the WTO's formation in 1995, the U.S. International Trade Commission has not once, in more than 400 cases, relied on the "material retardation" provision to find injury.²³¹ Instead, the provision is much more likely to benefit developing countries.²³² To date, India has already invoked this provision on several occasions when levying antidumping sanctions.²³³ While China has yet to do so, it certainly is a possibility that it will invoke the provision in the future on behalf of an important emerging industry.²³⁴

Because the "material retardation" provision is likely to be of little future benefit for the United States and the EU, they should consider advocating for its abolishment. In doing so, they would be eliminating a mechanism that they are unlikely to use, but that India and China may use against them. Because the provision was initially included to appease U.S. concerns, other countries will likely perceive U.S. agreement to the provision's elimination as a concession rather than a self-interested move.²³⁵ In reality, its restrictive impact will be far greater for India, China, and other developing countries than for the United States or EU.

230. *Id.* at n.9.

231. This is based on my scan of all ITC cases since 1995 in which the term "material retardation" appears in the decision. *See also* Prakash Narayanan, *Injury Investigations in "Material Retardation" Antidumping Cases*, 25 *NW. J. INT'L L. & BUS.* 37, 38 n.8 (2004) (noting that neither the EU nor United States invoked the material retardation standard between 1995 and 2002).

232. *See id.* at 39.

233. *See, e.g.*, Anti-dumping investigation concerning imports of D (-) Para Hydroxy Phenyl Glycine Methyl Potassium Dane Salt originating from China PR and Singapore, No. 14/23/2002-DGAD (Ministry of Commerce & Industry, June 24, 2003) (final findings); Anti-dumping investigation concerning imports of fused magnesia From China PR, No. 18/1/97/ADD (Ministry of Commerce & Indus., Feb. 2, 1999) (final findings); Anti-dumping investigation concerning imports of Bisphenol-A Originating From Japan, No. 14/73-92-TPA (Ministry of Commerce & Indus., Feb. 18, 1994) (final findings).

234. To date, China has relied more heavily on subsidies and other interventionist approaches from the central and local governments to protect its nascent industries. *See, e.g.*, LING LIU, *CHINA'S INDUSTRIAL POLICIES AND THE GLOBAL BUSINESS REVOLUTION* 22–57 (2005).

235. The United States originally sought for the "material retardation" clause to be included in the ADA because the International Trade Commission had used this standard in earlier antidumping cases prior to the formation of the WTO, and the United States wanted to preserve the option for future use. For a discussion of how this standard was employed in earlier cases, see generally Dong Woo Seo, *Material Retardation Standard in the U.S. Antidumping Law*, 24 *LAW & POL'Y INT'L BUS.* 835 (1992–93).

3. *Restricting Back-to-Back Investigations*

Successfully concluding an agreement to reform antidumping laws, however, will require that the United States and EU be willing to embrace certain proposals from developing countries in exchange for its proposals. An area where it can do so is the issue of back-to-back investigations.

The ADA places no limits on how frequently an antidumping investigation may be undertaken against the same defendant on the same product.²³⁶ A petitioner, after losing a case, may file an identical claim, albeit with additional supplemental information, immediately thereafter. India and China have both advanced proposals that would prohibit such action. Specifically, both countries have proposed amending ADA Article 5 to include a new provision requiring authorities to wait until one year after a negative ruling has been made before initiating a new investigation on the same product from the same WTO member.²³⁷

This proposal should be acceptable to the United States and EU. While back-to-back investigations were used in the past, neither has initiated such an investigation over the past decade. Therefore, this change will have little impact on existing American and European antidumping practice. If anything, it will benefit American and European exporters. One likely outcome is that industries in developing countries will exercise greater caution before bringing a case. Knowing that one of the consequences of losing is a one-year preclusion from bringing a follow-on case, more petitioners will hold off on filing until they are certain they have a viable case.

One possible additional change that the United States and EU could suggest is that preclusion be applied not only to negative determinations, as reflected in the present proposals, but also to withdrawn cases. This would have two benefits. First, it would ensure that the rule cannot be circumvented simply by having a petitioner withdraw the case before a negative ruling is issued. Second, it would further reduce the incentive to bring frivolous cases that are then withdrawn.²³⁸

India and China's proposal on back-to-back investigations has gotten little traction in the ongoing negotiations. It is not even reflected in the latest

236. In 2001, the WTO members did agree that "investigating authorities shall examine with special care" applications that arise within one year of a negative determination on an antidumping action on the same product from the same country. See World Trade Organization, Implementation-Related Issues and Concerns, ¶ 7.1, WT/MIN(01)/W/10 (Nov. 14, 2001). However, there is no prohibition on back-to-back investigations, and no ruling has been made as to the meaning of "special care."

237. See Proposals on Implementation Related Issues and Concerns, Submission by India to the Negotiating Group on Rules, at 1, TN/RL/W/26 (Oct. 17, 2002); Proposal of the People's Republic of China on the Negotiation on Antidumping, ¶ 1.3, TN/RL/W/66 (Mar. 6, 2003) [hereinafter "China AD Negotiating Proposal"].

238. There is no evidence that Indian and Chinese industries are currently engaging in this practice. However, this practice may emerge over time, as petitioners in other jurisdictions already engage in such harassment lawsuits. See Prusa, *supra* note 4, at 594–97.

version of the Chairman's negotiating text as an issue for discussion.²³⁹ Willingness to advocate on its behalf should therefore be well-received by India and China. It is a low-cost move for the United States and EU to make, in exchange for a concession elsewhere or for simply demonstrating goodwill in working together. Rather than blocking India and China's proposal, the United States and EU should champion it.

B. More Radical Reform Proposals

The "no regret" proposals allow the United States and EU to reposition themselves as willing partners in global antidumping reform rather than pure obstructionists. Realistically, however, none of the "no regret" proposals will significantly limit India and China's ability or motivation to use antidumping sanctions against foreign producers. More radical reforms are necessary in order to achieve such an outcome. These reforms, however, will also restrict the United States and EU's ability to use antidumping sanctions. Thus, they come with a near-term cost. Moreover, they will also require more significant changes to existing laws, thereby running afoul of Congress's stated preference to not "weaken" U.S. trade laws. As a result, they are likely to encounter significant domestic political opposition.

Nevertheless, they are well worth considering. Without further reform, the United States and EU face the threat that India and China will one day become more adept and more willing than before to take advantage of the lenient global antidumping rules for protectionist purposes. Thus, the current U.S. negotiating stance of refusing to consider fundamental reforms is a mistake. If the balance of benefits is likely to flip, then it is in the United States and EU's long-term interest to reshape the international legal standard on antidumping now, to make it more difficult for countries to use antidumping measures for purely protectionist reasons.

