



# US-Frozen Warm-water Shrimp *Anti-dumping – Gone to the Extreme!*

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The US decision to uphold an anti-dumping measure against Indian and Thai frozen warm-water shrimp came as a bolt from the blue for the two exporting countries that witnessed the devastating wrath of *tsunami* on December 26, 2004. At the time, these developing countries looked to both aid and trade to revive livelihoods and their economies.

Their shrimp exporting industries were in desperate need of re-investment, essentially through export revenues. But this was disregarded by the US which ordered an anti-dumping (AD) duty to be placed on shrimp imports from India and Thailand, for causing injury to US producers via dumping, 25 days after the *tsunami*. Ten months later, the US reviewed their measure again but found that removal of the measure would still cause injury to their domestic producers, despite the *tsunami*, and so continued the AD measure. This opened up old wounds. The briefing paper analyses the US AD measure and its consequences on livelihoods

## Investigations Prior and Post *Tsunami*

In late December 2003, the Southern Shrimp Alliance, an organisation of domestic shrimp producers from eight southeastern US states, including Mexican producers, lobbied the US International Trade Commission (USITC) to investigate imported frozen warm-water (FW) shrimp from India, Thailand, Vietnam, Brazil, Ecuador and China. The imported FW shrimp was alleged of being sold in the US market at a price below the prices prevailing in the market of these developing countries. Thereby causing material injury to US domestic producers. In other words, these countries were dumping their FW shrimp on the US market. The US Department of Commerce (USDOC) began its assessment on July 16, 2004 to survey the complaints' evidence and on January 19, 2005 according to its calculations and reasoning held in favour of the US domestic producers arguments.

In general, the enquiry found that the US domestic production of FW shrimp had reduced from 181.9mn lbs to 91.3mn lbs, while the number of production workers declined from 2,180 to 1,319 between 2001 to June 2004. As a consequence, USITC demanded AD duties ranging from 10 percent to 110 percent on shrimp imports in accordance with the amount of dumping caused by each country. In particular, duties between five to sixteen percent were imposed on both Indian and Thai exporters, whose export value of FW shrimp to the US was estimated at US\$400mn and US\$1bn in 2003, respectively.

Once the duty was forced, USDOC decided that they would return to their seats for a review of the Indian and Thai shrimp industries in April 2005, to ascertain the

impact of the *tsunami* and the possibility of revoking the AD measure, only if its removal would not lead to further injury of their domestic producers. But in November 2005, after the review, the USDOC announced its final decision stating that the AD measure shall be continued with as both Indian and Thai exports were still identified as being dumped.

### Box 1: *Tsunami* Destruction: The Case of Tamil Nadu, India

Tamil Nadu, a southern state of India has 591 fishing villages and 362 fish landing centres. In 2000, about 700,000 people were engaged in fisheries with some 10,000 mechanised fishing vessels, 21,000 *vallams* (boats) and 28,000 *catamarans* (a vessel as a sailboat with twin hulls); and the shrimp export accounted for 0.7 percent of the state's gross domestic product (GDP).

After the *tsunami*, the fisheries sector suffered major damage in terms of lives, boats, and gear, including infrastructure such as harbours and fish landing centres. The death toll was over 15,000 in the state, and the number of people affected rose to an estimated 2.72 million. Total damage ranged from official estimates of US\$1.6-2bn to as much as US\$6.5-7bn based on a reduction of GDP by 0.4 percent over the next four years. The preliminary survey and study by Sevabharathi, a Tamil Nadu non-governmental organisation (NGO), showed that, in terms of housing, the total requirements would be about 72,500 in almost 258 villages located in the worst affected coast line areas of the state.

Sources: *Asia Pacific Trade and Investment Review, April 2005 & Joint Report from NACA, FAO, SEAFDEC and BOBP-IGO, January 2005 & Sevabharathi Report, January 2005*

### Initiating an AD Measure – It’s Somehow Too Simple

Remarkably, between 1995 and 2003, the US has initiated 329 AD investigations against the exporters of Member countries, out of which 205 terminated with definitive AD measures. This translates to a success ratio of 62 percent for all US investigations. Only India was seen to enforce more AD measures over the same period, where 273 AD measures were imposed out of 379 investigations (Young L.M. and Wainio, ‘The Anti-dumping Negotiations: Proposals, Positions and Antidumping profiles,’ Journal of International Law and Trade Policy, 2005).

