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## Barriers to Indian trade: an overview of US trade remedies and the channels of recourse for Indian producers

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## INTRODUCTION

The globalization of the world's economy has increased dramatically in the past century. The most successful producers take advantage of lower labor and manufacturing costs in developing countries and favorable consumer markets in more developed countries. The vast movement of goods among different countries led to concerns over the protection of domestic industries and caused injured countries to impose quotas and tariffs on imports. These devices hindered the development of free trade and, ultimately, hurt consumers worldwide. Recognizing the need for reform, fifteen countries--including the United States, India, the United Kingdom, France and Pakistan--signed an agreement, the General Agreement on Tariffs and Trade **("GATT")**, in 1947 to reduce the use of trade barriers. Under this agreement, contracting countries are obligated to treat all other members equally, in regard to the imposition of trade barriers, and to only impose trade remedies in specific enumerated circumstances.

The present newsletter aims to provide a brief description of the trade remedies allowed under this international agreement, the procedure by which the government of one of the world's largest consumer markets—the United States—decides to impose these remedies, and the effects that the US remedies have had on one of the world's largest producing countries—India. As Indian firms decide to expand internationally and conduct an increasing amount of their trade with the US it is important for them to be aware of these trade remedies and the avenues of recourse that are available in the event that they find themselves suffering from or threatened with the imposition of a trade remedy on their products.

## 1. The GATT and the World Trade Organization ("WTO")

### 1.1 History

The goal of the GATT was to reduce barriers on international trade by reducing the use of import tariffs, quotas and subsidies. The evolution of the GATT and its provisions occurred during several "rounds" of discussions between signatory members. During these rounds, countries agreed to further reduce tariffs and expand the scope of the GATT into new areas such as intellectual property, agriculture and the service industry. In 1993, during the ninth round of discussions—the Uruguay Round-- the member countries created the WTO, an institutional body that the contracting countries gave the power to enforce the provisions of the GATT.

### 1.2 GATT Trade Remedies

There are two provisions in the GATT of 1947 that give the right to contracting countries to impose measures on imports that injure a contracting country's domestic industries. First, Article VI provides for the imposition of trade remedies when another country has been found to be conducting unfair trade practices. These remedies include Antidumping Duties **("AD")**--imposed on imports that are sold at less than normal value and that cause or threaten to cause material injury to a domestic industry--and Countervailing Duties **("CVD")**--

imposed on imports that have received either a direct or indirect government subsidy when the import was manufactured or produced. Second, Article XIX provides for the imposition of trade remedies, known as safeguards, when a contracting member's domestic producer is seriously injured or threatened with serious injury as a result of a fair or unfair trade practice. Serious injury is defined as a "significant overall impairment" in the domestic industry's position, and a threat of serious injury means a clear and imminent threat of such impairment. Article XIX illustrates that the original contracting countries recognized that some domestic industries would be seriously harmed by the opening of trade under the GATT and would require special protection.

## 2. US trade remedies overview

### 2.1 Antidumping duty determination

Under sections 731-739 of the Tariff Act of 1930, the International Trade Commission **("ITC")** and the Department of Commerce **("DOC")** have the responsibility of conducting AD investigations and determining whether to impose AD duties. There are 3 steps in this investigation process. First, after either an affected industry files a petition to the DOC or the DOC initiates an investigation on its own, the ITC is required to make a preliminary determination as to whether the foreign merchandise is causing or threatening to cause material injury[1] to a domestic industry.

Second, the DOC must make both an initial and a final determination of whether dumping has occurred and must calculate the appropriate duty to impose. Dumping occurs when foreign merchandise is being or is likely to be sold in the US at less than fair market value. A good is sold at less than fair market value if it is either 1) sold at a price that is lower than the cost of production; or 2) sold at a price that is lower than the value of the good in the producer's home market.

Third, if the DOC makes a determination that the foreign merchandise is being dumped, the ITC must then make a final determination[2] of whether the domestic industry is being materially injured or threatened with material injury and whether the dumped foreign merchandise is the cause of that injury. The DOC will then impose an AD order and instruct the US Bureau of Customs to impose a duty on the goods, which is the difference between the normal value of the good—the price of the good in the home market—and the price that it is being sold at in the US.

### 2.2 Countervailing duty determination

The process used for determining whether to impose CVD which is enumerated in sections 701-709 of Tariff Act of 1930, is virtually identical to the process for determining AD. The only difference is that the DOC, instead of determining whether a good has been dumped, must determine whether there is evidence that a foreign government has provided either direct subsidies or indirect subsidies to the foreign producer.

### 2.3 Safeguards

The authority for imposing safeguards is found in section 201 of the Trade Act of 1974. Because safeguards are used in instances where there are no unfair trade practices, the procedure for determining whether to impose safeguards is different than that used for AD and CVD. First, after receiving a petition from an affected industry or request from the executive or legislative branches,[3] the ITC must determine whether goods are being imported in such quantities that it is a substantial cause of serious injury or threatens to cause serious injury to a domestic industry that produces goods that are either identical or directly competitive. Unlike the injury requirement for AD and CVD, the injury that must be shown in

[1] Material injury is defined by the statute as an injury which is not inconsequential, immaterial, or unimportant. In determining whether there is material injury the DOC considers (1) the volume of imports of the subject merchandise, (2) the effect of imports of that merchandise on prices in the United States for domestic like products, and (3) the impact of imports of such merchandise on domestic producers of domestic like products.