Why would China and India play along with such extensive reforms? Given the immense scale of antidumping sanctions levied against their exporters and their internal political economy, both still appear willing to trade long-term advantage for concrete near-term gains. However, over time, as domestic antidumping pressures rise, this willingness will disappear. Therefore, if there is ever an opportune time to implement global reforms, it is now.

Below, I discuss three possible reforms. Each constrains the future antidumping actions of all parties, including China and India as well as the United States and EU. I offer them as examples of proposals that U.S. policymakers currently oppose and that they ought to reconsider because, despite the near-term costs, these proposals serve long-term U.S. interests.

239. See World Trade Organization, New Draft Consolidated Chair Texts of the AD and SCM Agreements, TN/RL/W/236 (Dec. 19, 2008) [hereinafter "WTO Draft Consolidated Chair Text"].

1. *Requiring Explanation of the Underlying Cause of Unfair Trade*

Proponents of antidumping laws argue that such laws are necessary because they provide a means of sanctioning foreign producers benefiting from unfair trade practices in the producer's home market. However, under existing WTO law, petitioners are not required to explain the nature of the unfair trade practice that allows a foreign competitor to engage in dumping. Nor are adjudicating authorities required to discuss the underlying unfair trade practice in their rulings. Instead, to prove dumping, the petitioner need only show that the defendant's price is lower than its "normal value." This often has little relationship with any unfair trade practice. Because of the various methodological manipulations permitted for calculating "normal value" under the existing law, countries are able to impose antidumping sanctions in the absence of any unfair trade practice for purely protectionist purposes.

To make this abusive use of antidumping laws more difficult, the United States and EU should consider advocating two changes to WTO law. First, Article 5.2 of the ADA should be amended to require that petitioners, when filing an antidumping case, must provide evidence of unfair trade practice(s) that enable the defendant to engage in dumping. Second, Article 12.2 of the ADA should be amended to require that government authorities, in their rulings, explain which of the unfair trade practices alleged by the petitioner were found to exist and how those practices enabled dumping.

This proposal has several advantages. First, it would allow antidumping sanctions to continue to be used in instances where unfair trade practices actually exist. This may be true if a foreign producer enjoys a sanctuary home market for any number of reasons, including (a) the government's unwillingness to enforce competition laws; (b) excessively high tariff rates for the product, as compared to other WTO members' rates; (c) non-tariff barriers to entry;²⁴⁰ (d) the government's implicit guarantee against continuing losses, and (e) market-distorting industrial policy.²⁴¹

At the same time, this would bar authorities from using antidumping sanctions where no unfair trade practice exists. In other words, a country could no longer punish a foreign producer that engages in differential pricing for strategic purposes. As discussed in Part I, such strategic pricing could exist if a firm prices above average marginal cost, but chooses to earn a lower profit margin overseas than at home in order to increase its

240. Some examples of non-tariff barriers include a licensing scheme to restrict access to markets, anti-competitive sanitary and phyto-sanitary standards, government-mandated standards that differ from the prevailing international standards, and restrictions on data flows. These types of non-tariff barriers can lead to the creation of sanctuary markets, allowing domestic firms to capture abnormal profits, which can be used to subsidize dumping in export markets.

241. Some examples of market-distorting industrial policies include subsidized research and development funding, advantaged access to capital markets, and government-imposed limitations on investment. Again, these policies can be anti-competitive and favor domestic producers, leading to abnormal profits which facilitate dumping.

market share, or for a variety of other reasons. Such behavior is not economically problematic. Global antidumping laws should be reformed to ensure that this type of pricing strategy is no longer punishable.

Second, by forcing discussion of existing unfair trade practices into the open, this proposal will draw greater attention to unfair trade practices that are still being committed. Hopefully, this constant attention would exert some pressure on countries that engage in such practices to curtail their use of these practices. At the very least, the rule change would give such countries an incentive to do so—eliminating the practice would prevent trading partners from using it as a basis for imposing antidumping sanctions against its producers.

Third, the rule change would have the related consequence of politicizing antidumping decisions. While politicization of trade disputes is not always desired, in this case, it would have a positive effect. At present, antidumping rulings are technical discussions about calculations of “normal value,” which allows authorities to circumvent the issue of unfair trade. A country can hide behind technical details without accusing its trading partner of acting unfairly. However, under the proposed rule, government authorities will no longer be able to do so. To impose antidumping duties, a government must accuse its trading partner of partaking in an unfair trade practice. This requirement raises the diplomatic stakes of the issue of antidumping. Governments, fearing an escalation of trade tensions, may exercise greater restraint.

2. *Making It More Difficult to Extend Antidumping Duties*

At present, once an antidumping duty is imposed, it can be extended indefinitely through a series of unlimited five-year renewals conducted during a “sunset” review process.²⁴² To justify a renewal, a government must simply conclude that expiration will likely “lead to continuation or recurrence of dumping and injury.”²⁴³

Because of this lax standard, in the majority of instances, the United States and EU will extend, rather than terminate, antidumping duties.²⁴⁴

242. ADA, *supra* note 23, art. 11.

243. *Id.* art. 11.3.

244. A study examining the first 181 contested antidumping orders found that the U.S. International Trade Commission extended antidumping duties in seventy two percent of the five-year sunset review's orders. See Michael O. Moore, *An Econometric Analysis of US Antidumping Sunset Reviews* 8 (GW Center for the Study of Globalization Occasional Paper Series 02–06, Oct. 7, 2006). To my knowledge, no exhaustive study of the EU's sunset reviews exists. Based on my own computations, I find that the European Commission extended antidumping duties in seventy eight percent of the sunset reviews that were concluded in 2004–08. This calculation is based on information provided in Annex F of the European Commission's Annual Report on Anti-dumping, Anti-Subsidies, and Safeguard Statistics, available at http://ec.europa.eu/trade/issues/respectrules/anti_dumping/stats.htm, as well as Commission of the European Communities, Annexes to the 23rd–27th Reports from the Commission to the European Parliament on the Community's Anti-dumping, Anti-subsidy and Safeguard activities (2003–2007) available at http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145263.pdf; http://trade.ec.europa.eu/doclib/docs/2008/december/tradoc_141849.pdf; <http://trade.ec.europa.eu/doclib/docs/2007/august/>

The average lifetime of a U.S. antidumping duty is over a decade, and some duties have remained for more than thirty years.²⁴⁵ China is now copying this practice. China has extended approximately sixty percent of its antidumping duties that have come up for sunset review.²⁴⁶ The extension rate for India, while still comparatively low, has also edged upward in recent years.²⁴⁷

While the lax standard for extending antidumping duties has historically served U.S. and European interests, it is worth considering whether this is still the case. American and European exporters may soon face a barrage of Chinese and Indian antidumping duties that remain in place indefinitely. To guard against this possibility, the United States and EU should consider the following three changes.

