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Shrimp Dumping: An Analysis of Antidumping Laws in the United States and the World Trade Organization

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SHRIMP DUMPING: AN ANALYSIS OF ANTIDUMPING LAWS IN THE UNITED STATES AND THE WORLD TRADE ORGANIZATION

*Curtis Beaulieu**

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INTRODUCTION

Florida shrimper Kenneth Farguson and his wife were forced to sell everything they owned and live on their boat.¹ Fifty-three year old Captain Charles C. Potter, who has been shrimping the Gulf Coast for almost half his life, is wondering how he will pay his \$1,865 boat mortgage in the absence of his once abundant shrimp sales.² These and many similar stories are increasingly common in the southeastern states now that the U.S. market has seen an influx of imported shrimp.

Between 2000 and 2002, southern U.S. shrimping factories saw a 40% drop in employment.³ During this same period, the U.S. increased its shrimp imports from Vietnam and India to over \$800 million.⁴ Meanwhile, in Thailand, while Wichan Maungchanburi is unable to sell

¹ Bill Kaczor, *As Shrimper Sells Nets For Food, Gov. Bush Offers Industry Help*, ASSOCIATED PRESS NEWSWIRE, Jan. 17, 2003.

² Jennifer Babson, *Florida Shrimpers Hit Hard Times*, MIAMI HERALD, Feb. 2, 2003.

³ Richard Burnett, *Struggling U.S. Shrimpers File Antidumping Petition; An Industry Group Says Six Countries Sold Shrimp At Artificially Low Prices*, ORLANDO SENTINEL, Jan. 1, 2004.

⁴ Margie Mason, *Vietnam Loses Catfish Dispute; LA Shrimpers React Favorably To Ruling By Trade Commission*, THE BATON ROUGE ADVOCATE, Jul. 25, 2003. *Trade – Vietnam Shrimp Committee Protests US Complaints*, VIETNAM NEWS BRIEF SERVICE, Jan. 2, 2004.

his excess shrimp domestically,⁵ he has found the U.S. to be a much more receptive market. Today, Thailand accounts for almost 50% percent of the frozen shrimp in the U.S. market.⁶

Surprisingly, that so many U.S. shrimpers have found it difficult to make a living shrimping⁷ in light of the fact that shrimp recently became the top-selling seafood in the U.S.⁸ Surpassing tuna in 2001, Americans consumed 1.4 billion pounds of the ten-legged, bottom-dwelling crustacean.⁹ While America's appetite for shrimp continues to grow, U.S. domestic shrimpers now provide less than twenty percent of the U.S. market.¹⁰ So, how should this problem be handled? The question becomes one of utility and economic efficiency; either foreign countries that produce shrimp more efficiently should be permitted to take advantage of their comparative advantages, or the trade should be deemed unfair and thus regulated to protect susceptible economies.

⁵ David Barboza, *Even With Glut, Shrimp Farmers Want Still More and Others Balk*, THE N.Y. TIMES, May 7, 2003.

⁶ Shawn Crispin, *Thai Shrimp Spat Could Grow If US Pursues Dumping Case, Trade Pact May Be Endangered*, THE ASIAN WALL ST. J., Jan. 16, 2004.

⁷ Keith O'Brien, *Prayers of the Shrimpers*, THE TIMES PICAYUNE, Mar. 16, 2003 (citing the Tariff Act of 1930 § 731, 19 U.S.C. § 16 (2000 & Supp. III 2003)).

⁸ Tom Murray, *Imported Shrimp Helps Meet Consumer Demand, Generating U.S. Econ. Activity Exceeding \$9.8 Billion*, PR NEWswire, Feb. 4, 2003.

⁹ Cain Burdeau, *Shrimpers Find Hope in Tariffs*, THE BATON ROUGE ADVOCATE, Aug. 17, 2003.

¹⁰ Mark Holan, *Shrimpers Seek Tariffs On Imports*, TAMPA TRIBUNE, Jan. 1, 2004. Also indicated in USITC Investigations Nos. 731-TA-1063-1068 (Preliminary) p.8, available at http://www.usitc.gov/ext_relations/news_release/2004/ER0217bb1.htm

The Southern Shrimp Alliance (SSA), a group of eight southeastern states consisting of forty-two shrimp processors, has united in an effort to battle the importation of under-priced shrimp in order to save their dying industry.¹¹ Their proposed weapon is an antidumping tariff on imports from Thailand, China, Vietnam, India, Ecuador, and Brazil.¹² In order to win, the SSA not only must convince the U.S. Department of Commerce (DOC) to adopt this tariff, but also must abide by the regulations of the World Trade Organization's General Agreement on Trade and Tariffs (GATT).¹³

The resolution will turn on the SSA's claim that the U.S. shrimping industry has suffered a material injury caused by foreign shrimping importation practices.¹⁴ Even if it is found that the U.S. has suffered a material injury, the question would then become whether it should permit an exception to imposing antidumping duties for developing countries under the theory of comparative advantage and the promotion of free trade at the expense of protecting the strength of its own domestic industries.

This note discusses areas of applicable law governing antidumping, both in the U.S. and the World Trade Organization (WTO), with respect to the potential conflicting policies. In particular, it reveals a fragile policy

¹¹ *U.S. Restaurants, Grocers, Seafood Distributors and Other Consuming Industries Unite to Fight \$2.4 Billion Shrimp Trade Case; Shrimpers' Trade Petition Could Seriously Impact Price and Availability of America's #1 Seafood; Hurt Consuming Industry Jobs*, PR NEWswire, Apr. 1, 2004.

¹² *India To Fight Out American Shrimpers*, FINANCIAL EXPRESS, Jan. 1, 2004.

¹³ 19 U.S.C. § 3511 (2000 & Supp. III 2003).

¹⁴ *Benefit of Law Against Dumping Disputed; Terms of Violation Open to Interpretation*, THE TIMES PICAYUNE, Mar. 14, 2004.

balance between the WTO goals for the elimination of trade barriers and the application of antidumping measures.

Part I provides a background of both U.S. customs law and governing WTO regulations regarding antidumping measures. Part II illustrates the treatment of developing countries as a growing concern in the WTO. Part III applies the provisions discussed in Part I and II to the SSA's petition to impose antidumping duties on farmed raised shrimp and prawns imported from India, Vietnam, China, Thailand, Ecuador, and Brazil. Lastly, Part IV will highlight certain areas within the U.S. customs law and the WTO regulations that are problematic in an attempt to recommend a solution that may improve those regulations.¹⁵

I. BACKGROUND

A. *What is Dumping?*

The international trade world has an implicit economic desire to avoid imbalance and maintain a fair playing field.¹⁶ "Dumping" is one example of an unfair trade practice. "Dumping" is the act of selling excess production of a certain product at a lower price in an importing country than it would otherwise be sold for in the

¹⁵ All countries listed in the petition are members of the WTO except for Vietnam. See *infra* Part IV.