[2] The ITC's final determination is not an appellate process. The ITC's process for making an initial determination is not as extensive and involved as the final determination and serves as barrier to ensure that frivolous cases are not pursued at the expense of government resources. The final determination is more extensive and only occurs once the DOC makes an affirmative finding of the existence of either dumping or subsidies.

[3] The US President, the US Trade Representative, the Senate Finance Committee and the House Ways and Means Committee may all request the ITC to initiate an investigation.

order to impose a safeguard is substantial injury and is harder to prove than material injury. The factors for determining whether there has, or will be serious injury, include: decline in sales or market share of a domestic industry's goods, and downtrends in production, profits or employment.

Second, after an affirmative determination of injury and causal connection between the increase in imports and the injury, the ITC submits its recommendation to be approved by the President of the United States. Unlike in CVD and AD cases, the President has a large amount of discretion in safeguard cases and must take into account the domestic impact of the imposition of relief measures on retailers and consumers, the impact on foreign affairs, and the burden on trade partners. Congress does not have the ability to override the President's veto of a section 201 determination.

Once the President has signed an order, safeguards--which include import quotas--are imposed for such time as is necessary to remedy the injury occurring to the domestic industry. In practice, the general rule is that these remedies will last no longer than 4 years, unless there are extenuating circumstance, for which an extension can be granted for an additional 4 years. Because the threshold of injury that must be proven is higher—substantial injury instead of just material injury-- safeguards are the least used trade remedy and do not have a great impact on Indian producers.

### 2.4 Time Frames for AD and CVD Investigations

For CVD cases, the total process of investigation and determination can take anywhere between 205 and 430 days, depending on the complexity of the case. For AD cases, the total process of investigation and determination can span from 280 to 390 days. The preliminary investigations by the ITC in both AD and CVD cases lasts 45 days.

## 3. Recourse and review of US imposed trade remedies

### 3.1 Representation during DOC and ITC Investigations

Due to the enormous financial losses accompanying the imposition of trade remedy orders and the difficulty of overturning these order, the most effective way for foreign and Indian producers to combat the imposition of a trade remedy is to be actively involved and adequately represented in the DOC and ITC investigations. During the initial stages of the ITC's AD and CVD preliminary investigation, questionnaires are sent out to foreign producers requesting information on the firm's operations abroad and in the US, and financial, production, sales data. While foreign producers are not required to respond, a lack of cooperation results in an adverse inference by the ITC. Three weeks into the preliminary investigation, the ITC holds a public conference where affected producers can present their legal and factual arguments and witness testimony. The producers are encouraged to file post conference briefs outlining their arguments and including pertinent information. After the DOC's final determination, the ITC holds a public hearing where parties can give their arguments, present witness testimony, and respond to questions from the ITC commissioners. Parties are encouraged to file post-hearing briefs. At the close of the ITC's final investigation but prior to the ITC's final vote, parties can inspect all the public information, and can make final comments on the accuracy of the information to the ITC.

### 3.2 Five Year Review by the ITC and DOC

Foreign producers should be aware that the US trade remedy orders are not permanent and that they will have a second opportunity to present their case after the imposition of the order. According to section 751 of the Tariff Act of 1930, the DOC and the ITC must conduct a "sunset review" of all CVD and AD orders after the fifth anniversary of its initial imposition. The DOC must revoke an order unless it finds that dumping or subsides are continuing or likely to reoccur and a domestic industry is continuing to be materially injured or such an injury is likely to reoccur. The DOC publishes a notice of initiation of review in the *Federal Register* and requests that interested parties submit necessary information, and statements on the likely effects of revocation of the order. If no interested party replies the DOC will revoke the order in 90 days and if there are inadequate responses the DOC will conduct an expedited review with only the readily available information. The DOC later publishes a notice of institution of a five year review. If the DOC decides to conduct a full review, they will send out questionnaires and conduct hearings similar to the steps during the initial investigation. The period for "sunset review" investigation and determination can last anywhere between 150 and 360 days.

### 3.3 Appeal to the US Court of International Trade and the US Court of Appeals

A producer that appeared as a party during the ITC and DOC investigation process has the right to appeal the ITC's final injury determination, or sunset review determination to the United States' Court of International Trade **("CIT")**. During its review, the CIT does not conduct a *de novo* review of the record but instead must decide whether ITC's determination was unsupported by substantial evidence on the record or otherwise not in accordance with the law. After the CIT makes its determination, a losing producer has the opportunity to make a second appeal to the United States Court of Appeals for the Federal Circuit. Overturning an ITC determination on review is very uncommon because the CIT and the Federal Circuit gives a large amount of deference to the ITC's final determination.

