

AN ANALYSIS OF “LESSONS LEARNED” FROM “CATFISH” AND “SHRIMP” ANTI-DUMPING CASES

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May 2005

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INTRODUCTION

The rapid and steady growth of Vietnam’s exports is one of the most important successes of the country’s *Doi moi* policy since 1985*. The country’s exports, after one uninterrupted growing decade, reached US\$26 billion in 2004, almost four times than that of 1995. A number of Vietnamese products have become globally competitive such as textile, marine products, wooden furniture, and footwear. On the one hand, this success makes Vietnamese exporters self-confident in their capability to penetrate foreign markets, but on the other hand, it introduces new challenges: non-tariff barriers to trade and protective measures. Amongst those protective measures, antidumping has been the most frequently and widely used weapon to protect domestic industries.†

Before 1994, few Vietnamese enterprises knew about the existence of antidumping (“AD”) practice in international trade and none knew how to deal with that. However, in 1994 they found antidumping “at the gates” with the first AD action against Vietnamese rice by Columbian producers. In the following years, the number of AD cases against Vietnamese products has increased to reach 18 in 2004. The number of products becoming targets of AD actions and the scale of export volume affected by AD duties increase. Of 18 AD actions against Vietnamese products, the actions against “Certain Frozen Fillets From Vietnam” (which popularly called by Vietnamese and hereinafter called as the “**Catfish case**”) and “Certain Frozen or Canned Warm water Shrimp and pawns From Brazil, China, Ecuador, India, Thailand and Vietnam” (the “**Shrimp case**”) by American producers are the most important cases to Vietnamese enterprises up to now due to their complexity and export volume affected by AD duties.

At present time, not every Vietnamese enterprise or business association has knowledge about international trade law in general, and antidumping in particular. Few have hands-on experience in responding to an AD action against them abroad. Therefore, experience of Vietnam Association of Seafood Exporters and Producers (VASEP), the Vietnamese authority and enterprises in dealing with the Catfish and Shrimp cases is important for other enterprises which may face AD actions against them in the future. The lessons

* Kazi M. Martin, *Vietnam: Deepening Reforms for Rapid Growth*, 1, http://siteresources.worldbank.org/INTRANETTRADE/Resources/WBI-Training/vietexports_martin.pdf (last accessed March 8, 2005).

† The Economist once argued that “anti-dumping suits are emerging as the chemical weapons of the world’s trade wars”. The Anti-Dumping Dodge, *Economist*, Sept. 10, 1988, at 77.

learned will help enterprises to allocate their resources properly in dealing with the cases, avoid unnecessary mistakes, and reduce damages by AD duties.

The purpose of this research paper is to draw lessons about organizing the defense from the two AD cases which may be beneficial for enterprises and Vietnamese authorities in dealing with future AD actions against Vietnamese products. This paper is divided into four parts. In Part one, we have an overview of the U.S. antidumping law which will help readers to follow the analysis of the two cases in the next parts. Part two tells the stories of the catfish case which includes background information, process and outcomes of the case. Part three is about the shrimp case. We summarize the lessons learned from the two cases in Part four.

To write this paper, we based on official documents of the cases (for example the related documents published by the U.S. International Trade Commission and Department of Commerce) and other sources such as news articles and academic researches. We also rely on information and opinions gathered through interviews of persons who are directly involved in the cases or who are experts in AD law.

This publication is an initiative funded by AUSAID, the Australian Agency for International Development and the Ministry of Trade of the Socialist Republic of Vietnam as a component of project ‘Vietnam Integration into the World Economy – Capacity Building for Antidumping’. The publication was written by Thai Bao Anh, legal consultant (baoanh_thai@baolawfirm.com.vn).

The research paper forms a part of a larger project including both research into dumping issues within Vietnam and a training component. Asian Law Group and Mekong Economics were assisted and supported by the Vietnamese Ministry of Trade. In particular, thanks are due to Mr. Tran Dong Phuong, General Director, Multilateral Trade Policy Department, Ministry of Trade and Ms Nguyen Lan Anh, WTO Desk Officer, Multilateral Trade Policy Department, Ministry of Trade.

Finally, all parties would like to thank Graham Alliband, CEG Facility Manager, for his professional management of the project and his endless efforts to support this project.

PART I: AN OVERVIEW OF U.S ANTIDUMPING LAW

Brief history of the U.S. antidumping law

Perhaps the first major antidumping law of the United States was the Revenue Act of 1916³ which is also known as the Antidumping Duty Act of 1916 and is still in force.⁴ Some scholars also think that the Sherman Antitrust Act (1890) and section 73 of the Wilson Tariff Act of 1894 are applicable to dumping situations⁵. The Antidumping Duty Act of 1916 was passed in response to alleged German predatory dumping during the First World War, and made it a crime to import foreign products for prices that were less than wholesale or actual market value.⁶ As it was a criminal statute, the perpetrators could be found guilty only upon finding of the intent to harm or destroy an industry in the United States or to prevent such an industry from being formed.⁷ This requirement seems not easy to satisfy as there has never been either a successful prosecution or a civil judgment under this Act.⁸ To lower the level of required proof for a complaint to seek for an antidumping relief, the U.S. Congress enacted the Antidumping Act of 1921.⁹ The Antidumping Act of 1921 is conceptually and institutionally similar to present-day antidumping law.¹⁰ For example, it established a two-pronged legal process whereby one government agency decided whether a product was being dumped and another government agency decided whether the dumping caused injury.¹¹

The Trade Act of 1974¹² amended the Antidumping Act of 1921 and then was replaced by the Trade Agreements Act of 1979¹³. This act added sections 731-740 to the Tariff Act of 1930. The Trade Agreement Act of 1979 contained major substantive and procedural changes, and transferred responsibility for administering the antidumping law from the

³ Revenue Act of 1916, ch. 463, 800-801, 39 Stat. 798 (codified at 15 U.S.C. 72).

⁴ Michael S. Knoll, *United States Antidumping Law: The Case for Reconsideration*, 22 Tex. Int'l L. J. 265, 268 (1987).

⁵ Robert W. McGee, *The Case to Repeal The Antidumping Laws*, 13 NW. J. INT'L L. & BUS. 491, 492 n.1 (1993).

⁶ Id. at 492.

⁷ Id.

⁸ Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade*, 172 (2nd ed. Routledge 1999).

⁹ Antidumping Act of 1921, Pub. L. No. 67-10, 42 Stat. 11 (codified as amended at 19 U.S.C. § 160-171).

¹⁰ Michael S. Knoll, *United States Antidumping Law: The Case for Reconsideration*, 22 Tex. Int'l L. J. 265, 269(1987).

¹¹ Id.

¹² Trade Act of 1974, 19 USC§ 160 (1976).

¹³ Trade Agreements Act of 1979, Pub. L. No. 96-39, tit. I, 106(a), 93 Stat. 193. (codified at 19 U.S.C. 1673-1673i, 19 U.S.C.A. 1673-1673i (1980 & 1992 Supp.)).

Department of the Treasury to the Department of Commerce.¹⁴ Most provisions of the Antidumping Act of 1921 were later merged into the Tariff Act of 1930 as well.¹⁵

Other amendments to the antidumping law were Title VI of the Trade and Tariff Act of 1984, and Title I, Subtitle C, Part 2 of the Omnibus Trade and Competitiveness Act of 1988.¹⁶ The most important modifications of the 1984 Act were provisions relating to cumulation of imports from subject countries and threat of material injury.¹⁷ The 1988 Act addressed the issues of the prevention of circumvention of antidumping orders, and amended provisions of the law relating to critical circumstances, material injury, and threat of material injury.¹⁸

One of the most recent amendment of antidumping law is the Uruguay Round Agreements Act (URAA) of 1995. To be consistent with the AD Agreement of the WTO, this act modified provisions of the law relating to issues such as material injury, threat of material injury, critical circumstances, regional industry, related parties, and cumulation. New provisions in this Act were about captive production, negligible imports, and sunset reviews, among others.¹⁹

Although in recent years, the number of AD actions against foreign products and the number of AD orders issued have been decreasing, the United States is still one of the top ten AD users.²⁰ The statistics of AD actions in the United States can be found in Annex IV of this paper.

Antidumping investigation proceeding:

This section summarizes a typical antidumping investigation process carried out by the International Trade Commission (ITC) and U.S. Department of Commerce (DOC). In fact, International Trade Administration (ITA), an agency of the DOC is the organ to carry out the works of the DOC. According to the U.S. law, antidumping duties are imposed upon the finding that “a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value” and a U.S. industry is “materially injured” or “threatened with material injury” or “the establishment of an industry in the United States is materially retarded”.²¹ An investigation could be divided into five stages: (i) initiation of the investigation by the DOC, (ii) the preliminary phase of the ITC’s investigation, (iii) the

¹⁴ United States International Trade Commission, “*Antidumping and Countervailing Duty Handbook*”, 10th ed., Pub. 3566, IV-4 (Dec 2002) (hereinafter “AD Handbook”)

¹⁵ McGee, *supra* n. 5 at.494 and n.17.

¹⁶ United States International Trade Commission, “*Antidumping and Countervailing Duty Handbook*”, 10th ed., Pub. 3566, IV-4 (Dec 2002) (hereinafter “AD Handbook”).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Brink Lindsey & Daniel J. Ikenson, *Antidumping Exposed The Devilish Details of Unfair Trade Law*, 107 (CATO Institute, 2003)

²¹ 19 USC § 1673.

preliminary phase of DOC's investigation, (iv) the final phase of DOC's investigation, and (v) the final phase of the ITC's investigation.

The antidumping investigation process is triggered by a petition of an industry or by the DOC (although in almost every case the petitioner is an industry) to the ITC and DOC simultaneously.²² Petitioners are required to provide some evidence of dumping and injury in order to initiate an investigation though these requirements are quite modest.²³ The law requires that the petition should be filed *on behalf of* an industry. This requirement means that the petitioners should satisfy two conditions: (i) they should account for at least 25 percent of the total production of the domestic like product, and (ii) they should account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition. If the petitioners do not satisfy the second condition, DOC will use one of the following methods to determine the level of industry support: polling the industry or using other information to determine the level of support.²⁴

Petition determination and initiation of the investigation by DOC: within 20 days after the date on which the petition is filed, the DOC determines whether it is necessary and reasonable to open an antidumping investigation as requested by petitioners.²⁵ If the determination is affirmative, the investigation is initiated. If not, the DOC dismisses the petition and terminates the proceeding.²⁶

Preliminary phase of the ITC's investigation: within 45 days after the date on which the petition is filed, the ITC determines whether an American industry is (i) materially injured or (ii) threatened with material injury or (iii) the establishment of an industry in the U.S. is materially retarded by reason of imports of the subject merchandise and that imports of the subject merchandise are not negligible.²⁷

The preliminary phase of the ITC's investigation can be broken into 6 stages:²⁸

1. Institution of the investigation and scheduling of the preliminary phase;
2. Questionnaires;
3. Staff conference and briefs;
4. Staff report and memoranda;

²² 19 USC § 1673a.

²³ Lindsey & Ikenson, *supra* n.20 at 2.

