

India, Thailand and US on Anti-dumping Measures relating to Shrimp

Another case calling for clarity in the WTO rules

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The basic rule under the World Trade Organisation (WTO) agreements on anti-dumping measures (ADM) and subsidies and countervailing measures (SCM) is that anti-dumping and countervailing duties could be levied only when it is established on the basis of investigations that,

- there has been a significant increase in dumped or subsidised imports, either in absolute terms or relative to production or consumption,
- prices of such imports have undercut those of the like domestic product, have depressed the price of the like product or have prevented that price from increasing, and
- injury is caused to the domestic industry or there is a threat of injury to the domestic industry of the importing country as a consequence.

Furthermore, relevant economic factors having a bearing on the state of the industry need to be taken into consideration while determining the injury. Also, there is a need to clearly ascertain that there is a causal link between dumped or subsidised imports and the injury to the domestic industry.

Though these rules are laid out to guide international trade, there is much controversy about how such anti-dumping duties are calculated and implemented. This is evidenced by the ever increasing number of disputes under Dispute Settlement Body (DSB) of the WTO involving issues related to dumping and anti-dumping measures.¹ And now an added complication in the saga of anti-dumping measures is the dispute relating to the amounts of bonds or securities that can be collected on the allegedly dumped imports before an assessment of the actual anti-dumping duty liability is made and such duties collected.

During the General Agreement on Tariffs and Trade (GATT) period, the major users of anti-dumping measures were United States (US), the European Union (EU), Canada and Australia. However, since 1995, there is a steady rise in the number of cases initiated by both developed and developing countries.

While most of the countries use this provision largely as a political shield to protect their domestic industries, the loopholes or absence of clear definitions in the anti-dumping rules have increased the possibility of abuse and discretionary practices, which is not compatible with the spirit of the relevant WTO agreements. This paper looks into one ongoing WTO dispute between US, India and Thailand in this context.

Very recently both India and Thailand, major exporters of shrimps to US, got a reason to rejoice after the WTO Dispute Settlement Panel (DSP) held that the US system of collecting an enhanced bond requirement (EBR) from shrimp exporters with relation to anti-dumping investigation is a violation of the WTO Anti-dumping Agreement. Despite this initial victory against the US, apprehensions have resurfaced as both the winning parties (i.e. Thailand and India) and also the US have declared their intention to appeal the verdict.

What was the Dispute?

The US Southern Shrimp Alliance (SSA) – an alliance of eight southern coastal States representing the harvesters, processors and distributors of US wild caught shrimp, filed a petition in 2003 in the US Department of Commerce (DOC) and the US International Trade Commission (ITC). The petitioners alleged that the exporters from Thailand, China, Vietnam, India, Brazil and Ecuador were selling shrimp at lower prices than in their home markets and were materially injuring the domestic industry in the US. This

they justified by showing the sudden drop in the harvest by more than half from \$1.25bn in 2000 to \$560mn in 2002. In short, they alleged that these countries are dumping their shrimps in the US market.

Under a 1991 Customs Bond Directive, the US required importers subject to anti-dumping action to post a custom bond equivalent to the greater of US\$50,000 or 10 percent of the duties paid during the preceding year. As per a 2004 US Customs and Border Protection enactment, (the Enhanced Bond Requirement, or EBR) exporters are



additionally required to post a minimum bond equivalent to the anti-dumping duty margin, multiplied by the value of imports of shrimp in the proceeding year as well as pay cash deposit equal to the amount of anti-dumping duty per entry. India also claimed that in order to post these bonds, the shrimp exporters had to put up a surety equivalent to the bond amount to the banks who financed the bonds. Apart from causing excessive financial burden on exporters paying the anti-dumping duties this enhanced bond requirement was claimed to be illegal since WTO rules do not allow an importer to counter dumping with specific measures besides anti-dumping duties.

In January 2005, ITC confirmed the US DOC's determination and slapped anti-dumping duties equal to dumping margins (i.e. by how much the normal value price exceeds the export price) on non-canned shrimp that the DOC calculated to range from 2.35 percent to 67.8 percent for Brazil, Ecuador, India and Thailand; up to 25.76 percent for Vietnam; and up to 112.81 percent for China. This was once again reaffirmed when a review took place in November 2005 to assess the impacts on the Indian and Thai shrimp industry due to the December 2004 Tsunami in South Asia. Although the above tariffs were not as high as the Alliance had requested (up to 200 percent), they hailed this decision.