¹⁶ The concept of comparative advantage involves the ability to allow countries to produce those products in which they have an advantage over other countries in production. However, sometimes countries create factors, such as subsidies or taxes, in which the advantage is strengthened or stunted by an exporting or importing country. Creating a fair playing field moves to eliminate those extrinsic factors to allow comparative advantage to take its course and overall global economy to develop.

exporting country.¹⁷ It is a means for disposing of what one country cannot consume and profiting from that which would normally go to waste by under-pricing the product and capitalizing on its demand.¹⁸ While some see dumping as one country transferring their problems of excess production to another, others view it as a competitive strategic market maneuver.¹⁹

The WTO was established with the purpose of promoting free trade in furtherance of globalization, a movement to establish global principles for sound agreements "rather than the use of force or the intimidation of power."²⁰ In essence, the WTO seeks to reduce protectionism and allow foreign industries to compete in local markets. Competition creates a playing field where only the strongest survive, thus producing a stronger global economy.²¹ The WTO has formed several agreements to achieve this goal, and each WTO member imposes their own trade regulations in compliance with the WTO's agreements, such as that seen in the WTO Antidumping Agreement.²²

¹⁷ RESTATEMENT THIRD OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 806 cmt. a (1987).

¹⁸ Understanding the WTO: The Agreements; Anti-dumping, subsidies, safeguards: contingencies, etc., http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm.

¹⁹ John H. Jackson, *Introduction: Perspectives on Antidumping Law and Policy*, in 1 MICHIGAN YEARBOOK OF INTERNATIONAL LEGAL STUDIES 1 (Stephen M. Harris ed., 1979). See also Christopher M. Barbuto, *Note: Toward Convergence of Antitrust and Trade Law: An International Trade Analogue to Robinson-Patman*, 62 FORDHAM L. REV. 2047, 2084 (1994).

²⁰ Alex Seita, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L.J. 429, 430 (1997).

²¹ *Id.* at 446-47.

²² See *supra* note 18 and accompanying text.

*B. Antidumping in the U.S.*²³

Title 19 of the U.S. Code covers custom duties and is the heart of international trade regulation in the U.S. Among the provisions in Title 19, is Chapter 4, the Tariff Act of 1930.²⁴ This Act established a means for combating unfair trade across U.S. borders, including dumping.²⁵ 19 U.S.C.S. §1673 provides the procedure for implementing trade tariffs on products which are dumped in the U.S.²⁶ Therefore, when making a determination as to whether antidumping tariffs should be imposed, the process should be broken down into the following four phases: initiation of investigations, preliminary determinations, final determination, and assessment of a duty.²⁷

1. Initiation of Investigation

In the U.S., a producer or industry of a product may petition to enact tariffs on importations of like products from other countries.²⁸ However, the producer or industry must show that those imports are sold at less than normal value, causing or threatening to cause the domestic industry to suffer a material injury.²⁹

Two agencies play a pivotal role in making a final decision as to the imposition of an antidumping duty, the

²³ For the sake of this article, the discussion of imposing antidumping duties is limited to the scope of the petition filed by the Southern Shrimp Alliance. See Raj Bhala, *Rethinking Antidumping Laws*, 29 GEO WASH. J. INT'L L. & ECON. 1 (1995) (discussing a more complete explanation of the entire procedure).

²⁴ 19 U.S.C. §§ 1001-1681 (2000 & Supp. III 2003).

²⁵ 19 U.S.C. §§ 1671-1677(2000).

²⁶ 19 U.S.C. § 1673 (2000).

²⁷ See Bhala, *supra* note 23, at 28.

²⁸ 19 U.S.C. § 1673(a) (2000 & Supp. III 2003).

²⁹ 19 U.S.C. § 1673.

Department of Commerce (DOC) and the U.S. International Trade Commission (USITC). While the DOC determines whether a product is being sold in the U.S. at a lesser value than the price sold within the exporting country, the USITC determines whether a U.S. industry has been materially injured or threatened to be materially injured by an alleged dumping.³⁰ The forgoing will outline this basic process.

An industry party may file a petition simultaneously with the DOC and USITC requesting an investigation on their behalf, or the DOC itself may initiate investigations when presented with the necessary elements according to 19 U.S.C. 1677.³¹ When filed by an industry party, the DOC must verify that the petitioning party has established a *prima facie* case for dumping no more than twenty days after the petition was filed.³² In addition, the petition must identify the like product, the domestic industry, and lost sales for the past three years.³³ Once established, the DOC and the USITC initiate the preliminary determinations.

2. Preliminary Determination³⁴

The USITC is permitted forty-five days to investigate the alleged injury sustained by a domestic industry upon receipt of a petition or DOC initiation of an investigation.³⁵ Once filed, parties from both sides may

³⁰ 19 U.S.C. § 1673(1),(2) (2000).

³¹ 19 U.S.C. § 1677.

³² 19 U.S.C. § 1673c (2000 & Supp. III 2003).

³³ 19 C.F.R. § 207.11 (b)(2) (2005).

³⁴ While there are several exceptions to extending deadlines, for the sake of simplicity, the following will discuss typical preliminary determinations.

³⁵ The USITC and the DOC, while working separately, cooperate with each other and are in constant communication pursuant to 19 C.F.R. § 207.13 (2005).

submit briefs, and if deemed necessary, the USITC may hold a hearing.³⁶ Once the USITC has made a preliminary determination, the DOC will continue to investigate whether there exists a “reasonable basis” for why a country is exporting a product to the U.S. at a price less than its normal value.³⁷ Because this investigation involves analysis of multiple markets, including defining the product and the normal value, the DOC is granted one hundred forty days to make this determination.³⁸

a. DOC Determination

The DOC’s primary role in the process for imposing antidumping duties is to investigate the “class or kind of foreign merchandise . . . being, or . . . likely to be, sold in the U.S. at less than its fair value.”³⁹ However, defining the product can often prove difficult as a result of the flexibility of the factors, but this is essential to an investigation’s outcome and the DOC’s determination.⁴⁰

According to 19 U.S.C. §1677, “like product” is defined as those goods which are “like, or in the absence of like, most similar in characteristics and uses.”⁴¹ Like products may include similar products with minor differences, similar products with a common use, or similar products made of different materials but similar end uses.⁴²

³⁶ There are two sides to the petition, one being the petitioner and the other being all who oppose the petition. 19 C.F.R. § 207.15 (2005).

³⁷ 19 C.F.R. § 351.307 (2005).

³⁸ 19 U.S.C. § 1673b (b)(1)(A) (2000).

³⁹ 19 U.S.C. § 1673(1) (2000).

⁴⁰ *New World Pasta Co. v. United States*, 316 F. Supp. 2d 1338, 1352-57 (2004).

⁴¹ See 19 U.S.C. § 1677 (10) (2000 & Supp. III 2003).

⁴² See *Hosiden Corp. v. Advanced Display Mfrs. of Am.*, 85

The DOC also makes a determination as to whether the alleged product is being dumped in the U.S.⁴³ To do so, the DOC evaluates the normal value based upon the price sold for consumption in the exporting country.⁴⁴ In the event that an inaccurate comparison causes for an incorrect price,⁴⁵ the DOC may elect an alternative calculation for determining normal value.⁴⁶ This alternative calculation involves taking the cost of production and adding "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses."⁴⁷ If the alternative calculation remains inaccurate, the DOC will calculate the normal value from a production price which is "comparable to the subject merchandise" from one or more countries with a comparable market economy.⁴⁸ It should be noted that the added production costs include, but are not limited to, labor costs, costs of energy to produce, and *pro rata* costs of the equipment used in production.⁴⁹

Furthermore, the DOC is authorized to make "adjustments" to the normal value when there exists two levels of trade within the exporting country.⁵⁰ Vis-à-vis the WTO regulations on antidumping duties, the U.S. considers

F.3d 1561, 1568 (Fed. Cir, 1996). *See also* Mitsubishi Heavy Indus., Ltd. v. United States (2000, CIT) 97 F. Supp. 2d 1203 (Ct. Int'l Trade, 2001). *See also* Cheflene Corp. v. United States, 170 F. Supp. 2d 1320, 1323 (Ct. Int'l Trade, (2001).