²⁴ Sections 702(c)(4)(A) and (D) and 732(c)(4)(A) and (D) of the Act (19 U.S.C. §1671a(c)(4)(A) and (D)) and 1673a(c)(4)(A) and (D)..

²⁵ 19 USC § 1673a (c) (1).

²⁶ 19 USC § 1673b (a) (2) and (3).

²⁷ 19 USC § 1673b (a) (1).

²⁸ AD Handbook, *supra* n. 16 at II-5.

5. Brief and vote; and
6. Determination and view of DOC.

In the first stage, a six-person team consisting of an investigator, economist, accountant/auditor, industry analyst, attorney, and supervisory investigator is set up to make a schedule for the preliminary phase of investigation. This team also prepares a notice of institution of investigation for publishing in the *Federal Register* to provide information for anyone concerning the subject matter.²⁹ In the second stage, questionnaires are sent to U.S. importers, U.S. producers, and foreign producers for information and data that the ITC needs for its determination. Before preliminary determination, a conference between the ITC and the attendance of concerned parties is held. In this conference, the concerned parties have a chance to present their legal and factual arguments and testimony by witnesses in support of their position.³⁰ After the conference, a staff report – prepared by the team addressing the factual issues, analysis of collected data and issues raised by the parties in the conference – is submitted to the ITC. A memorandum about the legal issues is also submitted by the attorney through the ITC General Counsel. In the fourth stage, the ITC convenes a public meeting between the ITC Commissioners and the investigation staff for questioning issues related to the staff report and memoranda. Then, the Commissioners vote for the determination. In the sixth stage, the ITC informs the Secretary of Commerce its preliminary determination and publishes it in the *Federal Register*. If the determination is negative or imports are found negligible the proceeding is terminated. If not, the DOC starts the preliminary phase of its investigation.³¹

Preliminary phase of DOC's investigation: within 160 days after the date on which the petition is filed, the DOC determines “whether there is a reasonable basis to believe or suspect that the merchandise is being sold, or is likely to be sold, at less than fair value [LTFV]”.³² If it finds affirmative, an order to suspend liquidation of all entries of the subject imports is issued to the U.S. Customs Service. Importers are then required to post a cash deposit or bond for each entry of the subject merchandise in an amount based on the estimated weighted average dumping margin.³³

Final phase of DOC's investigation: within 235 days after the date on which the petition is filed, the DOC makes final determination of whether the subject merchandise is being sold, or is likely to be sold at LTFV.³⁴

Final phase of the ITC's investigation: within 280 days after the date on which the petition is filed, the ITC makes final determination of an American industry is materially

²⁹ Id.

³⁰ Id.

³¹ Id.

³² 19 USC § 1673b (b) (1).

³³ AD Handbook, *supra* n. 16 at II-13.

³⁴ 19 USC § 1673d (a) (1).

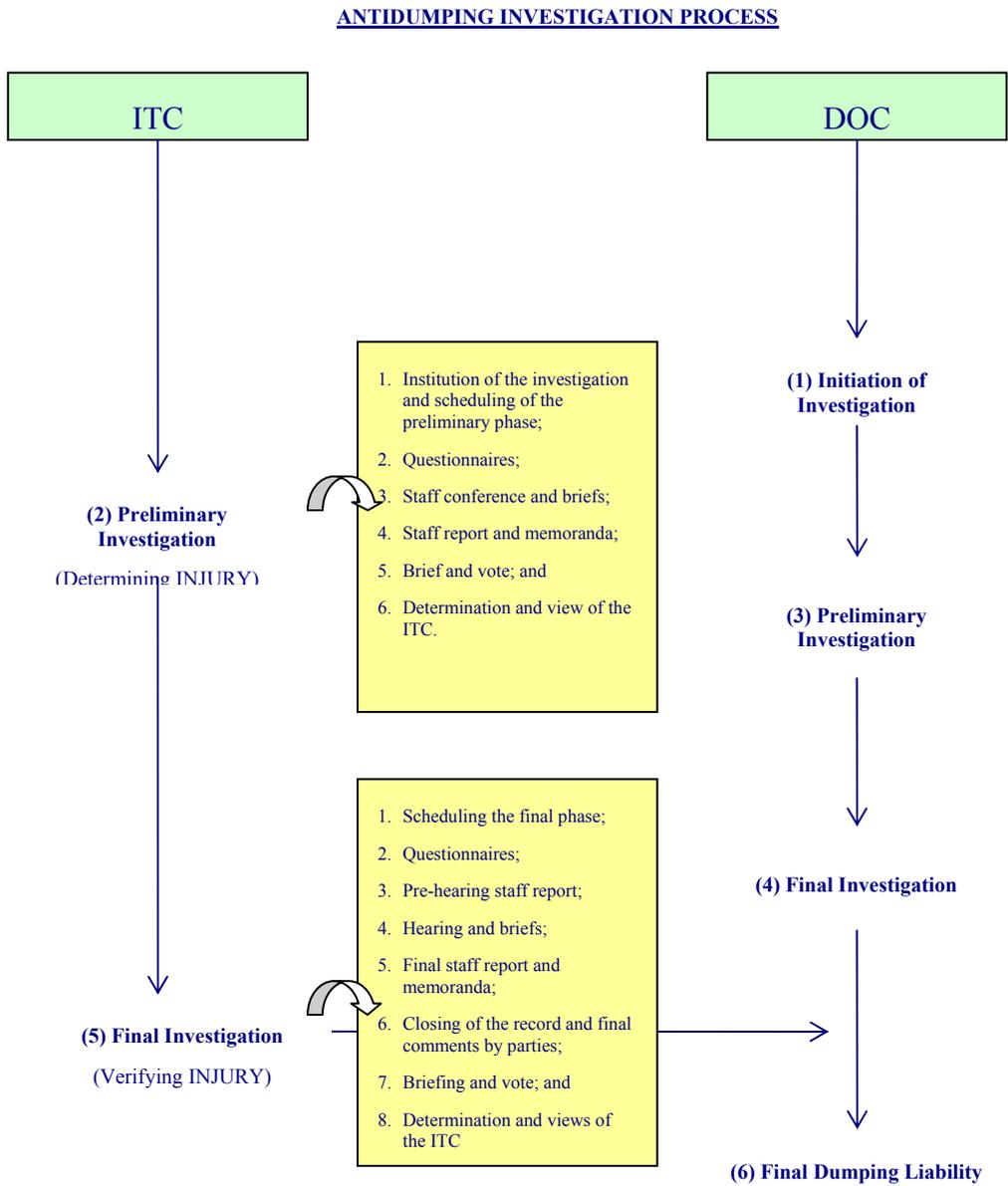
injured or threatened with material injury or the establishment of an industry in the U.S. is materially retarded by reason of imports of subject merchandise. Similarly to the preliminary phase, this phase can be divided into eight stages with the contents of each stage are similar to the stage in the preliminary phase:

1. Scheduling the final phase;
2. Questionnaires;
3. Pre-hearing staff report;
4. Hearing and briefs;
5. Final staff report and memoranda;
6. Closing of the record and final comments by parties;
7. Briefing and vote; and
8. Determination and views of the ITC.

If the ITC's determination is affirmative, the DOC issues an antidumping order within 7 days of the ITC's determination.³⁵

³⁵ 19 USC § 1673e (a).

Figure 1 AD investigation process under the U.S. AD law.



PART II: CATFISH CASE

In this Part, we summarize the facts and information in relation to the “catfish” case. It’s worth noticing that not all details but selected information necessary for the readers to go along with the analysis in the next Part is mentioned in this part.

“When is a catfish is not a catfish?”

The story of catfish case did not start on June 28, 2002, the day Catfish Farmers of America (CFA) filed their petition to the ITC and DOC alleging the dumping of “certain frozen fish fillets from Vietnam”. It had actually started one year prior to that date. In 2001, American catfish farmers, who were severely subject to competition by Vietnamese producers, launched a successful campaign at the state and federal levels for legislations to ban the later from using the name of “catfish” for their products. The imports of Vietnamese catfish, which is cheaper than those from the Southeast of America³⁶ has increased from 0.6 million pounds in 1998³⁷ to 26 million pounds in 2001.³⁸ The Bilateral Trade Agreement between Vietnam and the United States came into effect on December 10, 2001 with the elimination of tariff on Vietnamese catfish, have presumably contributed to a dramatic increase of import volume³⁹ from 12.5 million pounds in 2000 to 26 million pounds in 2001.⁴⁰ In 2001, the price for U.S. fish have dropped to as low as 50 cents a pound, about 15 cents below the cost of production and about 30 cents below the price in 2000.⁴¹

In 2001, CFA launched an USD 500,000-funded attack on the imported catfish which aimed at three factors: (i) sanitary conditions of Vietnamese catfish, (ii) the matter of species, and (iii) unfair competition of Vietnamese farmers exploiting a market developed at the American farmers’ expenses.

With respect to the sanitary matter, an advertisement by CFA said that "Never trust a catfish with a foreign accent...[t]hey've grown up flapping around in third world rivers and dining on whatever they can get their fins on".⁴² Representative Marion Berry of Arkansas, one of the three leading states producing catfish, even went further by offering a novel idea that Vietnamese fish are contaminated by the defoliant Agent Orange, which was sprayed by the

³⁶ Mostly in Mississippi, Arkansas and Louisiana states.

³⁷ Economist, *Case of the Ghostly Catfish*, December 16, 2002.

³⁸ U.S. International Trade Commission, *Certain Frozen Fish Fillets from Vietnam*, Investigation No. 731-TA-1012 Pub. 3617, 13.

³⁹ Philip Brasher, *When is a catfish not a catfish?*, Associates Press, December 27, 2001, p. A.21.

⁴⁰ US International Trade Commission, “Certain Frozen Fish Fillets From Vietnam”, Investigation No. 731-TA-1012, Publication 3617, p. 13 (August 2003). [hereinafter ITC Catfish Report].