As a consequence, on 24 April 2006 Thailand requested consultations with the US concerning anti-dumping measures on imports of frozen warm water shrimp. This request for consultations were on the US's application in the preliminary, final and amended final determinations of the practice known as 'zeroing' negative dumping margins, the effect of which was to artificially increase margins of dumping, and the consequent imposition of definitive anti-dumping measures on imports of certain frozen warm water shrimp from Thailand. However the consultations failed and a panel was established by the WTO DSB involving Brazil, Chile, China, the European Communities, India, Japan, Korea, Vietnam and Mexico as third-parties.

On the same lines, on 6 June 2006 India too requested separate consultations with the US on the amended bond directive and the EBR imposed by the US on imports of frozen warm water shrimp from India. As per an amendment to the US Customs anti-dumping directive, which covers shrimp and other agricultural and aquaculture goods, importers of the products have to pay the US government some money as a bond that amounts to a certain percentage of the value of the past 12 months of the targeted imports. This amount would be under hold with the US government for a year. The said amount prescribed as per the formula is much higher than the previous rules, which required only a bond amounting to 10 percent of the duties, taxes and fees paid by the importer annually.

Hence in its request, India claims that the measures under the amended directive are in violation of the WTO ADM and SCM Agreements as well as the GATT. However this consultation also failed to resolve the dispute and subsequently the DSB established another

separate panel allowing Brazil, China, European Communities, Japan and Thailand to act as third parties.

The main issues in these disputes were that the imposition of EBR and application of the practice known as 'zeroing' by the US on importers of shrimp products from India and Thailand are inconsistent with WTO agreements. Also, most of the legal claims made by these countries in their proceedings overlapped with each other, though for unknown reasons, the Indian case does not include any claims on the issue of zeroing. In the absence of an agreement between the parties, the WTO Director-General composed a three member Panel. This Panel issued the Interim Report to the parties on 9 October 2007 and the Final Report to the parties on 13 November 2007.

In its findings, the three member panel held that the applications of EBR on Indian and Thai shrimp exports are inconsistent with the rules of the WTO Anti-dumping Agreement as well as the GATT and due to this bond, the Indian and Thai shrimp exporters had to incur prohibitive costs on their exports. Further on, it held that the US violated both the Anti-dumping and the SCM Agreement because it failed to notify the amended Custom Bond Directive to the Anti-dumping and SCM Committees.

Also, since the US did not contest Thailand's 'zeroing' claims and while India did not even make a claim on 'zeroing', it was concluded that the use of 'zeroing' by the US breached US obligations under the Anti-dumping

Box 1: Trade Volumes of Shrimps

Volume of imports by the US fell to a 10-year low last year in 2007. According to the US National Marine Fisheries Service, shrimp imports by the US fell 556,000 tonnes valued at \$3.9bn, a fall of 5.7 percent in volume and 5.1 percent in value compared with 2006. The per capita shrimp consumption in the US also slid 10.7 percent last year from 4.6 kg to 4.1 kg. The decline was due to lower imports and a 45 percent drop in landings.

At the same time, Indian shrimp exports to the US have also shriveled significantly and the volume of imports fell to 20,000 tonnes valued at \$194mn, a fall of 23.8 percent in volume and 22.7 percent in value. However, this fall in the US import trend was across the board and several factors affected the shrimp market. Increase in crude oil prices, slowdown in economy, reduction in consumer confidence and health scare, particularly with regard to Chinese imports, were some of the main reasons to flatten the imports.

However, Thailand has not been impacted to the same degree because its duty imposts are of a lower magnitude and it exports low-volume value-added shrimp. While Thai shrimps gained market share in the US, countries such as India and China witnessed a fall in their share. Thailand is the main supplier to the US, accounting for 34 percent of the total traded volume and 32 percent of the import value. Ecuador with 11 percent share, followed next.

Agreement for the reason that the US did not calculate dumping margins on the basis of the 'product as a whole'.

