

UNITED STATES – MEASURES RELATING TO SHRIMP FROM THAILAND

Request for the Establishment of a Panel by Thailand

The following communication, dated 15 September 2006, from the delegation of Thailand to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

Upon instructions from my authorities, I wish to convey the request of the Government of the Kingdom of Thailand ("Thailand") for the establishment of a panel pursuant to Article XXIII of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), Articles 4 and 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), and Article 17 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "AD Agreement") with respect to certain measures imposed by the United States relating to imports of certain frozen warmwater shrimp ("shrimp") from Thailand.

On 24 April 2006, Thailand requested consultations with the United States pursuant to Article 4 of the DSU, Article XXII:1 of the GATT 1994, and Articles 17.2, 17.3 and 17.4 of the AD Agreement.¹ Consultations were held in Geneva on 1 August 2006. However, these consultations failed to resolve the dispute.

Thailand considers that the specific measures at issue, as described herein, are inconsistent with the provisions of the GATT 1994 and the AD Agreement described below:

1. *The Specific Measures at Issue:*

There are two measures imposed by the United States relating to imports of shrimp from Thailand at issue in this dispute.

(a) The Anti-Dumping Duty Measure

The first measure consists of the investigation, determinations, and order that led to the imposition of anti-dumping duties on imports of shrimp from Thailand (the "Anti-Dumping Duty Measure"). The United States initiated this investigation on 27 January 2004, pursuant to section 732 of the Tariff Act of 1930, as amended (the "Act"), in respect of certain frozen and canned warmwater shrimp imported from Thailand and several other countries.² On 28 July 2004, pursuant to section 733 of the Act, the United States Department of Commerce ("USDOC") preliminarily determined that

¹ WT/DS343/1, G/L/776, G/ADP/D66/1 (27 April 2006).

² *Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam*, 69 Fed. Reg. 3876 (27 January 2004).

certain frozen and canned warmwater shrimp from Thailand were being dumped in the United States (the "Preliminary Determination").³ On 23 December 2004, the USDOC published a final determination that frozen and canned warmwater shrimp from Thailand were being dumped in the United States (the "Final Determination").⁴ Following a determination by the US International Trade Commission that the US domestic industry was materially injured by imports of frozen warmwater shrimp from Thailand but that there was no injury or threat thereof to the US domestic industry by reason of imports of canned warmwater shrimp from Thailand,⁵ the USDOC published an amended final determination of dumping and an anti-dumping duty order imposing definitive anti-dumping duties only on imports of certain frozen warmwater shrimp from Thailand (the "Amended Final Determination").⁶

The measure at issue includes the use by the USDOC, in the course of its investigation and in the Preliminary, Final and Amended Final Determinations, of the practice known as "zeroing" to calculate dumping margins for each investigated Thai exporter. Under this practice, in calculating overall weighted-average dumping margins for each investigated Thai exporter, the USDOC set to zero the results of intermediate comparisons of export price and normal value for which the export price exceeded the normal value. The effect of the use of this practice was artificially to create margins of dumping where none would otherwise have been found or, at a minimum, to inflate margins of dumping and hence to impose inaccurate definitive anti-dumping measures on imports of shrimp from Thailand.

(b) The Continuous Bond Requirement

The second measure consists of the requirement imposed by the United States on importers of shrimp from Thailand subject to the Anti-Dumping Duty Measure to maintain a continuous bond in the amount of the applicable anti-dumping duty margin multiplied by the value of imports of shrimp imported by the importer in the preceding year in order to secure the payment of anti-dumping duties (the "Continuous Bond Requirement"). The Continuous Bond Requirement has been imposed at the time of entry on all imports of shrimp from Thailand subject to anti-dumping duties since approximately 1 February 2006. The Continuous Bond Requirement has been imposed pursuant to the US Customs and Border Protection ("CBP") agency's Amendment to Bond Directive 99-3510-004 for Certain Merchandise Subject to Antidumping/Countervailing Cases, dated 9 July 2004 (the "Amended Bond Directive"),⁷ the document entitled "Clarification to July 9, 2004 Amended Monetary Guidelines for Setting Bond Amounts for Special Categories of Merchandise Subject to Antidumping and/or Countervailing Duty Cases", also posted on CBP's website,⁸ and the document

³ *Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Critical Circumstances Determination: Certain Frozen and Canned Warmwater Shrimp from Thailand*, 69 Fed. Reg. 47100 (4 August 2004).