⁴³ 19 U.S.C. § 1677.

⁴⁴ 19 U.S.C. § 1677(b).

⁴⁵ Sometimes the product is not "sold" in the exporting country because of the type of market. For instance, China is considered a "non-market economy" because the price of a product is determined by the government and not the market. For a definition of a "non-market economy", see footnote 76.

⁴⁶ 19 U.S.C. § 1677b (a)(1)(C).

⁴⁷ 19 U.S.C. § 1677b (c)(1).

⁴⁸ 19 U.S.C. § 1677b (c)(2).

⁴⁹ 19 U.S.C. § 1677b (c)(3).

⁵⁰ 19 U.S.C. § 1677b (a)(7).

dumping as an unfair trading practice⁵¹ and therefore allows alternative means for calculating the normal value in order to save time and administrative expenses when making determinations as to the presence of dumping.⁵²

Once the normal value has been established, it is necessary to determine the dumping margin. The dumping margin is the difference between the normal value and the price sold in the U.S.⁵³ The DOC can then use the dumping margin as a means for calculating the proper tariff.⁵⁴

b. USITC Determination

The USITC is responsible for determining whether an industry has been "materially injured" or "threatened with a material injury" as a result of the alleged dumping of a product.⁵⁵ An industry is comprised of all the producers of like products (e.g., all those who make cars) or all those whose collective output makes up a major portion of a product's production (i.e., manufacturers of car parts).⁵⁶ While an industry is supposed to include those producers as a whole within the U.S., an industry can be separated into different markets if its producers provide most of the

⁵¹ 19 U.S.C. § 1337. Konstantinos Adamantopoulos and Diego De Notaris, Essay: *The Future of the WTO and the Reform of the Antidumping Agreement: A Legal Perspective*, 24 FORDHAM INT'L L.J. 30, 32 (2000).

⁵² Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144, S. Rep. No. 96-249, at 96 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 482.

⁵³ 19 U.S.C. § 1673 (1)(B).

⁵⁴ 19 U.S.C. § 1673e (2000).

⁵⁵ 19 U.S.C. § 1673d (b)(1)(A) (2000). While there is another determination of whether the industry is materially retarded (not allowed to be established), for the purposes of this paper, the discussion will be limited to an actual material injury or threatened material injury.

⁵⁶ 19 U.S.C. § 1677 (4)(A) (2000).

product for a particular region.⁵⁷ Classifying an industry as such depends solely on the DOC's definition of like product.⁵⁸

"Material injury" is defined as "harm which is not inconsequential, immaterial, or unimportant."⁵⁹ Upon evaluating the material injury caused to a domestic industry, the USITC considers the volume of imports, effect of the imports on U.S. prices, and impact of like product on the producers.⁶⁰ In addition, the USITC evaluates all economic factors such as declines in wages, sales, and prices.⁶¹

Ultimately, in conjunction with the DOC, the USITC clarifies whether an alleged dumping has caused a material injury to a U.S. industry. Here, the USITC must find that the injury was caused "by reason of" the dumped product.⁶² While there are several factors that indicate a causal link, the U.S. Court of International Trade has often focused its analysis on the conditions of competition,⁶³ which include an assessment of whether "the imports have caused significant price depression or suppression"⁶⁴ in order to find this requisite link.

3. Final Determination and Assessment of Duty

⁵⁷ 19 U.S.C. § 1677 (4)(C).

⁵⁸ 19 U.S.C. § 1673 (2)(B).

⁵⁹ 19 U.S.C. § 1677 (7)(A).

⁶⁰ 19 U.S.C. § 1677 (7)(B).

⁶¹ 19 U.S.C. § 1677 (7)(C)(iii).

⁶² 19 U.S.C. § 1673d (b)(1)(B).

⁶³ *Nucor Corp. v. United States*, 318 F. Supp. 2d 1207, 1215-16, (Ct. Int'l Trade 2004). *See also* *Neenah Foundry Co. v. United States*, 155 F. Supp. 2d 766, 776-77 (Ct. Int'l Trade 2001).

⁶⁴ 19 U.S.C. § 1677(7)(C)(ii) (2006).

The USITC then takes its affirmative finding and determines whether the investigated imports “are likely to undermine seriously the remedial effect of the antidumping duty order.”⁶⁵ This includes making a determination as to the timing and volume of the product.⁶⁶ Essentially, the USITC seeks to discover whether the dumped product has caused an incidental injury. To supplement the investigation, the USITC sends questionnaires to all parties involved.⁶⁷ The USITC staff drafts a prehearing report, the parties submit prehearing briefs, and the USITC conducts a hearing within four days.⁶⁸ Next, all parties present post hearing briefs, at which time, those who were not parties to the investigation have an opportunity to submit statements for the purpose of persuading the USITC before it makes a final determination.⁶⁹

Often times, either the petitioners or the DOC require additional time to gather information. Depending on the necessity of such extension, the DOC must make a final determination either within seventy-five days or one hundred thirty-five days after the its preliminary determination is published.⁷⁰ In the meantime, the DOC ascertains the dumping margin for each exporter and then collects a security deposit for each entry of an alleged dumped product.⁷¹ Finally, the DOC corrects all ministerial errors and publishes its final determination.⁷²

⁶⁵ 19 U.S.C. § 1673d (b)(4)(A)(i) (2006).

⁶⁶ 19 U.S.C. § 1673d (b)(4)(A)(ii) (2006).

⁶⁷ 19 C.F.R. § 207.20 (2005).

⁶⁸ 19 C.F.R. §§ 207.22-207.23 (2005).

⁶⁹ See 19 C.F.R. § 207.25 (2005), 19 C.F.R. § 207.26 (2005), and 19 C.F.R. § 207.29 (2005).

⁷⁰ 19 C.F.R. § 351.210 (2005) (enforcing 19 U.S.C. § 1673d).

⁷¹ 19 U.S.C. § 1673d (c)(1)(B).

⁷² 19 U.S.C. § 1673d (d) and 19 U.S.C. § 1673d (e).

In the event that both the USITC and the DOC make an affirmative determination as to dumping, a tariff will be imposed at an amount equal to the dumping margin.⁷³

C. Antidumping Under General Agreement on Trade and Tariffs (GATT)⁷⁴

U.S. antidumping laws were drafted long before GATT antidumping laws.⁷⁵ Since the U.S. had a major influence on the shaping of GATT, there exist many similarities between the regulations.⁷⁶ Much like the U.S., GATT requires a country to show that a product is being introduced within its borders at a price less than its normal value.⁷⁷ Next, that country must prove that the exporting country is dumping by showing a clear difference in prices in the exporting country and the importing country.⁷⁸ Finally, that country must establish a causal link between the dumping and the injury suffered by the domestic industry.⁷⁹ However, GATT's focus differs from that of the U.S. Unlike U.S. laws, GATT's primary focus is on the applicability of antidumping duties, rather than the dumping practices.⁸⁰

1. GATT Article VI

⁷³ 19 U.S.C. § 1673.

⁷⁴ While the WTO evolved out of GATT in 1994, the two terms will be used interchangeably.

⁷⁵ The U.S. antidumping regulations date back to 1916, while the GATT was signed in 1947.

⁷⁶ William Lovett, *Essay: The WTO: A Train Wreck In Progress?* 24 FORDHAM INT'L L.J. 410, 426 n.9 (2000).

