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No More Zeroing?: The United States Changes its Antidumping Policy to Comply with the WTO

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Introduction

Threatened by trade retaliation against U.S. exports by the European Union (“EU”) and Japan, on February 14, 2012, the U.S. Department of Commerce (“DOC”) announced a policy change to generally end the practice of “zeroing” in antidumping cases. The DOC had earlier

ended zeroing in antidumping investigations; the February 14 policy change covers future administrative reviews of existing antidumping orders, including new shipper reviews, expedited antidumping reviews, and sunset reviews.

Since this change in practice will apply to all imports, it may facilitate settlement of similar pending World Trade Organization (“WTO”) cases—except those seeking antidumping duty refunds on past zeroing. But the United States is not likely to stop trying to negotiate legalization of zeroing. The DOC may also continue to use zeroing in targeted dumping analyses, which have not yet been the subject of a WTO panel ruling.

What Is “Zeroing”?

General Agreement on Tariffs and Trade (“GATT”) Article VI and the WTO Antidumping Agreement (“ADA”) authorize importing countries to impose extra tariffs on imports found to be “dumped” and to cause material injury or threat to the domestic industry producing a like product. Article VI defines “dumping” as sales for export below “normal value” (the comparable price for sales within the exporting country or to a third country, or the cost of production plus overhead and profit). The DOC and other antidumping authorities calculate the margin of dumping for a product by computing the difference between normal value and export price for each model or type of a particular product, and aggregate the results. “Zeroing” meant that the DOC would omit (“zero”) the calculations where export price was *higher* than normal value, thus inflating dumping margins. The DOC, the EU, and some other importing countries originally used zeroing both in antidumping investigations and in administrative reviews of antidumping orders.^[1]

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Zeroing in the GATT/WTO

In the pre-WTO period, Japan unsuccessfully challenged zeroing in the *EC—Audio Cassettes* case, though the panel report's adoption was blocked.^[2] The Uruguay Round negotiations also failed to clarify whether zeroing would be legal. India then challenged zeroing under the WTO in *EC—Bed Linen*.^[3] The EC argued that without any explicit instruction by the ADA, an antidumping authority could establish a dumping margin for each product model and therefore need not aggregate any negative results to obtain a final dumping margin for the product as a whole. The panel and the Appellate Body rejected the EC's position. The Appellate Body ruled that the "fair comparison" requirement in ADA Article 2.4.2 meant that the EC should have established the dumping margin "for the *product*—cotton-type bed linen—and not for the various types or models of that product."^[4] The Appellate Body also concluded that the EC should have taken into account "*all* comparable export transactions," including those with negative individual dumping margins.^[5]

The Appellate Body then reiterated this position in cases against U.S. antidumping investigations.^[6] The battle eventually shifted to whether ADA Article 9.3, which governs administrative reviews, also would exclude zeroing,^[7] and whether the zeroing jurisprudence would apply to other types of zeroing (weighted-average-to-transaction and transaction-to-transaction, as well as weighted-average-to-weighted-average).^[8] Initially, panels resisted the Appellate Body's sweeping stance against zeroing, and one panel even questioned the binding nature of the Appellate Body's anti-zeroing decisions.^[9] However, the Appellate Body reaffirmed the vitality of jurisprudence within the WTO system, emphasizing that "adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes."^[10]

The battle concerning zeroing in administrative reviews has focused on the United States because of the U.S. retrospective method of assessing antidumping duties. In the U.S. system, the antidumping duty rate established by the DOC in an antidumping investigation does not determine an importer's final antidumping duty liability for imports of the subject goods into the United States. In the U.S. system, the importer deposits a security (in the form of a cash deposit) at the time of importation. The importer, or any interested party (a domestic producer or a foreign exporter or producer) may annually ask the DOC to perform an administrative review. In its review, the DOC gathers data on actual export prices and normal values for the period under review, and it calculates margins of dumping. If the calculated dumping margin is higher than the cash deposit, the importer must pay the difference with interest, and if it is lower, the difference is refunded with interest. The final margin of dumping for each importer becomes the new cash deposit rate for future entries of merchandise.

