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THE FAILURE OF U.S. ANTIDUMPING MECHANISMS AND ITS RELATION TO THE GLOBAL SHRIMPING INDUSTRY

*Ron Eritano**

INTRODUCTION

In the post-9/11 world, much discussion within the American governmental bureaucracy has focused on the protection of the American public from emerging global threats. While much of the rhetoric has centered on obvious concerns of physical security, this protectionist mentality extends to various sectors of the American business community. While support for an "America-first" business approach has ebbed and flowed throughout the expansion of international trade in the Twentieth Century, free trade proponents have viewed this approach with great skepticism, particularly in the latter half of the century. For those touting the domestic benefits of a protectionist system, the borderless trade policies advanced by Western interests in the late 1980s and 1990s reaffirmed their commitment to restraining its progress. Meanwhile, advocates of the "open market" have taken every opportunity to call attention to any positive contributions that result. Given these entrenched positions and the vast differences between these two influential sides, the state of American trade policy remains in continual flux.

Antidumping illustrates the economic quandary of balancing the promise of free trade with the realities of sovereign insecurities. Over time, United States antidumping law has evolved into a multifaceted process that has delighted some, frustrated others, and confused many. To help illustrate the many controversies and complexities of this system, this note will first examine the origins and development of antidumping measures in the United States. It will then detail the current processes for resolving dumping disputes and include an analysis of several problem areas in the current American system.

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Finally, the note will carefully scrutinize the American process in action through the review of a current dumping issue involving the American shrimping industry.

While one's opinion with regard to the U.S. antidumping regulatory regime often develops from their general position on free trade, the several shortcomings of the current system should be obvious to many. Some of the flaws in the American system include: a subsidy-like provision known as the "Byrd Amendment;" the use of the inequitable dumping determination mechanisms such as "cumulation" and "zeroing;" and an ignorance of a WTO provision requiring special treatment for "developing countries." As this note will illustrate, U.S. antidumping law can be improved to protect both domestic consumers and the global market without leaving domestic industries vulnerable to truly unfair international trade practices.

DEFINING DUMPING, BOTH GENERALLY AND SPECIFICALLY

One cannot accurately evaluate the effectiveness of an antidumping regulatory regime without a clear understanding of what actions constitute dumping. The United States defines dumping in one of two ways: (1) a foreign producer sells a product in the United States at a price below the sales price within the producer's country of origin; or (2) a foreign producer sells a product at a price lower than the cost of production.¹ Any difference between the two prices, or between the price and cost to produce, is referred to as the dumping margin and used as direct evidence in proving a dumping charge.² In general, antidumping regulations are intended to compensate for this margin by imposing duties to an equivalent extent.

While the types of products that can be dumped on the market are limitless, the motivating factor of increasing revenues remains the same. Despite this singular goal, economists have identified several forms of dumping which operate distinctively. The most common type is "predatory dumping," which occurs "when companies export at low prices to drive rivals out of business and obtain monopoly power."³ A similar form is "strategic dumping," which "combines low export prices with a protected home market to give exporters an advantage."⁴ Not all

¹ U.S. Dept. of Commerce, Int'l Trade Admin., An Introduction to U.S. Trade Remedies, available at <http://ia.ita.doc.gov/intro/>.

² *Id.*

³ CLAUDE E. BARFIELD, ANTIDUMPING REFORM: TIME TO GO BACK TO THE BASICS, Vol. 8, Num. 7, at 3 (2004).

⁴ *Id.*

dumping actions have such greed-driven purposes though. Both "cyclical dumping," oversupply in an industry developing from a dramatic reduction in demand, and "State-trading dumping," the intentional oversupplying of a domestic industry to obtain hard currency, are more the result of institutional ineptitude than intentional misconduct.⁵

THE ORIGINS, DEVELOPMENT, AND EFFECTIVENESS OF ANTIDUMPING REGULATION

Regardless of the method of dumping, many domestic industries have long responded to such actions by seeking the assistance of the government. Despite the theoretical existence of dumping since the advent of international trade, it was not until the twentieth century that a nation-state recognized the issue and responded with a legislative measure.

In 1904, Canada passed the first national antidumping law in the modern era.⁶ Under the guise of alleged dumping by the U.S. steel industry, the Canadian government reasoned that such a response was justified and necessary in the event that a foreign producer "put aside all reasonable considerations" to obtain control of a domestic market.⁷ One cannot fail to acknowledge the irony of the first national antidumping law resulting from U.S. business actions given its place in the world today as the strongest proponent of the use of such mechanisms. Shortly after Canada's actions, several other nations, including Australia, New Zealand and the United States followed this lead under a similar rationale.⁸

The roots of the U.S. government's policy on antidumping regulation actually stem from antitrust law of the late Nineteenth Century.⁹ In particular, the Sherman Antitrust Act of 1890 could be applied to foreign commerce and any related monopolization techniques employed by foreign companies in the United States.¹⁰ However, such application was limited to sales contracts made only in

⁵ *Id.*

⁶ ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT 14 (J. Michael Finger & Nellie T. Artis eds., 1993) [hereinafter WHO GETS HURT].

⁷ *Id.* at 15.

⁸ GREG MASTEL, ANTIDUMPING LAWS AND THE U.S. ECONOMY 18 (M.E. Sharpe ed., 1998).

⁹ J. Michael Finger, *The Origins and Evolution of Antidumping Regulation* in WHO GETS HURT, *supra* note 6, at 18.

¹⁰ *Id.*

the United States.¹¹ Thus, foreign businesses could avoid any such liability with careful planning as to where sales contracts were signed.

Seeking to address this problem, the federal government passed the Antidumping Act of 1916. This measure made it illegal to import goods at less than the actual market value if done with the predatory intent to injure, or destroy, the U.S. industry against which it was competing.¹² Borrowing from antitrust law, the Act used criminal penalties and treble civil damages as enforcement mechanisms.¹³ However, not only did the requirement of predatory intent prove too difficult a standard to establish, it also failed to account for a significant amount of dumping performed without such an intent but equally devastating to domestic industries.¹⁴ Given this high standard, no plaintiff has been able to successfully prove damages under this measure.¹⁵

Recognizing this deficiency, Congress passed the Antidumping Act of 1921, which continues to serve as the foundation for U.S. antidumping regulation to this day. The measure offered a more expansive definition of dumping and "empowered" the U.S. Secretary of the Treasury with the ability to impose a duty upon foreign producers whom the Secretary determines to having dumped their products on the U.S. market.¹⁶ Thus, the Act broke with existing antitrust law by replacing civil damages with the appropriate antidumping duties. Further, the empowerment of the Treasury Department signaled an administrative change in jurisdiction over dumping matters from the judiciary to the executive branch. The most important legal development from the passage of the 1921 Act pertained to a broadened standard of proof for injury, which was accomplished by removing the requirement of having to prove "intent" of predatory pricing.¹⁷ As a result, the United States had less difficulty establishing a "dumping" claim and applying an appropriate remedy.

The passage of the Hawley-Smoot Tariff Act in 1930 further solidified the jurisdictional shift away from the judiciary. It placed further responsibility in the hands of the Treasury Department to determine both incidents of dumping and injury and limited the

¹¹ *Id.*

¹² *Id.*

¹³ MASTEL, *supra* note 8, at 18.