⁷⁷ GATT, 61 Stat. A3, A23, T.I.A.S. 1700, 55 U.N.T.S. 194.

⁷⁸ GATT, art. VI, § 1.

⁷⁹ GATT, art. VI, § 6.

⁸⁰ GATT, art. VI, §§ 2, 3. The focus is found in GATT Article VI and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter AD Agreement).

Article VI provides the broadest antidumping regulation found within GATT. It seeks to condemn the practice of dumping while allowing those WTO member countries who suffer injury as a result of dumping retaliatory application of antidumping.⁸¹

In order for a WTO member to enact antidumping duties on an imported product, the member must find a product that has been introduced into the domestic market at a price that is less than normal value which causes or threatens to cause a material injury to a domestic industry.⁸² Normal value is derived from evaluation of the following items: (1) the price of the like product consumed in the exporting country; or (2) if there is no price in the exporting countries (because of non-market economy)⁸³ then either a) the highest exporting price to a third country or b) the cost of production in the exporting country, plus additional costs for profits.⁸⁴ This ability to choose alternate pricing calculations is similar to that implemented by the DOC.⁸⁵ Once dumping has been established, the WTO member country may impose a levy upon the dumped product, in an amount equal to the dumping margin, for the purpose of offsetting the injury.⁸⁶

2. Implementation of Article VI in the AD Agreement.

⁸¹ *Id.*

⁸² *Id.*

⁸³ The term "nonmarket economy country" means any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677 (18)(A).

⁸⁴ GATT art. VI, § 1 (b). *See also* AD Agreement VI, ¶ 1, § 2.

⁸⁵ *See supra* note 41.

⁸⁶ Dumping margin is the amount equal to the price of the dumped product in the importing country minus the normal value. GATT art. VI, § 2.

The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (AD Agreement) governs the application of Article VI.⁸⁷ While Article 2 of the AD Agreement specifically regulates how a country makes a determination as to an occurrence of dumping, Article 3 establishes the guidelines for making a determination as to injury.

a. Like Product

The GATT AD Agreement defines "like product" as a product "which is identical (i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product, which although not alike in all respects, has characteristics closely resembling those of the product under consideration.)"⁸⁸ The goal in providing such a definition is hopefully to ensure that similar products in different countries not receive discriminatory treatment.⁸⁹

Since like product determines which companies are assigned to a domestic industry, it is pertinent to define the scope of the investigation. There has been much debate over defining like product.⁹⁰ While the WTO has yet to provide a clear definition, there has been a constant dispute over defining those conditions which constitute a like product.⁹¹

⁸⁷ AD Agreement, Part I, art. 1.

⁸⁸ AD Agreement, art. 2.6.

⁸⁹ ROBERT HUDEC, *GATT/WTO Constraints on National Regulation: Requiem for an "Aim and Effects" Test*, in *ESSAYS ON THE NATURE OF INTERNATIONAL TRADE LAW* 359, 365 (1999).

⁹⁰ *Id.*

⁹¹ See Appellate Body Report, Japan – Measures Affecting the Importation of Apples [hereinafter Japan Appellate], WT/D5245/AB/R (Nov. 26, 2003), *available at*

Examination of other relevant GATT provisions, as well as the European Commission's (EC) approach, may provide some evidence as to how like product can be defined. The term "like product" is used throughout GATT in areas other than Article VI and the AD Agreement. In Article I, the Most-Favoured-Nation (MFN) Treatment proscribes that "any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the *like product* originating in or destined for the territories of all other contracting parties."⁹² Similarly, Article III, which designates National Treatment on Internal Taxation and Regulations, Article VIII, which gives MFN treatment to markings of origin, Articles XI and XIII, which eliminates and requires MFN treatment of Quantitative Restrictions,

http://www.wto.org/english/tratop_e/dispu_e/distabase_wtp_members3_e.htm. In a dispute between Japan and the U.S., where Japan applied quarantine restrictions on certain bacteria infected apples imported from the U.S., a distinction was required as to those infected apples and non-infected, those apples prone to infection, or to all apples regardless of their actual infection. The Appellate Body ultimately concluded that the Panel could make factual determinations concerning all apples imported from the U.S., giving the Dispute Settlement Panel the authority to determine what are like products. *See also* Appellate Body Report, Korea - Taxes on Alcoholic Beverages, WT/DS75/AB/R, WT/DS84/AB/R, (Jan. 18, 1999), *available at*

http://www.wto.org/english/trarop_e/dispu_e/7085d.pdf, involving Korea maintaining certain tax rates for different types of liquor mainly to support the Korean education system. Korea argued that Soju was taxed differently because of the distinctive competitive nature primarily consumption and price. Korea distinguished from those beverages made from similar raw materials designed for "thirst quenching, socialization" and the Korean Soju, pure ethyl alcohol made from sweet potatoes and rice. The Appellate Body noted that while Soju and imported liquors may have been classified as unlike products, Korea could not discriminately tax certain liquors because "'like' products are a subset of directly competitive or substitutable products."

⁹² GATT art. I.

and Article XVI, which prohibits government subsidies resulting in the exportation of a *like product* at a lesser value in other countries, all contain some usage of the term. However, none of these provisions provide a clear definition of the term.

Where the GATT fails to clearly define like product, the EC has attempted to provide some guidance as to what the term should mean. The EC appears to determine what constitutes like product by examining the physical characteristics of products. Furthermore, it may choose to implement the market-based approach or the two-way interchangeability test in making its determination.⁹³ For example, in a dispute arising from the EC imposing antidumping duties on China and Indonesia, the EC had to determine whether slippers and outdoor shoes were the same product.⁹⁴ The test implemented was whether outdoor shoes could be substituted by slippers for outdoor use, and whether slippers could be substituted by outdoor shoes for indoor use.⁹⁵ Therefore, it appears that the EC puts more emphasis on the substitution of products and thus the product's physical characteristics, rather than similarity of price when determining what constitutes like product.⁹⁶

b. Material Injury

The AD Agreement primarily illustrates the application of calculating a material injury. Once the normal value is calculated, it is compared to the exporting price.⁹⁷ The difference between the normal value and the

⁹³ See Adamantopoulos, *supra* note 51, at 37.

⁹⁴ See Japan Appellate, *supra* footnote 91, at 37.

⁹⁵ *Id.*

⁹⁶ See Adamantopoulos, *supra* footnote 93.

⁹⁷ AD Agreement, art. 2.1.

exporting price is the dumping margin.⁹⁸ If the margin is *de minimis*, then the dumping margin is considered negligible, meaning that the injury is too small to be actionable.⁹⁹ However, if the margin is found to be more than *de minimus*, the importing country may cumulatively review all products imported and those products' collective impact on the domestic industry.¹⁰⁰

A targeted country must also show a causal link between dumping and an injury suffered to its domestic industry.¹⁰¹ Article 3 of the AD Agreement requires a showing of the following to establish the existence of a causal link: a) the effect on domestic prices caused by the volume of the dumped imports and b) the effect on domestic producers of like products.¹⁰² Although both criteria appear redundant, the former requires an evaluation of the dumping country's actions while the later focuses on the effects on the domestic industry.

As has been seen, several factors should be considered when evaluating the impact of material injury. Not only should the declination in sales be taken into consideration, but also the severity of the dumping margin, the effects on labor, and the ability or inability of the industry to grow.¹⁰³ Therefore, the causation of injury should be limited to that injury which has been foreseen and is imminent and not merely one of allegation, conjecture, or remote possibility.