If no periodic review is requested,^[11] entries for that period are liquidated (duty assessment becomes legally final) at the initial cash deposit rate.^[12] The U.S. industry (petitioners) and importers and foreign exporters (respondents) both viewed zeroing as possibly making the difference between keeping or losing long-standing U.S. antidumping orders. Respondents argued that zeroing was creating margins where dumping had ceased; petitioners argued that respondents should not be able to hide targeted dumping by averaging dumped prices in competitive markets with non-dumped prices in non-competitive markets.

The U.S. Resists

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U.S. negotiators tried to negotiate a solution, proposing in the Doha Round Negotiations on Rules that ADA Articles 2.4 and 9.3 be amended to permit zeroing.[13] This position found little or no support and was met by strong opposition by the “Friends of Anti-Dumping” anti-zeroing alliance.[14] No resolution is likely on this issue in the now-deadlocked Doha Round negotiations.[15]

The U.S. antidumping authorities did only the minimum to comply with the Appellate Body decisions on zeroing. After the Appellate Body found that zeroing in investigations violated ADA Article 2.4, the DOC eliminated zeroing in original investigations[16] but continued to use zeroing in administrative reviews. The EU and Japan then pursued and won WTO challenges to U.S. use of zeroing in administrative reviews,[17] and then pursued compliance proceedings.[18] They both threatened trade retaliation against U.S. exports unless the DOC stopped using zeroing in administrative reviews.[19]

On December 28, 2010, the DOC published a Federal Register Notice under Section 123(g) of the Uruguay Round Agreements Act (“URAA”), seeking comments on a proposal to change its methodology for calculating dumping margins and antidumping duty assessment rates in reviews, to parallel its methodology for investigations.[20] Section 123 applies when the WTO has determined that a U.S. federal regulation or practice is WTO-inconsistent; it provides that the regulation or practice may be modified to implement the WTO decision only through a final rule or other modification published in the Federal Register, after the agency concerned has consulted with Congress and has published a proposed modification for comment.[21]

Meanwhile, the Court of Appeals for the Federal Circuit ruled that the inconsistency in the DOC’s interpretation of U.S. law as permitting both non-use of zeroing in original investigations and use of zeroing in administrative reviews was arbitrary and unreasonable.[22] Trading partners have continued to bring, and the United States has consistently lost, challenges to use of zeroing in U.S. antidumping cases.[23] The U.S. has not won a single case on zeroing in the WTO.

The End of Zeroing?

On February 6, 2012, the United States, together with the EU and Japan, announced that it had reached agreements settling its zeroing disputes. The agreements provide that the United States will expeditiously complete the process under URAA Section 123 to modify its methodologies, as described in the December 2010 Federal Register notice, by signing the final modification and submitting it promptly for publication. The agreements also require the United States to promptly initiate proceedings under URAA Section 129 for certain listed antidumping duty orders on products from the EU and Japan, and to issue final Section 129 determinations within four months, revising cash deposit rates established on the basis of zeroed calculations.[24] Section 129 deals with correction of antidumping or countervailing duty actions to comply with a WTO dispute settlement decision.[25] U.S. Trade Representative Ron Kirk declared that these agreements would benefit the U.S. economy by enabling American farmers and businesses to “invest in job-creating export markets without the uncertainty of possible trade retaliation.”[26]

On February 14, 2012, the DOC published its final notice of policy change on zeroing under URAA Section 123 in the Federal Register.[27] The notice states:

[I]n a review of an antidumping duty order conducted under 19 CFR 351.213 (administrative review), 351.214 (new shipper

review), and 351.215 (expedited antidumping review) (collectively “reviews”),. . . the Department will calculate weighted-average margins of dumping and antidumping duty assessment rates in a manner which provides offsets for non-dumped comparisons while using monthly average-to-average (“A–A”) comparisons in reviews, paralleling the WTO-consistent methodology that the Department applies in original investigations. The Department is also modifying its practice in five-year (“sunset”) reviews, such that it will not rely on weighted-average dumping margins that were calculated using the methodology found to be WTO inconsistent.

The notice also amends the DOC antidumping regulations. These changes will apply to all reviews pending before the DOC for which the preliminary results are issued after April 16, 2012; to all sunset reviews for which preliminary or expedited final results are issued after that date; and in issuing recalculated antidumping determinations to implement the results of four adopted WTO dispute settlement reports.[28]

Commentators have noted that there could be a catch. The DOC notice states that DOC’s intention is to apply a methodology which (as in antidumping investigations) “will necessarily include any exceptional or alternative comparison methods that are determined appropriate to address case-specific circumstances.”[29] Commentators have suggested that this leaves the door open for the DOC to use zeroing in “targeted dumping” situations[30] referred to in ADA Article 2.4.2, which explicitly permits use of weighted-average-to-transaction comparisons “if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods.”[31] There are no WTO rulings on targeted dumping—yet.

