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Issues of WTA in shrimp aquaculture for exports and options for way forward

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The global trade agreements under the ambit of World Trade Organization(WTO) (hereafter called as WTA), cover goods, services and intellectual property. They spell out the principles of liberalization, and the permitted exceptions. They include individual countries' commitments to lower customs tariffs and other trade barriers, and to open and keep open services markets. They also set procedures for settling disputes. They prescribe special treatment for developing countries. They require governments to make their trade policies transparent by notifying the WTO about laws in force and measures adopted, and through regular reports by the secretariat on countries' trade policies. As fisheries is not having the protection as agriculture under WTO regime, un understanding of WTA is important for fisheries professionals. Though WTA is put in place to ensure free trade among nations, many trade barriers are government-induced restrictions on international trade. The barriers can take many forms, including the following: tariffs, non-tariff barriers to trade import licenses, export licenses, import quotas, subsidies, voluntary export restraints, local content requirements, embargo, currency devaluation. Other trade barriers include differences in culture, customs, traditions, laws, language and currency. Most trade barriers work on the same principle: the imposition of some sort of cost on trade that raises the price of the traded products. If two or more nations repeatedly use trade barriers against each other, then a trade war results. Economists generally agree that trade barriers are detrimental and decrease overall economic efficiency, this can be explained by the theory of comparative advantage. In theory, free trade involves the removal of all such barriers, except perhaps those considered necessary for health or national security. In practice, however, even those countries promoting free trade heavily subsidize certain industries, such as agriculture and steel. Trade barriers are often criticized for the effect they have on the developing world. Because rich-country players call most of the shots and set trade policies, goods such as crops that developing countries are best at producing still face high barriers. Trade barriers such as taxes on food imports or subsidies for farmers in developed economies lead to overproduction and dumping on world markets, thus lowering prices and hurting poor-country farmers. Tariffs also tend to be anti-poor, with low rates for raw commodities and high rates for labour-intensive processed goods. The Commitment to Development Index measures the effect that rich country trade policies actually have on the developing world. Another negative aspect of trade barriers is that it would cause a limited choice of products and would therefore force customers to pay higher prices and accept inferior quality. Trade barriers affecting fisheries and shrimp exports from India are discussed hereunder.

1. Case of Tariffs

Worldwide, the average tariffs for fish products continue to be more than 40 per cent, well above the average of 6 per cent for manufactured goods. Tariff reduction has been below average in the case of fish, as well as in products which are of major export interest of developing countries. In some cases, fish products are among items whose rates show tariff peaks, i.e. whose rates are the highest among all products.

2. Cases of Non-tariff Measures

2.1. The GATT Tuna–Dolphin Cases

The principal issues raised by the tuna–dolphin cases whether the US measures to protect dolphins could be applied to tuna, whether domestic or imported. The Panel decided that dolphin and tuna could not be viewed as like products. Neither Panel however, was required to adjudicate as to whether dolphin-safe and non-safe tuna were like products and therefore whether national restrictions on non-safe tuna were GATT-consistent. The difficulty with the definition of like products is where negative externalities arise because of joint production. In the tuna case, this is because certain catch technologies lead to protected dolphins as well as yellow fin tuna being caught in the eastern Pacific. The issue of negative externalities arising from joint production however, was never tested by either tuna Dispute Panel because of the indirect nature of the US protective measures. The second tuna Panel found that the US dolphin conservation policy was GATT-consistent and could be applied extraterritorially. As in the first Panel Decision however, the actual measures were deemed neither 'necessary' nor GATT-consistent.