¹⁴ *Id.* at 21.

¹⁵ WILLIAM H. LASH III, U.S. INTERNATIONAL TRADE REGULATION: A PRIMER 26 (The American Enterprise Institute ed., 1998).

¹⁶ WHO GETS HURT, *supra* note 6, at 20.

¹⁷ MASTEL, *supra* note 8, at 21.

judiciary's role to strictly matters of law.¹⁸ Through this legislation, Congress entrusted the Treasury with the power to determine if a U.S. industry is "materially injured" by goods sold at less than fair value.¹⁹ The Act defined "material injury" as "harm which is not inconsequential" and instructed the corresponding authority to consider the following factors in making such a determination: the volume of the imports in question; the effect of those imports on the price of domestic-like products; and the overall impact of such imports on the domestic industry producing those domestic like products.²⁰

While the 1930 Tariff Act was amended and eventually repealed, these definitions still form the legislative basis for modern antidumping law in the United States. From 1890 to 1930, U.S. antidumping regulation experienced a dramatic shift in approaches taken by the federal government. Most noteworthy, the role of the judiciary has dissolved with economic evaluations replacing legal determinations. Whether such a shift in policy was the result of the exponential growth in international trade during this period, or of the rise of American business power during the early Twentieth Century, the lasting effects continue to this day.

MODERN DEVELOPMENTS IN U.S. ANTIDUMPING REGULATORY POLICY

By tracing the early development of U.S. antidumping regulation, one can better understand the modern American mindset with regard to this issue. Following the enactment of the 1930 Tariff Act, antidumping law in the United States remained static for the next forty-plus years. But with the passage of the Trade Act of 1974, Congress made a small but significant change in the standard used to determine material injury. In particular, the legislation defined "less than fair value" for determining "material injury" to include not just goods sold at prices below the home-market price, but also goods sold below the cost of production.²¹ This change further expanded the definition of dumping and exacted a clearer standard from which such determinations could be made.

In 1979, Congress enacted the Trade Agreements Act, a measure that replaced the 1921 Antidumping Act. This legislation amended the Tariff Act of 1930 to comply with the Antidumping Code of the

¹⁸ *Id.* at 19-20.

¹⁹ TARIFF ACT OF 1930, 19 U.S.C.A. § 1673 (West Supp. 2005).

²⁰ TARIFF ACT OF 1930, 19 U.S.C.A. § 1677 (West Supp. 2005).

²¹ MASTEL, *supra* note 8, at 21.

General Agreement of Tariffs and Trade (GATT).²² In addition to codifying two major goals of the GATT Code pertaining to public openness in antidumping and the general discouragement of trade barriers, the Trade Agreements Act also included the Code requirement of firmly establishing a causal link between dumped imports and any alleged material injury.²³ One other important change in the 1979 Act was administrative in nature. Specifically, the legislation placed responsibility for any such antidumping determinations with the Department of Commerce.²⁴ No longer would the Treasury Department play a role in such trade affairs.

Throughout the 1980s, U.S. policy with regard to antidumping further evolved with the passage of the Trade and Tariff Act of 1984 and the Omnibus Trade and Competitiveness Act of 1988. In addition to further refining the definition of "fair market price," these measures also broadened the number of products susceptible to antidumping laws and gave the U.S. Trade Representative the authority to request an antidumping investigation.²⁵ Despite these developments in the United States, unprecedented worldwide economic growth fostered an environment that sought to reduce any governmental impediments to international trade, thus ushering in a new era of free trade.

The inevitable collision between new world free trade and old world regulation occurred at the Uruguay Round of GATT Negotiations, which took place between 1986 and 1994. The overall product of these negotiations was the creation of the World Trade Organization (WTO). Throughout these negotiations, much of the discussion pertained to the compatibility of antidumping regulation, particularly in the United States and Europe, with the free trade environment.²⁶ In the end, these discussions resulted in the replacement of the GATT Antidumping Code with a detailed system to combat dumping which would then be enforceable against those nations who ratified the agreement. Part of the agreement contained elements consistent with the U.S. antidumping regime including: granting legal standing of workers to file petitions; excluding low cost sales from fair value determinations; using the process of cumulation in making any material injury determinations; and providing for U.S. legal

²² *Id.*

²³ JOSEPH E. PATTISON, ANTIDUMPING AND COUNTERVAILING DUTY LAWS, Vol. 1 at 20 (2004).

²⁴ MASTEL, *supra* note 8, at 21.

²⁵ *Id.* at 21-22.

²⁶ GREG MASTEL, AMERICAN TRADE LAWS AFTER THE URUGUAY ROUND 181 (M.E. Sharpe ed. 1996).

standards of due process and transparency throughout any dumping proceedings.²⁷ On the other hand, the agreement diverged from U.S. law on several important aspects including: a five-year sunset review of any dumping duties; an allowance for start-up costs which may be unavoidably higher as a result of their economic nature; and the consideration of industry support for any antidumping provisions.²⁸ One other noteworthy result of the Uruguay Round was the deference given to national bodies in dispute settlement with regard to dumping and injury determinations.²⁹ Specifically, WTO dispute settlement panels cannot overturn the decisions of national authorities if they are made in an "unbiased and objective" manner.³⁰ This nod to state sovereignty limited the WTO's influence over the dispute resolution process by leaving the door open for national dispute settlement processes that push the boundaries of what constitutes an "unbiased and objective" review. Thus, states were given substantial flexibility in the use and implementation of antidumping mechanisms, which eventually lead to numerous later-discussed conflicts in this area between sovereign states, particularly the United States, and the WTO.

Following the adoption of the Uruguay Round agreement through legislation in 1994, the United States generally adhered to the antidumping provisions it had agreed upon. However, in the fall of 2000, Congress passed the Continued Dumping and Subsidy Offset Act, more commonly known as the "Byrd Amendment." This controversial measure, advanced on behalf of labor interests and domestic producers, required any antidumping duties collected by the federal government to be distributed to those U.S. companies that had brought forward the particular dumping claim.³¹ Prior to the passage of the Byrd Amendment, the duties went into the general fund of the United States Treasury Department.³² This action marked a major shift in the U.S. antidumping policy because it amounted to a double penalty for foreign companies that dumped their products on the U.S. market. Thus, not only did these companies face the economic punishment of

²⁷ PATTISON, *supra* note 23, at 25.

²⁸ *Id.*

²⁹ MASTEL, *supra* note 26, at 183.

³⁰ *Id.*

³¹ Dan Ikenson, *Byrdening Relations: U.S. Trade Policies Continue to Flout the Rules*, FREE TRADE BULLETIN NO. 5, (Center for Trade Policy Studies, Washington, D.C.), Jan. 13, 2004, available at <http://freetrade.org/> (select the hyperlink tab for "publications"; then select the hyperlink "Free Trade Bulletins").

³² *Id.*

import duties, they also were faced with the fact of such duties being specifically directed to their competitors within the domestic industry.