First, a new provision should be added to Article 11 of the ADA that requires that the antidumping duty be terminated upon proof that the underlying unfair trade practice that enables dumping no longer exists. After all, if the initial impetus for duties no longer exists, then neither should the protection that was adopted in response. This also creates an incentive for the targeted country to eliminate the unfair trade practice, rather than simply engage in tit-for-tat retaliation.²⁴⁸ And it creates a mechanism to mandate elimination of an antidumping duty prior to the five-year sunset review, rather than allowing it to linger.

Second, the WTO should clarify that the procedures and methodologies applicable to the initial antidumping investigation also apply to the sunset reviews in which governments decide whether or not to extend antidumping duties.²⁴⁹ International law currently provides no clear criteria or procedures for how such reviews are to be conducted. As a result, “the scope for arbitrariness is even greater in sunset reviews than in initial investigations.”²⁵⁰ Because international law grants countries much discretion, decisions to ex-

tradoc_135663.pdf; http://trade.ec.europa.eu/doclib/docs/2007/april/tradoc_134455.pdf; http://trade.ec.europa.eu/doclib/docs/2005/october/tradoc_124323.pdf.

245. Brink Lindsey & Dan Ikenon, *Reforming the Antidumping Agreement: A Road Map for WTO Negotiations* 34 (Cato Institute Trade Policy Analysis No. 21, 2002).

246. My computations are based on the information reported by China in its Semi-Annual Report Under Article 16.4 of the Antidumping Agreement to the WTO Committee on Anti-Dumping Practices. These reports are available under the G/ADP/N series of WTO documents.

247. I find that India has, recent years, extended antidumping duties in roughly one-third of its sunset reviews, which is a noticeable increase from earlier years. My computations are based on information reported by India in its Semi-Annual Report Under Article 16.4 of the Antidumping Agreement to the WTO Committee on Anti-Dumping Practices. See *id.* for additional detail on locating these reports.

248. At present, even if the targeted country were to respond by eliminating the unfair trade practice, the antidumping duty can remain in place. Thus, there is little incentive to do so.

249. This proposal has been advanced by several countries, including the “Friends of Antidumping” coalition. See, e.g., Proposal on Reviews, Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu; Singapore; Switzerland; and Thailand to the Negotiating Group on Rules, at 2, TN/RL/W/83 (April 25, 2003).

250. Olivier Cadot, Jaime de Melo, & Bolormaa Tumurchudur, *Anti-Dumping Sunset Reviews: The Uneven Reach of WTO Disciplines* 3 (Jan. 2008) (Paper for World Bank Conference on Antidumping and

tend an antidumping duty for another five years are difficult to challenge. This reform will not only clarify and standardize the procedures for sunset reviews, but also make it easier for WTO members to challenge extensions.

Third, the United States and EU should reconsider its opposition to proposals that seek to limit the number of extensions that may be granted to a government. Several countries, including China, have put forward proposals prohibiting extensions altogether,²⁵¹ which the United States has strongly resisted.²⁵² While prohibiting extensions outright may be politically infeasible, the United States and EU may be well-served by a compromise to limit WTO members to one or two extensions.²⁵³ Certainly, this new requirement will force the United States and EU to terminate some of its duties. But, at the same time, it will also guarantee that their producers will not be facing decades-long antidumping duties in China, India, and other developing countries. Over the long-term, that guarantee is perhaps more important. While China and India remain open to the idea, the United States and EU should take advantage of the opportunity to enshrine it into international law, rather than dismissing it altogether.

3. *Requiring Compensation for Sustained Antidumping Duties*

Perhaps the best way to ensure that Indian and Chinese use of antidumping sanctions do not escalate at an uncontrollable pace is to raise the cost of imposing antidumping sanctions. As explained in Part I, one reason for the popularity of antidumping sanctions as a protectionist instrument is that they involve very little cost for the country imposing the sanctions. Once the legal elements of an antidumping claim are proven under the current less-than-stringent standards, a country can impose discriminatory antidumping tariffs without giving up anything in return. One reform that would address this issue is to require that a country imposing antidumping sanctions offer compensation to the targeted country.²⁵⁴

Some will argue that compensation is not justified in the case of antidumping duties because the duties represent a form of restitution for prob-

Developing Countries, World Bank and the Institut d'Etudes Politiques de Paris), available at <http://works.bepress.com/ocadot/4>.

251. See, e.g., China AD Negotiating Proposal, *supra* note 237, at ¶ 2.4; Korea's View on the Improvement of the Sunset System, Submission of the Republic of Korea to the Negotiating Group on Rules, at 1, TN/RL/W/111 (May 27, 2003). R

252. As a result, the latest version of the negotiating text includes no language on this issue, only the Chair's comment about the discord on this issue. See WTO Draft Consolidated Chair Text, *supra* note 239, at ¶ 11.3. R

253. In addition, negotiating proposals requiring that a government not be allowed to initiate a new investigation for at least one year after the duty has been removed have been tabled. See, e.g., China AD Negotiating Proposal, *supra* note 237, at ¶ 2.4. One scholar from a developing country has suggested that this period be extended to eighteen to twenty-four months. See, e.g., Alusio de Lima-Campos, *Nineteen Proposals to Curb Abuse in Antidumping and Countervailing Duty Proceedings*, 39 J. WORLD TRADE 239, 251–52 (2005). R

254. Under WTO law, compensation generally takes the form of suspension of agreed-upon trade concessions. See, e.g., GATT, *supra* note 47, arts. XIX (safeguards) & XXVIII (tariff modifications). R

lematic behavior, namely dumping. This argument has some merit if the defendant's behavior actually involves an unfair trade practice. But if the imposition of sanctions does not involve any cost to the imposing country, such as compensation to the targeted country, there is little incentive to withdraw the antidumping sanctions that provide protection for domestic industry even after the unfair trade practice has been terminated.

To balance these competing concerns, the United States and EU should propose that compensation be required after an initial fixed period of compensation-free sanctions. The period could be five years, requiring a country to offer compensation whenever it extended antidumping duties beyond the initial five-year term. This would increase the likelihood that a country would terminate antidumping duties during sunset reviews. Alternatively, the period could be three years, which is the length of the compensation-free time period stipulated in the existing WTO law on safeguards.²⁵⁵ Regardless of the length, an initial compensation-free period would allow for restitution of the injury. However, by requiring compensation for subsequent periods, the proposal would reduce incentives for countries to maintain duties for excessively long periods.