⁹⁸ AD Agreement, art. 2.2.

⁹⁹ *De Minimis* is defined under AD Agreement Article 5.8 as the margin being less than 2% of the of the export price.

¹⁰⁰ AD Agreement art. 3.3.

¹⁰¹ AD Agreement art. 3.5.

¹⁰² AD Agreement art. 3.1.

¹⁰³ AD Agreement art. 3.4.

II. PREFERENTIAL TREATMENT TOWARDS DEVELOPING COUNTRIES

A. Background

The WTO divides trading parties into three categories: developed countries, developing countries, and least developed countries.¹⁰⁴ While the GATT articles provide no explicit definitions as to the meaning of any of these categories, there exists some evidence as to what factors should help determine a country's status. The United Nations has created a list of fifty countries making up the least developed countries, thirty-two of which are members of the WTO.¹⁰⁵ Accordingly, one could assume that a distinctive factor in determining a country's status is the country's gross domestic product (GDP).¹⁰⁶ However, another distinction may exist in a country's sophistication of trade regime.¹⁰⁷ Still, another factor could be the relation to a country's per capita income.¹⁰⁸ Although not entirely clear, all of the above factors surely bear some significance on the determination of a country's status.

B. Developing Countries - A Growing Concern for the WTO

¹⁰⁴ Even though developing countries and least developed countries are two distinct classes, both will be referred to as developing countries.

¹⁰⁵ See United Nations Conference on Trade and Development available at, <http://www.unctad.org/Templates/WebFlyer.asp?intItemID=3432&lang=1>; and See Understanding the WTO at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm.

¹⁰⁶ Under GATT, several countries are grouped together and referred to as a region, such as the European Union.

¹⁰⁷ CONSTANTINE MICHALOPOULOS, DEVELOPING COUNTRIES IN THE WTO 39 (Palgrave ed., 2001).

¹⁰⁸ *Id.*

While it may be difficult to distinguish each category, it is clear that during the establishment of the GATT following WWII, the international trading community found it necessary to provide preferential treatment to those countries not “developed.”¹⁰⁹ From the original GATT Rounds in the 1940s to the current Doha Rounds, protection of non-developed countries has always been a concern.¹¹⁰ It should then follow that there exists an interest in having developed countries consider the status of developing countries when applying antidumping measures.¹¹¹

1. History

Following World War II, the international community sought to create a dependable world trading system for the purpose of preventing future global conflict.¹¹² Ever since the establishment of GATT, there has been a consistent interest in protecting the trade growth of developing countries.¹¹³ That interest persists today, as developing countries have increased in membership to the WTO. At its inception, nearly half of the countries which made up the International Trade Organization would have

¹⁰⁹ *Final Act of the United Nations Conference on Trade and Development (April 1948)*, Chapter 1 Article 1 Objective 2.

¹¹⁰ See *Final Act of the Uruguay Round*, http://www.wto.org/english/docs_e/legal_e/03-fa.pdf (last visited Mar. 23, 2006). See also *Tokyo Round, Safeguard Action for Development Purposes, paragraph 1*, <http://www.worldtradelaw.net/tokyoround/safeguarddcs.pdf> (last visited Mar. 23, 2006).

¹¹¹ Robert F. Housman, Symposium: *Democratizing International Trade Decision-making*, 27 CORNELL INT'L L.J. 699, 701-702 (1994).

¹¹² RAJ BHALA, *INTERNATIONAL TRADE LAW: THEORY AND PRACTICE* 127 (2nd ed. 2001).

¹¹³ GATT art. IV.

been considered developing countries by today's standards.¹¹⁴ However, today's developing countries and least developed countries (LDCs) make up two-thirds of all WTO members, evidencing the persisting interest in promoting the protection of developing countries.¹¹⁵

Starting with the Geneva Rounds (1955-1956), the GATT began to focus on trade in development for LDCs.¹¹⁶ Trade liberalization in developing countries and antidumping became pertinent issues during the Kennedy Rounds between 1964 and 1967.¹¹⁷ The Agreement on Antidumping was a product of the concern for potential abuse of trade remedies as nontariff barriers (NTBs). In addition, Articles XXXVI-XXXVIII were added to GATT during the Kennedy Rounds, which compelled developed countries to give preferential treatment for developing countries in determining trade barriers, such as antidumping duties.¹¹⁸ However, developing countries were not obligated to give the same treatment towards developed countries.¹¹⁹ In addition to amending the AD Agreement to strengthen the application of trade remedies for the purpose of reducing NTBs, the Tokyo Rounds (1973-1979) were also utilized to create the Enabling Clause,¹²⁰ which is discussed subsequently.

¹¹⁴ The International Trade Organization was the original name of organized countries which was never adopted by many countries including the United States. See MICHALOPOULOS, *supra* note 107, at 23.

¹¹⁵ Understanding the WTO: developing countries, http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm.

¹¹⁶ BHALA, *supra* note 112, at 134.

¹¹⁷ *Id.* at 825.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 137.

¹²⁰ *Id.* at 139.

The Uruguay Rounds, which established the WTO and solidified GATT, set forth two distinct ways by which developing countries and LDCs would be treated differently from developed countries by including further non-reciprocity and time delays in WTO regulation compliance.¹²¹ However in the 2001 Doha Rounds, WTO Director-General Supachai Panitchpakdi made bold statements regarding the increased responsibility developed countries had towards developing countries in promoting growth in international trade.¹²²

The Doha Rounds of negotiations continue to discuss the necessity for providing market access for developing countries and the relationship between trade and development.¹²³ Concurrently, the Doha Rounds call

¹²¹ *Id.* at 193.

¹²² Director General Supachai Pantichpakdi, American Leadership and the World Trade Organization: What is the Alternative?, Address Before the National Press Club (February 26, 2004), *available at* http://www.wto.org/english/news_e/spsp_e/spsp22_e.htm. *See also* Doha WTO Ministerial 2001: Ministerial Declaration, WT/MIN(01)/DEC/1 (November 20, 2001), *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm From the outset, the function of the Doha round is to ensure the stability in growth for developing countries. In the ministerial declaration of the Doha Rounds, states: The majority of WTO members are developing countries. We seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration. Recalling the Preamble to the Marrakesh Agreement, we shall continue to make positive efforts designed to ensure that developing countries, and especially the least-developed among them, secure a share in the growth of world trade commensurate with the needs of their economic development. In this context, enhanced market access, balanced rules, and well targeted, sustainably financed technical assistance and capacity-building programmes have important roles to play.

¹²³ Doha Work Programme: Ministerial Declaration 2005, WT/MIN(05)/DEC (Dec.22, 2005), <http://www.hkcsi.org.hk/reports/mc6/att14.pdf>. A "Work Programme"

for an outcome that "should be effective in practice and should enable developing countries to meet their needs, in particular in food security and rural development."¹²⁴ More recently, great concern has been placed on limiting the restrictions of compliance by providing developing countries greater market access through partial exemptions for reductions of tariffs.¹²⁵

All in all, GATT contains numerous agreements from the Enabling Clause to the AD Agreement, which provide developing countries special consideration for the purpose of promoting greater participation from those countries in the global trading system.¹²⁶

2. GATT Provisions Providing Special Treatment for Developing Countries

On November 28, 1979, GATT established the Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, also known as the Enabling Clause.¹²⁷ This provision directs developed countries (1) to accord preferential treatment towards developing countries by eliminating or reducing trade barriers, (2) to provide developing countries more access to markets in developed countries, and (3) to supply technical assistance in regards to negotiating trade

is the agenda for the round of negotiations.