⁴¹ Washington Post, *When Is a Catfish Not a Catfish?: When It Comes From Vietnam and Cuts Into U.S. Sales, Hill Says* (Dec 27, 2002). [hereinafter “When is a Catfish not a Catfish”]

⁴² Dan Chapman, *CATFISH TANGLE; U.S., Vietnam fight trade war over down-home delicacy* available at http://www.ajc.com/news/content/news/atlanta_world/1202/11catfish.html [hereinafter “Catfish tangle”]

United States during the war.⁴³ However, this allegation was silenced when the U.S. Embassy in Vietnam said there was no evidence that the fish are raised in unsafe conditions.⁴⁴

With regards to unfair competition, CFA said that Vietnamese producers have unfairly penetrated a market developed by expense of American farmers: “‘We've had a real problem with the scheme they're using to promote and sell this imported product as farm-raised catfish,’ said Warren of the catfish farmers group. ‘We had gone out and won markets where none existed. So it was particularly disingenuous to see a sub-product slip into that market.’”⁴⁵ A CFA’s advocate explained that Vietnamese products penetrated the market by “[m]isleading consumers and mislabeling” as catfish.⁴⁶

To prove that Vietnamese producers has mislabeling their products, CFA argued that “only the North American species - known as Ictaluridae - are genuine catfish”⁴⁷ despite the fact that there are more than 2,000 species of catfish. They further explained that “the only true catfish belong to the family with the Latin name Ictaluridae. The Vietnamese variety are (sic) in the family Pangasiidae, which are ‘freshwater catfishes of Africa and southern Asia,’”⁴⁸ This argument did not gain support from everybody. “Not only does it look like a catfish, but it acts like a catfish,” Sen. Phil Gramm (R-Tex.) said “And the people who make a living in fisheries science call it a catfish. Why do we want to call it anything other than a catfish?”⁴⁹ However, CFA’s arguments succeeded in convincing state and federal levels authorities. Section 755 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriation Act for 2002 provided that “[n]one of the funds appropriated or otherwise made available by this Act to the Food and Drug Administration shall be used to allow admission of fish or fish products labeled wholly or in part as “catfish” unless the products are taxonomically from the family Ictaluridae”.⁵⁰ The labeling law was subsequently broadened to prohibit all marketing and sales of fish as catfish. Section 10806 of the Farm Security and Rural Investment Act of 2002 provided that “the term ‘catfish’ may only be considered to be a common or usual name (or part thereof) for fish classified within the family of Ictaluridae and only labeling or advertising for such fish may include the term ‘catfish’”⁵¹ There are similar labeling law in the states of Mississippi, Louisiana, and Arkansas.⁵² The Vietnamese producers then marketed their products as “tra” or “basa” fish.

⁴³ *Id.*

⁴⁴ Washington Post, *When Is a Catfish Not a Catfish?* *supra* n.41.

⁴⁵ Dan Chapman, *Catfish Tangle*, *supra* n.42.

⁴⁶ Senator Tim Hutchinson (R-Ark.), see Washington Post, *When is a catfish not a catfish?* *Supra* n. 41.

⁴⁷ Seth Mydans, *American and Vietnamese Fighting over Catfish*, New York Times, November 3, 2002.

⁴⁸ Dan Chapman, *Catfish Tangle*, *supra* n.42.

⁴⁹ *Id.*

⁵⁰ ITC Catfish Report, *supra* n. 40 at 11.

⁵¹ [21 USCS § 321d](#)

⁵² ITC Catfish Report, *supra* n. 40 at 11.

Antidumping action against Vietnamese “tra” and “basa”

Facts

Despite the fight over labeling, the import volume of Vietnamese “tra” and “basa” (Vietnamese catfish) in 2002 still reached 36 million pounds, much higher than that of 2001 (26 million pounds)⁵³. The increasing rate of imports from 2000 to 2002 is 187.4 percent and the increasing rate of import value is 127.5 percent.⁵⁴ On June 28, 2002, CFA and a number of individual U.S. catfish processors (hereinafter the “Petitioners”) filed a petition to ITC and DOC alleging that U.S. catfish industry was materially injured and threatened with material injury by reason of less-than-fair-value (LTFV) imports of certain frozen fish fillets from Vietnam. On July 24, 2002, DOC announced the initiation of AD investigation on Federal Register (67 FR 48437). DOC issued its preliminary affirmative antidumping duty and critical circumstances determinations on January 31, 2003 (68 FR 4986). The determinations of antidumping duty and critical circumstances were amended on March 5 and May 28, 2003. ITC had its hearing on June 17, 2003. DOC had its final determinations on antidumping duty and critical circumstances on June 23, 2003 (68 FR 37116). Final dumping margins and critical circumstances determinations of DOC as follows:

Figure 2 DOC’s final determinations⁵⁵

<u>Producer/exporter</u>	<u>Weighted-average margin (percent)</u>	<u>Critical circumstances</u>
Agifish	44.76	No
Vinh Hoan	36.84	No
Nam Viet	52.90	Yes
CATACO	45.55	No
Afiex	44.66	Yes
CAFATEX	44.66	Yes
Da Nang	44.66	Yes
Mekonimex	44.66	No
QVD	44.66	Yes
Viet Hai	44.66	No
Vinh Long	44.66	Yes
Vietnam wide (all others)	63.88	Yes

⁵³ According to VASEP, Vietnamese catfish imports to the U.S. were 1,000 tones in 1998, 3,000 tones in 2000 and 10,000 tones in 2001. See “*Cuoc chien ca da tron len dinh diem, Hiep hoi chu trai ca da tron My se kien Viet Nam ban pha gia?* [Catfish war reached its peak, the CFA going to file antidumping petition], Thoi Bao Kinh Te Viet Nam [Vietnam Economics Times], May 22, 2002 [hereinafter “*Cuoc chien ca da tron len toi dinh diem*”].

⁵⁴ ITC Catfish Report, *supra* n. 40 at 13.

⁵⁵ ITC Catfish Report, *supra* n. 40 at I-2.

Is there an early warning?

Time is an important factor for respondents in AD actions. The statutory deadlines for the investigation of ITC and DOC are short and not many enterprises in Vietnam have hands-on experiences on answering questionnaires and working with investigating delegations of foreign AD authorities.⁵⁶ Therefore, early warnings of an impending AD action give respondents chance to have better preparation.

In “Catfish” case, the Vietnamese respondents did not have much time to prepare for the AD action. There were only one and a half months between the date of closing catfish labeling “case” on May 13, 2002⁵⁷ and the date the Petitioners file its AD petition to ITC and DOC on June 28, 2002. However, only three days after the close of “catfish labelling case”, VASEP sent out a message to its members advising them to hire lawyers for an impending AD action.⁵⁸ The organization got early warnings from various sources: (i) international media (ii) a third party, (iii) through law firms who seek for providing legal services in the AD case and (iv) VASEP’s own analysis. About two months before the CFA filed its AD petition to the ITC and DOC, Washington Post newspaper had revealed that “[t]he catfish association has hired a Washington law firm to begin preparing a possible antidumping petition to be filed later this year with the Department of Commerce and International Trade Commission.”⁵⁹ During May 2002, Peter Redmayne, president of the SeaFare Group⁶⁰, in an interview with “*Thoi Bao Kinh Te Viet Nam*” [Vietnam Economics Times], also warned that CFA could file an AD petition against Vietnam.⁶¹

Organizing the Defense:

Answering Questionnaires

Questionnaire is one of the major channels through which the DOC collects information for the investigation. An antidumping questionnaire is normally formatted in five sections: A, B, C, D and E.

Section A requests general information concerning the investigated company's corporate structure and business practices, the merchandise under investigation or review that it sells, and the quantity and value of sales of the merchandise in all markets. Section B requests a

⁵⁶ See Part I, Section “Antidumping investigation proceedings” of this paper.

⁵⁷ The provision prohibiting the practice of labelling non-Ictaluridae as “catfish” was issued on May 13, 2002 as a part of the Farm Security and Rural Investment Act of 2002 and codified as 21 USCS § 321d.

⁵⁸ Thoi Bao Kinh Te Vietnam, [Vietnam Economics Times], *Cuoc chien ca da tron len toi dinh diem*, [Catfish fight reaches its peak] *supra* n. 53.

⁵⁹ Washington Post, “U.S. Catfish Industry Readies to Fight”, April 26, 2002.

⁶⁰ SeaFare Group is a Seattle-based seafood consulting and trade show management company.

⁶¹ Thoi Bao Kinh Te Vietnam, [Vietnam Economics Times], *Cuoc chien ca da tron len toi dinh diem*, *supra* n. 53.

listing of the sales transactions for use in determining the Normal Value of the foreign like product. Section C requests a listing of the U.S. sales transactions for the Period of Investigation for use in determining Export Price and/or Constructed Export Price of the merchandise. Section D requests cost of production and constructed value information. This section focuses on the manufacture of the merchandise. Section E requests information about value added in the United States prior to delivery to unaffiliated U.S. customers. Normally, for the convenience of respondents, at least five appendixes will be attached (i.e. appendixes on glossary of terms, the instructions for submitting computer data, the description of the merchandise under investigation, etc.)

As it was the first time to respond to an antidumping case, Vietnamese respondents found several difficulties. Firstly, it was not easy to understand the questionnaires which were complicated, very technical and detailed. Although the lawyers worked closely with the respondents helping them to answer the questionnaires, the main workload of gathering information and answering was carried out by the respondents' staff who had to understand the rules of antidumping investigation and while at the same time, tried to satisfy all such rules.

Secondly, the American accounting standards, corporate structure and business practices were different from those of Vietnam. For example, one of the reasons based on which the CFA requested the DOC to reject Agifish's responses was the unreported factors of plastic bags and rubber bands. However, regarding this point, the DOC observed that in Agifish's business practice, plastic bags and rubber bands are reusable, and were treated as part of factory overhead as they were not material inputs. Those differences in business practice, if not clearly presented would lead to misunderstanding of the DOC, and therefore, would result in the rejection of responses.

Thirdly, the statutory time limit for answering was short.⁶²

Fourthly, the catfish case was the first AD case against Vietnamese products in the U.S.. Within a short time, the respondents have to quickly learn the general knowledge of American AD laws and regulations on the one hand and prepare for very technical issues for the defense on the other hand. In this case, the short time for knowing in advance about the AD action undoubtedly badly affected the respondents' preparation and consequently, the outcome of the case.

In response to those difficulties, VASEP carried out several training workshops in which both general knowledge of antidumping law and technical issues were introduced to the enterprises by experts. VASEP and the lawyers of White and Case, also worked with each enterprise in answering questionnaires. Finally, VASEP succeeded in convincing the DOC

⁶² Normally, respondents are given 21 days from the issuance of the questionnaire to complete the Section A portion and 37 days from the issuance for the remainder.

to extended the due date for almost all questionnaires, some more than once⁶³. Those efforts paid off. The DOC commented as follows on the responses to the questionnaires:

“The data submitted by the Respondents generally complies with these standards. With a few exceptions (e.g., unreported/misreported factors and consumption ratios), the Respondents provided useable factors of production information, in a timely manner, which the Department was able to verify. Consequently, the Department has determined that there is enough useable information to calculate an accurate dumping margin for this final determination; however, in some cases, partial facts available are warranted.”⁶⁴

Nevertheless, not all Vietnamese enterprises answered the questionnaires or provided the DOC with full information. As a result, only eleven companies were recognized by the DOC as fully cooperative in the investigation process and received separate rates. Other companies which were considered by the DOC as having failed to cooperate had Vietnam-wide rates on them, which were much higher than the AD rates of the cooperative ones.⁶⁵

Hiring Lawyers

Lawyers play an important role in antidumping cases. Firstly, they help respondents understand antidumping laws and regulations. Secondly, their technical knowledge help the respondents in answering questionnaires and working with the investigating delegation of the foreign antidumping authority. Thirdly, they represent the respondents in the case hearing.

In the catfish case, VASEP used an open and transparent mechanism for hiring lawyers. Law firms interested in the case submitted to VASEP proposals presenting their expertise and experience in antidumping cases. Several conferences were held for law firms to present about their expertise and their defending strategies to the representatives of VASEP and Vietnamese respondents. White and Case was finally selected by VASEP for several reasons: (i) it was a famous law firm with good reputation of its lawyers, (ii) the firm had experiences in antidumping practice, and (iii) the firm offered a reasonable price for its service.⁶⁶

⁶³ Barbara E. Tillman, *Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, A-552-801, Investigation Public Document IA/III/IX: AV, (June 16, 2003) p.7.

