

## Zeroing Under the WTO Anti-Dumping Agreement: Where Do We Stand?

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### I. INTRODUCTION

Sixty of the 357 disputes notified to the Dispute Settlement Body (DSB) of the World Trade Organization (WTO) in its 12-year history have involved anti-dumping issues. That figure places anti-dumping at the top in terms of issues most often requiring formal dispute resolution. The dumping margin calculation technique known as 'zeroing' has been an issue in several of those 60 disputes. On 9 January 2007, the Appellate Body (AB) issued its report in *United States – Measures Relating to Zeroing and Sunset Reviews (Japan)*, which was the fifth AB report in which some aspect of zeroing was adjudicated.<sup>2</sup> Thus, zeroing is among the most litigated issues of the most contentious subject under the WTO's purview.

Zeroing refers to the practice, conducted in some jurisdictions, of replacing the actual amount of dumping calculated for model or sales comparisons that yield negative dumping margins (i.e., models or export transactions for which the export price exceeds the calculated normal value) with a value of zero prior to the final calculation of a weighted-average margin of dumping for the product under investigation. Zeroing, thus, has the effect of overstating dumping margins by denying the full impact of non-dumped or negatively dumped models/export sales on the dumping margin for the product as a whole.

Dispute settlement panels and the AB have ruled often – but remarkably, not exhaustively – on the question of whether or not zeroing is a permissible

practice. Despite AB rulings that zeroing in conjunction with certain comparison methodologies violates provisions of the WTO Anti-Dumping Agreement (ADA),<sup>3</sup> ambiguity still prevails with respect to zeroing in conjunction with other comparison methodologies. Technically, from a legal standpoint, each of the various comparison methodologies expressly or implicitly sanctioned under the ADA carries its own arguments regarding the propriety or impropriety of zeroing. And each may require its day in court, so to speak, to achieve finality on this issue.

Edwin Vermulst<sup>4</sup> presents a framework for contemplating the propriety and impact of zeroing, as well as summaries of findings of the critical GATT/WTO decisions (through May 2005) on the subject. Since that publication, new panel decisions and AB reports have been issued, which clarify (and some may say complicate) understanding of the jurisprudence surrounding the issue. This article borrows from Vermulst, updates the state of play regarding zeroing, and asks whether zeroing can ever be deemed permissible in light of the obligations under the ADA.

### II. METHODOLOGY MATTERS

Article 2 of the ADA establishes the parameters for determining the existence and extent of dumping, which is defined in Article 2.1 as occurring when 'the export price of the product exported from one country to another is less than the comparable

#### Notes

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- 2 Cases in which AB ruled about zeroing: *European Communities – Anti-dumping duties on imports of cotton-type bed linen from India*, WT/DS141/AB/R of 1 March 2001 (*EC – Bed Linen*); *United States – Final dumping determination on softwood lumber from Canada*, WT/DS264/AB/R of 11 August 2004 (*United States – Softwood Lumber V*); *United States – Laws, regulations and methodology for calculating dumping margins (Zeroing)*, WT/DS294/AB/R of 18 April 2006 (*United States – Zeroing (EC)*); *United States – Final dumping determination on softwood lumber from Canada*, WT/DS264/AB/RW of 15 August 2006 (*United States – Softwood Lumber V (compliance)*); *United States – Measures relating to zeroing and sunset reviews*, WT/DS322/AB/R of 9 January 2007 (*United States – Zeroing (Japan)*). In addition to these AB reports, zeroing was discussed by the Panels in *EC – Anti-dumping duties on malleable cast iron tube or pipe fittings from Brazil*, WT/DS219/R of 7 March 2003 and in *United States – Anti-dumping measure on shrimp from Ecuador*, WT/DS335/R of 30 January 2007.
- 3 Formally known as the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT).
- 4 Edwin Vermulst, 'The WTO Anti-Dumping Agreement', in *Oxford Commentaries on International Law: Oxford Commentaries on the GATT/WTO Agreements* (Oxford: Oxford University Press 2005), pp. 51–62.

price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country'. In reaching a conclusion about the existence of dumping, Article 2.4 lays down the principle that 'A fair comparison shall be made between the export price and the normal value'. And Article 2.4.2 provides guidance as to what would constitute fair comparison methods:

Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

Article 2.4.2 expresses a preference for comparing normal value and export prices on a *weighted average-to-weighted average* basis or on a *transaction-to-transaction* basis, but allows for a third method – comparison of a weighted average normal value to individual export transactions – if particular conditions exist.

To appreciate how methodology matters, consider the variety of potential outcomes stemming from the same set of objective sales data in Chart 1.

Assume that the data in Chart 1 represent ex-factory prices<sup>5</sup> for separate transactions of equal weight (i.e., each transaction is for the same volume, say one unit) made on the corresponding dates. There are nine sales in the export market, 12 sales in the domestic market, and all are made during the month of September.

