Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

A Closer Look At 'Zeroing' In Anti-Dumping Calculations

Law360, New York (September 16, 2016, 10:44 PM EDT) --

Duane W. Layton

Matthew J. McConkey

On Sept. 7, 2016, the World Trade Organization Appellate Body issued its report in United States - Anti-Dumping and Countervailing Measures on Large Residential Washers from South Korea.[1] The dispute concerned the United States' imposition of anti-dumping and countervailing duties on large residential washers ("LRWs") imported from Korea, the complainant. Korea claimed that the U.S. Department of Commerce ("USDOC") erred in its method of calculating dumping rates and in its legal test for determining whether Korean producers received unfair subsidies. The United States and Korea brought separate challenges to the original panel report, which was circulated in March 2016. The Appellate Body's report overturned and upheld various aspects of the underlying panel's decision.

While the Appellate Body's decision addresses several methodologies and legal tests used by the USDOC in its anti-dumping and countervailing duty calculations, this article focuses on the USDOC's practice of "zeroing" when calculating dumping "margins."

Dumping occurs when a foreign producer's home market prices (referred to as "normal value") are higher than its prices for the same or similar goods when sold to the United States. There are other ways to calculate dumping, and there are numerous adjustments made by the USDOC to a producer's prices when its movement and selling expenses differ between the two markets (in order to ensure an "apples-to-apples" comparison). However, this is the most common way to determine dumping.

"Zeroing" refers to the practice of assigning a value of zero anytime a foreign producer's export price to the U.S. is above that producer's "normal value." In practice, this methodology tends to increase exporters' dumping margins, resulting in the imposition of higher anti-dumping duties.

The Appellate Body's Findings With Respect to Zeroing

In every anti-dumping investigation, the USDOC must decide (i) if it is going to base its initial determination of dumping on a comparison of individual sales by a foreign producer during the period of investigation in its home market to sales in the U.S. market (the so-called "transaction-to-transaction" methodology) or (ii) if it is going to compare all sales in both markets on a weighted-average to weighted-average basis. In a series of WTO rulings stretching back many years, the Appellate Body found that anti-dumping authorities like the USDOC cannot use zeroing in either instance. (See, e.g., Mayer

Brown's Nov. 25, 2014, Legal Update "WTO Rejects US Department of Commerce's Anti-Dumping Methodology for Non-Market Economies.") The U.S. government, in general, and the USDOC, in particular, take great exception to these rulings by the WTO.

One of the USDOC's many responses to these rulings has been to claim that zeroing is nonetheless justified when foreign producers are engaged in something called "targeted" dumping. Targeted dumping, according to the USDOC, is when an exporter employs significant differences in the prices that it charges to different purchasers in different regions or during different periods in order to hide or "mask" dumping. In such instances, the USDOC will compare a foreign producer's prices in its home market on a weighted-average basis to its export prices to the U.S. on an individual basis. Known as the weighted-average to transaction ("W-T") comparison methodology, this is what the USDOC used in the anti-dumping investigation of LRWs from Korea.

With respect to the USDOC's use of zeroing under the W-T methodology, the Appellate Body upheld the panel's finding that this practice is inconsistent with the legal standard found in the second sentence of Article 2.4.2 of the WTO Anti-Dumping Agreement. The Appellate Body explained that the W-T comparison methodology in the second sentence of Article 2.4.2 requires a comparison between a weighted-average normal value and "the entire universe of export transactions that fall within the pattern as properly identified under that provision, irrespective of whether the export price of individual 'pattern transactions' is above or below normal value." While the text of the second sentence of Article 2.4.2 allows an investigating authority to focus on "pattern transactions" and exclude from its consideration "non-pattern transactions" in determining dumping margins under the W-T comparison methodology, it does not allow an investigating authority such as the USDOC to exclude certain transaction-specific comparison results within the pattern when the export price is above normal value.

With respect to the consistency of zeroing under the W-T comparison methodology applied pursuant to the second sentence of Article 2.4.2 with the "fair comparison" requirement in Article 2.4, the Appellate Body again upheld the panel's findings. It explained that setting to zero the transactions that have a negative dumping margin (i.e., transactions involving export prices above normal value) has the dual effect of "inflating the magnitude of dumping, thus resulting in higher margins of dumping" and also making affirmative determinations of dumping more likely in cases where there are more export prices above normal value than below normal value. The Appellate Body also noted that by zeroing individual transactions, the USDOC failed to compare all comparable export transactions that form the applicable "universe of export transactions" as required under the second sentence of Article 2.4.2, thus failing to make a "fair comparison" within the meaning of Article 2.4.

Having found that zeroing is not permitted under the W-T comparison methodology applied pursuant to the second sentence of Article 2.4.2 and having upheld the panel's findings on zeroing under the second sentence of Article 2.4.2, the Appellate Body also upheld the panel's findings that the United States' use of zeroing when applying the W-T comparison methodology is inconsistent "as such" with Article 2.4 of the Anti-Dumping Agreement and with the USDOC's application in the LRWs anti-dumping investigation.

The Appellate Body also upheld the panel's findings with respect to the consistency of zeroing with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") in the application of the W-T comparison methodology in administrative reviews, which are basically annual reviews of the duty. Article 9.3 refers to the "margin of dumping" as established under Article 2, which represents the ceiling for anti-dumping duties levied pursuant to Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. The Appellate Body explained that if dumping margins are established inconsistently with Article 2.4.2 by using zeroing under the W-T comparison methodology, the corresponding anti-dumping duties that are levied are also inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Further, the Appellate Body noted that if zeroing is not permitted under the W-T comparison methodology applied pursuant to the second sentence of Article 2.4.2 in original anti-dumping investigations, it cannot be permitted in annual administrative reviews.

One Appellate Body member issued a separate opinion (a relatively rare occurrence) regarding zeroing under the W-T comparison methodology, in which he submitted that the USDOC's practice of zeroing in such situations is permissible. Nonetheless, the Appellate Body recommended that the WTO Dispute Settlement Body request that the United States bring its measures found to be inconsistent with the WTO agreements into conformity with its obligations under those agreements.

—By Duane W. Layton and Matthew J. McConkey, Mayer Brown LLP

Duane Layton is a partner and head of Mayer Brown's government and global trade group in Washington, D.C., Europe, Asia and Latin America. From 1994 to 1999, he was senior counsel at the U.S. Department of Commerce.

Matthew McConkey is a partner in Mayer Brown's Beijing and Washington offices. He advises clients on a range of international trade matters, with particular emphasis on anti-dumping, anti-subsidy (CVD) and general international trade and import issues.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] United States—Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea, WT/DS464/AB/R, September 7, 2016.
https://www.wto.org/english/tratop_e/dispu_e/464abr_e.pdf