¹²⁴ See Pantichpakdi, *supra* note 122.

¹²⁵ Negotiating Group on Market Access - *Minutes of the Meeting Held in the Centre William Rappard*, TN/MA/M/8 (May 26-28, 2003), http://www.wto.org/english/tratop_e/markacc_e/markacc_neg_oti_e.htm#prog_meet (last visited Mar. 23, 2006).

¹²⁶ MICHALOPOULOS, *supra* note 107, at 38-43.

¹²⁷ PHILIP KUNIG, NIELS LAU & WERNER MENG, *INTERNATIONAL ECONOMIC LAW: BASIC DOCUMENTS* 577 (2nd ed. 1993).

agreements.¹²⁸ Furthermore, Article 15 of the AD Agreement demands that special regard be given by “developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures” while providing “[p]ossibilities of constructive remedies...before applying anti-dumping duties where they would affect the essential interests of developing country Members.”¹²⁹ Although there exists no guidance or mandate that explains exactly what measures should be taken in order to exercise this provision, it surely reiterates the concept that developed member countries should provide additional special treatment in trade practice to those countries who do not share their status.

III. SOUTHERN SHRIMP ALLIANCE PETITION TO IMPOSE ANTIDUMPING DUTIES

A. Background

On February 17, 2004, forty-seven days after the initiation of the investigation, the USITC preliminarily determined that there were reasonable indications that shrimp were being dumped in the U.S. market,¹³⁰ and this had materially affected or threatened to cause material injury to the U.S. shrimp industry.¹³¹ This was the first step in a long journey of convincing the USITC that the U.S. should take affirmative action by imposing tariffs on those shrimp that are dumped in the U.S. market. The final determination was made on January 6, 2005.¹³² The USITC

¹²⁸ *Id.*

¹²⁹ AD Agreement art. 15.

¹³⁰ See *supra* notes 34-38 and accompanying text.

¹³¹ USITC Investigations [hereinafter Investigations] Nos. 731-TA-1063-1068 (Preliminary) (2004).

¹³² Certain Non-Canned Warmwater Shrimp and Prawns From

determined that all countries listed in the petition had illegally dumped certain non-canned warmwater shrimp and prawns and found Brazil, Ecuador, and India negligible for dumping canned warmwater shrimp and prawns in the U.S market.¹³³

B. The Petition

On December 31, 2003, the SSA filed a petition with the USITC.¹³⁴ The petition alleged that the importing of dumped frozen shrimp and canned warmwater shrimp products from subject countries either had caused or had threatened to cause a material injury to their industry that produced like products.¹³⁵

The petition established the product, the industry, the material injury faced, and the causal link pursuant to 19 CFR 207.11 (b)(2).¹³⁶ The product did not include every facet of shrimp, but rather was limited to shrimp that were "frozen or canned, wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off, deveined or not deveined, cooked or raw, or otherwise processed in frozen

Brazil, China, Ecuador, India, Thailand, and Vietnam Injure U.S. Industry. (Jan. 6, 2005), <http://edisweb.usitc.gov/edismirror/731-1063/Final/228858/253178/95b/64ab13.pdf> (last visited Mar. 23, 2006).

¹³³ *Id.*

¹³⁴ Brief of Petitioner [hereinafter Petitioner's Brief] In the Matter of: Certain Frozen and Canned Shrimp from Brazil, Ecuador, India, Thailand, China, and Vietnam, No. A-351-838 (Ct. Dec. 31, 2003), available at <http://edisweb.usitc.gov/edismirror/731-1063/Prelim/198225/207211/ae0/52E6B0.pdf>.

¹³⁵ *Id.* at 1. Like product is defined under 19 U.S.C. § 1677(10) 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 subtitle."

¹³⁶ See *supra* note 33 and accompanying text.

or canned form.”¹³⁷ The industry was to consist of forty-two firms which included 2,124 shrimp processors and related workers.

1. Defining Like Product

Determining what were and what were not similar products was an important initial step in determining whether dumping had taken place. In the briefs opposing SSA’s petition, there appeared to be one common argument the petition should be rejected because of SSA’s failure to either include or exclude certain products or industries related to the production of shrimp. Vietnam and Thailand argued that canned shrimp should be classified as a separate product.¹³⁸ Ecuador saw a distinction between primary processed shrimp and those that had been modified so that an additional feature had been added (value added), such as breaded shrimp.¹³⁹ India, on the other hand, argued that warmwater salad shrimp were different from other frozen shrimp due to a size differential.¹⁴⁰ Finally,

¹³⁷ Petitioner’s Brief, *supra* note 134, at 3.

¹³⁸ Postconference Brief of the Vietnamese Respondents [hereinafter Vietnamese Brief] at 1, USITC Investigations Nos. 731-TA-1063-1068 (Preliminary) (2004), *available at* <http://edisweb.usitc.gov/edismirror/731-1063/Prelim/199877/208865/a3b/55875A.pdf>. *See also* Postconference Brief of the Thai Respondents [hereinafter Thai Brief] at 2, USITC Investigations Nos. 731-TA-1063-1068 (Preliminary) (2004), *available at* <http://edisweb.usitc.gov/edismirror/731-1063/Prelim/199876/208846/573/5587DA.pdf>.

¹³⁹ Postconference Brief of the Ecuadorian Respondents at 43, USITC Investigations Nos. 731-TA-1063-1068 (Preliminary) (2004), *available at* <http://edisweb.usitc.gov/edismirror/731-1063/Prelim/199836/210271/d24/557324.pdf>.

¹⁴⁰ Postconference Brief of the Indian Respondents [hereinafter India Brief] at 6, USITC Investigations Nos. 731-TA-1063-1068 (Preliminary) (2004), *available at* <http://edisweb.usitc.gov/edismirror/731->

Louisiana sought to join in by contesting that the petition should have included fresh warmwater shrimp with the frozen warmwater shrimp.¹⁴¹ But, as the many distinctions continued, a line had essentially been drawn as to what constituted like product.

2. Finding Material Injury

In this case, distinguishing the material injury was just as important as defining the product. However, there exists elasticity in determining the dumping margin and the casual link between dumped shrimp and their impact on the domestic industry.

The SSA petition focused primarily on “a reasonable overlap in competition for cumulation.”¹⁴² In other words, it had focused on the imports from all the countries listed in the petition as a whole when assessing the impact of the imports on the same geographical market or customers.¹⁴³ SSA argued that because imports were handled by the same brokers and wholesalers and that the shrimp were interchangeable, the imported products were reaching the same customers and seafood distributors as the domestic products.¹⁴⁴

Under 19 U.S.C. §1677(24), if the imports from a country are less than three percent of the volume of all imports of the like product, those imports will be considered negligible, signifying that the alleged dumping

1063/Prelim/199843/208922/dba/5587AF.pdf.

¹⁴¹ Postconference Brief of the Louisianan Respondents at 4, USITC Investigations Nos. 731-TA-1063-1068 (Preliminary) (2004), available at <http://edisweb.usitc.gov/edismirror/731-1063/Prelim/199815/208810/57/5587D4.pdf>.

¹⁴² Petitioner's Brief, *supra* note 134, at 16.

¹⁴³ See *supra* note 49 and accompanying text.

