

Anti-Dumping on Shrimp Exports – A Case Study

Anti-dumping has been one of the most talked about area of WTO in the recent times. There is extraordinary concern about areas of WTO in the recent times. This is mainly on two counts. First, India is one of the highest users of anti-dumping, second only to United States in the year 2001 according to the WTO sources. Second, India is also one of the main victims of anti-dumping action by foreign authorities. There are several reasons as to why dumping takes place across nations, but it needs to be underlined that the act of dumping per se is not the cause of concern. Only when dumping leads to material injury or threatens to cause material injury that the WTO Agreement on Anti-dumping allows imposition of anti-dumping duties. In other words, it must be clearly understood that anti-dumping duty is not a protection measure but is to be used only to remedy a particular trade distortion.

Anti-dumping Agreement of the WTO is the basis on which various national authorities have formulated their own national legislations. The concepts and definitions, rights and obligations, and to a great extent the procedures followed by different national authorities remain identical flowing out of the same agreement. Therefore, this article attempts to discuss various aspects of anti-dumping with a view to give an insight into the basic concepts of anti-dumping mechanism.

Before imposition of any anti-dumping measures, three main conditions are to be necessarily established by the anti-dumping authorities. These are:

- Existence of Dumping beyond de minimis limits
- Existence of Injury

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- Causal link between dumping and injury

To initiate an anti-dumping action, the domestic industry must be able to provide sufficient evidence to support the contention of '*material injury*'. Material injury or thereof cannot be based on mere allegation, statement or conjecture. Moreover, a '*causal link*' must exist between the material injury being suffered by the Indian Industry and dumped imports. Related to all of the above is what is termed as, the De Minimis Margin. According to the provisions of the Agreement on Anti-dumping, any exporter whose margin of dumping is less than 2% of the export price shall be excluded from the purview of anti-dumping duties even if the existence of dumping injury as well as the causal link is established. The Directorate General of Anti-dumping and Allied Duties (DGAD) is the designated authority for filing and monitoring anti-dumping investigations in India. The DGAD applies the Lesser Duty Rule for making their recommendations regarding the amount of anti-dumping duty to be imposed. Going purely by the economic rationale behind anti-dumping, duties levied by most countries, several studies undertaken by various scholars suggest that antidumping legislation is economically inefficient and that antidumping practices do not conform to the economic explanation of protection. On the contrary, these studies seem to imply that a political economy motivation seems to be driving the imposition of anti-dumping levies in most countries. It must however be remembered that 'anti-dumping is not a tool for protection of the weak. It is a tool for dealing with a situation where the strong may attack the strong.'

As things stand, almost 90% of the total world imports are now entering countries in which anti-dumping laws are in place. In India also, there has been a spectacular growth of anti-dumping investigations in recent

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years. The number of such investigations launched in 1999 was more than double that of those started in 1995. The national law on anti-dumping in India has been in place since 1985. The first Anti-dumping investigation in India was initiated in 1992. During the period from 1992 – 93 to 2003 – 2004, the DGAD received large number of applications for initiating the Anti-dumping investigations. After the examination of these applications, the anti-dumping investigations were initiated in 167 cases.

Anti-dumping Duty on Shrimp

On December 31, 2003, the United States Department of Commerce (DOC) received antidumping duty petitions on imports of certain frozen and canned warm water shrimps from Brazil, Ecuador, India, the People's Republic of China, Thailand, and Vietnam filed in proper form by the Ad Hoc Shrimp Trade Action Committee ("Petitioner") on behalf of the domestic industry and workers producing frozen and canned warm water shrimp ("Petition")

On January 8, 2004, the Department sent the Petitioner a deficiency questionnaire requesting clarifications of certain items in the petition. On January 12, 2004, the Petitioner submitted their deficiency questionnaire response.

On February 17, 2004, the United States International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that imports of certain frozen and canned warm water shrimp from India are materially injuring the United States Industry,

On 20th February 2004, the Department selected Hindustan Lever Limited ('HLL'), Devi Sea Foods Limited ('Devi') and Nekkanti Sea Foods

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Limited ('Nekkanti'), the largest exporters of shrimp to the US during the Period of Investigation (POI) as mandatory respondents. These companies submitted extensive information to DOC in their responses to DOC's questionnaires.