⁶⁴ *Id.* at 12.

⁶⁵ “Since exporters other than Agifish, Vinh Hoan, Nam Viet and CATACO, and those Voluntary Section A Respondents receiving separate rates, did not respond to our questionnaires, the Department found that they failed to cooperate to the best of their ability and an adverse inference was appropriate.” Barbara E. Tillman, *Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 62. (available at www.ia.ita.doc.gov/download/vietnam-catfish/vietnam-frozen-fish-fillets-final-decision-memo.pdf) last accessed May 18, 2005.

⁶⁶ VASC Orient, *"Huy động tổng lực chống lại việc Mỹ ngăn cản nhập khẩu cá da trơn"* [Gathering all resources for defending the catfish exportation to America], May 24, 2002.

Financial Resources

American lawyers' fees, especially international trade lawyers' fees, are high and charged on a working hour basis. In the catfish case, VASEP has paid its lawyers, White and Case, approximately USD 500,000⁶⁷. The money for the lawyer's was paid from a fund contributed by the Vietnamese respondents and managed by VASEP.

Lobbying activity

American politics and legislation are distinguished by the popular existence of lobbying activities. Generally, "[a]ll [American] politics is local," and the politics in relation to international trade are no exception."⁶⁸ For this reason, American producers always have advantages over their foreign counterparts in lobbying.

However, the goals and methods of lobbying are different depending on which government branch the activity is aimed at: the legislative, the executive or the judiciary. Regarding the issues in relation to international trade, the purpose of lobbying the legislature is to pass a law or amend an existing law in favor of an interest group (the most effective impact of lobbying). The purpose of lobbying the executive (DOC and ITC) is to ensure that methodologies – which are in favor of the lobbying party – are used in antidumping investigation. This is less effective than lobbying the executive branch because the outcomes of investigation still depend on many other technical factors. Lobbying the judiciary is not effective or one can even say impossible. The U.S. Courts is constitutionally independent and shall not be influenced by anything other than law. Additionally, in accordance with Chevron doctrine⁶⁹, the courts should respect professional decisions by an administrative agency, such as the DOC, as long as such agency's decisions are not arbitrary or unreasonable.

In the catfish case, the CFA has much more advantages than Vietnamese respondents in lobbying the legislative branch. Firstly, the CFA has more experience in and budget for public relations activities than Vietnamese enterprises. For example, the U.S. catfish industry of which the CFA is the representative of the majority has spent USD 50 million in an advertising campaign to inform the American consumer of the quality and characteristics of the farm-raised domestic catfish.⁷⁰ Secondly, the catfish industry is the largest aquaculture industry in the United States⁷¹ - and mostly located in the Southeast, an area of

⁶⁷ Tuoi Tre Newspaper, "Con Tom Bi Kien, Chuyen Hay Con Dai..." [Shrimp Is Under Attack, The Story Still Continues...], December 25, 2003. available at <http://www.tuoitre.com.vn> (last accessed March 15, 2005). A copy of this article can be found in Annex V of this paper.

⁶⁸ See generally Tip O'Neill, *All Politics is Local, and Other Rules of the Game* (1994).

⁶⁹ Haldane Robert Mayer, *A Review of Recent Decisions of the United States Court of Appeals for the Federal Circuit*, 52 Am. Univ. L. Rev. 761, 762 (2003).

⁷⁰ 147 Cong. Rec. H5432 (Sept. 6, 2001) (statement of Rep. Everett).

⁷¹ Certain Frozen Fish Fillets from Vietnam, 2003 ITC LEXIS 441, at 66.

traditional conservative politics. For those reasons, the CFA has had strong support from local politicians who need the votes of local people. The CFA even went further in exploiting the local focus characteristics of American politics and people by using the rather radical slogan like “[n]ever trust a catfish with a foreign accent...”. Thirdly, unlike the shrimp case in which the attack was aimed at respondents from several countries, in the catfish case, Vietnamese enterprises were alone.

Another element contributing to the CFA’s success in convincing the Congress on the “label issue” was their lawyer, Mike Hathaway. Mike Hathaway was a former deputy general counsel at the Office of the U.S. Trade Representative. The Rushford Report, July 2001 issue commented as follows: *“In the early 1990s, Hathaway was of counsel to Crowell & Moring, where he often teamed up with Doral Cooper, another former high-ranking USTR official who is president of the law firm’s trade subsidiary.... The point: While he is an amiable fellow, when lawyer Hathaway gets on a case, usually somewhere down the line, someone has reason to say, Uh Oh. Now, Hathaway is setting the hooks into Vietnamese catfish. Or, rather, “catfish,” since not even whiskered bottom dwellers are what they appear to be, once trade lawyers get involved.”*

So it is clear that Vietnamese enterprises could not outplay the CFA in the game of lobbying the American legislative branch due to its disadvantages in terms of budget, connections, American public relations experience and the most important point is the “local focus” characteristics of American politics.

Nevertheless, VASEP has tried its best to launch a lobbying campaign. Through various channels, VASEP has had support of six senators of both political parties.⁷² This group constantly expressed its support for free trade and consumer’s benefits to both DOC and ITC.⁷³ In an interview with *Lao Dong* [Labor] newspaper, Mr. Nguyen Huu Dzung, general secretary of VASEP, said that VASEP’s lobbying activities had been consulted and carried out by two famous lobbying companies.⁷⁴ The lobbying was not only carried out through lobbyists but also through other official channels. For example, two days before the meeting of ITC on the injury issue, Mr. Vu Mao, Chairman of the Foreign Affairs Committee of the National Assembly, sent a letter to ITC asking the Commission to carefully consider the case in order to have a fair decision.

If VASEP had more disadvantages than the CFA in terms of budget and political connection, its communication policy proved to be effective. From the beginning to the end

⁷² John McCain (R-AZ), Chuck Hagel (R - Nebraska), Diane Feinstein (D - California), Olympia Snowe (R - Maine), Patty Murray (D - Washington) and Maria Cantwell (D - Washington).

⁷³ Letters to DOC on December 20, 2002 and to ITC on July 18, 2003. See the letter to DOC on December 20, 2002 in Annex I of this paper.

⁷⁴ Interview with *Lao Dong* newspaper, August 13, 2003 (available at [http://www.laodong.com.vn/pls/bld/display\\$.htnoidung\(168.75657\)](http://www.laodong.com.vn/pls/bld/display$.htnoidung(168.75657))).

of the case, there was a constant streamline of information from VASEP to the media. The association promptly provided the media with updates of the case progress and therefore, gained nationwide support. VASEP also got the support of American media. There were at least thirty articles - many from famous newspapers like Washington Post, New York Times, and the Economist - supporting Vietnamese catfish.⁷⁵

The effectiveness of lobbying the executive branch is not certain. However, VASEP has successfully convinced the DOC to provide Vietnamese respondents more opportunities and time to complete questionnaires. The CFA expressed criticism saying that although it was not required by the law "... in this proceeding, the Department has provided Respondents an extraordinary number of opportunities to report complete, accurate, and reliable data..."⁷⁶ In fact, DOC extended the due date for almost all questionnaires, some more than once.⁷⁷ As it was the first time Vietnamese respondents had to deal with antidumping proceeding, the extra time and opportunities were very important to them.

The Non-Market Economy Issue

The non-market economy has a deep impact on the calculation of antidumping margin. Once a country is determined as non-market economy, the DOC justifies the use of a "surrogate" market economy for determining the Normal Value. A scholar has commented: "[a]s a practical result of this approach, the U.S. government ends up playing a God-like role in deciding the fate of foreign producers from NMEs [non-market economies]"⁷⁸.

In the catfish case, the application of non-market economy status was explained by the DOC as follows:

"The level of government intervention in the economy is still such that prices and costs are not a meaningful measure of value. The Vietnamese currency, the dong, is not fully convertible, with significant restrictions on its use, transfer, and exchange rate. Foreign direct investment is encouraged, but the government still seeks to direct and control it through regulation. Likewise, although prices have been liberalized for the most part, the Government Pricing Committee continues to maintain discretionary control over prices in sectors that extend beyond those typically viewed as natural monopolies. Privatization of SOEs and the state-dominated banking sector has been slow, thereby excluding the private sector from access to resources and

⁷⁵ The list of those articles can be found at Annex II

⁷⁶ Barbara E. Tillman, *Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, A-552-801, Investigation Public Document IA/III/IX: AV, (June 16, 2003) p.7.

⁷⁷ Id.

⁷⁸ Sungjoon Cho, *A Dual Catastrophe of Protectionism*, 25 NW. J. INT'L L. & BUS. 315, 330 (2005).

insulating the state sector from competition. Finally, private land ownership is not allowed and the government is not initiating a land privatization program.”⁷⁹

In the shrimp case, the DOC upheld the determination of non-market economy status that it had in the catfish case.⁸⁰

⁷⁹ U.S. Department of Commerce, Antidumping Duty Investigation of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam - Determination of Market Economy Status, Public Document A-552-801 at 2, available at <http://www.ia.ita.doc.gov/download/vietnam-nme-status/vietnam-market-statusdetermination.pdf> (last visited Jan. 5, 2005).

⁸⁰ 69 FR 71005, 71007.

PART III: SHRIMP CASE

Facts

In the last decade, shrimp has become one of the most popular seafood in the United States. U.S. consumption of shrimp increased steadily at an average annual growth rate of 4.0 percent. In 2003, U.S. annual per capita consumption of shrimp (all preparations) reached a record of 4.0 pounds⁸¹. In 2003, U.S. consumption of shrimp reached 1,211 million pounds of which 1,066 million pounds was imported.⁸²

The U.S. shrimp industry is mostly based on harvesting with the shrimp fleet is composed of thousands vessels in the Mexican Gulf and South Atlantic coasts. The estimated U.S. commercial landings of warmwater shrimp totaled 276.9 million pounds⁸³. A small but growing percentage of U.S. domestic production of warmwater shrimp is produced by aquaculture (i.e., farm-raised)⁸⁴. In 2003, U.S. production of farm-raised shrimp was estimated to be 13.4 million pounds (about 4.5 percent of U.S. production of warmwater shrimp).⁸⁵

The total of shrimp imports steadily increased between 2001 and 2003 (from 852 million pounds to 1,066 million pounds).⁸⁶ Shrimp prices decreased from \$ 3 to \$ 1.85 per pound during the period between 2001 and 2003⁸⁷.

In response, the U.S. Shrimp Trade Action Committee (STAC), an ad hoc representative of the U.S. Southern Shrimp Alliance (SSA), filed a petition for an anti-dumping investigation with the DOC on December 31, 2003. The respondents in this case were shrimp producers from Brazil, China, Ecuador, India, Thailand, and Vietnam. On July 16, 2004, the DOC announced its preliminary determination of sales less than fair value of frozen and canned warm-water shrimp from China and Vietnam.