This reform proposal has the added benefit of reducing the asymmetry between the existing international law governing antidumping sanctions and governing safeguards. At present, the law on safeguards requires that petitioners prove a higher standard of injury—"serious" injury—than that required of petitioners in an antidumping case, who must prove "material" injury.²⁵⁶ However, even though safeguards petitioners may have suffered a greater injury, countries that apply safeguards must offer compensation, while those that apply antidumping sanctions are not required to do so. No wonder, then, that most countries choose to pursue antidumping actions rather than safeguards. By eliminating or reducing the difference in the compensation requirements, the proposal should narrow the difference between the two permissible instruments of contingent protection. Scholars who argue that safeguards, rather than antidumping duties, should be the primary instrument of contingent protection will find this to be a welcome development.²⁵⁷

Among the possible reforms discussed, this proposal is likely to have the greatest impact on the United States. If implemented immediately, the costs would be higher for the United States than any other country, as the United States has the largest number of antidumping duties in place today and therefore would need to pay the highest compensation to maintain its du-

255. Safeguards Agreement, *supra* note 64, art. 8.3.

256. *Compare id.* art. 2.1 (establishing a "serious injury" standard for the imposition of safeguards), with ADA, *supra* note 23, at n.9 (defining the "injury" requirement for antidumping to be "material injury").

257. *See, e.g.*, Claude Barfield, *Anti-dumping Reform: Time to Go Back to Basics*, 28 WORLD ECON. 719, 731 (2005) (discussing four advantages of substituting safeguard actions for antidumping actions).

ties. To lessen the negative impact, the United States may want to consider proposing that the compensation requirement not take effect until 2020. This would give the United States a decade to prepare its protected industries for the phase-out of existing antidumping duties. At the same time, this would still achieve the desired effect of deterring India and China from aggressively imposing new antidumping duties by raising the long-term cost of doing so.

The compensation requirement does not eliminate the protectionist element of antidumping sanctions, but it does lessen its impact, and, in doing so, reduces its attractiveness. In a world where patterns of use of antidumping sanctions are shifting against the United States, the idea of requiring compensation is likely to be in America's long-term interest. Without it, the United States risks the danger that other countries will increasingly subject U.S. products to a cost-free, decades-long protectionism that historically the United States has best exploited.

To summarize, the three "radical" policy shifts that I have discussed represent only a small fraction of the reforms possible to global antidumping law. But they shift the law in three important ways: a) they increase the difficulty of imposing antidumping duties for purely protectionist purposes; b) they decrease the length of time for which antidumping duties can be applied; and c) they increase the cost of employing antidumping measures over a long period of time. I argue that, in contrast to existing U.S. and European negotiating policy, the United States and EU should be attempting to change international law in this direction. If the United States and EU do not shift their policy, they will run the risk that India and China's growing ability to take advantage of the permissive existing legal standard will one day result in global antidumping laws working against their interests. To be sure, other proposals can also help avoid this adverse outcome. But, most other proposals do not necessarily benefit the United States or EU relative to India and China, and for this reason I focus on the three proposals described above since they are more likely to be politically palatable.²⁵⁸

258. For example, many advocates of antidumping reform have pushed for mandatory inclusion of a public interest clause in antidumping laws. See, e.g., Aradhna Aggarwal, *The WTO Anti-dumping Agreement: Possible Reform Through the Inclusion of a Public Interest Clause* 4 (Indian Council for Res. on Int'l Econ. Rels. Working Paper No. 142, Sept. 2004); Submission of the European Communities Concerning the Agreement on Implementation of Article VI of the GATT 1994 (Anti-dumping Agreement) to the Negotiating Group on Rules, at 3, TN/RL/W/13 (July 8, 2002). Such a clause would require government authorities to consider the public interest as part of their investigation and only impose antidumping duties if they determine that such duties are in the public interest. I do not discuss this proposal because a public interest requirement already exists under Chinese law, and a similar provision requiring consumer input exists under Indian law. See *supra* notes 79, 105–106 and accompanying text. Furthermore, past experience has shown that inclusion of a public interest requirement has had little effect on curbing antidumping use.

Another example of a popular reform proposal is to clarify and restrict the use of a constructed value methodology for calculating "normal value" when assessing whether dumping exists. See, e.g., China AD Negotiating Proposal, *supra* note 237, at ¶ 1.5; Lindsey & Ikenson, *supra* note 245, at 17–19 (advocating for the elimination of profit from any constructed value calculation). The constructed value approach is

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Nevertheless, the goal of this Article is not to advance these specific proposals per se. Instead, it is to present an argument that will hopefully shift U.S. negotiating policy away from its entrenched opposition to antidumping reform and toward a realization that certain reforms are in its long-term interest. In fact, the Doha Round offers the United States a rare window of opportunity to advance these reforms. While the world's future antidumping powers—namely, India and China—are still receptive to idea, the United States should be reshaping international law on antidumping in a more restrictive manner. To squander this opportunity is both foolish and short-sighted.

V. CONCLUSION

In shaping the international law on antidumping, the United States and EU embraced a permissive legal standard, divorced from economic theory, which legitimized their own protectionist use of antidumping laws. Until recently, that standard served their industries well, albeit often at the expense of consumers. The rules legitimized their efforts to protect domestic industries from increased foreign competition when there was not necessarily an economic basis for doing so. However, others have learned to play this harmful game. Over the course of a decade, China and India—two longstanding targets of antidumping sanctions—have rapidly emerged as antidumping powerhouses. These two countries are now the source of more antidumping cases than the United States and EU combined. To date, the United States and EU have not treated this shift as cause for alarm. I suggest that this is a mistake. True, there may not be an immediate cause for concern. India and China are playing within the bounds of international law, and the current global antidumping rules continue to work in favor of American and European producers. But there is reason to believe that, contrary to the prevailing view, India and China's use of antidumping measures will continue to grow and outpace the United States and EU's use in the years ahead.

Scholars and policymakers have assumed that India and China's recent rising use is a fleeting anomaly, triggered by historic tariff cuts and a need to retaliate against other countries that are targeting them. In fact, this is not fully correct. Many industries in India and China have yet to discover the utility of antidumping laws. China has not yet fully embraced a strategy of using antidumping sanctions as a retaliatory instrument. And retaliation does not explain why India continues to use antidumping sanctions aggressively, even after others have ratcheted down their use of antidumping sanc-

commonly used in U.S. antidumping cases, especially those against China, whereas this approach is less commonly used by India and China when targeting U.S. or European producers. Therefore, while the proposal may be normatively positive, I do not raise it because it is unclear that it would actually advantage the United States or EU.

tions against India. These signs suggest that India and China's use of antidumping sanctions as a protectionist instrument will not level off in the years to come. Instead, as their domestic markets grow, American and European exporters will likely incur larger costs from antidumping duties imposed by India and China.