Not surprisingly, many of the signatories to the WTO expressed strong outrage towards the measure by arguing that it was "a prohibited subsidy under the WTO and GATT."³³ Surely one can find validity in such criticism given the fact that this action ran contrary to the promotion of free and fair trade principles enumerated in and advanced by the 1994 WTO agreement. In early 2003, a WTO Appellate Body reached a similar conclusion in determining that the Byrd Amendment is incompatible with WTO rules. Yet while the Office of the U.S. Trade Representative has expressed a desire to comply with WTO rules, neither the Executive Branch nor Congress has shown any willingness to repeal the controversial measure.³⁴ This ignorance of the purpose and goal of the WTO antidumping agreement only serves to weaken one of the few international bodies that has maintained real and actual influence over many nation-states.

THE CURRENT PROCESS FOR RESOLVING DUMPING DISPUTES IN THE UNITED STATES

Despite strong differences in opinion over the Byrd Amendment and its compatibility with WTO rules, the United States sought to comply with most of the provisions of the 1994 agreement with regards to antidumping actions. It set up a "two-step process" for managing antidumping actions that involves related actions taken by two separate federal agencies. In short, the United States Department of Commerce (DOC) determines whether dumping has indeed occurred and the International Trade Commission (ITC), an independent federal agency, determines if those same dumped products have caused "injury" to the competing domestic industry.³⁵

An antidumping action begins with the filing of a petition, concurrently with the DOC and the ITC, by the allegedly injured industry or industries. The petition should reference a specific product and can be submitted by any "interested party" within an industry. Many representatives within a particular business community may establish standing as an "interested party" including manufacturers,

³³ *Id.*

³⁴ Press Release, The Office of the U.S. Trade Representative, Statement of USTR Spokesman Christopher Padilla on World Trade Organization Arbitrators' Determination on the "Byrd Amendment" (Aug. 31, 2004) available at http://www.ustr.gov/Document_Library/Spokesperson_Statements.

³⁵ MASTEL, *supra* note 26, at 73.

distributors, laborers or trade associations.³⁶ In addition to identifying the alleged dumper(s), the petition should contain materials supporting the charge that sales are occurring at "less than fair value."³⁷ The petitioner must also be sure to include allegations of "material injury" or "threat of material injury" along with supporting materials connecting such an injury to the supposed dumping practices of the aforementioned violator.³⁸ These basic guidelines provide little opportunity in the earliest stages of this procedure for the accused "dumpers" to rebut any of these initial charges. While this approach illustrates similarity to the ability of any plaintiff with standing to file a claim against another party in the traditional American legal system, it does not allow for a response from the adverse party nor does it provide a mechanism to resolve claims that are eventually labeled frivolous in nature.

The first determination regarding the petition comes from the DOC's Office of International Trade Administration (ITA). This body has twenty days after the filing of the petition to determine whether the petition is adequate to go forward. This determination of legal sufficiency is rather limited with regards to fact-finding and focuses mainly on whether the proper party has filed the petition and whether relief can be granted for the injury alleged given the supporting information supplied by the petitioner.³⁹ Any failure to meet this burden results in a dismissal of the claim. Again, the process does not allow for input from the accused "dumpers".

While the ITA conducts the initial inquiry, the ITC concurrently considers whether an injury occurred. The ITC has forty-five days from the filing of the petition in which to make this determination. However, should the ITA dismiss the case, the ITC will not issue anything. In making this preliminary injury determination, the ITC is determining if there is a "reasonable indication" that the petitioning industry suffered a "material injury, is threatened by a material injury," or has been "materially retarded."⁴⁰ Throughout this stage of determination, the Commission can rely on a variety of information, including that received from the parties or obtained through its own investigation.⁴¹ Given the low standard of "reasonable indication" and

³⁶ MICHAEL K. YOUNG, UNITED STATES TRADE LAW AND POLICY 55-56 (Carolina Academic Press ed. 2001).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 56-57.

⁴⁰ *Id.*

⁴¹ *Id.*

little time afforded respondents to defend against such allegations, the ITC finds an injury in an "overwhelming majority of cases."⁴²

Should the ITC offer an affirmative preliminary ruling of an injury within the required forty-five day time period, the responsibility then shifts back to the ITA, which has 120 days to determine if the act of "dumping" indeed did occur. In this preliminary decision, the ITA applies a standard of "reasonable basis to believe or suspect" that foreign products are being sold at "less than fair value" in the United States.⁴³ Using information obtained from the petitioners, respondents, and independent investigation of the industry market and pricing patterns, the ITA decides if goods are being dumped and, if so, the appropriate "dumping margin" to be corrected.⁴⁴ The methods used to calculate these dumping margins are controversial and will be discussed more thoroughly later in this note. If such a finding occurs, the Commerce Department can assess duties that could not officially be collected until an affirmative ITC final determination.⁴⁵ However, should the ITA fail to find the presence of dumping, it is still required to issue a final determination according to 19 U.S.C. § 1673(d).⁴⁶

Following an affirmative determination of "dumping" in its preliminary findings, the ITA then performs its final determination. During this thorough review, ITA officials conduct more detailed factual and legal fact-finding and analysis of the situation, which often can include on-site inspection of the foreign respondents operations.⁴⁷ The ITA must present both its findings and the materials supporting such a position within seventy-five days after issuing its preliminary determinations. This step in the determination process seems repetitive and unnecessary. Further, the fact that the ITA calculates the "dumping margin" prior to actually making on-site visits lends credence to the argument that margin lacks accuracy.

The final say in the determination process rests with the ITC. Here, the ITC issues its final decision on whether an "injury" occurred as a result of the dumping action. By examining such factors as "the amount of imports, increases in either the total or relative amount of imports, the impact of imports on the price of the good, and the impact of imports on the state of the domestic injury," the ITC must only

⁴² *Id.* at 59.

⁴³ *Id.*

⁴⁴ *Id.* at 60.

⁴⁵ MASTEL, *supra* note 26, at 73.

⁴⁶ YOUNG, *supra* note 36, at 60.

⁴⁷ *Id.*

decide if the "imports are more than inconsequential or insignificant contributing cause" of the injury to the domestic industry.⁴⁸ This determination by the ITC must take place within forty-five days of the final ITA decision. At this point in the process, an antidumping order is issued and respondents are required to pay duties equivalent to the "dumping margin" established in the ITA's final determination. The U.S. Customs Service carries out the enforcement of the order.⁴⁹ Notice that nowhere in this process does the respondent have a clear opportunity to present its case before either the ITA or ITC. The Respondent's only input comes as a result of targeted questions by the investigators. Thus, an unrelated issue that may have some bearing on the situation could easily be excluded from consideration.

Parties on the wrong side of any antidumping ruling do have the ability to appeal to the U.S. Court of International Trade (CIT), which can review, remand, and reverse the decisions should it find the determination to be "unsupported by substantial evidence on the record, or otherwise not in accordance with the law."⁵⁰ This standard makes the overruling of such a determination difficult, unless a respondent can demonstrate the agencies' decisions to be "arbitrary, capricious, or an abuse of discretion."⁵¹ Clearly, such a standard of review is difficult to meet. However, respondents can also further appeal any CIT decision to the appropriate Federal Circuit Court of Appeals. In complying with the WTO rules, however, both the Department of Commerce and ITC must review any such duty application five years after a final ruling to determine if the penalty still remains necessary.