On September 1, 2004, the DOC amended the preliminary determination on July 16, 2004. On November 5, 2004, the DOC held a public hearing on issues concerning financial ratios, surrogate values, and the Mandatory Respondents. On November 29, 2004, the DOC had final determination for Vietnam and China.

⁸¹ *Fisheries of the United States, 2003*, National Marine Fisheries Service, Oct. 2004, p. 86.

⁸² US International Trade Commission, “*Certain Frozen or Canned Warmwater Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand and Vietnam*”, Investigation No. 731-TA-1063-1068, publication 3748 at IV-5 (Jan 2005). [Hereinafter “ITC Shrimp Report”].

⁸³ *Fisheries of the United States, 2003*, National Marine Fisheries Service, Oct. 2003, p. 3.

⁸⁴ ITC, *ITC Shrimp Report*, *supra* n.82 at I-9.

⁸⁵ *Id.* at 22.

⁸⁶ *Id.* at IV-2.

⁸⁷ Consumers for World Trade, *U.S. Shrimp Smell Fishy* (Oct. 15, 2003), at <http://www.cwt.org/news/Articles/October%202003/Shrimp.htm>.

Figure 3 DOC's final determination.

Vietnam:			
Minh Phu Seafood Corp.	4.21	No	69 FR 71005 (Dec. 8, 2004)
Kim Ahn Co., Ltd.	25.76		
Minh Hai Joint Stock Seafoods Processing Co.	4.13		
Camau Frozen Seafood Processing Import Export Corp.	4.99		
Amanda Foods (Vietnam) Ltd. Aquatic Products Trading Co. Bac Lieu Fisheries Co., Ltd. Coastal Fisheries Development Corp. (COFIDEC) Cai Doi Vam Seafood Import Export Co. Cam Ranh Seafoods Processing Enterprise Co. Can Tho Agriculture and Animal Products Import Export Co. Cantho Animal Fisheries Product Processing Export Enterprise C.P. Vietnam Livestock Co., Ltd. Cuu Long Seaproducts Co. Danang Seaproducts Import Export Corp. Hanoi Seaproducts Import Export Corp. Investment Commerce Fisheries Corp. Kien Giang Sea Product Import Export Co. Minh Hai Export Frozen Seafood Processing Joint-Stock Co. Minh Hai Seaproducts Import Export Corp. Nha Trang Fisheries Joint-Stock Co. Nha Trang Seaproduct Co. Pataya Food Industries (Vietnam) Ltd. Phu Cuong Seafood Processing Sao Ta Foods Joint-Stock Co. Soc Trang Aquatic Products and General Import Export Co. Song Huong ASC Import Export Co. Thuan Phuoc Seafoods and Trading Corp. UTXI Aquatic Products Processing Co. Viet Foods Co., Ltd. Viet Nhan Co. Vietnam Fish-One Co., Ltd. Vinh Loi Import Export Co.	4.38		
Vietnam-wide rate	25.76		

Early warning

VASEP had been aware of an impending antidumping case for a long time before the STAC filed its antidumping petition to the DOC. On January 20, 2003, Mr. Ngo Phuoc Hau, Vice President of VASEP informed Lao Dong [Labor] Newspaper that VASEP had already prepared for an antidumping action against its shrimp exported to America.⁸⁸ In comparison with the catfish case, Vietnamese respondents had much more time to prepare for the DOC's investigation. It is clearly that VASEP has learned a lot from experience in the catfish case. The association had understood the importance of early warnings during the preparation period for an investigation. Therefore, VASEP has developed an early warning mechanism which comprises several elements: (i) monitoring the preparation activities of American shrimp producers, (ii) analysis of the U.S. shrimp industry and the trends of shrimp importation to the U.S., and (iii) a network of connections with international trade law firms

⁸⁸ Vietnam News Agency, *Vietnam chuan bi doi pho voi vu kien ban pha gia tom cua My* [Vietnam is preparing for an antidumping action against its shrimp exported to the U.S.], January 22, 2003, available at <http://www.vietnamembassy-usa.org/tintuc/newsitem-v.php3?datestamp=20030122095636>.

and lobbying companies. The mechanism proved to be a success, Vietnamese respondents had almost two years to prepare for the case.⁸⁹

Organizing the defense

Thanks to the long time for preparation, various activities have been carried out to improve the capability of Vietnamese respondents in responding to investigation. Mistakes and shortcomings revealed in the catfish case were learned. The mechanism to manage the defense was also refined.

Answering questionnaires

Experience from the catfish case showed that, it was difficult for Vietnamese respondents to understand the U.S. antidumping law in general and investigation practices in particular. Vietnamese respondents also found difficulties in providing accurate information to the DOC where there were differences in business practices and accounting standards. Understanding those difficulties, VASEP has organized a dozen training workshops in which enterprises were trained about the U.S. antidumping law⁹⁰. Technical issues such as preparation of accounting data, answering questionnaires and cooperating with lawyers were also addressed in those workshops.

Answering the questionnaires in the shrimp case was more technically difficult than the catfish case. The reason was the scope of investigation in the shrimp case was much broader⁹¹ which required a huge workload for Vietnamese respondents. Although the DOC had to use supplementary questionnaires and extend the due date for the respondents several times, the respondents' preparation paid off. Firstly, the nation-wide duty reduced from 16.1 percent in the preliminary phase to 4.38 percent. Secondly, three of four mandatory respondents had their duties reduced remarkably in comparison with the duties determined in the preliminary phase. Only one company was imposed duty rate higher than that of the preliminary phase. The DOC explained this case as follows:

“Pursuant to section 776(a)(2)(D) of the Act, we were applying facts otherwise available to [...] because it refused to allow the Department to verify the information it had submitted during the

⁸⁹ In an interview with VnExpress on December 26, 2003, Mr. Nguyen Huu Dzung said that “the preparation [for the shrimp antidumping case] has been carried out in the last two years.” See VnExpress, “*Vietnam chi 1,5 trieu USD cho vu kien tom*” [Vietnam pays USD 1.5 million for the shrimp case], available at <http://vnexpress.net>.

⁹⁰ Id.

⁹¹ “The scope of this investigations includes certain warmwater shrimp and prawns, whether frozen or canned, wild-caught (ocean harvested) or farmraised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off, deveined or not deveined, cooked or raw, or otherwise processed in frozen or canned form.” Department of Commerce, Federal Register Vol. 69 No. 136, at 42677.

course of investigation. Furthermore ... the Department has determined that [...] did not cooperate to the best of its ability to comply with the Department's requests for information."⁹²

Hiring lawyers

VASEP used an open and transparent mechanism which was similar to the process in the catfish case for hiring lawyers. Of several law firms offering legal service, Willkie Farr & Gallagher LLP was selected. In addition to being a law firm specializing in international trade law, the firm also had experience with Vietnamese aquaculture industry by assisting Vietnamese enterprises in the catfish case with regard to the non-market economy issue. Furthermore, the firm also had experienced in confronting Dewey Ballantine, the law firm of SSA.

Financial resources

The shrimp case was much more technically complicated than the catfish case, and therefore, the expenses for defending the case were higher. While the SSA was preparing for its petition to the DOC, VASEP had already estimated the lawyer's fee in this case would reach USD 1.5 million⁹³. On November 27, 2003, in a conference with its members, VASEP launched a financial campaign for the budget of the impending antidumping case. Although the SSA did not officially file their petition to the DOC, VASEP received contributions from its members equal to USD 70,000 straight after the campaign announcement. The budget for the case increased after the SSA filed its petition to the DOC, and by the end of 2004, VASEP had paid USD 2 million for lawyers' fees.⁹⁴

Lobbying activities and working with organizations having mutual benefits

Lobbying activities in the shrimp case were well organized and carried out under a predetermined strategy. Firstly, VASEP established close relationship with American entities which have mutual benefits. The Consuming Industries Trade Action Coalition and American Seafood Distributors Associations were the two organizations who worked closely with foreign shrimp producers in this case. VASEP and other foreign shrimp producers worked closely with the Shrimp Task Force, the ad-hoc representative of the two organizations in the case. To support a lobbying effort of the American Seafood Distributors Association, VASEP contributed USD 55,000 for distribution of documents proving that Vietnamese shrimp's price had not been dumped⁹⁵. A website was set up by this Task Force

⁹² 69 FR 71005, 71008.

⁹³ VnExpress, *Vietnam pays USD 1.5 million for the shrimp case*, supra n. 89.

⁹⁴ Tuoi Tre newspaper, *Van con hy vong cho vu kien tom*, [there is still hope for shrimp antidumping case], December 2, 2004. Available at:

<http://www.tuoiitre.com.vn/Tianyon/Index.aspx?ArticleID=58271&ChannelID=11>

⁹⁵ VietnamNet, *"My tien dan den vu kien ban pha gia tom"* [antidumping actions against shrimp is looming], August 8, 2003 (<http://www.vnn.vn/kinhte/hoinhapphattrien/2003/8/25164/>).

to provide all necessary information about the case.⁹⁶ A sample of the Task Force leaflet can be found in Annex III

Secondly, the lobbying activity targeted politicians who understood the American consumer's benefit and could have influence on the DOC to ensure fair and reasonable procedures would be applied. Through the Shrimp Task Force, VASEP and other foreign shrimp producers won the support of a group of thirteen members of Congress. This group of Congress members sent a letter to the DOC on May 7, 2004 requesting the Department to "use fair and reasonable procedures in the pending antidumping investigation concerning imported shrimp."

Thirdly, VASEP obtained the support of several Vietnamese state agencies. In order to coordinate with other respondents, the Ministry of Trade worked with its Thai counterpart and reached an agreement on exchanging information in relation to the antidumping case.⁹⁷ A group of the National Assembly Deputies also sent a letter to DOC asking the agency to be fair in hearing the case.

Fourthly, the association worked with non-governmental organizations to provide the American public information about the Vietnamese shrimp industry and its competitiveness. For example, ActionAid Vietnam, a non-governmental organization helped 2,500 shrimp farmers to send a letter expressing their wish for a fair hearing of the case to DOC and disseminate it in the Internet.⁹⁸

⁹⁶ <http://www.citac.info/shrimp/>

⁹⁷ "Vietnam – Thai Lan tìm kiếm giải pháp chống vụ kiện tôm" [Vietnam and Thailand looking for a solution for the shrimp antidumping case]. Available at

<http://www.tuoiitre.com.vn/Tianyon/Index.aspx?ArticleID=17291&ChannelID=11>

⁹⁸ Tuoi tre Newspaper, *Nong dan Vietnam phan doi thue chong ban pha gia tom*, [Vietnamese farmers protest the antidumping duty imposed on their shrimp], November 11, 2004. Available at: <http://www.tuoiitre.com.vn/Tianyon/Index.aspx?ArticleID=55286&ChannelID=11>. For further information about the activities of non-governmental organizations which have contributed to the defense of Vietnamese enterprises, please visit the website of the Ministry of Trade of the Socialist Republic of Vietnam: <http://www.mot.gov.vn>.

PART IV: LESSONS LEARNED

From the catfish and shrimp cases, there are several lessons on which Vietnamese enterprises may find some benefits.