### 3.4 Appeal to the WTO's Dispute Settlement Body

Under the GATT Understanding on Rules and Procedures Governing the Settlement of Disputes, a contracting member, on behalf of its producers, can appeal another member's imposition of a trade remedy to the WTO. The countries are required to first meet in consultation and mediation, and, if that fails, the complaining party can request a review panel. The panel will decide the issue and submit a report that must be approved by the Dispute Settlement Body **("DSB").** It normal takes between 3 and 6 months for the panel to deliberate and submit a report. The decision by the DSB can be appealed to the Appellate Body which is composed of seven international trade experts who serve four year terms. The appeals process lasts anywhere from 60 to 90 days. If a trade remedy is found to violate the provision of the GATT, the offending country is required to bring its law in compliance. Between 1995 and 2006, contracting countries filed 115 complaints against the United States. Of the 115 complaints, the DSB ruled in favor of the US in 14 cases, and ruled against the US in 30 cases—the remaining 71 cases were either withdrawn or became inactive.

## 4. US trade remedies and India

### 4.1 US AD and CVD measures on Indian Exports

India was among the top ten countries cited in US countervailing cases during the years 1980-2005—accounting for 4.4% of the total number of cases—but was not among the top ten countries cited in US antidumping cases. According to the statistics released by the DOC, out of the 67 CVD and AD investigations conducted by the ITC and DOC that entered the final phase between 2003 and 2009, eight cases involved Indian exports. Of those eight cases, the ITC and DOC imposed AD orders for four products—pre-stressed concrete steel wire strand, preserved mushrooms, carbazole violet pigment 23, and frozen warm water shrimp—and CVD orders for two products—carbazole violet pigment 23, and pre-stressed concrete steel wire strand.

### 4.2 Future Issues

Although the current WTO round of discussions—the Doha round—stalled in 2008 after disagreements between the US, China and India over agriculture tariffs, India has made it clear that they wish to start the rounds again. The key issue leading to the stall of discussions involved the extent to which developing countries could raise duties on agricultural products in response to import surges. India, in an effort to protect its agrarian population, desired to have the right to raise duties to levels it deemed necessary to protect the lives of farmers. The US was concerned that such an agreement would allow tariffs to be raised to levels higher then those proposed in the Uruguay round, thus leading to a step backward in trade liberation. An alternative approach, which was accepted by India but rejected by the US, was to allow the imposition of special safeguards when a developing country could show "demonstrable harm" to their farmers.

In November 2001, WTO contracting parties agreed to include trade remedy laws on the agenda at a Ministerial Meeting in Doha. Before the discussion stalled, both Japan and the EU specifically advocated a review of the antidumping procedures of all contracting countries. In 2007, a new issue arose when the chair of the negotiating group in rules, Uruguayan Ambassador Galmes, included the US's "zeroing"[4] method of anti-dumping calculation in the text of a draft agreement. India argues that allowing such a method of calculation—which was previously found to be illegal by the DSB—favors the US by allowing it to impose AD more easily.

A third issue involving trade remedies is India's opposition to proposal made by developed countries, which would disallow government subsidies to traditional communities that use boats with small motors. The argument behind the proposal is that it will protect the environment from damage and overfishing. India has pronounced that the issue is non-negotiable and the Indian Government will continue to supply subsidies regardless of the WTO's final decision. While the Doha round has been stalled, due to the current economic crisis, both developed and developing countries have enacted measures, including extensive subsidies to ailing industries and policies favoring the purchase of domestic over foreign goods, to stimulate national economic recovery. Such policies will cause countries, such as India and the US, to impose an increasing number of CVDs and ADs in retaliation.

## CONCLUSION

Indian producers and exporters are adversely affected by the AD, CVD—and to a lesser extent—safeguards that the US imposes every year. However, Indian producers should be aware that when there is a threat of future imposition of these remedies, they have the right to be represented throughout the ITC and DOC investigations. This representation is crucial to help both fully inform the commission and defend against the imposition of a trade remedy. While the best situation would be for commission to issue a negative finding of either material injury to a domestic industry, dumping, or government provided subsidies, Indian producers do have channels of recourse when there is an affirmative finding. The producers can appeal the ITC determination to the CIT and the US Court of Appeals, wait for the five-year review to once again state their case, or lobby their national government to file a complaint to the WTO's Dispute Settlement Body. To ensure that India's producers are protected in the future from these debilitating barriers, it would be advisable for India to take an active role in the discussion on AD and CVD reform when the WTO's Doha round reconvenes. ***(Daniel Colin Beer)***

*(This E-Newsline is prepared by Daniel Colin Beer, a IInd year law student at the University of Georgia School of Law who is pursuing his internship at PSA).*

[4] When the DOC calculates the dumping margins, it compares the US price to the normal value. The normal value is the value of the goods in the home market. When the normal value is higher than the U.S. price, the difference is treated as the dumping amount for that sale or that comparison. When, however, the U.S. price is higher, the dumping amount is set to zero rather than its calculated negative value. All dumping amounts are then added and divided by the aggregate export sales amount to yield the company's overall dumping margin. Zeroing eliminates negative dumping margin from the dumping calculation, and thus allows the DOC to impose a greater number of ADs.

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