Notably, the US AD duty was still forced on both Indian and Thai exports, before the April 2005 review took place and for its duration. Even though Article 15 of the WTO Anti Dumping Agreement (ADA) provides members to consider special and differential treatment (S&DT) for developing countries. In this context, the US did not relate its AD measure with S&DT *vis-à-vis* India and Thailand which had been shattered by the *tsunami*. Thus, the AD measure was simply adding to the loss of export revenue of both these countries’ shrimp exporters. US should have postponed the initiation of the AD measure against Thailand and India until after the findings of the review in November, rather than instigating the impetuous AD measure against them in January 2005.

This situation highlights the inherent leniency that governments exhibit with regard to the initiation of AD measures. There is little hindrance to WTO Members wishing to start AD investigations against the exports of other Members. Article 5 of the ADA, sets out the standards for commencing an AD investigation. It states that an AD investigation shall be initiated upon the receipt of an application from the domestic industry, and that such an application must include evidence of dumping, injury of dumping and a causal link between the dumped imports and alleged injury. However, this provision has

been determined to leave a high degree of discretion for AD initiation procedures and its conditions are highly subjective (Campos A., ‘Nineteen Proposals to Curb Abuse in Anti-dumping and Countervailing Duty Proceedings,’ Journal of World Trade, 2005). In the softwood lumber dispute, where Canada argued against the US AD duty on Canadian softwood lumber imports, the Panel stated that Article 5 lacks clear definition for what should be considered sufficient evidence to start an AD investigation.

Although the claim by Canada (that the US had initiated AD investigations without sufficient evidence) was rejected in this case, such deficiency in the ADA inflates the possibility of the commencement of unfair or needlessly protective AD measures.

Even worse is that once these AD measures are instigated, they are practically set in stone either being prolonged or delayed by reviews, or sunset reviews. Nonetheless, when afflicted Members approach the WTO Dispute Settlement Body (DSB) to take legal proceedings against Members with such AD measures, proceedings may last even longer than the reviews.

### Exaggerating the Amount of Dumping

In the initial dumping investigation and the review, the USDOC calculated the amount of dumping taking place within its domestic market by means of a method known as ‘zeroing’. When the export price of shrimp from each country was lower than the normal market value, the difference was set as a positive dumping margin (as dumping was taking place). However, when the export price was higher than normal market value, the difference would substantiate to a negative dumping margin. The USDOC would then reduce this negative dumping margin to zero, as it did not consider it to be dumping i.e. ‘zeroing’. Hence, that left only positive dumping

### Box 2: An Old Fishy Tale – Vietnamese Catfish

Vietnamese catfish exports to the US rapidly increased from a few hundred tonnes in 1998, to 21,000 tonnes of fillets (21 percent of the US catfish market) in 2002. Consequently, US domestic producer prices dropped, thereby prompting aggressive protective action by the eight catfish producing states. The US producers’ association took their grievance to the USDOC, claiming that Vietnam was dumping frozen fillets at 37 percent to 64 percent below fair market value. At the time, Vietnamese catfish provided employment to about 11,000 households, producing 137,000 tonnes of the goods in 2003. It was estimated that about 30,000 poor landless people were working in catfish farming.

But in January 2003, USDOC ruled in favour of the US catfish industry, and levied a series of AD duties against Vietnam’s catfish exporters. Vietnam, not being a WTO member, had limited scope for challenging the US AD measure.

The effect of the price decline and reduced exports led to loss of employment among small-scale farm households, labourers and people working in processing plants, the majority being young women. The poorest groups appeared to be the most significantly affected. A United Nations Food and Agriculture Organisation (UNFAO) study estimates 8,000 people lost their jobs as labourers in catfish farms and 10 percent or 500 workers lost their jobs from export-processing enterprises in An Giang province. Women and labourers returned to previous jobs in rural areas, as they had limited skills to move to other occupations after the decision.

But it should be mentioned that even though the AD duty was in place, prices in the US for fillet failed to recover as the industry expected, and sales of domestic frozen fillets still went down 5 percent from 2002. Farm and processor prices during 2003 also remained low. This indicates that although an AD measure may be in place to protect the local industry, this does not necessarily mean that the industry will become more efficient, competitive and/or profitable. Without competition, industries are often seen to stagnate in the absence of effective government measures, and AD protective measures could only lead us back to the days of import-substitution strategies, which were seen to be redundant for all economies.