Diversify export market

The first lesson from the catfish case is that when domestic producers' competitiveness is weakened and their market share is shrunk, they can use any ways possible to obstruct competing foreign imports. Antidumping is just one of the measures that domestic producers can resort to. The second lesson is: domestic producers usually have more advantages than foreign producers in the game of lobbying the legislative branch. Those advantages are (i) their knowledge of local politics, (ii) the "local focus" characteristics of politics in big countries like the United States, (iii) their understanding and experience on public relations in the home country, and (iv) their network of connections.

Therefore, there are more chances for domestic producers to obstruct the foreign imports than vice versa. Diversifying export markets help Vietnamese enterprises to reduce bad effects when their exports to a certain market are obstructed.

Build up a strong brand

The catfish case has had an unexpected consequence for VASEP. After the DOC imposed antidumping duties on Vietnamese catfish, the catfish export volume of VASEP to other markets (i.e. EU, Japan, Australia) have remarkably increased. Vietnamese people also started using catfish. The reason was simple, the catfish case had been covered by the media and was a hot topic for a short time but long enough for the consumers in the U.S. and other countries to know about the existence of the product. This shows that good quality and cheap price are not enough for a new product to penetrate a foreign market. Strong brand and proper marketing methods are needed⁹⁹.

Antidumping actions against Vietnamese products will increase

There are two major reasons to anticipate that the number of antidumping actions against Vietnamese goods will increase in the near future. Firstly, Vietnamese exports have been grown uninterruptedly in the last two decades and are expected to continue in the future. Secondly, the membership of the WTO – which Vietnam is expecting to gain by the end of 2005 – will create a new wave of exports of labor intensive products (i.e. textile and wooden furniture). This sudden increase of Vietnamese exports to a certain country could create pressure on domestic industries and trigger an antidumping action.

⁹⁹ After the catfish case, Vietnamese catfish industry has chosen "Top Quality Pangasius from Vietnam" as a brand for products from "tra" and "basa" fish (catfish).

For that reason, Vietnamese enterprises should prepare for antidumping actions. Firstly, they need to closely monitor their exports in order to make sure that the increase of their market share in a certain country is not “too hot”. Secondly, enterprises need to (i) train themselves the general knowledge of international trade law in general and antidumping law in particular, (ii) improve their financial record system to meet with the requirements of antidumping investigations, and (iii) improve the English language abilities of their staff.

Develop an early warning mechanism:

Time is an important factor for respondents in AD actions. The catfish and shrimp cases show that the more time for preparation, the better the respondents respond in antidumping investigations.

Although there is no ideal mechanism that can be applied in every industries, an early warning mechanism may include the following factors: (i) economic analysis, (ii) monitoring the domestic producers’ activities, (iii) a network of connections with lobbying companies and law firms abroad, and (iv) monitoring the media.

The economic analysis should reflect both the current situation of Vietnamese exports to a country and the situation of that country’s domestic industry. Any sudden increase of market share could result to an antidumping action. A market dominated by foreign imports could also be a reason for domestic producers to file an antidumping petition. The decrease of market share can also be a reason for the domestic producers to use antidumping despite the fact that that decrease may result from a cut in the government’s subsidies or outdated technology or natural calamity. Elections where politicians need the votes of people could also add to the reasons for domestic producers to file an antidumping petition.

Closely monitoring domestic producers’ activities may help Vietnamese enterprise to detect an impending antidumping. Before filing an antidumping petition to the competent authority, domestic producers need to coordinate to raise funds, hire lawyers and prepare information for the petition. In most cases, those activities are open to the public. Once Vietnamese enterprises observe such activities, they should prepare themselves. Monitoring the media is one of the most effective ways when Vietnamese exporters do not have a representative abroad.

Networking with law firms and lobbying companies is a good way for Vietnamese enterprises to know about those companies and their services. In return, they may provide Vietnamese with information about an impending antidumping action.

Behavior in an antidumping case:

Answering an antidumping investigation requires a lot of professional knowledge and professional behavior. Although antidumping is an administrative proceeding, it is still considered as a “quasi-legal” process. This means that the respondents’s response during the investigation should not be based on “common sense” and emotion but proof. The

respondents should be aware that emotional reactions may worsen the relationship between the investigating agency and the respondents rather than improve it.¹⁰⁰ Therefore, Vietnamese enterprises should give the preparation of data and information the first priority in their workplan.

Vietnamese respondents during investigation should cooperate with the investigating agency. Instead of trying to prove who is “right” and who is “wrong”, the respondents should focus on providing the investigating agency with all information it needs. The most important thing is not “to be right” but to minimize the AD rates as low as possible. Un-cooperative respondents in the catfish and shrimp cases have had AD rates imposed on them which were much higher than those who were cooperative.

Respecting the due date of questionnaires is also important. Late responses could be rejected by the antidumping authority which may lead to a higher dumping duty. Information provided by the respondents could also be rejected if the antidumping authority thinks that the respondents do not fully cooperate or were not honest.¹⁰¹

Cooperating with other respondents during investigation is important. The investigating authority often cross-checks the information provided by various respondents. Through cooperation respondents may find errors causing discrepancies in their information and fix them before submitting to the investigating authority.

Organize the defense:

Role of business associations: from the catfish and shrimp cases, the role of business associations proved to be very important. A business association is the coordinator in all activities in relation to an antidumping case. Prior to the antidumping case, the business association is the watchdog of the industry and responsible for running the early warning mechanism. It is also responsible for organizing training for its members in order to respond to an antidumping investigation and developing a network of connections in the country of impending antidumping action. Each business association needs to set up a task force responsible for preparing for possible AD action. The main functions of this task force would be:

- evaluate the risk that their products may be subjected to AD actions abroad;

¹⁰⁰ In the catfish case, many Vietnamese respondents and other social organizations had strongly emotional reactions. For example, a general director of a Vietnamese respondent even said that “I strongly disagree with the DOC’s determination..... I will organize them [the catfish farmers] to boycott American products, such as food, soya bean... By this determination, the DOC considers the Bilateral Trade Agreement [between Vietnam and the U.S] as a tool to protect American industries.”. Tuoi Tre Newspaper, *Vietnam Dissents the DOC’s Determination*, June 19, 2003. Available at <http://www.vnn.vn/kinhte/2003/6/16188>. Last accessed March 14, 2005.

¹⁰¹ See Part III, Section “Answering questionnaires” of this paper.

- study AD laws of the major export markets of the association;
- work with lawyers and economists who are experts in AD to study precedents of AD cases in “at risk” market to learn the tactics and strategy of domestic industry in attacking foreign products as well as the opinions of AD administrations;
- work with the association member enterprises to improve their accounting and recording standard to meet the requirements of AD investigation;
- draw a plan to coordinate the association member enterprises in case of being attacked by AD actions.

Financial resources: the preparation and defense in an antidumping action need money. Although respondents are the people who pay the expenses, it is necessary to centralize the management of financial resources. The business association is the most suitable agency for managing the all financial resources because it is the coordinator in the preparation and defense.

Lobbying: the catfish case shows that lobbying the legislative branch proves to be very effective. However, domestic producers always have more advantages than foreign producers in this area. Lobbying the executive branch has limited effect but is necessary because it could pressure the antidumping authority to use fair and reasonable procedures in the investigation. Nevertheless, the lobbying activities need a strategy with specific goals and targets. Lobbying also needs strong support of evidence rather than simply access to target groups with “common sense” arguments. Cooperation with the media, organizations having mutual benefits in antidumping country, and non-governmental organizations is important in winning the support from the public.

Non-market economy status: although the determination of the non-market economy status is rather a political than a technical decision, the respondents still need to prove that their business is not subject to government control¹⁰². The “surrogate” country used for

¹⁰² Individual dumping margins are automatically assigned to exporters in market-economy country cases. In non market economy cases, however, exporters must pass a “separate rate” test to receive their own, individual dumping margins. Those exporters that do not pass this test receive the non market economy countrywide dumping margin. To pass this test, the respondents should demonstrate that its export activities, on both a *de jure* and *de facto* basis, are not subject to government control.

Evidence supporting a finding of *de jure* absence of government control over export activities would include 1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses, and 2) any legislative enactments devolving central control of export trading companies.

Evidence supporting a finding of *de facto* absence of government control over export activities would include: 1) whether the export prices are set by or are subject to the approval of a government authority, 2) whether the respondent has the authority to negotiate and sign contracts and other agreements, 3) whether the respondent has autonomy from the government in making decisions regarding the selection of management, and 4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.

calculating the normal value should be carefully studied to find out the similarities and dissimilarities between the industries of the two countries.

Role of Vietnamese authority

The Vietnamese authorities have an important role. In general, whether Vietnam is considered as a non-market economy in the next antidumping cases depends on the authorities. On the one hand, the authorities need to speed up the economic reforms in order to integrate its economy into the world economy. On the other hand, it should make sure that state agencies do not intervene in enterprises' business.

The authorities can also help business associations in monitoring the early warning system by providing macro-economic data and collecting information through its network (for example, the Ministry of Trade through its network of commercial attachés could help Vietnamese exporters to gather information of their export markets). The authorities can also provide technical assistance and training to enterprises, especially assistance and training in relation to international trade law. Finally, the authorities, through their connections abroad, may communicate with foreign antidumping authority to convince them to use fair and reasonable procedures in hearing the cases.

- THE END -

ABOUT THE AUTHOR

Bao Anh Thai, managing partner of the Hanoi-based law firm of Bao&Partners, specializes in international trade and contract laws and public policy. His practice includes advising state agencies companies with regard to antidumping duty proceedings and international commercial and banking transactions. Mr. Thai is a 1995 graduate of Hanoi Law School and a 2004 LL.M. graduate of James E. Rogers College of Law, the University of Arizona. He was a Fulbright scholar in 2003-2004.

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ANNEX I: Letter of senators to the department of commerce

December 20, 2002

The Honorable Donald L. Evans
Secretary
U.S. Department of Commerce
14th Street and Constitution Avenue
Washington, D.C. 20230

Re: Case Number A-552-801

Dear Mr. Secretary:

We are writing to express our concern regarding the anti-dumping petition that domestic catfish farmers filed in June against Vietnam's catfish exporters. The petitioners in this case allege that exports of Vietnamese catfish to the United States have harmed the domestic catfish industry because the Vietnamese product is being sold at less than fair market value. In advance of the Department's January ruling on this matter, we would ask that you make every effort to ensure that all of the facts in this case are carefully analyzed before any decision is taken.

As you know, this case comes at a particularly sensitive time in U.S.- Vietnam relations, given the passage last December of the historic U.S.-Vietnam Bilateral Trade Agreement. It also comes against a backdrop of protectionist barriers mandated by Congress to limit competition from Vietnamese catfish in the U.S. market.

A provision inserted in the FY 2002 Agriculture Appropriations Act, and enacted permanently in the Farm Bill, prohibits the labeling of fish or fish products as "catfish" unless the fish have a certain family name. The practical effect of this measure is to restrict all catfish imports into our country by requiring that they be labeled as something other than catfish, which benefits domestic producers by significantly reducing foreign competition. According to the Department of Agriculture, during the first seven months of 2002, catfish imports dropped 37 percent compared with the same period last year. Imports from Vietnam represent only a small fraction of the catfish consumed in the United States.