Under the *weighted average-to-weighted average* comparison method (Avg-to-avg., in Chart 2), no dumping would be found because the weighted average price in both markets is 30. Under the *transaction-to-transaction* method, comparing the prices of individual sales made around the same date, no dumping would be found either.

Chart 1: Sales data example

Sales date	Export trans.	Domestic trans.
2 Sept.	5	20
4 Sept.	5	25
6 Sept.		35
8 Sept.	25	25
10 Sept.	30	25
12 Sept.	35	25
14 Sept.		30
16 Sept.	35	35
18 Sept.	40	35
20 Sept.	45	40
22 Sept.		25
24 Sept.	50	40
Export sales value	270.0	
Average price	30.0	30.0

Chart 2:

Sales date	Export trans.	Domestic trans.	Export avg.	Domestic avg.	Avg-to-avg.	Trans-to-trans	Avg-to-trans
2 Sept.	5	20	30	30	0	15	25
4 Sept.	5	25	30	30	0	20	25
8 Sept.	25	25	30	30	0	0	5
10 Sept.	30	25	30	30	0	-5	0
12 Sept.	35	25	30	30	0	-10	-5
16 Sept.	35	35	30	30	0	0	-5
18 Sept.	40	35	30	30	0	-5	-10
20 Sept.	45	40	30	30	0	-5	-15
24 Sept.	50	40	30	30	0	-10	-20
Amount dumping					0	0	0
Dumping %					0.0%	0.0%	0.0%

#### Notes

5 Once all expenses incurred to promote, sell, store, and transport the products are deducted from both export price and domestic price, and various other adjustments, such as level of trade and accounting for physical differences, have been made, two sets of ex-factory prices remain.

In the 'Trans-to-trans' column tallying the results of the *transaction-to-transaction* method, the positive dumping amounts on the first two transactions amount to 35 (15 + 20). Of the remaining seven transactions, two are priced identically in both markets and five are less expensive in the domestic market, generating negative dumping amounts totalling -35. For the product as a whole, the total dumping amount and the resulting dumping margin is thus zero, at least as long as dumped and non-dumped export transactions are allowed to offset each other.

Using the exceptional method allowed under Article 2.4.2, the *weighted average-to-transaction* method, the average domestic price would be compared to the individual export transactions. Again, in this case, the overall dumping margin would be zero because the positive dumping amounts calculated for the first three export sales, totalling 55, are completely offset by the negative dumping amounts in the last five export sales, totalling -55.

Prior to the entry into force of the ADA in 1995, some authorities would routinely use this third method to calculate dumping margins. They would then take the position that the transactions generating negative margins are not dumped and subsequently replace the negative dumping amounts with zeroes.<sup>6</sup> The result of this technique was that non-dumped transactions could not be used to offset dumped transactions. This practice later became known as *simple*<sup>7</sup> zeroing to distinguish it from *model* zeroing (discussed below).<sup>8</sup>

Thus, if we were to zero the negative dumping margins from the example in Chart 2, the results would look much different (see Chart 3).

Under both the *transaction-to-transaction* method and the *average-to-transaction* method, the negative dumping amounts would be replaced with zeroes, and the overall conclusion would be one of affirmative dumping. In the example above, the same set of objective sales data would produce a 13 per cent dumping margin (35 divided by the total export sales value of 270) under the *transaction-to-transaction* method, and a 20.4 per cent dumping margin under the exceptional method.

The logic traditionally invoked for using such an asymmetrical comparison method is that it allows the authorities to focus on *targeted* dumping.<sup>9</sup> Without recourse to zeroing, incidences of dumping would be masked or diluted by resorting to methodologies that give equal weight to non-dumped sales. The analogy often cited is that of getting a ticket for speeding: If you drive too fast and are ticketed for speeding, you cannot claim credit for the times that you drove within the speed limit.

It does not require much imagination to understand that use of the *average-to-transaction* method, in conjunction with zeroing, will make it easier to find dumping in most cases, particularly when compared with the *weighted average-to-weighted average* method. In fact, if just one export transaction is lower-priced than the weighted average normal value, a finding of dumping will result from the use of the *weighted*

Chart 3: Zeroing of negative dumping margins

Sales date	Export trans.	Domestic trans.	Export avg.	Domestic avg.	Avg-to-avg.	Trans-to-trans	Avg-to-trans	With Zeroing	
								Trans-to-trans	Avg-to-trans
2 Sept.	5	20	30	30	0	15	25	15	25
4 Sept.	5	25	30	30	0	20	25	20	25
8 Sept.	25	25	30	30	0	0	5	0	5
10 Sept.	30	25	30	30	0	-5	0	0	0
12 Sept.	35	25	30	30	0	-10	-5	0	0
16 Sept.	35	35	30	30	0	0	-5	0	0
18 Sept.	40	35	30	30	0	-5	-10	0	0
20 Sept.	45	40	30	30	0	-5	-15	0	0
24 Sept.	50	40	30	30	0	-10	-20	0	0
Amount dumping					0	0	0	35	55
Dumping %					0.0%	0.0%	0.0%	13.0%	20.4%

#### Notes

6 It should be noted that the prices of the non-dumped export sales *would* be included in the calculation of the total export price, used as the denominator in the calculation of the dumping margin.