AN OVERVIEW OF ADDITIONAL PROBLEM AREAS WITHIN THE U.S. ANTIDUMPING DETERMINATION PROCESS

As previously discussed, the Byrd Amendment is a lightening rod for critics of the U.S. antidumping regulatory regime. Its protectionist leanings irritate foreign businesses, foreign governments, international bodies and domestic consumers groups to no end. However, this provision is just one of several mechanisms within the U.S. antidumping regulatory structure that attracts the ire of the international business community.

One such area pertains to "cumulation," a process used by the ITC in making its "material injury" determination. "Cumulation"

⁴⁸ *Id.* at 61.

⁴⁹ *Id.* at 62.

⁵⁰ *Id.* at 63.

⁵¹ *Id.*

involves the aggregation of imports in antidumping disputes involving imports from more than one source country.⁵² The Trade and Tariff Act of 1984 contained a provision implementing this process into U.S. trade law, which had previously evaluated dumping disputes on a country-by-country basis.⁵³ Under this type of regime, the American imports of the multiple foreign businesses can be pooled together to determine their share of the domestic market. Thus, the probability of finding the existence of a "material injury" substantially increases. In fact, a study of antidumping cases that went before the ITC between 1985 and 1988 found that almost half of those involving an affirmative determination of "material injury" were the direct result of the cumulation.⁵⁴ While such discrepancies sound numerically logical, this very same study further suggests that the ITC was "more likely" to find for the existence of "material injury" when cumulation is used.⁵⁵

The 1984 Act allows for several exceptions to the cumulation requirement. Most of the exceptions are political in nature and have stronger basis in U.S. foreign policy than trade law. Specifically, the ITC must refrain from cumulating imports from any country that has ratified the Caribbean Basin Economic Recovery Act (CBERA) and from Israel unless the imports come solely from Israel.⁵⁶ Such exceptions only contribute further to the validity of the criticism of the cumulation policy. For not only does the use of the cumulation method make it that much more probable for an affirmative injury determination, but the existence of exceptions also signals a recognition by the United States of the harsh results of this process which can be muted only through political means.

Although cumulation has long caught the ire of critics of the U.S. antidumping system, there are other specific determination mechanisms used in calculations to evaluate "material injury" and ascertaining "dumping margins" that frustrate the international trade community. These include the process of "zeroing" and determination of "normal

⁵² Wendy L. Hansen & Thomas J. Prusa, *Cumulation and ITC Decision Making: The Sum of the Parts is Greater Than the Whole* (Nat'l Bureau of Economic Research, Working Paper No. W5062, March 1995).

⁵³ *Id.*

⁵⁴ Bruce A. Blonigen & Thomas J. Prusa, *Antidumping 22* (Nat'l Bureau of Economic Research, Working Paper No. W8398, July 2001), available at <http://ssrn.com/abstract=278031>.

⁵⁵ *Id.* at 22.

⁵⁶ International Trade Commission, ITC Injury Investigations available at www.adcvt.com/InjuryInvestigations.htm.

value." Both issues will be discussed thoroughly later in the examination of the shrimp dumping case.

Another area of controversy within the antidumping spectrum, also political in nature, relates to special allowances given to "developing" and "least-developed" countries in dumping actions. There are no WTO definitions for "developing countries" and members can announce whether they are a "developed" or "developing" country. "Least-developed" countries are designated as such by the United Nations. According to Article 15 of the 1994 WTO Agreement, members of the WTO who are "developed" countries must give "special regard" to the situations of "developing countries when considering the application of antidumping measures."⁵⁷ Article 15 further elaborates that when faced with such an instance, a "developed" country should thoroughly explore all possible remedies before applying any duties pertaining to an affirmative finding of dumping.⁵⁸ Thus, under WTO rules, both the Department of Commerce and ITC should theoretically give "developing" countries a little more leeway before reaching a final determination which results in import duties being placed on these particular countries. However, "special regard" is a rather ambiguous term that has led to various interpretations by WTO member-countries. Not surprisingly, the inconsistency in application has led to numerous criticisms by both "developing" and "developed" members. Opponents of such special treatment point to the fact that "developing" countries contribute heavily to the number of dumping cases in the "developed" world. On the other hand, many of the "developing" countries argue that much of the "developed" world has failed to give full recognition to the rights afforded them under Article 15 of the WTO Agreement.⁵⁹ The forthcoming case-study on a dumping dispute pertaining to the American Shrimp industry will further expand on this discussion.

ALTERNATIVES TO ANTIDUMPING DUTIES

Many opponents of the special treatment afforded "developing" countries and "cumulation" often cite such controversies when

⁵⁷ Agreement on Implementation of Article VI (Anti-Dumping) of the General Agreements on Tariffs and Trade 1994, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 1, Implementation of Special and Differential Treatment, Article 15 (1994) available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

⁵⁸ *Id.*

⁵⁹ *Id.*

exhorting the inefficiencies of the U.S. antidumping regulatory regime. They point to more market-driven remedies for domestic commerce such as existing antitrust law or safeguard actions. Proponents of the antitrust system contend that the use of antitrust law would eliminate a large area of potential abuse which exists under the current antidumping regime, namely the filing of an antidumping action by a domestic industry that wishes to keep its prices domestically high by discouraging foreign competitors from enduring the high costs associated with such a process.⁶⁰ Also, perhaps such a transition would remove some of the international politics from the decision-making process as foreign companies would receive the same treatment as U.S. companies with regard to business competition. On the contrary, enforcement issues could arise as U.S. courts would be limited in their reach over foreign enterprises.⁶¹ Thus, the repeal of antidumping law and transition back to antitrust may prove more complicated than proponents suggest.

Another possible replacement for U.S. antidumping regulations is the safeguard action. Under this approach, tariffs or quotas are placed on imports for only a limited time period, which under the WTO rules can be granted for up to four years.⁶² Based on this information, one can see little difference between such temporary quotas and the five-year sunset review requirement in the antidumping regulation. However, safeguard actions differ significantly in the following ways: a higher standard of "injury" must be established by a domestic industry; and they allow for penalized countries to receive temporary compensation to offset any tariff or quota.⁶³ Opponents of such a policy shift might argue that the higher standard places a large burden on domestic industries and may discourage them from challenging even legitimate dumping occurrences. Thus, regardless of which alternative one chooses, neither clearly distances itself from current antidumping law.

A CASE STUDY OF AN ANTIDUMPING ACTION: THE DUMPING OF WARMWATER SHRIMP, FROZEN OR CANNED, ON THE U.S. MARKET

Given the complexities and controversies of the antidumping process at both the national and international level, one may be able to obtain a clearer understanding of the issue through an examination of a

⁶⁰ BARFIELD, *supra* note 3, at 15.

⁶¹ MASTEL, *supra* note 26, at 104.

⁶² BARFIELD, *supra* note 3, at 17.