⁴ *Notice of Final Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand*, 69 Fed. Reg. 76918 (23 December 2004).

⁵ *Certain Frozen or Canned Warmwater Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand, and Vietnam [Investigations Nos. 1063-1068 (Final)]*, 70 Fed. Reg. 3943 (27 January 2005) and USITC Publication 3748, *Certain Frozen or Canned Warmwater Shrimp and Prawns from Brazil, China, Ecuador, India, Thailand, and Vietnam: Investigations Nos. 1063-1068 (Final)* (January 2005).

⁶ *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand*, 70 Fed. Reg. 5145 (February 1, 2005).

⁷ The Amended Bond Directive is posted on CBP's website at http://www.cbp.gov/xp/cgov/import/add_cvd/bonds/07082004.xml (last accessed on 12 September 2006).

⁸ Posted at http://www.cbp.gov/linkhandler/cgov/import/add_cvd/bonds/bond_clarification.ctt/bond_clarificaion.doc (last accessed on 12 September 2006).

entitled "Current Bond Formulas", also posted on CBP's website.^{9 10} The measure at issue includes any amendments or extensions to the Continuous Bond Requirement, and any related or implementing measures.

Prior to the adoption of the Amended Bond Directive and the imposition of the Continuous Bond Requirement, importers of goods subject to US anti-dumping or countervailing duties were required to maintain a minimum bond as general security for compliance with customs regulations (*i.e.*, not specifically to secure the payment of anti-dumping or countervailing duties) only in the amount of 10 per cent of the duties, taxes and fees paid by the importer on the same merchandise imported in the previous year. Pursuant to the Amended Bond Directive, CBP may designate imports of categories of merchandise subject to anti-dumping or countervailing duties as "special categories" and may require importers of goods deemed to be a "covered case" within such a "special category" of merchandise to provide, at the time of importation, enhanced continuous bonds of sufficient value to cover liability for anti-dumping duties, calculated by multiplying the applicable anti-dumping or countervailing duty margin by the value of imports of the goods imported by the importer in the preceding year. In addition, the importers remain subject to the separate requirement of US anti-dumping law to pay, at the time of importation, cash deposits of estimated anti-dumping duties in the amount of the value of the merchandise multiplied by the applicable anti-dumping or countervailing duty rate.

Thailand understands that imports of shrimp from Thailand and five other countries¹¹ that are subject to anti-dumping duties have been designated as a "covered case" within the designated "special category" of "agriculture/aquaculture" merchandise and have been subjected to the Continuous Bond Requirement on that basis. Thailand understands that these imports constitute the only case and goods to which the Continuous Bond Requirement has been applied to date.

2. *Summary of the Legal Basis of the Complaint*

(a) The Anti-Dumping Duty Measure

Thailand considers that the Anti-Dumping Duty Measure is inconsistent with Article VI of the GATT 1994 and the provisions of the AD Agreement listed below:

- (i) Article 2.4.2 of the AD Agreement, which prohibits the use of zeroing in calculating margins of dumping using the average-to-average and transaction-to-transaction comparison methodologies. The use of zeroing to calculate margins of dumping is inconsistent with this obligation.
- (ii) Article 2.1 of the AD Agreement, which requires the investigating authority to calculate a single margin of dumping for the "product" under investigation.
- (iii) Article 2.4 of the AD Agreement, which requires the investigating authority to make a fair comparison between export price and normal value. The use of zeroing to alter

⁹ Posted at http://www.cbp.gov/linkhandler/cgov/import/communications_to_trade/pilot_program/current_bond.ctt/current_bond.doc (last accessed on 12 September 2006).

¹⁰ CBP is the agency authorised under various statutory and regulatory provisions of US law to administer US customs laws and regulations, including the authority to impose bonds pursuant to 19 U.S.C. §1484, 19 U.S.C. §1502, 19 U.S.C. §1505, 19 U.S.C. §1623, and 19 U.S.C. §1673g, and the regulations governing the amount and imposition of bonds codified at 19 C.F.R. 113.13, 19 C.F.R. 113.40, and 19 C.F.R. 113.62, adopted pursuant to T.D. 84-213, 49 Fed. Reg. 41152 (19 October 1984).

¹¹ These are Brazil, Ecuador, India, the People's Republic of China and Vietnam.

the results of certain intermediate comparisons between export price and normal value is inconsistent with this requirement.