The evidence we have seen indicates clearly that the success of Vietnamese catfish exporters in the U.S. market is due not to dumping or government subsidies, but to the quality of the Vietnamese product and the relatively low cost of production in Vietnam. American consumers enjoy eating Vietnamese catfish. The punitive tariffs on Vietnamese catfish imports sought by domestic producers in the pending anti-dumping suit would penalize American consumers. A decision to impose such tariffs would be inconsistent with our obligations under the U.S.-Vietnam Bilateral Trade Agreement and would not reflect the market principles by which trade between our countries should be governed.

We are also concerned that protectionist measures designed to favor the U.S. catfish industry are undermining the efforts of other U.S. industries to fight protectionism abroad. In particular, the European Community is currently employing protectionist measures against the U.S. herring fishery, claiming that U.S. herring imports cannot be labeled and marketed as "sardines" within the European Community. On October 23, 2002, the World Trade Organization's dispute resolution body found the E.C.'s action on sardines -- which is similar to that of the United States against Vietnamese catfish -- to be out of compliance with the E.C.'s international obligations. If the U.S. continues forward with protectionist measures for U.S. catfish, it will be to the detriment of another U.S. fishery, by undermining the WTO's decision against the E.C.'s actions in the trade of herring.

If this case moves forward and high tariffs ultimately are applied, American consumers will suffer the consequences of increased protectionism. A variety of U.S. companies that import and distribute this product throughout the United States, as well as the numerous U.S. grocery store and restaurant chains across the country that offer this product to American consumers, will suffer as well. Most of the Vietnamese product enters the United States through the ports of Los Angeles and San Francisco. The U.S. farming community also derives benefits from the Vietnamese exports, since Vietnamese fish farmers purchase U.S. corn and soybean for use on their farms. If this case is successful, many leaders in the trade-dependent U.S. seafood industry fear that a similar case against foreign shrimp imports could be filed next, as one protectionist barrier begets another.

The best interests of the American consumer should be the paramount consideration in any determination that is made. American consumers, American businesses, and Vietnamese farmers and exporters should not be penalized for the success of competitive Vietnamese catfish products in the U.S. marketplace.

Sincerely,

John McCain

Chuck Hagel

Olympia Snowe

Susan Collins

Diane Feinstein

cc: Grant Aldonas, Under Secretary for International Trade
Faryar Shirzad, Assistant Secretary for Import Administration

ANNEX II List of Articles.

[Rushford Report: Vietnam Catfish](#) (Jan 2003)
[Case of the ghostly catfish](#) (Dec 16, Economist)
[Catfish Tangle: U.S., Vietnam fight trade war over down-home delicacy](#) (Dec 11, Atlanta Journal)
[Vietnam catfish firm unbowed by U.S. trade spat](#) (Nov 22, Reuters)
(Nov 21, Reuters)
[Vietnam Rejects "Non-Market Economy" Label by US in Catfish Dispute](#) (Nov 14, AFP)
[American and Vietnamese Fighting over Catfish](#) (Nov 5, NY Times)
[Vietnam Denies U.S. Catfish Charge](#) (Oct 3, AP)
[US Trade Team in Vietnam for Catfish Probe](#) (Oct 2, Reuters)
[International Trade Vietnamese Frozen Fish Pose Threat Of Material Injury of U.S. Catfish, ITC Says](#) (August 9, BNA)
[Vietnam, US Battle Over Catfish](#) (August 8, AP)
[U.S. Catfish Dispute Threatens Jobs](#) (July 17, AP)
[Catfish Industry in Vietnam](#) (July 17, AP Photos)
[Fish Dumping Claim Rejected by Vietnamese](#) (July 5, Bloomberg)
[Highlights of New Farm Bill](#) (May 3, AP Congress)
[US Catfish Industry Readies for Fight](#) (Apr 26, AP)
[Catfish at center of U.S.- Vietnamese trade battle](#) (Apr 22, The Kansas City Star)
[Poetic Justice: Base Sales Boom](#) (Apr 10, CWT)
[Catfish farms reap a windfall](#) (March 29, VN Embassy)
[When Is a Catfish Not a Catfish?: When It Comes From Vietnam and Cuts Into U.S. Sales, Hill Says](#) (Dec 27, Washington Post/AP)
[One catch not fish of the day](#) (Dec 28, Washington Times)
[Catfish blues cast doubt on US-Vietnam trade](#) (Dec 20, Financial Times)
[A battle of words and welfare took place on the U.S. Senate floor last week](#) (November 21, 2001, The Selma Times)
[Catfish campaign against Vietnamese fish](#) (November 14: VASEP)
[Senator J. McCain comments on Vietnamese catfish](#) (November 6)
[Senate Votes To Stop Labeling of Vietnamese "Basa" Fish As American Catfish](#) (October 31, 2000)
[Vietnamese Catfish Rile Southern Lawmakers](#) (September 10: Washington Post)
[Catfish Case Muddies Waters for Bush 'Fast Track' Plans](#) (July 13: WSJ)
[Ross & Berry Take Lead To Protect U.S. Catfish Farmers](#) (July 11, 2001)
[Watch the Bones](#) (July 6: Rushford Report)
[Vietnam And US to Settle Dispute Over Catfish Exports](#) (July 4, 2000)
[U.S. Catfish Farmers take aim at Vietnamese basa fish](#) (WorldCatch News Network: April 16)

WHY "ZEROING" ADDS UP TO A BIG NEGATIVE FOR U.S. CONSUMERS!

On November 30, the Department of Commerce will begin announcing duties on shrimp imported to the U.S. from six foreign countries as part of its investigation of alleged "dumping."

However, in determining the amount of these taxes, the DOC's method of calculation is not merely out of step with simple grade school math, it is in clear violation of World Trade Organization rules.

It's called "zeroing" and nothing about it adds up for American consumers of shrimp.

In its flawed approach to determining import taxes by averaging product-specific dumping margins for foreign suppliers, the Commerce Department converts all negative dumping margins to zero. This discretionary practice is not required by U.S. anti-dumping laws, is patently unfair, and biases the outcome of anti-dumping investigations by always resulting in artificially inflated, unmerited tariffs and taxes.

The European Union has ceased the practice of zeroing, yet the Department of Commerce persists, to the detriment of shrimp consumers and processors in America.

No new legislation is required to terminate the practice of zeroing. If the DOC simply calculates averages the way we were all taught in school, we believe that taxes will not be assessed on imports from 12 foreign companies in five of the six countries under investigation. And the winners will be the American families who consume more shrimp than any other seafood.

If the Commerce Department continues to use zeroing in its dumping investigation, another challenge from the WTO is likely. And worse, the countries now exporting shrimp to the United States would have the right to retaliate against U.S. exports.

Artificially high tariffs on imported shrimp are unfair, will increase the price we all pay for shrimp, and will result in lost U.S. jobs.

YOU CAN HELP!

Contact the Department of Commerce today and demand that the practice of zeroing be ended in anti-dumping investigations.

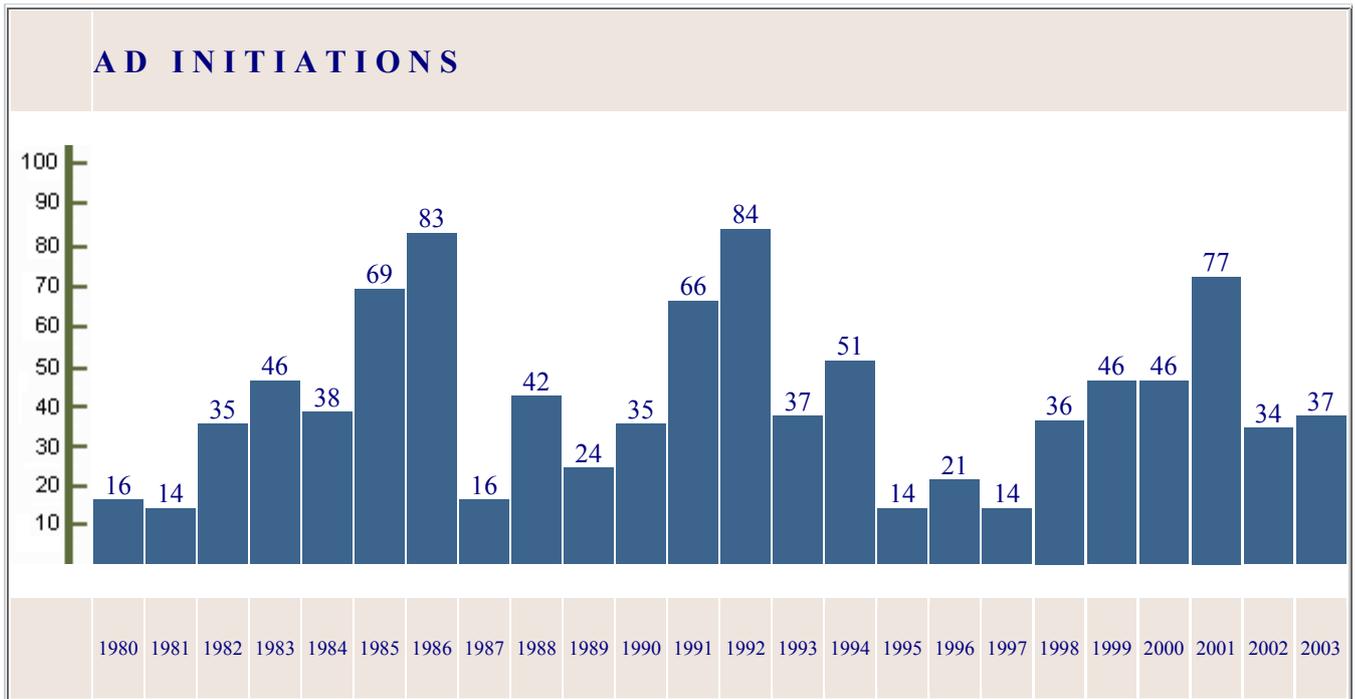
Contact Commerce Secretary Donald L. Evans at (202) 482-2000 or via email to: devans@doc.gov

To learn more about why these proposed tariffs are bad for America, visit: www.freetradeinseafood.com or www.citac.info/shrimp