For the United States and EU, if the current rules remain unchanged, then one day in the not-too-distant future, the net advantage that they currently enjoy will disappear. Therefore, while India and China still remain supportive of the notion of antidumping reform, the United States and EU should work to reshape the rules governing the imposition of antidumping sanctions. Rather than blocking reform efforts, as they have done, the United States and EU should be actively championing proposals in the Doha Round negotiations that will make it more difficult to enact antidumping duties for protectionist purposes. In other words, the United States and EU should be dismantling the permissive legal standard that they helped put in place. If they do not, they risk the danger that the standard will soon come to serve other countries' protectionist interests more than their own.

TABLE 1. CONTINGENT PROTECTION MEASURES IMPLEMENTED BY WTO MEMBERS, 1995 TO 2009

| | 1995–99 | 2000–04 | 2005–09 | Total |
|-----------------------|--------------|---------------|--------------|---------------|
| Antidumping | 709 (92%) | 1003 (90%) | 662 (91%) | 2374 (91%) |
| Countervailing Duties | 47 (6%) | 63 (5%) | 29 (4%) | 139 (5%) |
| Safeguards | 14 (2%) | 51 (5%) | 34 (5%) | 99 (4%) |
| Total | 770 | 1117 | 725 | 2612 |

Notes:

Percentage of total contingent measures in the time period is listed in parentheses below the relevant number.

Computations based on World Trade Organization statistics. See WTO Statistics on Antidumping, available at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm; WTO Statistics on Safeguard Measures, available at http://www.wto.org/english/tratop_e/safeg_e/safeg_e.htm; WTO Statistics on Subsidies and Countervailing Measures, available at http://www.wto.org/english/tratop_e/scm_e/scm_e.htm.

TABLE 2. ANTIDUMPING INVESTIGATIONS, 1981 TO 2008

| | 1981–87 | 1988–94 | 1995–01 | 2002–08 |
|--------------------|---------------|--------------|--------------|--------------|
| Traditional Users* | 1265 (97%) | 973 (64%) | 743 (39%) | 408 (27%) |
| China & India | 0 (0%) | 9 (1%) | 272 (14%) | 443 (29%) |
| Other New Users** | 40 (3%) | 526 (35%) | 881 (47%) | 680 (44%) |
| Total | 1305 | 1508 | 1896 | 1531 |

Notes:

Percentage of total contingent measures in the time period is listed in parentheses below the relevant number.

*Traditional users include Australia, Canada, EU, and the United States.

**Other new users include all other countries except for the traditional users, China, and India.

Computations are based on GATT statistics as reported for 1981 to 1994 in Maurizio Zanardi, *Antidumping: What are the Numbers to Discuss at Doha?*, 27 *WORLD ECON.* 403, 414–16 (2004), and in World Trade Organization statistics for 1995–2008, available at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm.

TABLE 3. IMPACT OF INDIAN ANTIDUMPING MEASURES ON SELECT U.S. & EUROPEAN PRODUCERS

| U.S. PRODUCERS | | | | |
|-------------------------|-------------------------|---|--|----------|
| Product | Year AD Duty Enacted | Value of Imports at Start of AD Investigation | Value of Imports Three Years After AD Duty Enacted | % Change |
| Newsprint | 1997 | \$27,952,432 | \$3,479,160 | -87.6% |
| Caustic soda | 2000 | 720,456 | 255,303 | -64.6% |
| Vitamin AB2D3K | 2001 | 1,850,225 | 1,326,581 | -28.3% |
| Vitamin C | 2002 | 3,165,821 | 124,638 | -96.1% |
| EUROPEAN PRODUCERS | | | | |
| Product | Year AD Duty Enacted | Value of Imports at Start of AD Investigation | Value of Imports Three Years After AD Duty Enacted | % Change |
| Sodium cyanide | 1999 | \$668,153 | \$289,098 | -56.7% |
| Thermal sensitive paper | 1999 | 335,814 | 124,737 | -62.9% |
| Oxo alcohols | 1999 | 37,565,259 | 24,159,458 | -35.7% |
| Vitamin C | 2000 | 3,702,555 | 510 | -99.9% |
| Vitamin AD3 | 2001 | 1,698,395 | 732,757 | -56.9% |
| Isopropyl alcohol | 2002 | 1,079,772 | 835,738 | -22.6% |
| D-para-hydroxy phenyl | 2002 | 95,529,584 | 85,410,630 | -10.6% |
| Caustic soda | 2003 | 2,065,205 | 274,232 | -86.7% |

Notes:

Values reflect the import statistics for the HS-6 line(s) affected as reported in the UN Commodity Trade Statistics database, available at <http://comtrade.un.org/db/>.

All figures are reported in U.S. dollars.

TABLE 4. IMPACT OF CHINESE ANTIDUMPING MEASURES ON SELECT
U.S. & EUROPEAN PRODUCERS

| U.S. PRODUCERS | | | | |
|------------------------------|-------------------------|---|--|----------|
| Product | Year AD Duty Enacted | Value of Imports at Start of AD Investigation | Value of Imports Three Years After AD Duty Enacted | % Change |
| Newsprint | 1998 | \$37,253,438 | \$61,365 | -99.8% |
| Esters of acrylic acid | 2000 | 13,721,397 | 2,424,200 | -82.3% |
| Paper for writing | 2002 | 38,941,399 | 23,472,651 | -39.7% |
| Toluene diisocyanate | 2003 | 83,223,365 | 65,581,788 | -21.2% |
| Phenol (hydroxybenzene) | 2003 | 20,139,528 | 14,131,459 | -29.8% |
| EUROPEAN PRODUCERS | | | | |
| Product | Year AD Duty Enacted | Value of Imports at Start of AD Investigation | Value of Imports Three Years After AD Duty Enacted | % Change |
| Dichloromethane ¹ | 2001 | \$11,081,459 | \$4,979,124 | -55.1% |
| Hexanelactam ² | 2003 | 41,351,768 | 12,284,599 | -70.3% |
| Chloroform | 2004 | 19,513,439 | 16,540,812 | -15.2% |

Notes:

¹ Duties were levied only against four EU members (France, Germany, Netherlands, and the U.K.). However, the product was not imported from any other EU members.

² Duties were levied only against three EU members (Belgium, Germany, and the Netherlands). The product was also imported from Spain, which was not subject to duties. The value of Spanish imports is not reflected above.

Values reflect the import statistics for the HS-6 line(s) affected as reported in the UN Commodity Trade Statistics database, available at <http://comtrade.un.org/db/>.

All figures are reported in U.S. dollars.