¹⁴⁴ Petitioner's Brief, *supra* note 134, at 8-9.

country is presumed as not intentionally harming or threatening the domestic industry.¹⁴⁵ Thus, the antidumping duties will not be imposed. Here, each and all alleged countries, as illustrated in the petition, were importing more than the three percent negligible threshold and therefore were not automatically eliminated from review.¹⁴⁶

Furthermore, the petition alleged that the U.S. was a uniquely vulnerable market.¹⁴⁷ Japan, the U.S., and the E.U. were the three most shrimp-consuming regions.¹⁴⁸ The SSA claimed that because the E.U. imposed harsher health standards on shrimp and Japan's demand had leveled off, the U.S. market was the "most attractive to shrimp exporters."¹⁴⁹ Because U.S. shrimp consumption had significantly increased over the past few years,¹⁵⁰ the SSA alleged that the increase in competition had allowed the subject countries to take advantage of a growing market by selling their excess production of shrimp at considerably lower prices than the selling price in their own country—hence, dumping.¹⁵¹ The impact was most clearly depicted in the sharp declination in revenue for domestic shrimp fisherman, making it harder to pay for fuel, nets, and supplies, which forced shrimpers out of the business of selling shrimp.¹⁵²

¹⁴⁵ *Contra supra* note 71.

¹⁴⁶ *See generally* Petitioner's Brief, *supra* note 134.

¹⁴⁷ *Id.* at 16-19.

¹⁴⁸ *Id.* at 22.

¹⁴⁹ The EU is allowed to impose sanitary standards under the Agreement on the Application of Sanitary and Phytosanitary Measures of GATT.

¹⁵⁰ Petitioner's Brief, *supra* note 134, at 24.

¹⁵¹ *Id.* at 23-25.

¹⁵² *Id.* at 32.

On the other hand, not surprisingly, the subject countries made, contrasting arguments as to how their exports were not in direct competition and why the U.S. shrimp industry had faced an economic shift in the shrimp market. Brazil contended that the E.U. was its primary market for shrimp exports and that it was not dumping because it did not have an excess production of shrimp.¹⁵³ Similarly, Vietnam stated that Japan was its main export market and that it had been developing new markets.¹⁵⁴ India presented alternative explanations for why the U.S. shrimp industry had suffered, citing unrelated economic factors such as environmental regulations.¹⁵⁵ Thailand, on the other hand, presented the argument that the E.U.'s deterrence of Thai shrimp had caused them to become increasingly competitive on the global market and not just the U.S. domestic market.¹⁵⁶ Finally, Ecuador asserted that the U.S. could not meet the demand for shrimp, which appeared to be the most compelling argument since there had been a substantial increase in the U.S. shrimp consumption, and the subject countries had been able to fill that demand.

C. The Commission's Views

Preliminary determinations required the USITC to decide whether there was a reasonable indication that a domestic industry had been materially injured or threatened to be materially injured in order to proceed with the final determinations. These determinations concerning dumping

¹⁵³ Postconference Brief of the Brazilian Respondents at 2-3, USITC Investigations Nos. 731-TA-1063-1068 (Preliminary) (2004), available at <http://edisweb.usitc.gov/edismirror/731-1063/Prelim/199727/208738/c57/55544D.pdf>.

¹⁵⁴ See Vietnamese Brief, *supra* note 138, at 9.

¹⁵⁵ See India Brief, *supra* note 140, at 14-19.

¹⁵⁶ See Thai Brief, *supra* note 138, at 5.

were to be based upon clear and convincing evidence with no likelihood to the contrary that the defined product had materially injured or threatened to injure the defined industry.¹⁵⁷

1. Scope of Investigation

First, the USITC established the domestic like product as well as the domestic industry. The USITC adopted the description of like product proposed by the SSA, which included a variety of species, food preparations, and shrimp sizes.¹⁵⁸ Their decision was based upon rejecting the notion that “value-added” shrimp, salad shrimp, giant freshwater prawns, canned shrimp, fresh shrimp, and breaded shrimp should be removed from the scope of like product by explaining that the products contained no more than minor differences in physical characteristics, end uses, and channels of distribution.¹⁵⁹ However, the USITC chose not to include fresh warmwater shrimp even in light of the Louisiana petitioner’s request.¹⁶⁰

Moreover, the USITC found that the industry consisted of (1) all harvesters of warmwater shrimp and (2) all processors of warmwater shrimp products based upon the production-related activities and the related parties in

¹⁵⁷ Certain Frozen or Canned Warmwater Shrimp and Prawns From Brazil, China, Ecuador, India, Thailand, and Vietnam, Inv. No. 731-TA-1063-1068 (Preliminary) USITC Pub. 3672 [hereinafter Investigation] at 3 n.2 (Feb. 2004), *available at* <http://edisweb.usitc.gov/edismirror/731-1063/Prelim/198225/207211/ae0/52E6B0.pdf>.

¹⁵⁸ *Id.* at 5.

¹⁵⁹ *Id.* at 9-15.

¹⁶⁰ Postconference Brief of the Louisiana Shrimp Association at 4, 12, USITC Investigations Nos. 731-TA-1603-1608 (Preliminary) (2004), *available at* <http://edisweb.usitc.gov/edismirror/731-1063/Prelim/199815/208810/57/5587D4.pdf>.

the petition.¹⁶¹ The production-related activities included machine peeling and deveining as well as commercial cooking of shrimp.¹⁶² The related parties included certain processors who were also importers of the subject product.¹⁶³

2. Finding of Material Injury

Investigations were limited to examining the material injury for the data collected ranging from January 2000 through September 2003.¹⁶⁴ By assessing the supply, demand, volume, and price of the subject imports, the USITC determined that there was a "reasonable indication" that the domestic industry had suffered a material injury.¹⁶⁵ The U.S. industry, due to environmental concerns, high land costs, and weather patterns, had become restricted to seasonal wild caught freshwater shrimping.¹⁶⁶ Therefore, the shrimping industry was unable meet the U.S. demand, which had risen from 909 million pounds in 2000 to 1.05 billion pounds in 2002.¹⁶⁷ However, the rise in volume of imported shrimp from 466 million pounds in 2000 to 650 million in 2002 was found to have caused the price of domestic shrimp to fall in the third quarters from 2000 to 2002.¹⁶⁸ The imported shrimp sold at such a low price forced domestic producers to lower their prices.¹⁶⁹ In a final blow, the USITC rejected the subject countries' argument that there were too many fishermen in U.S. seas.

¹⁶¹ See Investigation, *supra* note 157 at 15-19.

¹⁶² *Id.* at 17.

¹⁶³ *Id.* at 18.

¹⁶⁴ *Id.* at 10.

¹⁶⁵ *Id.* at 23.

¹⁶⁶ *Id.* at 23-24.

¹⁶⁷ See Investigation, *supra* note 157, at 23-24.

¹⁶⁸ *Id.* at 25-28.

¹⁶⁹ *Id.* at 28.

The USITC also considered other factors, namely those required by U.S. antidumping procedures as well as those rules permitted by GATT, regarding the impact from imports.¹⁷⁰ In addition to income tax statements showing substantial losses and declines in operating performance, most striking was the decline in U.S. shrimpers' average daily wages, which fell from \$116.97 in 2000 to \$68.26 in 2002.¹⁷¹ From these financial statistics, the USITC went on to make its final determination.