The U.S. policy change on zeroing could facilitate resolution of pending zeroing disputes with other trading partners. The U.S. agreements with the EU and Japan provide that the DOC will eliminate zeroing from dumping margins in antidumping orders covered by the four dispute settlement reports referred to above. The DOC will now calculate non-zeroed margins for all administrative reviews going forward—even for countries that have not brought WTO cases—but not for reviews that are concluded before April 12. For outstanding antidumping orders, an interested party will be able to request elimination of zeroing from existing cash deposit rates in the next annual administrative review (or any ongoing review that concludes on or after April 12). A country that wants more than that will have to bring a WTO dispute. Moreover, due to the prospective nature of remedies under the WTO system, the current U.S. policy change does not entail any compensation for previous antidumping duties paid on imports because of zeroing.

Korea has continued to pursue a dispute against the United States regarding zeroing on past imports of corrosion-resistant flat steel, and the Dispute Settlement Body established a panel in this case on February 22, 2012, under expedited procedures agreed by the parties.[32]

Conclusion

The U.S. policy change on zeroing is likely to bring the United States into conformity with the relevant Appellate Body decisions, although the United State will continue to seek legalization of zeroing through negotiations. Some countries still want to continue to

challenge U.S. zeroing in past administrative reviews in the hope that the United States will recalculate dumping margins on those products under URAA Section 129 as it did for the EU and Japan. The jury is still out on the DOC use of zeroing in targeted dumping situations, though if this occurs, it is realistic to expect further litigation in the WTO.

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Endnotes:

[1] 19 U.S.C. § 1675(a) (2008) (mandating periodic review of the amount of the anti-dumping duty).

[2] Panel Report, *EC—Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ¶ 119, ADP/136 (Apr. 28, 1995) (unadopted).

[3] Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, ¶ 11, WT/DS141/AB/R (Mar. 12, 2001) [hereinafter *EC—Bed Linen*].

[4] *Id.* ¶ 53.

[5] *Id.* ¶ 55.

[6] Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, ¶¶ 95-96, WT/DS264/AB/R (Aug. 31, 2004).

[7] Appellate Body Report, *United States—Laws, Regulations, and Methodology for Calculating Dumping Margins (“Zeroing”)*, WT/DS294/AB/R (May 9, 2006). See also Sungjoon Cho, *The WTO Appellate Body Strikes Down the U.S. Zeroing Methodology Used in Antidumping Investigations*, ASIL Insights (May 4, 2006), <http://www.asil.org/insights/2006/05/insights060504.html>.

[8] Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada (Article 21.5—Canada)*, WT/DS264/AB/RW (Sept. 1, 2006); Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 23, 2007).

[9] Panel Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 7.102, WT/DS344/R (Dec. 20, 2007) (ruling that panels “are not, strictly speaking, bound by previous Appellate Body or panel decisions that have addressed the same issue”). See also Sungjoon Cho, *A WTO Panel Openly Rejects the Appellate Body’s “Zeroing” Case Law*, ASIL Insights (Mar. 11, 2008), <http://www.asil.org/insights/2008/03/insights080311.html>.

[10] Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 160, WT/DS344/AB/R (Apr. 30, 2008). See Sungjoon Cho, *The Appellate Body Has Reversed the Panel’s Departure from the Zeroing Jurisprudence*, ASIL Insights (Update) (June 6, 2008), <http://www.asil.org/insights/2008/03/insights080311.html#update>. In a subsequent decision, the Appellate Body ruled unequivocally that the United States “continued” use of zeroing was inconsistent with the WTO antidumping norms. Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology*, ¶¶ 304-13, WT/DS350/AB/R (Feb. 4, 2009).

[11] Interested parties do not always request an annual review because reviews can involve substantial costs and legal fees.

[12] See Panel Report, *United States—Continued Existence and Application of Zeroing Methodology*, ¶ 7.159-7.161, WT/DS350/R (Oct. 1, 2008).