During the period February to June 2004, various interested parties, including the petitioners submitted comments on the scope of this and concurrent investigations of certain frozen and canned warm water shrimp concerning whether certain other seafood products to be covered under the scope of the investigation. The mandatory respondents submitted their reply to the questionnaire by April 2004. A supplemental questionnaire was issued and the replies were received by July 2004.

On May 3rd2004, the petitioners alleged that Devi, HLL made third country sales below the cost of production (COP), and therefore requested that department initiate a sale-below-cost investigation of these respondents. On May 28, 2004, the department initiated a sales-below-cost investigation for Devi and HLL.

On 18th May, 2004, the department determined that the case was extraordinarily complicated and postponed the preliminary determination until no later than July 28, 2004 .

On June 8, 2004 the petitioners alleged that HLL made below cost sales to Italy and therefore, requested that the department initiate a sales-below-cost investigation. However, because Italy was not selected as HLL's comparison market in this case, the department did not consider this allegation.

On 15th June 2004, the petitioners objected to Devi's use of Canada as its third country comparison market and they requested that the

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department to obtain sales data for their company's second largest third country market, Japan. In July 2004, the department determined that it is appropriate to use the third country market initially reported by Devi.

On July 12, 2004, HLL requested that the department find that one of its third country sales was made outside the ordinary course of trade. The department expressed its inability to consider this request for the preliminary determination however, assured HLL that it would be considered for the final determination.

In June 2004, pursuant to section 735(a)(2) of the Act, the Seafood Exporters Association of India (SEAI) and the individual respondents in this investigation, requested that, in the event of an affirmative preliminary determination in this investigation, the department postpone the final determination until not later than 135 days after the date of the publication of the preliminary determination in the Federal Register and extend the provisional measures to not more than six months and the department considered this request favourably.

Statutory Requirements

Section 732(b)(1) of the Tariff Act of 1930, as amended ("the Act") requires that before the Department may initiate an anti-dumping investigation by petition, the Department must determine whether the petition was filed on behalf of the domestic industry.

Section 771(4)(A) of the Act defines the "industry" as the producers of a domestic like product. Thus to determine whether a petition has the requisite industry support, the Act directs the Department to look to producers and workers who produce the domestic like product.

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The International Trade Commission (“the Commission”), which is responsible for determining whether “the domestic industry” has been injured, must also determine what constitutes a domestic like product in order to define the industry. The Act defines the domestic like product as a product which is like or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.”

The scope of the investigation included certain warm water shrimp and prawns whether frozen or canned or wild caught or farm raised, head on or head less, shell on or peeled, cooked or raw or otherwise processed in frozen and canned form. The petitioner in the US ascertained that the industry’s injured condition is demonstrated by (1) reduced sales; (2) reduced prices; (3) declining employment; (4) declining market share; and (5) Significant financial losses.

It is important to note that these duty margins do not imply that the Indian exporters are selling their products in the US market below cost. Rather these margins are the result of certain complex calculations by which primarily a range of products sold in the US and a pre-selected third country are matched by product specifications and adjusted selling prices.

There is no Shrimp Aquaculture in the US and US Shrimp resources are only from the wild. It is known phenomenon that Shrimp catches from the oceans are declining and it is becoming increasingly more expensive to catch shrimp from the ocean. Whereas aquaculture has made tremendous progress in farming technology as well as production yields and as a result, Asian and Latin American Countries can today produce shrimp more efficiently at lower costs of production. Therefore, these countries are able to offer Shrimp at more competitive prices.

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Consequently, shrimp that was once a luxury item is now available to the average American consumer at competitive prices.