D. Final Determination

On January 6, 2005, the USITC determined that non-canned warmwater shrimp and prawns imported from Brazil, China, Ecuador, India, Thailand, and Vietnam had materially injured the U.S. shrimp industry.¹⁷² In addition, the USITC concluded that China, Thailand, and Vietnam were negligible for dumping certain canned warmwater shrimp and prawns.¹⁷³ From the USITC's final determinations and recommendations, the DOC set various tariff rates in accordance with the countries' determined dumping margin.¹⁷⁴

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 29.

¹⁷² Certain Frozen or Canned Warmwater Shrimp and Prawns From Brazil, China, Ecuador, India, Thailand, and Vietnam, Inv. No. 731-TA-1063-1068 (Final) USITC Pub. 3748 at 1, *available at* http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2004/shrimp/final/PDF/PUB3748.pdf.

¹⁷³ *Id.*

¹⁷⁴ Fact Sheet: Amended Final Determinations and Issuance of Antidumping Duty Orders: Import of Certain Frozen Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China, and the Socialist Republic of Vietnam at 2, *available at* <http://ia.ita.doc.gov/download/factsheets/amended-factsheet-shrimp-brazil-ecuador-india-thailand-prc-vietnam-amended-final-020105.pdf>

IV. PROBLEMS AND SOLUTIONS

A. *Problems with U.S. Antidumping Laws and WTO
Antidumping Regulations*

1. U.S. Responsibility

Occurring almost simultaneously with the U.S. shrimp dumping investigations, the WTO allowed the European Communities to suspend its GATT obligations against the U.S. for its failure to bring the Antidumping Act of 1916 into conformity with the WTO Dispute Settlement Body's recommendations.¹⁷⁵ Such conformity would provide the U.S. an opportunity to take a good look at its antidumping laws and examine how they affect global trade positively or negatively. Although the U.S. has the most sophisticated antidumping procedures, with that brings the price of costly litigation which most developing countries are unable to afford and therefore unable to defend. Thus, in order for the system to be truly fair, reformation of the current standards would seem a necessary step.

2. Problems with Antidumping Procedures - Excessive
Flexibilitya. *Contradictive Purpose*

Although the WTO has set out to allow for the "optimal use of the world's resources" by focusing on the "substantial reduction of tariffs and *other barriers* to trade and to the discriminatory treatment in international trade relations,"¹⁷⁶ the WTO has appeared to have contradicted

¹⁷⁵ See Appellate Body Report, U.S. – Anti-Dumping Act of 1916, WT/DS136/ARB (Feb. 24, 2004), available at http://trade-info.cec.eu.int/doclib/docs/2004/february/tradoc_115972.pdf.

¹⁷⁶ Marrakesh Agreement Establishing the World Trade Organization, art. 1, § A (2006), available at

its own purpose. By permitting countries to impose antidumping regulations, it has promoted the use of other barriers for discriminatory treatment. Thus, a WTO member is provided a loophole to move forward with any goal it may have toward a policy of protectionism. A clear example is seen in the SSA's efforts to protect the U.S. shrimping industry, which had suffered due to the increase of importation of foreign shrimp through the optimal use of a trade barrier, namely antidumping measures.

b. Ambiguity of Like Product

The apparent discrepancy in determining what constitutes like product allows each country attempting to impose antidumping duties to strategically include or exclude products which may or may not be suffering a material injury. In the long run, this may allow a country to beef up its industry and include products to which the alleged dumping party may not have access or produce. While "like product" under Article VI is different from "like product" under Article III, a greater emphasis should be placed on the economic competitive market comparisons rather than actual physical characteristics. Otherwise, developed countries will be able to dominate those industries they have chosen to protect.

In the shrimp dispute, the DOC and USITC included a rather broad range of shrimp when defining the product.¹⁷⁷ What started as a petition for frozen and canned warmwater shrimp grew to include freshwater shrimp.¹⁷⁸ The SSA's action in broadening the scope of like product clearly represents an attempt to employ a policy of

http://www.wto.org/English/res_e/booksp_e/analytic_index_e/wto_agree_01_e.htm.

¹⁷⁷ See Investigation, *supra* note 157.

¹⁷⁸ See *supra* note 160 and accompanying text.

protectionism in the shrimping industry. While many U.S. courts have provided factors for determining like product,¹⁷⁹ the WTO has provided minimal guidance.¹⁸⁰ Perhaps because the WTO dispute panel is fairly new, the WTO has yet to revamp the AD Agreement articles concerning the definition of like product. However, once cases have been litigated through the WTO, hopefully, a clearer definition of like product will be established.

c. Conjuring Normal Value

By providing differing means for calculating normal value based on different economies under 19 U.S.C. §1673 and Article 3 of AD Agreement, it appears that the DOC possesses the capacity to fluctuate the margin of dumping between the normal value and the price of the product sold in the U.S. This leeway arguably provides a domestic country with the ability to increase the number of antidumping duties, thus over-compensating an injured domestic industry and in turn, producing unfair subsidies. As such, antidumping duties would no longer be used as a remedy for unfair trading but more as an economic crippling weapon, which would no doubt defeat the original intended goal of such measures.

For example, while China's nonmarket economy is evolving from a developing country to a more developed country, a more reliable formula for calculating normal value, aside from the comparison of like products sold in other countries, would prove beneficial. As the standard for calculating normal value stands today, antidumping duties could be placed on practically any Chinese product which could prove devastating for a country whose economy is in the process of making a major transition.

¹⁷⁹ See *supra* note 42 and accompanying text.

¹⁸⁰ See GATT art. 1.

B. Proposed Solution

I propose that the level of ambiguity could be somewhat diminished through the introduction of a predatory intent element. If adopted, in order to prove intent, a party alleging dumping would need to provide evidence of participation in past dumping, specific targeting of dumped products, and conspiracy to reduce prices. Introduction of such a standard may also take some of the bite out of the excessive flexibility provided in both the U.S. and WTO dumping standards by imposing an additional burden on the country seeking relief. Furthermore, it would ensure that those countries charged with dumping are not unnecessarily punished absent proof of intent.

Although this would allow for less flexibility for developed nations, it could also cause for an increase of costs associated with an already expensive process therefore defeating the very goal it seeks to attain. Additionally, such a standard would require that fuller disclosure be provided amongst countries. More transparency would more clearly portray how governments and the WTO litigate antidumping procedures. However, large, developed countries would likely oppose such transparency because those countries charged with dumping would be more capable of defending dumping allegations.

The SSA petition provides no indication that shrimp was dumped intentionally. It is unclear whether the countries intended to dump or whether they were merely taking advantage of what they saw as a viable market. In either case, the SSA's attempt to impose antidumping tariffs on those countries included in the complaint resembles unfavorable protectionist policies and clearly

conflicts with the WTO's goal of developing the global economy and eliminating unfavorable protectionist practices. Introduction of an element of intent may ensure that the WTO's goals are not compromised and that the implementations of antidumping tariffs are not abused.

CONCLUSION

As they currently stand, the WTO and U.S. laws regarding dumping provide excessive flexibility to those countries alleging dumping. As a result of this flexibility, those countries seeking relief are provided the opportunity to impose trade tariffs that are crippling to developing countries and clearly contradict the WTO's goal of promoting global trade and preventing protectionist activities.

Introduction of an element of intent could help to level the playing field for developing countries by increasing the burden on those countries seeking relief. Although fair, the level of transparency imposed resulting from the introduction of such a standard would undoubtedly be opposed by the most industrially developed countries.

The SSA's case provides a good example of how the current standards can be manipulated in favor of the most industrially developed countries to promote protectionist policies by means of the most effective trade barrier—antidumping tariffs.