2. Shrimp–turtle case

The WTO shrimp–turtle case covers a very similar range of trade and environmental – and therefore PPM – issues as the two tuna–dolphin cases outlined above. The most important contribution of the shrimp–turtle case however, is that it was launched after the introduction of the WTO DSU such that the final Panel Decision has become part of WTO case law. The 1973 US Endangered Species Act requires US shrimp trawlers and other shrimp vessels in US waters to use turtle-excluder devices (TEDs) 'when fishing where there is a likelihood of encountering sea turtles' (United States, 1973). TEDs are now regarded as the international standard for protecting turtles because of their low cost, effectiveness and ease of use (CIEL, 1999). The Act was amended in November 1989 to permit the placing of embargoes on shrimp imports from countries that did not have a comparable regulatory programme to that of the United States to protect sea turtles. All US shrimp imports require certification that they were harvested using TEDs and that their incidental sea turtle mortality rate is similar to the United States unless their fishing environment does not pose a threat to sea turtles. In 1995, the Marine Turtle Specialist Group of the IUCN (International Union for Conservation of Nature & Natural Resources) prioritised the threat of shrimp fishing methods to endangered sea turtle species. The United States applied the embargo under the Endangered Species Act on all non-turtle-safe shrimp imports in May 1996. In October 1996, India, Malaysia, Pakistan and Thailand lodged a WTO complaint against the US embargo on the grounds that such import bans cannot be applied extra-territorially (WTO, 1996a). The US defence, unlike in the tuna cases, rested upon GATT Article XX exceptions alone rather than incorporating Article III on national regulations. The WTO shrimp Panel Report, published 6 April 1998, found that the measures were discriminatory in that the United States took no account of methods other than TEDs used to protect sea turtles. The argument was rejected by the Panel on the

grounds that sea turtles are not an exhaustible resource and that such 'unilateral measures could jeopardize the multilateral trading system' (WTO, 1998).

2.3. Anti-Dumping on Shrimp Exports

Anti-dumping has been one of the most talked about area of WTO in the recent times. There is extraordinary concern about areas of WTO in the recent times. This is mainly on two counts. First, India is one of the highest users of anti-dumping, second only to United States in the year 2001 according to the WTO sources. Second, India is also one of the main victims of anti-dumping action by foreign authorities. There are several reasons as to why dumping takes place across nations, but it needs to be underlined that the act of dumping per se is not the cause of concern. Only when dumping leads to material injury or threatens to cause material injury that the WTO Agreement on Anti-dumping allows imposition of anti-dumping duties. In other words, it must be clearly understood that anti-dumping duty is not a protection measure but is to be used only to remedy a particular trade distortion. Anti-dumping Agreement of the WTO is the basis on which various national authorities have formulated their own national legislations. The concepts and definitions, rights and obligations, and to a great extent the procedures followed by different national authorities remain identical flowing out of the same agreement. Therefore, this article attempts to discuss various aspects of anti-dumping with a view to give an insight into the basic concepts of anti-dumping mechanism. Before imposition of any anti-dumping measures, three main conditions are to be necessarily established by the anti-dumping authorities. These are:

1. Existence of Dumping beyond *de minimis* limits
2. Existence of Injury
3. Causal link between dumping and injury

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

As things stand, almost 90 per cent of the total world imports are now entering countries in which anti-dumping laws are in place. In India also, there has been a spectacular growth of anti-dumping investigations in recent years. The number of such investigations launched in 1999 was more than double that of those started in 1995. The national law on antidumping in India has been in place since 1985. The first Anti-dumping

investigation in India was initiated in 1992. During the period from 1992 – 93 to 2003 – 2004, the DGAD received large number of applications for initiating the Anti-dumping investigations. After the examination of these applications, the anti-dumping investigations were initiated in 167 cases.