TABLE 5. VALUE OF IMPORTS AFFECTED BY NEW ANTIDUMPING INVESTIGATIONS, 1999 TO 2008

| Year | Value of Chinese & Indian Imports Subject to New U.S. & EU AD Investigations | Value of European Imports Subject to New Chinese & Indian AD Investigations | Difference |
|------|--|---|---------------|
| 1999 | \$513,273,391 | \$77,935,587 | \$435,337,804 |
| 2000 | 778,205,351 | 33,739,569 | 744,465,782 |
| 2001 | 1,872,553,202 | 160,310,788 | 1,712,242,414 |
| 2002 | 799,261,525 | 341,123,428 | 458,138,097 |
| 2003 | 5,171,806,629 | 203,811,283 | 4,967,995,346 |
| 2004 | 2,332,567,488 | 981,062,454 | 1,351,505,034 |
| 2005 | 2,922,937,219 | 261,147,571 | 2,661,789,648 |
| 2006 | 4,434,809,975 | 44,659,480 | 4,390,150,495 |
| 2007 | 5,715,529,232 | 59,200,839 | 5,656,328,393 |
| 2008 | 7,467,359,624 | 653,297,350 | 6,814,062,274 |

Notes:

Value reflects the import statistics of the HS-6 product lines subject to a new antidumping investigation in the year that eventually resulted in an antidumping measure (except for 2008 investigations, some of whose outcomes are still unknown) as reported in the UN Commodity Trade Statistics database, *available at* <http://comtrade.un.org/db/>.

All figures are reported in U.S. dollars.

TABLE 6. PROBIT MODEL OF INDIAN ANTIDUMPING INVESTIGATIONS

| BINARY DEPENDENT VARIABLE = 1 IF AD CASE WAS INITIATED | | | | | |
|--|---------------------|---------------------|---------------------|---------------------|----------------------|
| EXPLANATORY VARIABLE | (1) | (2) | (3) | (4) | (5) |
| Change in Tariffs (lagged) | -.0041 (.0020)** | -.0043 (.0024)* | -.0033 (.0024) | -.0035 (.0024) | -.0030 (.0024) |
| Change in Quantity (lagged) | -.0001 (.0001)** | -.0001 (.0001)* | -.0001 (.0001)* | -.0001 (.0001)* | -.0001 (.0001)* |
| Change in Unit Price (lagged) | -.0004 (.0002)* | -.0002 (.0002) | -.0002 (.0002) | -.0002 (.0002) | -.0003 (.0002) |
| Change in Tariff (lagged) x Change in Quantity (lagged) x 100 | | | | | -.0001 (.0001) |
| Change in Tariff (lagged) x Change in Unit Price (lagged) x 100 | | | | | -.0003 (.0004) |
| Chemicals | | .6201 (.1698)*** | .6306 (.1710)*** | .6108 (.1692)*** | .8021 (.1494)*** |
| Paper-related products | | .6665 (.1963)*** | .6616 (.1984)*** | .6502 (.1963)*** | .8330 (.1802)*** |
| Plastics & Rubber | | .5876 (.1800)*** | .5959 (.1813)*** | .5808 (.1794)*** | .7673 (.1612)*** |
| Steel | | .3876 (.1806)** | .3823 (.1820)** | .3697 (.1806)** | .5538 (.1621)*** |
| Synthetic fibers | | .8911 (.1799)*** | .9192 (.1819)*** | .8896 (.1793)*** | 1.0917 (.1616)*** |
| BJP government | | | | .1584 (.0526)*** | |
| Other industry fixed effects | No | Yes | Yes | Yes | Yes |
| Year fixed effects | No | No | Yes | No | Yes |
| Observations | 34,074 | 34,074 | 34,074 | 34,074 | 34,074 |

Notes:

Other industry fixed effects are for other sectors (for example, agriculture, textiles, and metals) not reported above. Year fixed effects are for each year in the sample. Standard errors (in parentheses) are clustered at the 6-digit HS product level.

*** indicates significance at the one percent level; ** at the five percent level; and * at the ten percent level.

The marginal effects estimators for each of the explanatory variables are as follows (the number in parentheses indicates the estimator for the corresponding column):

Change in tariffs (lagged):

(1) -2.49 e-6; (2) -4.23 e-6; (3) -2.92 e-6; (4) -3.50 e-6; (5) -1.92 e-6.

Change in quantity (lagged):

(1) -8.51 e-8; (2) -1.06 e-7; (3) -9.15 e-8; (4) -1.06 e-7; (5) -7.23 e-8.

Change in unit price (lagged):

(1) -2.21 e-7; (2) -2.18 e-7; (3) -2.20 e-7; (4) -2.17 e-7; (5) -1.75 e-7.

TABLE 7. INDIA—AVERAGE ANNUAL PERCENTAGE CHANGE IN TARIFFS, IMPORT QUANTITY, & UNIT PRICE, BY INDUSTRY, 1996 TO 2006

| INDUSTRY | TARIFFS | IMPORT QUANTITY | UNIT PRICE |
|--|---------|-----------------|------------|
| Publishing | -18.3% | 13.5% | 5.7% |
| Fertilizers | -15.4% | 26.0% | -0.1% |
| Wool & yarn | -7.1% | 1.4% | 4.1% |
| Synthetic fibers | -6.1% | 19.7% | -0.5% |
| Silk | -6.1% | 8.8% | 5.0% |
| Textiles | -5.8% | 22.3% | 2.4% |
| Optical, photographic, & medical equipment | -5.6% | 25.0% | -3.0% |
| Furniture | -5.4% | 56.9% | 1.3% |
| Headgear | -5.4% | 46.8% | -5.1% |
| Footwear | -5.4% | 39.4% | -3.3% |
| Glass | -5.4% | 33.4% | -1.8% |
| Animal fodder & food waste | -5.4% | 21.6% | 7.0% |
| Tobacco | -5.4% | 18.2% | 13.7% |
| Ceramics | -5.2% | 51.2% | -3.8% |
| Cotton | -5.2% | 37.6% | -1.2% |
| Beverages & spirits | -5.0% | 37.0% | -3.5% |
| Cosmetics, soaps, waxes, & candles | -5.0% | 30.4% | -1.4% |
| Paper | -4.8% | 21.3% | -1.1% |
| Rubber | -4.3% | 19.8% | -1.4% |
| Machinery | -3.9% | 29.6% | -4.8% |
| Prepared foodstuffs | -3.5% | 29.2% | 1.0% |
| Natural fibers | -3.3% | 33.1% | 4.6% |
| Starches, enzymes, & albuminoids | -3.3% | 26.2% | -2.2% |
| Chemicals | -3.3% | 18.8% | -0.1% |
| Pharmaceuticals | -3.3% | 7.0% | 12.9% |
| Tanning & dye extracts | -3.1% | 18.0% | -0.4% |
| Metals | -2.9% | 18.9% | 2.2% |
| Minerals | -2.8% | 28.0% | 0.0% |
| Transportation | -2.8% | 22.8% | 0.6% |
| Animals & animal products | -2.1% | 27.9% | 20.7% |
| Plastics | -2.0% | 24.9% | -1.4% |
| Wood, cork, & pulp | -1.7% | 21.8% | 21.9% |
| Toys | -1.5% | 32.9% | -2.9% |
| Agriculture | -0.5% | 24.2% | 0.5% |
| Steel | 0.5% | 19.9% | 0.9% |