Consequently, the panel's conclusion and recommendation was that the US had to bring its measures into conformity with its obligations under the WTO Anti-dumping Agreement and the GATT 1994. Thus, the panel report is one of the latest² in a series of unfavourable WTO rulings particularly against the US practices of employing 'zeroing' when calculating dumping margins. Past panels have ruled that the US government's practice of ignoring ('zeroing out') 'negative dumping margins', where prices are lower at home than in the export market, and only taking into account 'positive dumping margins', unfairly inflates the result and results in unduly high anti-dumping duties.

Two Controversial Measures

Enhanced Bond Requirement

On 9 July 2004, US Customs and Border Protection amended its existing bond requirements to include new guidelines specific for 'covered cases' within 'special categories' of merchandise. The EBR was adopted by US Customs as a part of its "continued vigilance...to ensure collection of all appropriate anti-dumping and countervailing duties." In 2005, US Customs implemented the EBR with respect to imports of certain shrimp that were subject to anti-dumping duties. Following the application of the EBR, shrimp importers faced significantly higher security obligations to enter their goods into the US. Shrimp is the only category of merchandise that has been made subject to the EBR.

The US argued that the EBR, in conjunction with cash deposits, was necessary to ensure the payment of anti-dumping or countervailing duties under its retrospective duty assessment system. It also claimed that the EBR attempted to ensure full collection of the anti-dumping duties by securing against the possibility that the margin of dumping could increase from the time of the investigation until the calculation of the final duty liability during the administrative review, and that importers could default on payment of the increased duties.

Zeroing

Under the WTO Anti-dumping Agreement, a country can impose anti-dumping duties on an imported product if they find that the company exporting the product charges less for it in the market of the importing country than in the exporting country. To determine the anti-dumping margin, i.e. the difference between those two prices to determine the level of the duty to be imposed, the US DOC used a methodology known as 'zeroing'. From the period of GATT, zeroing has been an issue for debate as it tends to inflate final dumping margins by preventing negative margins from offsetting positive margins. It is a process that has already been challenged in number of previous disputes between the US and countries, such as Canada, the EU, Japan, Mexico,

Ecuador and Thailand. Each time, the WTO DSB has constantly ruled against this practice, where investigators treat transactions with negative dumping margins as having margins equal to zero in determining weighted average anti-dumping margins.

For example, if a good was sold for \$100 in the home market and \$70 in the foreign market, a 30 percent dumping margin would be applied, but if the good was sold for \$130 in the foreign market, a zero value would be applied. Thus, when aggregating these transactions, a dumping margin of \$30 would be found whereas an average of the two transactions would have resulted in no margin and hence no dumping.

Significance and Livelihood Concerns

Throughout the last two decades, shrimp aquaculture has become an increasingly important alternative to ocean-caught shrimp. Almost a quarter of the world's 2.5mn tonnes of shrimp came from farms during the late 1990s, and this is a leap from just one-twentieth in the early 1980s. Consequently, shrimp farming in countries such as India, Indonesia, Thailand and Ecuador developed to a large scale. This is largely due to economic liberalisation, high profitability and a good international market. There is an ever rising demand for shrimp among consumers in countries like Japan, the US and the EU, which encourage export oriented farming to a large scale in these developing countries.

In this scenario the governments too in these countries, started giving huge importance to the shrimp culture. This importance is to increase its exports and thus bring in foreign exchange reserves. For instance, in 2003, shrimp exports from India to the US accounted for almost \$400mn.

Today the fishery sector in India provides employment to about 12mn people and is often dominated by small-scale family business. Similar is the situation in Thailand. Hence, usage of any kind of anti-dumping and safeguard measures by importing countries can raise serious socio-economic concerns in these countries. The producers would be the most vulnerable to the possible negative impacts as they will find it difficult to pay the required duties and bonds. Imposition of anti-dumping duty and EBR by the US on Indian shrimp has already impacted export of marine products to the US, which declined by 21.6 percent to 43,758 tonnes in 2006-07 as against 55,817 tonnes in 2005-06. Consequently, the number of marine product exporters also declined to 80 in 2006-07 from 107 in 2005-06.

Moreover, since anti-dumping cases consume a lot of time and resources, importers generally tend to move to other markets until that dispute is resolved. Later, in most of the cases in spite of the dispute being resolved the importers seldom re-approach their lost market. For instance, when an anti-dumping case was initiated against the Indian leather goods in South Africa the market was lost to India forever in spite of the dispute being resolved amicably, because of the uncertainty caused by the dispute.