7 See *United States – Zeroing (EC)*, Panel, para. 2.5; *United States – Zeroing (EC)*, AB, para. 2.

8 See section IV, below.

9 Compare *United States – Fresh and chilled Atlantic salmon from Norway*, para. 476, ADP/87, 30 November 1992.

*average-to-transaction* method, even if all other export transactions are *higher-priced* than the weighted average normal value. Thus, through the magic of zeroing, affirmative dumping margins are not difficult to produce.

The *average-to-transaction* method combined with zeroing will virtually always yield higher dumping margins than the *weighted average-to-weighted average* method and, at best, will lead to an equal result in the rare cases where *all* export transactions are lower-priced or *all* export transactions are higher-priced than the benchmark weighted average normal value. This is, of course, because the use of a *weighted average-to-weighted average* method automatically offsets positive and negative dumping amounts.

The *average-to-transaction* method will not always produce higher dumping margins than the *transaction-to-transaction* method because the latter is subject to greater discretion in determining which sales to compare and it can produce arbitrary results.

### III. EARLY ZEROING DISPUTES AND THE ARTICLE 2.4.2 ADA COMPROMISE

A first GATT challenge to the practice of zeroing, brought in 1992 by Norway in *United States – Fresh and chilled Atlantic salmon*,<sup>10</sup> failed because the Panel found that the weighted average-to-transaction comparison was not inherently biased. In support, the Panel noted that where all export transactions were priced below the average normal value, the bias would not occur.<sup>11</sup> While Norway had provided an example showing the bias, the Panel found that there was no evidence that the example reflected the factual situation in the Salmon case.<sup>12</sup>

Similarly, a second challenge brought by Japan against the EC in 1994, *EC – Audio tapes in cassettes*,<sup>13</sup> failed because Japan had argued that the *weighted average-to-transaction comparison* would *always* inflate dumping margins.<sup>14</sup> The GATT Panel decided to take the *transaction-to-transaction* method as a benchmark and correctly concluded that the claim was mathematically incorrect because either method might produce

higher dumping margins than the other method, depending on the facts of the case:<sup>15</sup>

... the average to average benchmark proposed by Japan also failed in some instances accurately to reflect the results that would be obtained if the existence and extent of dumping were determined on a transaction-to-transaction basis. In fact, the Panel was aware of no averaging methodology that would not in some cases produce results that differed from those obtained through the determination of the extent of dumping on a transaction-to-transaction basis.

In light of this fact, and taking into account that Japan did not contend that the use of averaging was inconsistent with the Agreement per se, the Panel could not conclude that the EC's methodology as applied in this case was unfair on the grounds of arbitrariness.<sup>16</sup>

While Japan had submitted dumping margin calculations pertaining to the largest exporter, which showed that the use of a *weighted average-to-weighted average* comparison would have produced a lower dumping margin than the method used by the EC, the Panel again considered that the *transaction-to-transaction* method was the appropriate benchmark, as Article 2 of the Tokyo Round Anti-Dumping Code did not require use of the averaging method.<sup>17</sup>

Observers have pointed out that the Panel's insistence on using the *transaction-to-transaction* method as the benchmark resulted in the imposition of an impossible burden of proof on the applicant as it would be impossible for any applicant to predict how the authorities would apply such a method in a particular case.<sup>18</sup>

In a third GATT case, *EC – Cotton Yarn*,<sup>19</sup> the Panel rejected Brazil's claim that the EC should have made an adjustment<sup>20</sup> for distortions caused by zeroing in hyper-inflationary economies. The Panel considered that zeroing took place only *after* adjustments had already been made.<sup>21</sup>

However, the battle on zeroing between users of the anti-dumping instrument and its victims did not end there. In the then-ongoing Uruguay Round

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10 *United States – Fresh and chilled Atlantic salmon from Norway*, ADP/87, 30 November 1992.

11 *Ibid.*, para. 482.

12 *Ibid.*, para. 484.

13 *EC – Audio cassettes from Japan*, ADP/136, 28 April 1995.

14 *Ibid.*, paras 125–126.

15 *Ibid.*, para. 354.

16 *Ibid.*, para. 357.

17 *Ibid.*, para. 358.