⁶³ *Id.*

recent U.S. antidumping decision. Like so many U.S. industries prior to globalization, the shrimping community had long been mostly domestic in nature. All along the coasts of the Southeastern United States, shrimpers operated in a tight-knit community in a trade that had been handed down from generation to generation. But with a growth in customer demand many restaurants and grocery stores were forced to look elsewhere. With the advances in technology in the latter part of the Twentieth Century, obtaining shrimp from other countries became feasible and in time even more cost-effective. As a result domestic shrimpers were forced to compete with foreign suppliers that were able to offer the product at lower prices and in greater quantities. In time, the domestic shrimping industry suffered economically as more and more domestic sellers sought the product from international sources. Eventually many of these domestic shrimpers were forced to give up their trade on account of their inability to compete. Currently, shrimp imports account for almost 90% of U.S. shrimp consumption.⁶⁴ As a result, the number of active shrimpers in the Gulf Coast region has dwindled by almost 60% in the past decade.⁶⁵ The ones still struggling to operate responded, as many U.S. industries have done in the past, by seeking the assistance of the government in maintaining their livelihood.

On December 31, 2003, the Ad Hoc Shrimp Trade Action Committee of Washington, D.C., the Versagi Shrimp Corporation of Florida, and the Indian River Shrimp Company of Louisiana filed petitions with the DOC and ITC alleging the dumping of imports of certain frozen or canned warm-water shrimp from Brazil, China, Ecuador, India, Thailand and Vietnam.⁶⁶ In their submissions, the petitioners argued that the shrimping industry in the United States had been materially injured and had been threatened with material injury by the imports of frozen and canned warm-water shrimp imports from these six countries at less than fair value (LTFV).⁶⁷ Specifically, the petitioners maintained that imports of such shrimp had increased by 50% from 2000 to 2002 while the wholesale prices of shrimp from

⁶⁴ Don Matthew, *The Fallacies of Shrimp Protectionism*, June 27, 2004, THE MISES INSTITUTE, available at <http://www.mises.org/fullstory.aspx?control=1551>.

⁶⁵ *Id.*

⁶⁶ Certain Frozen or Canned Warmwater Shrimp and Prawns From Brazil, China, Ecuador, India, Thailand, and Vietnam, 3 USITC Pub. 3672, Inv. Nos. 731-TA-1063-1068, Preliminary, (February 2004) [hereinafter Preliminary Report].

⁶⁷ *Id.*

these six countries dropped 28% in that same amount of time.⁶⁸ Thus, shrimp from these foreign countries comprised a much larger percentage of the total shrimp sold in the United States and did so with prices much lower than domestic shrimpers could offer. Seeking to gain the beneficial political support of U.S. consumers groups, the petition also pointed out that despite the lower wholesale prices of such shrimp from foreign suppliers, the average cost of shrimp to the American consumers in domestic restaurants had risen by 28%.⁶⁹ Upon receipt of the petition, both the ITA and ITC commenced their preliminary investigations, the former into the allegations of dumping, while the latter sought to determine the existence of a material injury.

1. The International Trade Commission Preliminary Determination

As previously mentioned, at this stage in the proceedings, the ITC applied a legal standard of "reasonable indication" as to whether a domestic industry had been materially injured or not. In considering the information before them, the Commission sought to determine if the record "contained clean and convincing evidence that there is no material injury or threat of such injury; and no likelihood" that contrary evidence could arise through an investigation.⁷⁰

The Commission first sought to define the "domestic like product" and "domestic industry" in this particular case. According to the Tariff Act of 1930, a "domestic like product" is that product which is most similar to the product subject to the investigation.⁷¹ Petitioners argued that all domestically produced shrimp are a "like product." One respondent sought to establish differences in the U.S. domestic shrimp market between "primary processed" shrimp and "value added" shrimp, which includes breaded shrimp. Respondents from India, Thailand, and Vietnam also sought to define certain other types of shrimp as separate "domestic like products."⁷² In the end, the ITC dismissed the respondents' contentions and settled on a single "domestic like product" which included both fresh warm-water shrimp and processed warm-water shrimp. Further, the Commission used factors such as production-related activities and related parties to define the injured

⁶⁸ Press Release, The Shrimp Alliance, Shrimp Petitions Fact Sheet (December 31, 2003) available at <http://www.shrimppalliance.com/Press%20Releases/Filing%20Fact%20Sheet.pdf>.

⁶⁹ *Id.*

⁷⁰ See Preliminary Report, *supra* note 66.

⁷¹ *Id.* at 4.

⁷² *Id.* at 6.

"domestic industry" as all domestic harvesters and processors of warm-water shrimp or shrimp products.⁷³

The next step in the Commission's preliminary determination involved the evaluation of the volume of imports and the effect on prices. Here, the ITC had to decide whether to cumulate the volume and effects on prices of imports from all respondents. The Commission sought to establish whether the imports in question competed with each other and with other domestic like products in the United States. To reach this determination, it considered factors such as: the degree of fungibility between shrimp imports from different countries and between imports and domestic warm-water shrimp; the presence of sales in the same geographic market from different countries and domestic warm-water shrimp; the existence of common or similar channels for distribution for the shrimp from different countries and the domestic warm-water shrimp; and whether the shrimp imports are present in the domestic market simultaneously.⁷⁴ The Commission eventually determined that all four factors were satisfied and that cumulation was appropriate in this instance.

Having established the domestic product at issue, defined the injured industry, and cumulated the imports at issue, the Commission sought to determine if there was a "reasonable indication" that the domestic warm-water shrimp industry had been "materially injured." Through the additional consideration of the conditions of competition in this industry, the volume of foreign shrimp imported, the effect such imports had on domestic wholesale prices, and the impact the shrimp imports had on the overall domestic industry, the ITC eventually concluded that there was a "reasonable indication" that the domestic shrimp industry had been "materially injured" from the imports of the warm-water shrimp from these six countries. The Commission issued this determination within the forty-five day required time period in February of 2004.

2. The Preliminary Department of Commerce (ITA) Determination

The ITA of the Department of Commerce initiated its preliminary investigation of the imports of warm-water shrimp imports on January 21, 2004, approximately twenty days after the petition was filed. Thus, according to the ITA, there was legal sufficiency in the petitioners' claims and the case moved forward.

⁷³ *Id.* at 19.

⁷⁴ *Id.* at 20.

On July 29, 2004, the Department announced a preliminary finding of dumping by foreign companies in Brazil, Ecuador, India, and Thailand. It determined particular dumping margins for each importer and instructed the U.S. Customs Service to "begin to suspend liquidation of entries of subject merchandise" and to "collect a bond or cash deposit from the importer of record based on the margins found in the Department's preliminary determinations."⁷⁵ The ITA amended the report three weeks later to correct particular errors in the "dumping margin" calculations for certain importers.

3. Final Determination of the Department of Commerce

On December 20, 2004, the Department issued its final determination that importers from Brazil, Ecuador, India, and Thailand had dumped frozen and canned warm-water shrimp at less than fair value. The Department assigned appropriate dumping margins for each importer which were consistent with the findings in its preliminary report. On January 26, 2005, the Department amended the final determination for ministerial errors and to offer the governments of both India and Thailand the use of ITA fact-finding teams to determine the effects of the tragic tsunami of December 26, 2004, on the shrimp industry in both India and Thailand. This well-intentioned gesture, while primarily humanitarian in nature, offers a clear example of the Department's practical and political flexibility with regard to antidumping duties even after a final determination has been reached. Despite its legitimate use in this particular situation, such flexibility further illustrates the fluidity of U.S. antidumping law and provides additional ammunition for critics of this system when critiquing it as purely political and lacking any true legal justification.