2.3.1. Anti-dumping Duty on Shrimp

On December 31, 2003, the United States Department of Commerce (DOC) received antidumping duty petitions on imports of certain frozen and canned warm water shrimps from Brazil, Eucador, India, the People's Republic of China, Thailand, and Vietnam filed in proper form by the Ad Hoc Shrimp Trade Action Committee ("Petitioner") on behalf of the domestic industry and workers producing frozen and canned warm water shrimp ("Petition") On January 8, 2004, the Department sent the Petitioner a deficiency questionnaire requesting clarifications of certain items in the petition. On January 12, 2004, the Petitioner submitted their deficiency questionnaire response. On February 17, 2004, the United States International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that imports of certain frozen and canned warm water shrimp from India are materially injuring the United States Industry, On 20th February 2004, the Department selected Hindustan Lever Limited ('HLL'), Devi Sea Foods Limited ('Devi') and Nekkanti Sea Foods Limited ('Nekkanti'), the largest exporters of shrimp to the US during the Period of Investigation (POI) as mandatory respondents. These companies submitted extensive information to DOC in their responses to DOC's questionnaires. During the period February to June 2004, various interested parties, including the petitioners submitted comments on the scope of this and concurrent investigations of certain frozen and canned warm water shrimp concerning whether certain other seafood products to be covered under the scope of the investigation. The mandatory respondents submitted their reply to the questionnaire by April 2004. A supplemental questionnaire was issued and the replies were received by July 2004. On May 3rd 2004, the petitioners alleged that Devi, HLL made third country sales below the cost of production (COP), and therefore requested that department initiate a sale-below-cost investigation of these respondents. On May 28, 2004, the department initiated a sales below-cost investigation for Devi and HLL. May 18, 2004, the department determined that the case was extraordinarily complicated and postponed the preliminary determination until no later than July 28, 2004 . The International Trade Commission ("the Commission"), which is responsible for determining whether "the domestic industry" has been injured, must also determine what constitutes a domestic like product in order to define the industry. The Act defines the domestic like product as a product which is like or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title." The scope of the investigation included certain warm water shrimp and prawns whether frozen or canned or wild caught or farm raised, head on or head less, shell on or peeled, cooked or raw or otherwise processed in frozen and canned form. The petitioner in the US ascertained that the industry's injured condition is demonstrated by (1) reduced sales; (2) reduced prices; (3) declining employment; (4) declining market share; and (5) Significant financial losses. It is important to note that these duty margins do not imply that the Indian exporters are selling their products in the US market below cost. Rather these margins are the result of certain complex calculations by which primarily a range of products sold in the US and a pre-selected third country are matched by product specifications and adjusted selling prices.

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

efficiently at lower costs of production. Therefore, these countries are able to offer Shrimp at more competitive prices Consequently, shrimp that was once a luxury item is now available to the average American consumer at competitive prices. On July 29, DOC made affirmative preliminary determination and imposed provisional antidumping duty ('AD duty') as follows :

Table 21.1Details on the antidumping duties

S.No	Exporter	Prelim Rate
1	Devi Sea Foods Limited	3.56 per cent
2	Nekkanti Seafoods Limited	9.16 per cent
3	Hindustan Lever Limited	27.49 per cent
4	All others	14.20 per cent

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

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

The ADO will be in force for five years unless it is revoked in a changed Circumstances Review (CCR) initiated by DOC or ITC. The CCR should not normally be initiated for atleast two years after ADO is issued unless sufficient reasons exist for its initiation. In the fifth year, a 'sunset review' will be initiated by DOC. Then DOC and ITC will conduct the sunset review mostly like the way investigation is conducted, to determine whether duties can be withdrawn or should be continued for another five years.

2.3.3. Changed Circumstances Review (CCR)

In an unprecedented move, ITC decided to invite comments on whether they should initiate, on their own, a 'changed circumstances review' for frozen shrimp imports from Thailand and India on account of destruction caused by tsunami after December 2004. There is no set procedure outlined in the ITC manual for this measure.

2.4. Case of 'Muddy smell' and shrimp export to Japan

As alternative markets, Japan is the most likely buyer. But quality concerns such as the `muddy' smell in shrimps from some centres in Andhra Pradesh have dampened the scope. Japan was till recently the largest market for Indian shrimps, though it continues to pick up stocks they are nowhere near the quantities it used to buy in the late 1990s. Indian shrimp exports to Japan have dropped to about 28,000 tonnes in 2003, just half that of its exports in the mid-1990s. Though exporters hope to step up sales to Japan, the other producers particularly Thailand and Vietnam will also be targeting this market. Competition will be high and prices low.