Source: Two papers, FAO of the UN, 2004, one by Peacock N. and the other by Tung N. T., Thanh N. V. and Phillips M.

### Box 3: WTO Negotiations on the AD and SCM agreements

WTO Members have been playing a 'tug of war' on trade remedial measures at the Doha Round of negotiations. On the one hand, the 'Friends of AD negotiations' are pulling for the curtailment of AD/SCM measures. On the other, the US is yanking in the opposite direction to remain with the *status quo* of the present AD and SCM agreements. This is inevitable considering the fact that as of December 31 2003, the US had 359 active measures imposed against other Members (who only had 50 measures against it). Simultaneously, the EU seems uncertain which of the opposing sides to join. With regard to the two core issues presented on the US AD on FW shrimp, i.e. firstly, governments hastily ordering AD measures and secondly, the exaggeration of dumping through 'zeroing', the following proposals have been made:

1. It has been positively suggested that for any such AD measure to be declared, Members should wait for the acceptance from an effective pre-initiation procedure via 'Fast track' WTO Panels. The EU and the 'Friends of AD negotiations' (see below) have supported such an approach in the Doha round negotiations on WTO rules.
2. A number of Members, including the 'Friends of AD negotiations' are vehemently opposed to the method of 'zeroing'. The US, admittedly, seems more willing to discuss this method in negotiations, rather than in dispute settlement.

Overall, the 150 uncoordinated and mixed submissions by Members in WTO rules negotiations between 2002 and mid 2004 indicate that consideration is needed for aligning Members proposals to the task of clarifying the AD and SCM agreements. The establishment of an effective framework, which comprises of consensus objectives amongst WTO Members for negotiations on trade remedial measures, is essential; otherwise such talks will amount to nothing.

*The Friends of AD negotiations include: Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Republic of Korea; Mexico; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; Thailand; and Turkey.*

margins to be added up. Indian exporters, Devi Sea Foods Ltd, Hindustan Lever Ltd, Nekkanti Seafoods Ltd, were determined to have weighted average dumping margins of 5.02 percent, 13.42 percent, 9.71 percent respectively and all other Indian exporters at 9.45 percent. While 10 Thai exporters were found to maintain dumping margins between 5 and 7percent. Such calculations increased the amount of dumping accounted for in the investigation and increased the likelihood for initiations of AD action.

The practice of 'zeroing' violates WTO rules when applied, according to the reasoning of the Appellate Body (AB) in the European Union (EU) Bed Linen Case (though zeroing was not in actual dispute in this case). The AB stated that zeroing does not take into account all comparable export transactions and hence fallaciously enlarges the amount of dumping taking place. It has been estimated that the elimination of zeroing would reduce dumping margins by 87 percent in 18 previous US cases (Lindsey B. and Ikenson D., 'Reforming the Anti-dumping Agreement: A Road Map for WTO Negotiations,' Trade Policy Analysis, 2002). This would have potentially reduced the number of AD investigations in these cases substantially and certainly reduced AD duties.

#### Future Prospects

Even before the *tsunami*, Thailand was determined to take action on behalf of its exporters against the US AD measure. In early December 2004, it was joined by India, Brazil, Ecuador, China and the EC, in its request for consultations with the US over the measure at the WTO DSB. Ecuador has carried on the baton by taking further action at the WTO DSB, requesting consultations of its own with the US, in November 2005. It is likely the DSB will be called upon to establish a Panel to solve this dispute. These developing countries are certain to receive the support of previous WTO Panel rulings

regarding the issue of 'zeroing', though it is ambiguous as to a ruling on the issue of initiating AD investigations. Following the AB decision in the EU-Bed Linen case, the AB in the US-Softwood lumber dispute ruled that zeroing applied by USDOC is inconsistent with ADA rules. As to the extent of the requirement of sufficient evidence for initiating an AD investigation, the WTO Panels have diverged in reasoning; analysis is on a case-by-case basis. The Panel in the Argentina - Poultry dispute upheld that the Argentine AD investigation was initiated without sufficient evidence; while the Panel ruled the opposite in the aforementioned US-softwood lumber case.

However, the WTO DSB lacks effective enforcement against large members. For instance, the US has been observed to lengthen the period in which the AD measure ought to be in place by employing delaying tactics. Indeed the US-softwood lumber case was initiated by Canada in September 2002 and is ongoing as of November 2005.