4. Final Determination of the International Trade Commission

Pursuant to section 735(b) of the Tariff Act of 1930, the ITC determined that the U.S. shrimp industry was "materially injured" by imports from Brazil, China, Ecuador, India, Thailand, and Vietnam for certain "non-canned" warm-water shrimp sold in the United States

⁷⁵ Press Release, Dep't of Commerce, Fact Sheet on Preliminary Determination in Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, and Thailand, (July 29, 2004) available at http://www.ita.doc.gov/media/FactSheet/0704/shrimp_072904.html.

at less than "fair market value."⁷⁶ However, in its January 2005 report, the Commission did not find the presence of such "material injury" in the domestic shrimp industry from the imports of "canned" warm-water shrimp from China, Thailand, and Vietnam.⁷⁷ Further, the ITC determined that any injury from the importation of "canned" warm-water shrimp from Brazil, Ecuador, and India were negligible and thus did not amount to any "material injury."⁷⁸ In summary, the Commission seemed to vindicate shrimp importers from all six countries from inflicting any "material injury" on the domestic industry *only* with regard to "canned" warm-water shrimp. Thus, appropriate duties could still be placed on those importers "dumping" non-canned warm-water shrimp on the U.S. market.

Using the same factors in its preliminary analysis, the Commission defined two domestic like products in this situation, distinguishing between "canned" and "non-canned" warm-water shrimp.⁷⁹ The ITC then conducted two separate analyses, similar to its preliminary determination, of defining the domestic industry for both the "canned" and "non-canned" warm-water shrimp industry. This included a review of production related activities and related parties as well as the use of cumulation in determining the volume and price effects of the subject imports. Then, similar to the preliminary investigation, the Commission considered whether "material injury" had occurred in either the "canned" or "non-canned" domestic shrimp industry. Using the same factors from its preliminary determination including the conditions of competition, the volume of imports, the price effects of imports and the impact of the imports on the industry, the ITC found the domestic "non-canned" warm-water shrimp industry to have been materially injured.⁸⁰ However, through analysis of the same factors with respect to the domestic "canned" warm-water shrimp industry, no such material injury could be established from such imports from China, Thailand, and Vietnam.⁸¹

In addition, any finding of injury from imports of "canned" shrimp from Brazil, Ecuador, and India were deemed negligible.⁸² For

⁷⁶ Certain Frozen or Canned Warmwater Shrimp and Prawns From Brazil, China, Ecuador, India, Thailand, and Vietnam, 1 USITC Pub. 3748, Inv. Nos. 731-TA-1063-1068, Final, (January 2005).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 11.

⁸⁰ *Id.* at 36.

⁸¹ *Id.* at 45.

⁸² *Id.*

under 19 U.S.C. § 1677, any subject imports from one country, which compete with domestic like products, that account for less than 3% individually of all of that product sold domestically over the previous year, are deemed negligible and not capable of materially injuring.⁸³ Further, should the imports of these individual countries when cumulated together account for less than 7% of all imports of the subject product, the Commission will make a determination of negligibility and terminate its investigation with respect to those imports.⁸⁴

Like the action taken by the DOC, the ITC recognized a possible change in situations in both India and Thailand following the tsunami. As such, the Commission has sought to collect information to determine whether this disaster merits a changed circumstances review under 19 U.S.C. §1675(b). Under this section of the Code, the Commission can review whether revocation of the final determination, based on the change in circumstances of the subject importing country, would lead to the continuation or recurrence of "material injury."⁸⁵ Thus, should the Commission find that the tsunami devastated the shrimping industries in both India and Thailand to the point that they no longer will be able to inflict "material injury" on the "non-canned" warm-water shrimping industry within the United States, the ITC could then terminate its determination. No decision has been reach at this time.

EXAMINING THE PROBLEM AREAS OF THE U.S. ANTIDUMPING REGULATORY REGIME WITH RESPECT TO THE SHRIMP ANTIDUMPING CASE

One of the largest controversies in relation to the shrimp dumping cases pertains to the U.S. enactment of the "Byrd Amendment." As stated previously, this provision requires the distribution of any antidumping duties collected by U.S. Customs as a result of an antidumping decision to the determined "injured" petitioners. Thus, not only does the domestic industry benefit from the extra burden placed on foreign competition, it also reaps a direct financial reward as a result of duties placed on foreign importers.

In the shrimp dumping case, it is estimated that the petitioners will benefit to the extent of \$829,000 each on account of the Byrd

⁸³ *Id.* at 37.

⁸⁴ *Id.*

⁸⁵ *Id.* at 3.

Amendment.⁸⁶ Given such a sizeable monetary award for the petitioners, it should not be a surprise that the number of antidumping cases have increased since the passage of this measure.⁸⁷ This type of corporate welfare, in an industry where 90% of the product sold domestically comes from foreign exporters, can only negatively affect the prices paid by U.S. consumers.⁸⁸ Clearly, in this trade dispute and others, the well-intentioned Byrd Amendment leaves both the U.S. business and consumer sectors at a long-term disadvantage in the global market while only providing short-term relief to a specific industry.

Further, in 2003 a WTO appellate body ruled that the Byrd Amendment violated the 1994 WTO Agreement.⁸⁹ This action left U.S. producers and exporters vulnerable to retaliation from any other WTO countries that disagree with the application of this measure. In fact, on May 1, 2005, the EU responded by imposing a "15% duty on various types of paper, clothing, fabrics, footwear, and machinery — amounting to tariffs worth approximately \$28 million."⁹⁰ In addition, Canada has also recently imposed similar duties on "cigarettes, oysters and live swine worth \$14 million."⁹¹ Both governments will review the duties annually and will measure their impact against the "fluctuating amount of Byrd Amendment disbursements."⁹²

These responses from two of the U.S. largest trading partners clearly illustrate the negative effect that the continued subsidization of American industries will have on American producers and consumers alike. In the shrimp case alone, these tariffs will, at the very least, result in higher prices for American consumers who purchase frozen shrimp, as well as domestic restaurants and grocery stores that sell frozen shrimp. Further, the threat of additional retaliatory tariffs from

⁸⁶ *Bubba Gump Protectionism*, WALL ST. J., July 19, 2004 available at <http://webreprints.djreprints.com/1057200868910.html>.

⁸⁷ *The Shrimp Dumping Case and the Byrd Amendment*, THE CONSUMING INDUSTRIES TRADE ACTION COALITION SHRIMP TASK FORCE [hereinafter CITAC SHRIMP TASK FORCE], at http://www.citac.info/shrimp/about/byrd_amendment.htm (last visited Feb. 6, 2006).

⁸⁸ *Bubba Gump Protectionism*, *supra* note 86.

⁸⁹ See CITAC SHRIMP TASK FORCE, *supra* note 87.

⁹⁰ Press Release, CITAC, CITAC Byrd Amendment Working Group Launched to Push for the Repeal of "Trade Distorting Corporate Welfare Program" (May 5, 2005) available at http://www.citac.info/press/release/2005/05_05.php.

⁹¹ *Id.*

⁹² *Id.*

burgeoning economies in India, China, and Brazil could have devastating effects on all types of American producers and exporters.