On July 29, DOC made affirmative preliminary determination and imposed provisional antidumping duty ('AD duty') as follows :

<u>Exporter</u>	<u>DOC's Prelim Rate</u>
Devi Sea Foods Limited	3.56%
Nekkanti Seafoods Limited	9.16%
Hindustan Lever Limited	27.49%
All others	14.20%

DOC made the mandatory 'disclosure' of adjustments made to each company's data in arriving at the margins; and relevant details of software program they used for margin calculations. It was noticed during the course of the investigation that DOC made several adjustments to HLL's data, some of which are prima facie not warranted. This was brought to DOC's notice pointing out that the adjustments made were 'ministerial errors' that could be rectified immediately. The margin calculations were performed making several adjustments to the data submitted by the Companies. Most of these adjustments are unique to the US anti-dumping law and do not conform to normal commercial methods of determining profit or loss.

Period of Investigation

The department fixed the period of Investigation (POI) as 1st October 2002 to September 2003.

Scope of Investigation

The scope of this investigation includes certain warm water shrimp and prawns whether frozen or canned, wild caught or farm raised, head on or head off, cooked or raw form. In accordance with the preamble of the regulation, the department set aside a period of time for parties to raise issues regarding product coverage and encouraged all parties to submit comments within 20 calendar days of publication of the Initiation Notice. Throughout the 20 days and beyond, the department received many comments and submissions regarding a multitude of scope issues. On May 21, 2004 the department determined that the scope of this and the concurrent investigations remains unchanged.

Fair Value Comparisons

To determine whether sales of certain frozen and canned warm water shrimp from India to the United States were made at Less Than Fair Value (LTFV), the department compared the export price (EP) to the normal value (NV) on the weighted average basis for the period of Investigation.

For the preliminary determination, the Department determined that Devi, HLL and Nekkanti did not have viable home markets sales during the POI. Therefore, as the basis for NV, the department used third country sales to Canada (Devi), Spain (HLL) and Japan (Nekknati) when making comparison in accordance with the act.

Product Comparison

In accordance with the Act, the department considered all products produced and sold by Devi in Canada, HLL in Spain and Nekkanti in Japan, appropriate, during the POI that fit the description in the “scope of Investigation” for determining appropriate product comparison to United States sales. Where there were no sales of identical merchandise in the third country made in the ordinary course of trade to compare to U.S. sales to sales of the most similar foreign like product made in the ordinary course of trade. Where there were no sales of identical or similar merchandise made in the ordinary course of trade, we made product comparisons using constructed value (CV).

In making the product comparisons, the department matched foreign like products based on the physical characteristics reported by the respondents in the following order of importance: processed form, cooked form, head status, count size (on an “as sold” basis), shell status, vein status, tail status, other shrimp preparation, frozen form, flavouring, container weight, presentation, species, and preservative.

For determining whether there were sales at less than fair value, DOC compared the sales made in the US during POI with:

- Sales made in home market during POI
- If there is no home market, then sales made in largest third-country market during POI; and
- If there are no comparable sales in largest third-country market, with the cost of manufacturing products sold in the US, after adding profit derived in line with the U.S. regulations.

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Accordingly, DOC determined that there was no home market for any of the Indian mandatory respondents. Therefore DOC selected the largest third country market for them as follows:

- HLL : Spain
- Devi : Canada
- Nekkanti : Japan

For making product comparisons, DOC carried out an exercise called 'model matching criteria' for which comments were obtained from all interested parties. The SEAI actively participated in this process. DOC then determined that fifteen product characteristics in a particular order of priority were important from Industry's stand point and hence were relevant for its analysis. Each attribute within a characteristic was assigned code numbers. (Example: the status of head of a shrimp is identified as a characteristic, which can have only one of two attributes: head-on or headless. Head on is given code 1 and headless is given code 2) When the fifteen characteristics are taken together in respect of any product, a unique control number is created. All sales in the U.S. and the third country markets during POI were grouped together based on these control numbers and then the weighted average selling price, selling expenses and cost of manufacturing for each product were calculated.

Then DOC matched each unique product sold in the US with any of the unique products sold in the third country market applying a set of criteria mandated in the regulations governing the US anti-dumping proceedings ('regulations').