2.5. Case of Zero-tolerance of Residual Antibiotics

In recent years, in order to export aquaculture products into EU, the United States and other markets, In 2001, EU decided to examine 100 per cent of shrimp products imported from China, Thailand, Vietnam, Indonesia and other countries because they discovered residual antibiotics chloramphenicol (CAP) and nitrofurans (NF) in some products. EU authorities have initiated a food-safety policy called "zero tolerance" towards chloramphenicol, nitrofuran and other antibiotics. However, there is no scientific evidence to show that a very low content of residue - as low as one billionth - of antibiotics can be harmful to the health of the consumers. EU has stipulated that the residue in food should be 0.3ppb or even 0.7ppb. It is difficult for exporters, including those from EU, to achieve such accurate results in the products they export. These strict food-safety regulations have enabled EU member countries to destroy all imported lots which contain residual antibiotics of chloramphenicol and nitrofurans. Even worse, EU authorities have destroyed several lots of imported shrimps from Vietnam and other Asian countries while these products were still in storehouses. Many of these were destroyed without advance notice, and not in the presence of the owners. These regulations have caused serious difficulties for exporters of fisheries from Asian countries. In 2001, EU banned the import of shrimp from China and, on account of residual chloramphenicol in shrimp from Indonesia, shrimp export from this country into EU has decreased by 64 per cent. The existence of nitrofurans in shrimp from Thailand caused severe restrictions to be placed on shrimp export from this country into EU. The issue of residual antibiotics in shrimp continues to be a cause for concern for exporting countries. Meanwhile, many products manufactured in EU and sold in many Asian countries have been discovered to contain residual antibiotic chloramphenicol and other toxins. China has demolished 2 containers of 'sausages' infected with antibiotics from the Netherlands. It was also discovered that two types of powdered milk from the Netherlands - Protifar and Frisolac 2 - contain residual chloramphenicol of about 0.545 ppb and 0.303 ppb respectively. These products are being sold in Asian countries. Current regulations on food safety in some member countries of the EU still permit the use of antibiotics in livestock husbandry and the export of beef containing residual chloramphenicol of more than 10 ppb. EU policies regarding the export of domestic products to developing countries on the one hand and imports from developing countries to EU on the other can be thus seen as following two different sets of standards. The EU restrictions on import mentioned above can be considered as a non-tariff barrier that obstructs the export of seafoods and agricultural products from Asian countries. EU's "zero-tolerance" policy and its implementation by EU authorities have clearly resulted in damage to the trade between EU and Asian countries as well as to the economic development of Asian countries. On 20 September 2002, EU's Veterinary committee decided to abrogate the compulsory examination policy of 100 per cent of shrimps imported from India, Vietnam and some other countries on account of residual antibiotics.

3. Options for Way forward

3.1. Eco-labelling

Labelling - especially eco-labelling - is a new concept for the fisheries sector. However, eco-labels will become increasingly important in the world markets. As a result of successful campaigning by environmental groups, the consumers of fish and fish products in several developed countries have begun showing an increasing preference for fish and fish products that are produced under better conservation and management regimes. In the near future, international markets are likely to demand eco-labelled or, in other words, "fairly traded" fish products. Over the last decade, some countries have developed systems of environmental labelling for their products. Currently a concern for producers, importers

and exporters from several countries in the world, eco-labelling has received attention from the WTO during its recent trade and environment discussions on account of its potential impact on international trade as a "green" non-tariff barrier. The experience of European Eco-Labelling Network demonstrates how national and regional standards can create links between trade and environment. Eco-labelled products need to meet the minimum requirements specified by EU's Eco-Labelling Network. If this Network is strictly implemented, it may hinder exports from almost all manufacturers in developing countries. These manufacturers will have to face serious difficulties in order to meet the EU standards, since they employ technologies that are suitable for the level of scientific and technological development in their country. The examination of products from non-European companies to determine whether they meet the eco-labelling standards in Europe will place an additional burden on these companies. In the light of the growing interest in the linkages between environmental standards and international trade, one may view eco-labelling either as an opportunity or as a bottleneck for exports of fish and fish products. Environmental standards could complement the standards for food safety, which are strictly adhered to in the United States, European Union and Japan. Environment standards and those for food safety could address the two major external concerns regarding fish production and consumption. One can conceive of a situation where a fish product imported and sold in EU markets may carry two logos - one for food safety, and the other for its origin in a sustainable fishery. A fisheries sector with improved management and better organization may be able to take advantage of important new marketing opportunities in international trade.