Notes:

Compounded annual growth rates ("CAGR") were calculated for all HS-6 product lines in a given industry and then averaged across the HS-6 product lines. Results are not weighted. Tariff lines for which no quantity or tariff rate was reported in 1996 were excluded from the analysis. For certain tariff lines in which a quantitative restriction ("QR") existed in 1996, the tariff rate used was that for the year in which the QR was lifted, and the CAGR was calculated accordingly.

TABLE 8. INDIA—ANALYSIS OF TARIFF LINES FOR INDUSTRIES
CURRENTLY NOT USING ANTIDUMPING

| Industry | (1) % OF TARIFF LINES THAT MEET AVERAGE CONDITIONS OF AD CASE (Tariff Cut > 5%; Import Increase > 50%) | (2) % OF TARIFF LINES THAT MEET MORE STRINGENT CONDITIONS (Tariff Cut > 8%; Import Increase > 200%) |
|------------------------------------|--|---|
| Tobacco | 75% | 63% |
| Footwear | 68% | 43% |
| Animals & animal products | 62% | 59% |
| Furniture | 62% | 38% |
| Prepared foodstuffs | 60% | 50% |
| Headgear | 60% | 30% |
| Pharmaceuticals | 56% | 30% |
| Wood, cork, & pulp | 55% | 45% |
| Metals | 55% | 36% |
| Starches, enzymes, & albuminoids | 53% | 33% |
| Natural fibers | 52% | 48% |
| Cosmetics, soaps, waxes, & candles | 47% | 26% |
| Transportation | 45% | 37% |
| Cotton | 43% | 36% |
| Agriculture | 43% | 31% |
| Animal fodder & food waste | 43% | 29% |
| Tanning & dye extracts | 43% | 13% |
| Minerals | 42% | 26% |
| Fertilizers | 37% | 32% |
| Toys | 37% | 27% |
| Optical & medical equipment | 36% | 25% |
| Textiles | 33% | 28% |
| Beverages & spirits | 32% | 23% |
| Machinery | 24% | 16% |
| Wool & yarn | 13% | 9% |
| Publishing | 5% | 0% |

Notes: All percentage changes are over a one-year period.

Certain industries that have not been historically subject to antidumping investigations in other WTO member countries (e.g., fats, raw hides & skins, precious stones, and arms) are excluded from this analysis.

TABLE 9. PROBIT MODEL OF CHINESE ANTIDUMPING INVESTIGATIONS

| BINARY DEPENDENT VARIABLE = 1 IF AD CASE WAS INITIATED | | | | |
|--|----------------------|----------------------|----------------------|----------------------|
| EXPLANATORY VARIABLE | (1) | (2) | (3) | (4) |
| Change in Tariffs (lagged) | -.0069 (.0020)*** | -.0111 (.0027)*** | -.0099 (.0037)*** | -.0098 (.0038)*** |
| Change in Quantity (lagged) | -.0008 (.0004)* | -.0007 (.0005) | -.0007 (.0005) | -.0006 (.0005) |
| Change in Unit Price (lagged) | -.0028 (.0011)*** | -.0038 (.0016)** | -.0041 (.0017)** | -.0031 (.0018)* |
| Change in Tariffs x Change in Quantity (lagged) x 100 | | | | -.0020 (.0010)** |
| Change in Tariffs x Change in Unit Price (lagged) | | | | -.0002 (.0001)* |
| Chemicals | | 4.8039 (.3235)*** | 4.5411 (.3386)*** | 5.8180 (.3586)*** |
| Paper-related products | | 4.6634 (.3593)*** | 4.4285 (.3597)*** | 5.6706 (.3903)*** |
| Plastics & Rubber | | 4.7732 (.3364)*** | 4.4281 (.3430)*** | 5.7828 (.3711)*** |
| Steel | | 4.9076 (.3258)*** | 4.6761 (.3284)*** | 5.9149 (.3614)*** |
| Synthetic fibers | | 4.4511 (.3446)*** | 4.2805 (.3430)*** | 5.5291 (.3755)*** |
| Other industry fixed effects | No | Yes | Yes | Yes |
| Year fixed effects | No | No | Yes | Yes |
| Observations | 39,194 | 39,194 | 39,194 | 39,194 |

Notes:

Other industry fixed effects are for other sectors (e.g., machinery) not reported above, which were not found to be significant.

A dummy variable for the least-common sectors for AD investigations was included, but was found to not be significant.

Year-fixed effects are for each year in the sample.

Standard errors (in parentheses) are clustered at the 6-digit HS product level.

*** indicates significance at the one percent level; ** at the five percent level; and * at the ten percent level.

The marginal effects estimators for the key explanatory variables are as follows (the number in parentheses indicates the estimator for the corresponding column): Change in tariffs:

(1) -8.14 e-15; (2) -1.26 e-25; (3) -3.59 e-28; (4) -1.64 e-30.

Change in quantity (lagged):

(1) -9.00 e-16; (2) -8.13 e-27; (3) -2.54 e-29; (4) -1.09 e-31.

Change in unit price (lagged):

(1) -3.31 e-15; (2) -4.33 e-26; (3) -1.52 e-28; (4) -5.20 e-31.