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- Where there is a match, the net selling price of unique US product is compared with net selling price of matching unique product of the third country market. In the process, certain adjustments are made to ensure that both products are on comparable basis.
 - If the US price is higher than third country price, then there is no dumping margin. This excess of US price over third country price is ignored for dumping margin calculation purposes.
 - If the US price is lower than third country price, there is dumping margin to the extent of price difference. This dumping margin is multiplied by the unique product's sales quantity to arrive at the dumping amount for that particular unique product.

- Where there is no match, the net selling price of unique US product is compared with CV (the unique product's cost of manufacture plus an element of profit that is calculated as mandated in the regulations).
 - If the US price is higher than CV, then there is no dumping margin. This excess of US price over CV price is ignored for dumping margin calculation purposes.
 - If the US price is lower than CV, there is dumping margin to the extent of difference. This dumping margin is multiplied by the unique product's sales quantity to arrive at the dumping amount for that particular unique product.

The sum of dumping amounts is divided by the total sales to the US to arrive at the anti-dumping duty rate for each Company.

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The dumping amounts of all three companies are totaled and divided by the US sales quantities of these three companies to arrive at the weighted average anti-dumping duty rate for 'All Others'.

The process followed and the methods adopted by DOC and ITC in this investigation so far are consistent with their past practices and in conformity with their regulations. In respect of Indian determination, there is no reason to believe that DOC's subjective judgement on any issue is prejudicial. Nevertheless the SEAI felt that certain subjective decisions of DOC do not reflect the ground realities in the global shrimp industry and decided to take aggressively at a later stage of determination.

The following are the rates of duty in the preliminary determination for the six countries:

Country and Number of mandatory respondents	Duty for mandatory respondents	Duty for all others
Thailand (3)	5.56% to 10.26%	6.39%
Ecuador(3)	6.08% to 9.35%	7.30%
India(3)	3.56% to 27.49%	14.20%
Vietnam (4)	12.11% to 19.60%	16.01%
China (4)	0.04% to 98.34%	49.09%
Brazil (3)	0.00% to 67.80%	66.91%

The duty imposed on India is unlikely to create any short term dislocation in business for two reasons: one, imports from China were much larger than from India and these would be disrupted immediately; two, non-tariff countries are not in a position to step up exports to the

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US for some time to come. However, there may be some impact in longer term which needs to be carefully assessed.

Change in Rates of Duty – Final Determination

DOC has released amended notice of final determination on 27th January 2005 after correcting ministerial errors. The duty rates for India are as under:

<u>Company</u>	<u>Amended Final Margin</u> <u>As on 27.01.2005</u>
Devi Sea Foods Limited	4.94%
Nekkanti Seafoods Limited	9.71%
Hindustan Lever Limited	15.36%
All others	10.71%

These rates will be applicable from the date the amended notice is published in Federal Register i.e., w.e.f. 31.01.2005.

The rates for other countries have also varied marginally.

Concluding events relating to Investigation

ITC Final Determination Notice in Federal Register:-

ITC informed DOC of its final determination on 21st January 2005, much ahead of earlier schedule. Therefore, the conclusion of the investigation was advanced from 7th February 2005 to 28th January 2005.

The notice of final determination of ITC was published in Federal Register on 31.01.2005 Consequently:

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- The deposit cap ends as on 26th January 2005. Thus if a Company's duty rate:
 - Increases in an Administrative Review ('AR'), then the difference between: (a) What is paid from 4th August 2004 to 26th January 2005; and (b) what is due based on higher rate will not be collected.
 - Decreases in an AR, then the difference between: (a) What is paid from 4th August 2004 to 26th January 2005; and (b) What is due based on higher rate, will be refunded.

- For rest of the first AR period (from 27th January 2005 to 31st December 2005), the difference is either collected or refunded as the case may be, together with interest.

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DOC Antidumping Duty Order

DOC has already published the Antidumping Duty Order in Federal Register. The Order:

- Signifies conclusion of investigation
- Sets the anniversary month for ARs. Since the Order will be published in January, the anniversary month for Shrimp ARs will be January of each following year. Therefore, first AR will cover the period from 4th August 2004 to 31st December 2005; second AR from 1st January 2006 to 31st December 2006 and so on.
- Requires anti-dumping duty to be paid by cash deposit only. U.S. Customs will not accept bond or any other security from this date.