[13] The United States proposed to insert the following paragraph: “Authorities are not required to offset the results of any comparison in which the export price is greater than the normal value against the results of any comparison in which the normal value is greater than the export price.” Communication from the United States, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, ¶ 29, WT/DS294/16; Proposal on Offsets for Non-Dumped Comparisons, TN/RL/GEN/147 (Jun. 27, 2007).

[14] Negotiating Group on Rules, *Statement on “Zeroing” in the Anti-Dumping Negotiations, Statement of Brazil; Chile; China; Colombia; Costa Rica; Hong Kong, China; India; Indonesia; Israel; Japan; Korea, Rep. of; Mexico; Norway; Pakistan; Singapore; South Africa; Switzerland; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Thailand; and Vietnam*, TN/RL/W/214/Rev.3 (Jan. 25, 2008).

[15] Negotiating Group on Rules, *Communication from the Chairman*, at 6, TN/RL/W/254 (Apr. 21, 2011).

[16] Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin during an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722 (Dec. 27, 2006).

[17] Appellate Body Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, WT/DS294/AB/R (Apr. 18, 2006); Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007).

[18] Appellate Body Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”) - Recourse to Article 21.5 of the DSU*, WT/DS294/AB/RW (May 14, 2009); Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews - Recourse to Article 21.5 of the DSU*, WT/DS322/AB/RW (Aug. 18, 2009).

[19] *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)—Recourse to Article 22.6 of the DSU by the United States: Communication from the Arbitrator*, WT/DS294/39 (Dec. 8, 2010); *United States—Measures Relating to Zeroing and Sunset Reviews—Recourse to Article 22.6 of the DSU by the United States: Communication from the Arbitrator*, WT/DS322/38 (Dec. 15, 2010).

[20] Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 75 Fed. Reg. 81533 (Dec. 28, 2010).

[21] 19 U.S.C. 3933(g).

[22] *Dongbu Steel Co., Ltd. v. United States* (Fed. Cir., Mar. 31, 2011); *JTEKT Corp. V. United States* (Fed. Cir., Jun. 29, 2011). However, the U.S. Court of International Trade has recently upheld the DOC’s revised determination on remand in this issue, concluding that “Commerce did not abuse its discretion in changing its investigation methodology, but not its review methodology, in the Final Modification in response to WTO decisions.” *Union Steel & Dongbu v. U.S.* (USCIT, Feb. 27, 2012).

[23] See Tania Voon, *Orange Juice, Shrimp, and the United States Response to Adverse WTO Rulings on Zeroing*, ASIL Insights (July 20, 2011), <http://www.asil.org/insights110720.cfm>.

[24] Joint Communication from the United States and Japan, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/44 (Feb. 8, 2012); *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, *United States—Continued Existence and Application of Zeroing Methodology*, WT/DS294/43, WT/DS350/20 (Feb. 8, 2012). The statutory deadline under Section 129(b)(2) (19 U.S.C. 3538(b)(2)) is 180 days; four months shortens that.

[25] 19 U.S.C. 3538.

[26] Office of the United States Trade Representative, United States Trade Representative Ron Kirk Announces Solutions to Years-Old Zeroing Disputes, Demonstrating Export Growth and Job Creation (Feb. 6, 2012). See also *US Agrees to Quit Zeroing, Avoids EU and Japan Retaliation*, 16 Bridges Wkly Trade News Digest (Feb.8, 2012).

[27] Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 Fed. Reg. 8101 (Feb. 14, 2012).

[28] 77 Fed. Reg. 8113. The reports to be implemented are *US—Zeroing (EC)*, *US—Zeroing (Japan)*, *US—Stainless Steel (Mexico)*, and *US—Continued Zeroing (EC)*.

[29] 77 Fed. Reg. 8102.

[30] *Commerce Final Rule Leaves Door Open to Future Use of Zeroing*, Inside US Trade, Daily News (Feb. 10, 2012).

[31] ADA art. 2.4.2.

[32] “United States—Anti-Dumping Measures on Corrosion-resistant Carbon Steel Flat Products From Korea – Request for the Establishment of a Panel by Korea,” WT/DS420/5 (Feb. 10, 2012); Daniel Pruzin, *U.S., Korea Agree on Procedures at WTO to Accelerate Zeroing Dispute Complaint*, Int’l Trade Daily (Feb. 17, 2012).