3.2. Food Safety and HACCP in Fisheries Trade

The biggest challenge faced by fisheries in relation to market access, especially to markets in the United States and EU, concerns food safety, rather than environment-related issues. Canada, EU and the United States introduced regulations based on the HACCP system in the 1990s. In 1997, the HACCP system was incorporated into the WHO/FAO *Codex Alimentarius* and it became the basic instrument in international trade disputes under the WTO Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures. Fish-processing and exporting firms see HACCP primarily as a non-tariff barrier to trade with developed countries. They comply with it only to the extent that they can export their fish products to the developed-country markets. In the near future,

3.3. Meeting Certification Requirements

Like eco-labelling, certification is a relatively new concept for fisheries. At present, near-shore fisheries consists mostly of a very large number of small scale fishing boats whose operations are not managed through an effective legal or regulatory mechanism. Attempts to comply with the certification requirements of the seafood-importing markets and introducing the concepts related to sustainable fisheries that figure in certification requirements are being made. The Marine Stewardship Council and ISO 14000 are particularly relevant in this context.

3.3.1. Meeting Marine Stewardship Council standards

The Marine Stewardship Council (MSC), launched in early 1996, was set up mainly to design and implement market-driven incentives for sustainable fisheries, which would translate into responsible, environmentally appropriate, socially beneficial and economically viable fisheries practices that maintain the biodiversity, productivity and ecological processes of the marine environment. The MSC accreditation scheme was established in mid-1998 and the first seafood products certified by the MSC were launched

in early March 2000. The launcher of MSC, Unilever, has already made it known publicly that only fish carrying the MSC logo will be sold through its outlets by the year 2005. The fisheries trade companies should be interested in MSC certification because the MSC logo will help them in enhancing their market access and in improving their public image. There are many reasons for supporting the MSC initiative, including (a) its potential for reducing tariffs on fish and fish products in the major markets, (b) its potential to increase the market share of Indian exports; and (c) the opportunity it provides for improving the general public's perception of fisheries. However, MSC may well become a non-tariff trade barrier to fish exports from developing countries.

3.3.2. Meeting ISO 14000 standards

Demands on environmental standards can pertain to the products or to production processes. Customers and importers from developed countries often demand that developing-country suppliers should abide by specific environmental standards or have an Environmental Management System (EMS) in place. ISO 14000 is an international standard that can respond effectively to these demands. The ISO 14000 series includes international standards developed on the basis of negotiations and therefore helps to harmonize the views of different countries regarding eco-labelling, environmental management and life-cycle assessment. There is no clear evidence that importing countries will require the exporters to obtain ISO 14000 certification. However, this has been suggested by discussions in the current international environmental movement and the policies of several developed countries. The tendency to use EMSs or eco-labelling standards as non-tariff barriers may well emerge in the future as a problem in the major markets or fish products. Fish exporters may find it difficult to overcome such barriers in the coming years. It is difficult to estimate the potential impacts of ISO 14000 on the export of fish products. Some companies can find in ISO 14000 a means to strengthen their export competitiveness and their foothold in the market, even when there is no major pressure from foreign customers. ISO 14000 can be used potentially as a marketing tool in both domestic and international markets. Companies from developing countries may use an ISO 14000 EMS certification to meet the requirements of foreign customers, community pressures, policies or legal requirements. However, ISO 14000 can be a nontariff barrier in trade if the certification process is difficult and costly. Thus, ISO 14000 may help in removing trade barriers, although it may also function as a potential trade barrier.