Appeals to CIT

Any appeal arising from any decision of DOC of ITC can be made to the Court of International Trade ('CIT'), New York within 30 days of the Anti-dumping Duty Order.

The proceedings before CIT normally take 8 months to one year. The CIT remands the case with its opinion back to DOC for fresh determination. In case DOC recalculates the duty margin, the revised margin applies prospectively until completion of AR. DOC may take few months for this.

Refund of Duty

The duty paid from 4th August 2004 will remain as deposit until the first AR is concluded.

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First Administrative Review

As mentioned above, the first AR will cover the period from 4th August 2004 to 31st December 2005. DOC will publish Notice of Opportunity in January 2006. The following are important points relating to ARs:

- An interested exporter may write to DOC seeking AR of his case before 31st January 2006.
- The AR will be initiated in normal course in February 2006
- An exporter who applied to DOC may withdraw his application within 3 months of initiation. Then there will be no AR for that exporter.
- The petitioners may also ask for AR of any exporter or exporters. The petitioners only can revoke the request for AR in respect of any such exporter or exporters within the 3 month period.
- An importer may also ask for any of his exporters.
- There will be a preliminary determination and a final determination in AR. The normal time limits are 240 days and 120 days respectively, extendable to 360 days and 180 days. Thus an AR may take 12 months to 18 months.
- DOC will conduct verifications before preliminary determination.
- If there are more applicants for AR than what DOC can handle, then DOC selects the requisite number of exporters as mandatory respondents for AR based on volume of shrimp exports.
 - The review exporters get individual rates
 - The exporters who: (a) requested for review; or (b) were referred to DOC by petitioners or importers to be reviewed, but were not selected by DOC for review, will get the weighted average rate of the reviewed exporters.
 - For all other exporters, the margin rates at which duties are being deposited will apply.

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- At the end of AR, DOC will instruct US Customs to liquidate entries from 4th August 2004 to 31st December 2005 at the applicable rates as mentioned above.
- From the date of publication of AR final determination in Federal Register, the rates determined in AR will be new Cash deposit rates.

Tenure of Anti-dumping Duty Order ('ADO')

The ADO will be in force for five years unless it is revoked in a changed Circumstances Review (CCR) initiated by DOC or ITC. The CCR should not normally be initiated for at least two years after ADO is issued unless sufficient reasons exist for its initiation.

In the fifth year, a 'sunset review' will be initiated by DOC. Then DOC and ITC will conduct the sunset review mostly like the way investigation is conducted, to determine whether duties can be withdrawn or should be continued for another five years.

Changed Circumstances Review (CCR)

In an unprecedented move, ITC decided to invite comments on whether they should initiate, on their own, a 'changed circumstances review' for frozen shrimp imports from Thailand and India on account of destruction caused by tsunami. Once initiated, the CC review and determination will conclude in 120 days. Contrary to what we heard from media reports, ITC did not initiate CC review but only decided to call for public comments to decide whether to initiate such review. It is not yet clear how ITC propose to collect required information or how they intend to obtain information from SEAI to facilitate their decision making in this regard. As mentioned earlier, this is an unprecedented move and there is no procedure outlined in the ITC manual for this measure.

Conclusion

After more than a year of hectic action of arguments and analytical computations, the dust has finally settled down on the US shrimp antidumping investigations. Though the final ruling of the US DOC on the petition of the Country's domestic shrimpers has upheld the 'dumping' charges on the shrimp imports from India, the magnitude of margins as such has steeply fallen below the allegation of the petitioners and by implication their expectations as well. The numbers tell a tale of their own. The petitioners had alleged dumping margins ranging from 82.3% to 110.90% for India. We hope that SEAI would be able to convince ITC the effect of Tsunami which may bring down the duties to lower level.

(The views expressed in the above article are the personal views of the author)