- (iv) Article 9.3 of the AD Agreement, which requires that the amount of the anti-dumping duty must not exceed the margin of dumping. The imposition of dumping duties inflated by the use of zeroing is inconsistent with this obligation.

(b) The Continuous Bond Requirement

Thailand considers that the Continuous Bond Requirement is inconsistent with the requirements of Article VI of the GATT 1994, including the requirements set out in Article VI:2 and Note 1, paragraphs 2 and 3 to *Ad Article VI* of the GATT 1994, and the provisions of the AD Agreement listed below:

- (i) The Continuous Bond Requirement is inconsistent with Article 18.1 of the AD Agreement, in that it constitutes specific action against dumping of exports from Thailand that was not taken in accordance with the provisions of GATT 1994, as interpreted by the AD Agreement.
- (ii) The Continuous Bond Requirement is not a security for the payment of anti-dumping duties "pending final determination of the facts of any case of suspected dumping" as described in Article VI:2 and Note 1, paragraphs 2 and 3 to *Ad Article VI* of the GATT 1994. The Continuous Bond Requirement is not a provisional measure consistent with Article 7 of the AD Agreement as it is not applied in accordance with the requirements of Article 7.1 of the AD Agreement and has been applied subsequent to final determinations by the USDOC and the US International Trade Commission.
- (iii) The simultaneous imposition of the Continuous Bond Requirement and the obligation to make cash deposits of estimated duties is inconsistent with Article VI:2 and Note 1, paragraphs 2 and 3 to *Ad Article VI* of the GATT 1994 and Article 7.2 of the AD Agreement that permit only the imposition of either a bond or a cash deposit.
- (iv) The simultaneous imposition of the Continuous Bond Requirement and the obligation to make cash deposits of estimated duties is inconsistent with Article VI:2 and Note 1, paragraphs 2 and 3 to *Ad Article VI* of the GATT 1994 because it does not constitute a "reasonable security" for the payment of anti-dumping duties.
- (v) The simultaneous imposition of the Continuous Bond Requirement and the obligation to make cash deposits of estimated duties is inconsistent with Articles 7.2 and 7.5 of the AD Agreement because the total amount of the security is greater than any provisionally-estimated amount of dumping.
- (vi) The simultaneous imposition of the Continuous Bond Requirement and the obligation to make cash deposits of estimated duties is inconsistent with Article 7.5 and Articles 9.1, 9.2 and 9.3 of the AD Agreement because it results in the collection of anti-dumping duties that exceed the appropriate amounts within the meaning of Article 9.2 and that exceed the margin of dumping as established under Article 2 within the meaning of Article 9.3.
- (vii) The duration of the Continuous Bond Requirement is inconsistent with Article 7.4 of the AD Agreement because it is not limited to as short a period as possible.

Thailand further considers that the Continuous Bond Requirement violates the United States' obligations under the GATT 1994 for the following reasons:

- (i) The Continuous Bond Requirement constitutes a restriction on importation prohibited under Article XI:1 of the GATT 1994 or, alternatively: (1) a duty or charge imposed on or in connection with importation inconsistent with Article I:1 and Article II:1(a) and (b) of the GATT 1994; or (2) a rule and formality or a method of levying duties or charges in connection with importation inconsistent with Article I:1 of the GATT 1994.
- (ii) By applying the Continuous Bond Requirement only to shrimp from Thailand and five other countries, the United States fails to administer its customs laws, regulations and administrative rulings in a uniform, impartial or reasonable manner and therefore violates Article X:3(a) of the GATT 1994.
- (iii) The Continuous Bond Requirement is not justified by paragraph (d) of Article XX of the GATT 1994 and in any case is not applied consistently with the requirements set out in the chapeau of Article XX of the GATT 1994. Thailand considers in particular that the Continuous Bond Requirement is not necessary to secure compliance with the United States' laws and regulations and that it is applied in a manner constituting an arbitrary and unjustifiable discrimination between Thailand and other countries where the same conditions prevail and a disguised restriction on international trade.

Accordingly, Thailand requests the establishment of a panel pursuant to Article XXIII of the GATT 1994, Articles 4 and 6 of the DSU, and Article 17 of the AD Agreement.

Thailand requests that the establishment of a panel in this matter be placed on the agenda of the meeting of the Dispute Settlement Body scheduled for 28 September 2006.