By abdicating many of the free trade principles espoused by the United States as a major player in the WTO, the short-sighted Byrd Amendment actually fails to achieve its greater goal of truly protecting Americans. For only a select few are protected while the great majority of Americans are left to deal with the consequences. Congress would be wise to repeal this misguided measure or at the very least repeal the controversial remedy in a manner suiting to U.S. trade partners. While any action short of repeal would likely not alleviate these concerns, Congress could achieve some progress by subsidizing to a small extent and/or for only a shortened period.

Another major problem area within the shrimp dumping case relates to the method of "zeroing," which is used by the DOC in calculating the "dumping margins." In making a "dumping margin" calculation, as previously stated, the DOC usually cumulates the next import price of the product and compares it to the "normal value" of that product in the domestic country. This amount is then used as evidence to determine if dumping did indeed occur. When the "normal" value is greater than the price at which the subject product is imported, the difference is the "dumping margin" to be used in determining whether dumping occurred and, if so, the amount of duty to be applied to compensate the difference. However, in the United States, when the price of the imported product is actually greater than the "normal value" of the product domestically, the dumping amount is calculated as zero rather than any calculated negative value.⁹³ Thus, by eliminating the use of negative margins in calculating the average "dumping margin," there is a much greater chance of reaching the conclusion that dumping has indeed occurred.⁹⁴ This system of calculation creates doubts as to the accuracy of any dumping and/or margin determination and can often lead to an inflated average dumping margin.⁹⁵

In 2001, the WTO appellate body ruled that the use of "zeroing" violated its rules, which require "a 'fair comparison' between export prices and normal values."⁹⁶ Despite this ruling, which stemmed from

⁹³ BARFIELD, *supra* note 3, at 28.

⁹⁴ *Id.*

⁹⁵ Sebastian Mallaby, *Jumbo Shrimp Follies*, THE WASH. POST, November 15, 2004, at A25 available at <http://www.washingtonpost.com/ac2/wp-dyn/A50173-2004Nov14>.

⁹⁶ Barfield, *supra* note 3, at 29.

a case involving the European Union, the DOC continued to the employ "zeroing" in antidumping determinations.⁹⁷ Then in April of 2004, the WTO ruled specifically against the United States' use of "zeroing" as it pertained to a case brought by Canada with regard to lumber.⁹⁸ After several months of deliberation, the DOC just recently reached an agreement with Canada to discontinue the use of "zeroing" in this particular case.⁹⁹

The willingness of the U.S. to make such an accommodation clearly signifies its recognition of the unfairness of the use of this procedure. By greatly increasing the likelihood of finding the existence of dumping, the use of "zeroing" only encourages more domestic industries to make dumping allegations and pursue legal recourse. This approach only further adds to the perception that the United States is committed to fair competition in free trade only when it obviously benefits domestic industries and operates in a protectionist mode in all other instances. In the shrimp dumping case for example, given that a vast majority of the shrimp market in the United States comes from imports, the United States seems willing to use "zeroing" to find for larger dumping margins for the minute domestic shrimp industry. Such a mentality clearly contradicts the many international trade agreements to which the United States has agreed to and supported. Only through the elimination of the "zeroing" process and the application of an equitable system accounting for accurate determinations can the United States absolve itself of such a reputation.

Other methods in the dumping determination process also receive strong opposition. The "cumulation" of goods from multiple countries to determine the presence of a "material injury" was discussed on page 87. While this method was not used in the shrimp dumping case, the process used to calculate the "normal value" of the shrimp for certain countries in the shrimp case is worth noting. As previously discussed, dumping occurs when an imported good is sold at less than the "normal value" of the good sold in its own domestic market. The problem with this approach is that "common business practice" results in businesses charging different prices in different markets based on many variables

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Press Release, CITAC Shrimp Task Force, U.S. Will End "Zeroing" In Canada Lumber Dumping Case; Commerce Department Should End Same WTO-Illegal Practice in Shrimp Trade Case (Dec. 14, 2004) *available at* http://www.citac.info/shrimp/press_releases/2004/12_14.htm.

such as the cost of transportation, the cost of living, the cost of storage, etc.¹⁰⁰

Another problem in the calculation of "normal value" results from the fact that foreign importers often do not sell the same product on their domestic market.¹⁰¹ The shrimp dumping case illustrates this point well. For example, shrimpers in Thailand and Vietnam sell very little frozen shrimp in their own countries.¹⁰² Thus, there is no true "home market" of which to compare in determining "normal value." The ITA responded to this predicament by estimating the price of the product in the "home market" through a comparison of surrounding nations.¹⁰³ In the present case, the ITA examined the cost of production in Bangladesh to come up with a "normal price" in neighboring Vietnam.¹⁰⁴ One need not have a degree in international trade law to recognize the great potential for inaccuracy in this process. While Vietnam and Bangladesh are geographically related, the economies of these Southeast Asian countries are decidedly different and cost of production in one country could hardly be thought to clearly reflect the price of the good in another country. This "apples and oranges" method of comparison serves only to raise further questions about the legitimacy of the U.S. process.

One final problem area found in the U.S. shrimp antidumping case involves the supposed "special treatment" to be afforded "developing" and "least-developed" countries under Article 15 of the 1994 WTO Agreement. The "special regard" to be given such countries, however, is ambiguous in definition and often ignored by those in the developed world. Of those countries involved with U.S. shrimp antidumping case, none have been designated "least-developed" by the United Nations. However, all six nations (China, India, Vietnam, Thailand, Brazil, and Ecuador) in the dispute have designated themselves "developing" countries.¹⁰⁵ Yet neither the ITC nor the DOC referenced this particular status when making their determinations regarding dumping and material injury. This disregard

¹⁰⁰ See Matthew, *supra* note 64.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See Mallaby, *supra* note 95.

¹⁰⁵ World Bank, Data and Statistic: Country Groups available at <http://www.worldbank.org/> (select the hyperlink tab "Data and Research"; under the data column, select "classification of economies" from the drop down menu under "key statistics"; select the hyperlink "View all groups" under the "Definitions of Groups" heading).

serves only to weaken the WTO's rule-making authority. While the U.S. is certainly not the only country to ignore this provision, its role as the global economic and political leader endows it with a greater duty to encourage growth and development.

While Brazil, China, and India all have economies that are growing at impressive rates respectively, the same cannot be said for Ecuador, Thailand and Vietnam. In fact, despite being the largest foreign supplier of shrimp in the United States, Thailand maintains a poverty rate of well-over 13%.¹⁰⁶ Unfortunately, these grim statistics have only worsened since the tsunami disaster. In India alone, the tsunami destroyed over 88,000 fishing boats and 200,000 nets vital to the Indian shrimping industry.¹⁰⁷ The poverty rate in Vietnam is even higher, at 37%, and here the shrimp industry is thought to employ nine million Vietnamese.¹⁰⁸

The shrimp industry plays a large role in the economies of all these nations and should have been taken into account when making any determination that could result in such detrimental long-term economic effects. The U.S. system should provide for some type of "public policy" review before implementing any of its decisions. It should allow for a detailed cost/benefit analysis of the effects of such tariffs on "developing countries" and other nations that have endured circumstances akin to the tsunami disaster. The U.S. seems to be willing to go in such a direction as the ITC has reopened the case against India and Thailand due to the effects of the tsunami.¹⁰⁹ This same sentiment should be present in all dumping considerations, not only following a disaster of epic proportions.