Box 2: Some Similar Cases

Ecuador-US Shrimp Dispute

On January 30 2007, the WTO Appellate Body issued a similar ruling in favor of Ecuador against the methods used by the US to calculate shrimp anti-dumping duties (particularly the practice of *zeroing*). While the WTO had earlier ruled against zeroing in softwood lumber and ball bearings and other steel items, this was the first time that such a ruling had come in the case of shrimp. However, as per an unusual agreement between the two parties, it was declared that US will not contest Ecuador's claim. In return Ecuador agreed not to ask the panel to suggest ways in which the US could bring its policies into WTO compliance. Further on 26 March 2007, the parties informed the DSB that, they had agreed that the reasonable period of time for the US to implement the DSB recommendations and rulings shall be 6 months, expiring on 20 August 2007.

Later the US DOC announced that it would terminate the anti-dumping duties on shrimp from Ecuador with effect from 15 August 2007. This elimination of anti-dumping duty on shrimp imports from Ecuador means that imports entering the US on or after August 15, 2007 will not be subject to the 2.48 percent to 4.42 percent anti-dumping duties that have been in place since February 2005.

US-Mexico Stainless Steel Dispute

In April 2008, the WTO Appellate Body reversed an earlier Panel's findings and held that simple 'zeroing' in periodic reviews is inconsistent with the GATT and the Anti-dumping agreement. The dispute arose out of Mexico's January 31, 2008 appeal of the Panel Report, wherein Mexico specifically contested the 'simple zeroing' practice of the US in which US DOC officials in periodic reviews compare individual export transactions against average normal values and do not take into consideration comparisons when the export price is greater than the average normal value when aggregating the sums to calculate the exporter's margin of dumping. In its decision, the Appellate Body noted that it has examined whether the zeroing methodology is WTO consistent in the context of original investigations, periodic reviews, new shipper reviews, and sunset reviews and in each context has found the practice WTO inconsistent with GATT 1994 and the Anti-dumping Agreement.

From the point of view of developing countries who may not always have the wherewithal to contest costly disputes in the WTO, it was interesting that the Appellate Body criticised the panel for not heeding to the established jurisprudence in the matter and clear Appellate Body 'guidance' on the illegality of the zeroing practice. This would add to the security and predictability of the multilateral trading system to the benefit of developing countries.

Not only are such disputes harmful to the exporting countries, they adversely affect both the consumers in the importing countries due to the increasing costs and the local producers due to the rise in prices of inputs for processing industries. That is why the US shrimp duties are opposed by grocers, restaurants, processors, distributors, business councils and other consuming groups in the US. They have voiced their concerns on the likely impacts on employment and earnings in the US, claiming that every job in the shrimp-producing industry is matched by 20 jobs in the shrimp-consuming (processing and distribution) industry. They fear that the price of shrimp in the US market would rise if the supply of cheap shrimp were reduced. Since in 2002, almost 90 percent of the US shrimp came from imports, of which 70 percent is supplied by the countries targeted by US anti-dumping measures.

US and WTO Rulings on Zeroing

The WTO DSB has constantly struck down zeroing in a number of disputes. This zeroing practice was challenged and ruled against the law for the first time by the WTO DSB in a dispute brought by India against the EC. In this dispute, popularly known as the EC bed linen case, India had challenged the EC's practice of calculating anti-dumping margin. Immediately after this verdict, the EC, like every other WTO member, abided

the ruling and implemented the DSB recommendation by withdrawing its zeroing practice. Later, EC even filed a complaint against the US practice of zeroing. Time and again now EC is opposing this US practice and have expressed this opposition in the Doha round of negotiations as well.

Thus the DSB's anti-zeroing jurisprudence created much controversy and some members, including the US expressed their disagreement to this case law. On the other hand, as the anti-zeroing rulings gathered impetus, various countries began to challenge the zeroing policy itself and in a while even won those disputes at WTO. Some of those disputes are as follows.