In addition to WTO dispute settlement, there is the option of negotiation through the Doha Round Ministerial conferences. However, WTO Members are perceived to be far from agreement in such talks at present, certainly no improvements were made to the Doha declaration on trade remedial measures at the Hong Kong Ministerial conference in December 2005. Though there is a commitment to conclude the round by the end of 2006, this factor may indicate that Doha negotiations are a better option than the WTO DSB in terms of cost and time.

Ultimately though, the AD measure directly impacts exporters. For instance, shrimp exports from India to the US were approximately 30 percent lower in September 2005 compared to the previous year, reducing the number of Indian shrimp exporters by half. Such a shock to a domestic industry has been determined to have a knock-on effect on livelihoods, as viewed in Vietnam.

The last option is for Thai and Indian exporters to adapt to the market place. There is the possibility of

#### Box 4: Sustainable Trade, Environment and Development

In the last few decades, over 30 percent of the world's mangrove forests, covering tens of thousands of miles of coastline, have been destroyed to make room for shrimp farms. In fact, exporting countries, comprising of mostly developing countries, now have some 110,000 warm-water shrimp farms, covering around 1.3 million hectares (3.2 million acres).

Such rapid development of shrimp farming has led to harmful consequences. In the aftermath of the *tsunami*, it became evident that areas with intact coastal ecosystems suffered much less damage than those where development had damaged mangroves and coral reefs. For instance, the Pichavaram mangrove swamp in Tamil Nadu in India slowed down the waves, protecting around 1,700 people living in settlements built between 100 meters to 1,000 meters inland from the mangroves.

Notably, the development of shrimp farming is currently unsustainable. The Environmental Justice Foundation report noted an increased demand for warm-water shrimp species in the West; in fact, the world consumption of shrimp has increased by 300 percent over the last ten years. As a consequence, a shift toward a 'slash and burn' style of aquaculture has been prompted, because the networks of large, human-made ponds have to be abandoned after five or six years due to disease and poor water quality. In the upper Gulf of Thailand alone, 40,000 hectares (99,000 acres) of farms were abandoned by 2000, with 90 percent of shrimp farmers left out of business. United Nations Environment Programme (UNEP) estimated that while intact mangroves are worth US\$1,000 a hectare, in contrast the value of mangroves, which are cleared and converted for shrimp farms, falls to about US\$200 a hectare.

Hence there is great importance for the establishment of policies that will effectively allow for sustainable trade and development of the fisheries industry and simultaneously a sustainable environment. But at the WTO negotiations, Members face the unique dilemma of whether environmental interests, such as over-capacity and over-fishing, should be implemented into WTO rules or not. The negative effect of this decision would consequently lead to trade sanctions being employed on the basis of such environmental criteria in WTO disputes. It is apparent though that trade and environmental policy must be modified concurrently for a sustainable future.

*Source: Weiner D., Earth Island Institute Journal, 2005 and James Owen, National Geographic News, December 20, 2004 and UNEP Press Release 2005*

entering into new markets, such as the EU, or move into value-added finished products, such as ready-to-cook meals, which will allow domestic producers to circumvent the duty (Bridges Weekly, November 2005). This will require investment in research and development and perhaps re-training of workers, which again shall have an impact on local livelihoods.

Alternatively, Thai and Indian exporters have been determined to circumvent the AD measure by diverting their products through third countries, frustrating the US. Basically, this circumvention practice means establishing assembly factories in either the importing country (in this case the US) or in a third country, which would then sell to the US market, free of the AD charge. The ADA does not cover the issue of circumvention. Evidently, the US has proposed anti-circumvention in Doha negotiations, as a response to impede such practices (the US has domestic regulations against circumvention), with some support from the EU.

#### Conclusion

It seems paradoxical that the greatest promoter for trade liberalisation and open markets since World War II, namely the US, has been noticed to be one of the most trade protectionist countries through the use of AD measures since the beginning.

The worst effects on Indian and Thai shrimp exporters and subsequent livelihood concerns have already been realised, from both the *tsunami* and the US AD measure, which is deeply regretful. Thus AD and SCM agreements must be reformed so that the unfair treatment from such lax use of AD measures can be curbed. This does not mean abolishing AD measures altogether, but essentially making sure that AD measures are only used when there is a need to provide the right amount of protection to domestic firms from real unfair trade advantages. To throw more fuel in the fire, any future AD measure put in place should be equal to the actual amount of dumping taking place, which is injuring a domestic industry.

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