TABLE 10. CHINA—AVERAGE ANNUAL PERCENTAGE CHANGE IN
TARIFFS, IMPORT QUANTITY, & UNIT PRICE, BY INDUSTRY,
2000 TO 2006

| INDUSTRY | TARIFFS | IMPORT QUANTITY | UNIT PRICE |
|--|---------|--------------------|---------------|
| Furniture | -56.5% | 12.2% | 11.0% |
| Wood, cork, & pulp | -53.9% | 6.2% | 3.2% |
| Toys | -49.2% | 9.3% | 10.0% |
| Machinery | -19.8% | 12.6% | 8.3% |
| Synthetic fibers | -18.6% | -6.4% | 3.7% |
| Optical, photographic, & medical equipment | -16.8% | 10.5% | 12.5% |
| Paper | -15.8% | 0.7% | 6.1% |
| Beverages & spirits | -15.7% | 30.2% | 7.5% |
| Tobacco | -12.5% | 30.2% | -7.5% |
| Textiles | -12.4% | 20.8% | 12.0% |
| Wool & yarn | -12.3% | -3.4% | 4.2% |
| Pharmaceuticals | -12.2% | 11.8% | 8.6% |
| Cotton | -11.1% | 9.5% | 2.3% |
| Animals & animal products | -10.5% | 20.9% | 9.4% |
| Plastics | -10.1% | 10.4% | 10.2% |
| Publishing | -9.9% | 4.0% | 22.4% |
| Cosmetics, soaps, waxes, & candles | -9.5% | 15.0% | 9.0% |
| Transportation | -9.3% | 15.2% | 5.4% |
| Ceramics | -8.6% | 7.6% | 12.2% |
| Steel | -8.1% | 10.2% | 10.1% |
| Prepared foodstuffs | -7.6% | 14.8% | 9.7% |
| Chemicals | -7.6% | 11.8% | 8.1% |
| Minerals | -7.4% | 7.7% | 5.4% |
| Headgear | -7.2% | 1.3% | 8.4% |
| Natural fibers | -6.7% | 24.1% | 0.3% |
| Glass | -6.5% | 6.8% | 11.6% |
| Silk | -6.4% | -5.4% | 3.5% |
| Agriculture | -6.0% | 16.3% | 6.1% |
| Tanning & dye extracts | -5.2% | 6.4% | 8.3% |
| Footwear | -4.6% | 19.9% | 13.7% |
| Metals | -4.5% | 11.0% | 14.0% |
| Rubber | -4.2% | 14.0% | 5.6% |
| Fertilizers | -3.4% | 45.3% | -5.0% |
| Starches, enzymes, & albuminoids | -3.4% | -0.9% | 9.5% |
| Stone | -2.5% | 8.1% | 6.9% |
| Animal fodder & food waste | -1.8% | 0.5% | 2.4% |

Notes:

CAGRs were calculated for all HS-6 product lines in a given industry, and then averaged across the HS-6 product lines. Results are not weighted.

Tariff lines for which no quantity or tariff rate was reported in 2000 were excluded from the analysis. For certain tariff lines where the tariff rate was raised in 2001 prior to China's WTO accession the tariff rate used was that for 2001 and the CAGR was calculated accordingly.

TABLE 11. CHINA—ANALYSIS OF TARIFF LINES FOR INDUSTRIES
CURRENTLY NOT USING ANTIDUMPING

| INDUSTRY | (1) % OF TARIFF LINES THAT MEET AVERAGE CONDITIONS* | (2) % OF TARIFF LINES THAT MEET MORE STRINGENT CONDITIONS** |
|------------------------------------|--|--|
| Textiles | 75% | 46% |
| Beverages & spirits | 71% | 48% |
| Furniture | 70% | 35% |
| Animals & animal products | 62% | 48% |
| Cosmetics, soaps, waxes, & candles | 57% | 43% |
| Transportation | 52% | 36% |
| Natural fibers | 50% | 27% |
| Cotton | 50% | 24% |
| Prepared foodstuffs | 50% | 36% |
| Machinery | 48% | 30% |
| Headgear | 45% | 9% |
| Tobacco | 43% | 29% |
| Ceramics | 41% | 31% |
| Optical & medical equipment | 41% | 25% |
| Pharmaceuticals | 36% | 24% |
| Fertilizers | 35% | 35% |
| Agriculture | 35% | 23% |
| Toys | 33% | 31% |
| Footwear | 31% | 14% |
| Glass | 29% | 18% |
| Wool & yarn | 28% | 9% |
| Tanning & dye extracts | 26% | 2% |
| Wood, cork, & pulp | 22% | 15% |
| Publishing | 21% | 16% |
| Silk | 20% | 0% |
| Metals | 11% | 6% |
| Animal fodder & food waste | 7% | 7% |
| Starches, enzymes, & albuminoid | 7% | 0% |
| Minerals | 5% | 3% |

Notes:

*Tariff Cut > seven percent; Import Increase > twenty percent

**Tariff Cut > ten percent; Import Increase > fifty percent

All percentage changes are over a one-year period.

Certain industries that have not been historically subject to antidumping investigations in other WTO member countries (e.g., fats, raw hides & skins, precious stones, and arms) are excluded from this analysis.

TABLE 12. INDIA'S RETALIATION RATE AGAINST
ANTIDUMPING MEASURES

| | Pre-1995 | 1995-99 | 2000-04 | 2005-08 | Total |
|-------------------------|----------|---------|---------|---------|-------|
| Traditional Users* | 0% | 67% | 90% | 100% | 62% |
| Other Asian New Users** | N/A | 50% | 88% | 100% | 80% |
| Non-Asian New Users*** | 40% | 0% | 26% | 14% | 17% |
| Total | 11% | 36% | 65% | 38% | 44% |

Notes:

*Traditional users include the United States, European Union, Australia, and Canada.

**Other Asian new users include China, Indonesia, Malaysia, South Korea, Taiwan, and Thailand.

***Non-Asian new users refer to ten other countries besides those named above that have enacted antidumping measures against India.

Retaliation is defined as the initiation of an antidumping investigation against a country within one year of its enactment of an antidumping measure against India.

No antidumping measures were enacted against India by other Asian countries prior to 1995.

Computations based on reports of antidumping cases in countries' semi-annual reports to the WTO on antidumping under the G/ADP/N series, available at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm and the World Bank's Global Antidumping Database version 5.0, available at <http://econ.worldbank.org/ttbd/gad/>.

TABLE 13. CHINA'S RETALIATION RATE AGAINST
ANTIDUMPING MEASURES

| | Pre-2001 | 2001-04 | 2005-08 | Total |
|-------------------------|----------|---------|---------|-------|
| Traditional Users* | 17% | 42% | 10% | 25% |
| Other Asian New Users** | 13% | 18% | 7% | 13% |
| Non-Asian New Users*** | 0% | 2% | 0% | 1% |
| Total | 8% | 19% | 5% | 12% |

Notes:

*Traditional users include the United States, European Union, Australia, and Canada.

**Other Asian new users include India, Indonesia, Malaysia, Pakistan, the Philippines, South Korea, Taiwan, and Thailand.

***Non-Asian new users refer to fifteen other countries besides those named above that have enacted antidumping measures against China.

Retaliation is defined as the initiation of an antidumping investigation against a country within one year of its enactment of an antidumping measure against China.

Computations based on reports of antidumping cases in countries' semi-annual reports to the WTO on antidumping under the G/ADP/N series, available at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm and the World Bank's Global Antidumping Database version 5.0, available at <http://econ.worldbank.org/ttbd/gad/>.