- US – Anti-dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, Panel Report circulated on Dec. 22, 2000, WT/DS179/R
- US – Final Dumping Determination on Soft Lumber from Canada, Panel Report circulated on Aug. 11, 2004, WT/DS264/AB/R
- US – Laws, Regulations, and Methodology for Calculating Dumping Margins ('Zeroing'), Panel Report circulated on Apr. 18, 2006, WT/DS294/AB/R
- US – Measures Relating to Zeroing and Sunset Reviews, Appellate Body Report adopted on Jan. 23, 2007, WT/DS322/AB/R

- US – Final Anti-dumping Measures on Stainless Steel from Mexico, Appellate Body Report adopted on 30 April 2008, WT/DS344/AB/R

Thus, the US is already under an obligation to repeal its zeroing policy in its entirety nearly on all fronts, both in the original investigations and in the periodic reviews (the Appellate Body has yet not ruled on the third type of margin determination in the case of targeted dumping). But so far, in spite of repeated rulings by the WTO, the US prevaricated in implementing in letter and spirit most of the recommendations of the DSB on 'zeroing' practices. However in the Doha negotiations, the US is demanding³ some suitable amendments to the anti-dumping rules to make its zeroing practices legitimate and legal in all cases except in original investigations. But due to the conflicting views⁴ on zeroing among major WTO members and due to the slow progress of WTO negotiations on rules, any amendment of the Anti-dumping Agreement to legalise zeroing is extremely doubtful in the near future. It is said that even in the US, there is a lobby against zeroing, and anti-dumping measures in general.

Conclusion

On the basis of the WTO ruling, the anti-dumping duties on shrimps, which were more than 10 percent when they were imposed on India, Thailand and three others

in February 2005, has recently been brought down to 1.09 percent. However, the US International Trade Commission and the US DOC have already initiated the third round of administrative review of anti-dumping duty imposed on shrimp imports from India, Brazil, Ecuador and Thailand. A notification issued by the US government said the final results of this review are expected to be issued by February 2009.

In the meantime, these rows over anti-dumping duties and bonds on shrimp exports from India and Thailand have taken a fresh turn. All the three countries, i.e. the US, India and Thailand, have challenged the WTO Panel's ruling. While US has appealed against the verdict that the EBR from exporters was not in accordance with the Anti-dumping Agreement of the WTO, both India and Thailand are demanding that the WTO panel's ruling, which had favoured them, should be made tighter to prevent additional duties to be imposed in the future. Thus, they are claiming that the US EBR practice should not be held inconsistent as applied in this specific case only, but inconsistent as such with the WTO rules.

According to Thailand and India, the appeal is necessary because the Panel had at no point of time decided that the EBR scheme *per se* is violative of WTO law. Instead the Panel has concentrated merely on the unreasonability of the scheme. Now it remains to be seen whether like *zeroing* the very concept of EBR will be declared contrary to WTO law.

References

- ICTSD (2006), *Fisheries, International Trade and Sustainable Development: Policy Discussion Paper*, ICTSD Natural Resources, International Trade and Sustainable Development Series, International Centre for Trade and Sustainable Development, Geneva, Switzerland
- Sungjoon, Cho (2008), *WTO Panel Openly Rejects the Appellate Body's "Zeroing" Case Law*, ASIL Insight - International Economic Law Edition, Volume 12, Issue 3
- US Shrimpers seek duty on Imports, *New York Times*, 1 January 2004 – accessible at <http://query.nytimes.com/gst/fullpage.html?res=9405E0DB1F3EF932A35752C0A9629C8B63>
- US to contest WTO panel ruling on EBR, *The Economic Times*, 12 May 2008 – accessible at http://economictimes.indiatimes.com/Economy/US_to_contest_WTO_ruling_on_EBR/articleshow/3030866.cms
- United States – Measures Relating to Shrimp from Thailand - *Report of the Panel, WT/DS343/R*
- United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties, *WT/DS345/R*

Endnotes

- 1 There have been 73 disputes on Anti-dumping, 77 on subsidies and 35 on Safeguards from 1995 to date (as of end-May 2008)
- 2 In a later dispute involving the US and Mexico, the Appellate Body, reversing a panel decision, ruled that the US practice of using the zeroing methodology in periodical reviews (as against original investigation where zeroing had already been ruled inconsistent with WTO rules) was also inconsistent with WTO rules.
- 3 See document TN/RL/W/213 at <http://www.wto.org>
- 4 See, for example, document TN/RL/W/214/Rev.2 at <http://www.wto.org> where many WTO Members have strongly disagreed with the US demand.

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