RECOMMENDED CHANGES TO THE U.S. ANTIDUMPING REGULATORY REGIME

In light of the issues discussed in the shrimp dumping case, as well as the dumping determination process in general, there are a number of actions the U.S. could take to improve the process for the good of all parties without jeopardizing the protection of domestic industries from true predatory dumping. As previously indicated, the

¹⁰⁶ Sebastian Mallaby, *A Fishy Approach to Fair Trade*, WASH. POST, March 29, 2004, at A23, available at http://www.citac.info/shrimp/news/wash_post_041404.htm.

¹⁰⁷ *The Shrimp Game*, WASH. POST, April 25, 2005, at A18, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/04/24>.

¹⁰⁸ See Mallaby, *supra* note 106.

¹⁰⁹ See *The Shrimp Game*, *supra* note 107.

first of such changes would be the repeal of the Byrd Amendment. This anachronistic instrument serves only to harm U.S. interests more than help them. While certain lobbying groups in the country will argue otherwise, this measure has run its course. It is a measure fitting of the mid-twentieth century when domestic interests feared the expansion of global trade. The development of technology and advent of globalism have opened up the world to unprecedented dependent relationships. This measure only serves to distract from this momentum while at the same time harming those it is supposed to protect.

Within the dumping determination process in particular, there needs to be a practice of allowing respondents in antidumping investigations to rebut any evidence against them.¹¹⁰ The U.S. legal system provides such rights. Without such a mechanism, domestic industries will continue to have a low burden in establishing dumping claims. One could also address this low burden by requiring the domestic producers to present solid evidence of dumping when filing a petition.¹¹¹ Under the present scheme, domestic industries need not require much proof at all when filing a petition, which in turn leaves respondents at their mercy. Often, these domestic companies may simply be moving forward with a claim as a way of scaring a respondent out of the market. Surely, the antidumping system should provide a protection against such misguided uses.

Another possible remedy to the American regime would be to eliminate the use of "zeroing" in the calculation of the "dumping margin."¹¹² Given that the WTO prohibits its use and the fact that the U.S. has resisted using it in a particular case with Canada, the time has long since passed to eradicate the method from the regulatory process.

Along these same lines, the U.S. should reign in the use of "cumulation" in its dumping determination. Without completely eliminating it, the U.S. should set a higher *de minimis* threshold when accumulating imports.¹¹³ Under this theory, any dumping margin below a certain percent is treated as zero.¹¹⁴ While the WTO agreement provides for a threshold of 2%, the U.S. operates under a system that sets the limit at 0.5%. At the very least, the United States

¹¹⁰ Brink Lindsey & Dan Ikenson, *Reforming the Antidumping Agreement: A Road Map for WTO Negotiations*, CATO INSTITUTE CENTER FOR TRADE POLICY STUDIES, Dec. 11, 2002, at 12.

¹¹¹ *Id.* at 13.

¹¹² *Id.* at 19.

¹¹³ *Id.* at 33.

¹¹⁴ *Id.*

should acclimate the WTO level. This type of action will help reduce the number of unnecessary dumping cases.¹¹⁵

As mentioned previously, another recommended change involves the implementation of a public-policy test.¹¹⁶ Such a provision would serve to comply with the "developing countries" provision of the WTO agreement and would provide needed flexibility in a volatile political and business world. A public policy provision would force the ITA and ITC to examine all sides of an issue and provide for a more equitable remedy.

Finally, the U.S. should employ a termination policy that differs from its current review process.¹¹⁷ As noted earlier, the U.S. system allows for review of an antidumping claim after five years. However, the current process does not always result in a review after this time period. A respondent must initiate such a review and the petitioners always have a right to contest. Once initiated, the entire review process often takes longer than a year. Taken together, this whole process can often result in a six or seven year term, even if the tariff is not continued. Thus, initial dumping violators are additionally punished even if they have corrected their activities with the five-year period. A more equitable system would be to have the duty completely sunset after five years.¹¹⁸ A petitioner will still have to right to bring an additional claim against any continued violators and the DOC could construct a system of expedited review for alleged repeat offenders.

CONCLUSION

Over the past century, U.S. antidumping law has developed from a judicially enforced system grounded in antitrust law to an administrative-based regulatory operation. Whether the result of expanding global trade stemming from technological innovation or the evolution of domestic legal policy with regard to international business, this transition has been anything but smooth. As U.S. antidumping regulation grew more complicated over time, international frustration with its policies increased. What the United States is left with today is a regulatory regime that remains inconsistent with many of the requirements it had agreed to when signing onto the WTO Agreement in 1994 following the Uruguay Round of discussions.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 34.

¹¹⁷ *Id.* at 35.

¹¹⁸ *Id.*

As the U.S. shrimp antidumping case has demonstrated, there are numerous areas of controversy involving the resolution of dumping disputes in the United States. The "Byrd Amendment" has generated a large amount of opposition from many U.S. trading partners since its passage in 2001. Most of the U.S. business community as well as consumers would benefit greatly from the repeal of this subsidy-like measure. Surely, Congress can come up with more proactive methods to support and stabilize certain struggling U.S. industries.

The use of "cumulation" and "zeroing" also has incurred the resistance of many free trade proponents. Both techniques fall short in promoting fairness in the open market. "Cumulation" runs contrary to the idea of sovereignty. Unless one can establish that importers from multiple countries are working in concert to bring domestic prices down, combining the imports from various countries ignores the territorial integrity of the involved nations. The use of "zeroing" fails to provide equity in dumping determinations and often leads to imperfect results. Such inexactitude removes the fairness that many U.S. elected leaders so often reference when discussing the realities of free trade. The United States must take the necessary steps to remove such protectionist mechanisms from its antidumping procedures.

The inclusion of special allowances for "developing countries" in the WTO Agreement represents the boundless possibilities of free trade to not only support the economies of the developed world but also to improve economic situations in these respective countries. However, the lack of guidance in Article 15 of the Agreement has led to the ineffectiveness of this aspirational goal. While the United States, European Union, and other "developed nations" should seek to operate within this ideal, the WTO would be wise to craft a more explicit provision. Hopefully, some progress will be made with regard to such provisions in the current Doha Round of Negotiations.

Finally, there are a number of additional steps that the United States can take to improve its determination process. These include: allowing respondents in antidumping investigations to rebut any evidence against them; requiring the domestic producers to present solid evidence of dumping when filing a petition; implementing a public-interest test; setting a higher *de minimis* threshold when accumulating imports; and employing a termination policy that differs from its current review process.

While these recommended actions would probably not resolve all of the issues pertaining to the United States' current antidumping policy, they would allow it to operate more fluidly in an ever-changing global environment. Given that this global market will undoubtedly

continue to expand with future advances in technology, U.S. consumers and producers will best succeed by operating within a system that affords them the flexibility necessary to compete. Although these recommendations may not fully achieve this result, they represent a break from a status quo that has only served to inhibit the best interests of many within both the American business and consumer communities.