This message presented in the public interest by

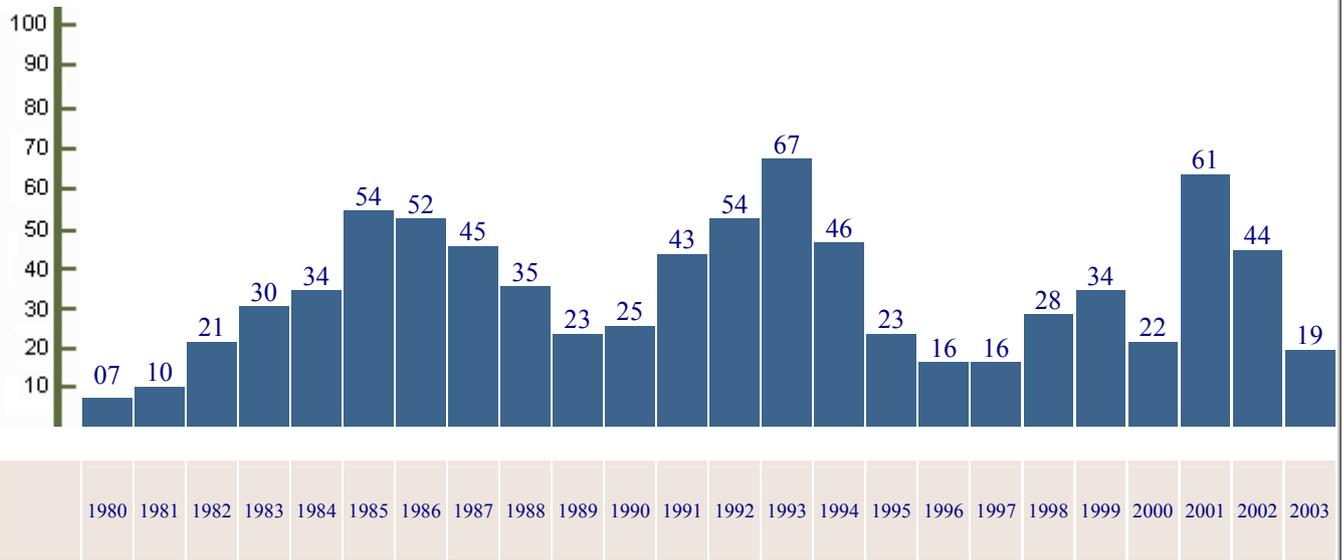


ANNEX IV Antidumping Investigations Case Activity (January 01, 1980 - December 31, 2003)¹⁰³



¹⁰³ Import Administration, <http://ia.ita.doc.gov/stats/ad-1980-2003.html>

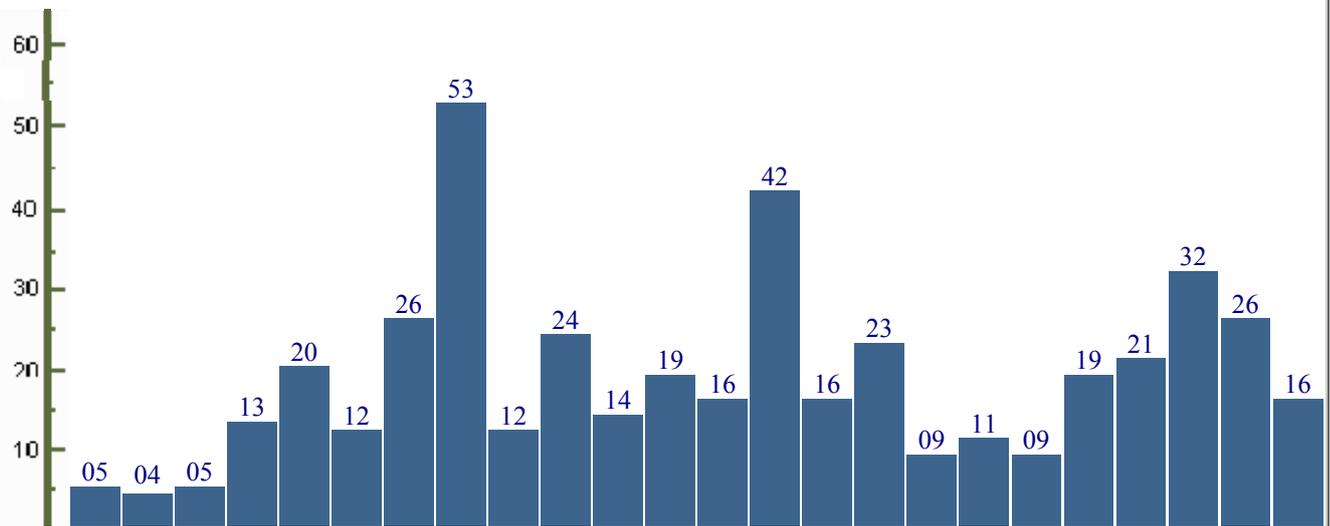
AD PRELIMINARY DETERMINATIONS



AD FINAL DETERMINATIONS

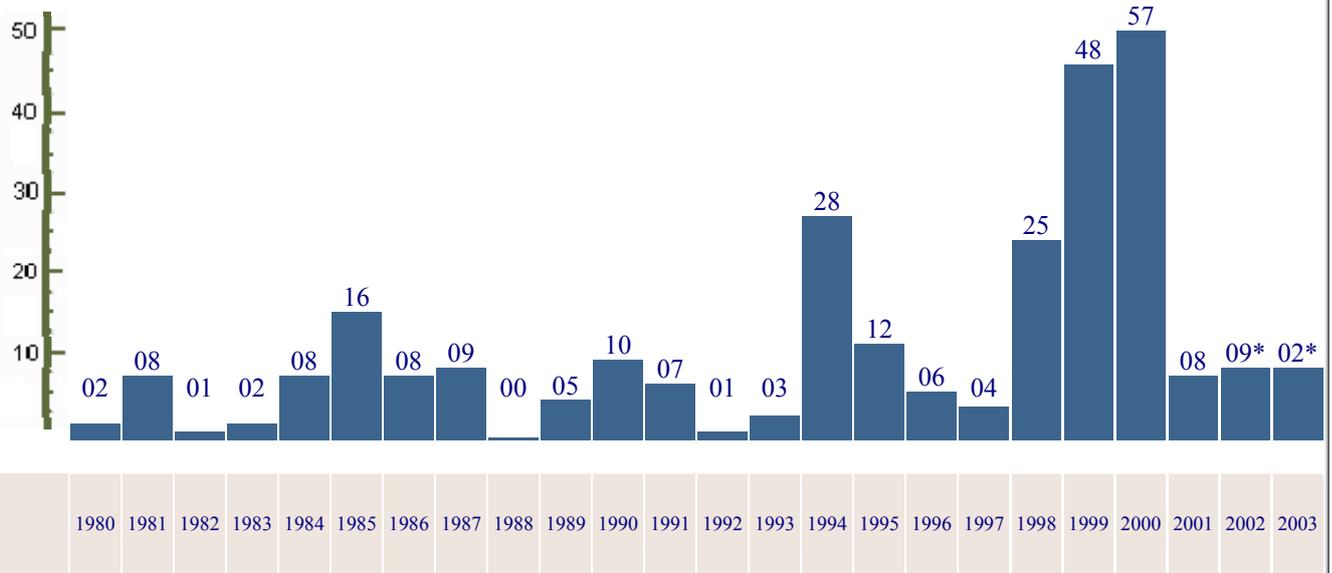


AD DUTY ORDERS ISSUED



1980 1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003

AD DUTY ORDERS REVOKED



* This number includes Sunset Revocations

Combined Antidumping Data

	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
INITIATIONS	16	14	35	46	38	69	83	16	42	24	35	66	84	37	51	14	21	15	36	46	45	77	35	36

PRELIMS	07	10	21	30	34	54	52	45	35	23	25	43	54	67	46	23	16	16	28	34	22	61	44	19
FINALS	06	05	07	23	36	30	43	58	17	40	18	28	28	80	31	38	12	15	17	37	35	34	58	20
DUTY ORDERS	05	04	05	13	20	12	26	53	12	24	14	19	16	42	16	23	09	11	09	19	21	32	26	16
REVOCATIONS	02	08	01	02	08	16	08	09	00	05	10	07	01	03	28	12	06	04	25	48	57	08	09	02

Annex V Tuoi Tre's Article: "Shrimp Under Attack, The Story Still Continue..."

Thứ Năm, 25/12/2003, 15:10 (GMT+7)

Con tôm bị kiện, chuyện hãy còn dài...

TTO - Thông tấn xã Việt Nam cho biết: Ngày 30-12 tới, Liên minh đánh bắt tôm miền Nam nước Mỹ (SSA) sẽ chính thức đệ đơn kiện các nước xuất khẩu tôm, trong đó có VN, bán phá giá mặt hàng này tại thị trường Mỹ. Và hiệp hội Chế biến và xuất khẩu Thủy hải sản VN (VASEP) lại bắt đầu một cuộc đua kiện tụng, tranh luận có thể kéo dài.



Sau cá ba sa, các doanh nghiệp VN đã không còn bất ngờ trước sự tấn công của giới doanh nghiệp Mỹ nhằm vào số tôm xuất khẩu của mình nữa. Chính vì thế, hôm 27-11, Những thông tin mới nhất về VASEP đã mở cuộc vận động tài chính trong các hội viên vụ kiện được cập nhật tại trang của mình để tính đường "án phí" lâu dài. 70.000 USD thu chủ của VASEP được chỉ mới là con số lẻ so với chi phí 500.000 USD mà con cá ba sa phải trả, tuy nhiên, nó thể hiện quyết tâm của các doanh nghiệp VN không để Liên minh tôm miền Nam Mỹ (SSA) "muốn làm gì thì làm".

Ngày 8-8 SSA cũng đã bắt tay với hiệp hội nuôi tôm Louisiana (LSA) để tăng áp lực kiện tụng. Theo những kế hoạch ban đầu, SSA định sẽ "đánh" đồng loạt 12 nước có tôm xuất sang thị trường Mỹ, nhưng sau đó, vì lý do tài chính, họ quyết định chuyển hướng sang các quốc gia có lượng tôm xuất khẩu nhiều nhất. VN xếp thứ 3, nhưng lại là nước bị liệt vào dạng "không phải nền kinh tế thị trường" nên sẽ gặp nhiều bất lợi trong cuộc chơi cân não này.

Hiện nay, hàng loạt các biện pháp, hàng loạt các công ty, hãng luật và những tay vận động hành lang đang chuẩn bị những "đòn phép" tối hậu nhất đang được trù tính. SSA dự định thuê Dewey Ballantine, hãng luật nổi tiếng ở Washington về các vụ **chống phá giá** tham gia vụ này. Hãng Jones Walker, một hãng luật có nhiều liên minh với cựu chủ tịch Ủy ban Phân bổ Ngân sách của hạ viện Mỹ cũng nằm trong danh sách cộng tác của SSA.

Tuy nhiên, những chính trị gia lại lo ngại sự chi phối khá mạnh của cuộc bầu cử vào tháng 11 năm 2004. Tổng thống G.Bush không thể bỏ qua lá phiếu của cử tri ở tám bang thành viên của SSA (Louisiana, Alabama, Georgia, Florida, Mississippi, Bắc và Nam Carolina, Texas).

Một điểm rất đáng lưu ý trong vấn đề này là đề xuất của Thái Lan về việc lập liên minh giữa các nước bị kiện để có thể đối phó với Mỹ. Vì thật tình, dù muốn dù không, khi Trung Quốc, Ấn Độ và Brazil (cùng bị kiện), vốn là những nước có tiếng nói trong WTO "ngồi chung xuống", các doanh nghiệp VN cũng sẽ có thêm sức mạnh.