18 Horlick and Clarke, 'Standards for Panels Reviewing Anti-Dumping Determinations under the GATT and WTO', in Petersman (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (1997), pp. 313–324, at pp. 321–322.

19 *EC – Imposition of anti-dumping duties on imports of cotton yarn from Brazil (EC – Cotton yarn)*, ADP/137, paras 485–486, 4 July 1995.

20 See section 1 above.

21 *EC – Cotton Yarn*, as note 19 above, para. 501.

negotiations, a push by the latter to limit the use of the *weighted average-to-transaction* method resulted in a compromise that produced the language in Article 2.4.2, which mandates that the asymmetrical method can be used only if 'the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison'.

Article 2.4.2 mandates the use of either the *weighted average-to-weighted average* method or the *transaction-to-transaction* method, but under specific, exceptional circumstances allows for use of the *weighted average-to-transaction* method. Thus, while not specifically precluding or sanctioning the practice of zeroing, Article 2.4.2 was seen as a compromise because it presumably limited the scope for resort to zeroing since the *weighted average-to-transaction* methodology would be exceptional.

The compromise solution would allow the authorities to counter three forms of *hidden*<sup>22</sup> or *targeted dumping*: where there was a pattern of export prices differing significantly by purchaser, region, or time period.<sup>23</sup> Under this exceptional third methodology, therefore, zeroing would appear to be at least implicitly sanctioned because otherwise the exception would produce results identical to the *weighted average-to-weighted average* methodology, and thus would be meaningless in practice.<sup>24</sup>

#### IV. NEW FORMS OF UGLY: MODEL ZEROING

Virtually as soon as the ADA entered into force on 1 January 1995, some authorities adopted a variation of the *simple*<sup>25</sup> zeroing technique that had been used in the past (and which was the impetus for the compromise language of Article 2.4.2). So-called *model zeroing* emerged to become a major irritant to countries targeted by anti-dumping actions.

In anti-dumping investigations, price comparisons are made typically on a model-by-model (or product-code-number by product-code-number)<sup>26</sup> basis before the results of these comparisons are weight averaged

Chart 4: Examples of model zeroing

Model	Export trans.	Domestic trans.	Unit dumping	Model zeroing
A	100	50	-50	0
B	100	100	0	0
C	100	100	0	0
D	100	100	0	0
E	100	150	50	50
Total	500			
Amount dumping			0	50
Dumping %			0.0%	10.0%

to produce a result for the merchandise as a whole. Thus, after the first step (the model-by-model comparisons) a positive or negative dumping amount will have been calculated for each product code. *Model zeroing* refers to the practice of imposing a value of zero on product comparisons that generate negative dumping margins, preventing the results of those comparisons from offsetting the effects of products found to be positively dumped.

In the example in Chart 4, only Model E is sold at a lower price in the export market than on the domestic market. The dumping amount of model E is 50. However, model A is negatively dumped by the same amount. In total, there is no dumping. But by zeroing the results for model A, the total amount of dumping is 50, which divided by the total net value of export sales (500) yields an overall dumping margin of 10 per cent. As a result of model zeroing, dumping need only be found for one model (even if all other models are not dumped, and even if the negative dumping margins far outweigh the positive one) to generate an affirmative dumping finding for the merchandise as a whole. Model zeroing, therefore, facilitates findings of dumping.

To return to the speeding analogy, a ticket is issued for a particular incidence of speeding. You cannot claim credit for the driving within the limit in the past. But likewise, you do not have to pay the speeding ticket for each past incidence of noncompliance with the limit. With model zeroing, the assumption is the

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22 Horlick and Shea, *The World Trade Organization Anti-Dumping Agreement*, 29 *Journal of World Trade* 1 (February 1995), p. 25.

23 Compare Croome, *Reshaping the World Trading System* (1995), at 305: 'Curbs were imposed on comparing isolated export selling prices with average prices in the home market, unless evidence could be produced that the sellers were targeting particular regions, purchasers or periods for dumping'. See also *EC - Bed Linen*, AB, para. 62.

24 Compare *United States - Zeroing (EC)*, Panel, para. 7.277.

25 See *United States - Zeroing (EC)*, Panel, para. 2.5.

26 These product code numbers are normally devised by the administering authorities to distinguish different models or types of the product under investigation. Typically, each feature or characteristic of the product under investigation that has a significant impact on the price or the cost of the product will then be given a unique code number. Before a weighted average dumping margin per producer is calculated, dumping amounts will first be calculated for each product code number exported by the producer concerned. While beyond the scope of this article, it is noted that product code comparisons are used for the calculation of injury margins too and in this context, zeroing may occur also.

opposite. One 'ticket' for one dumped model, even if all other models are not dumped, brings a fine in the form of imposition of an anti-dumping duty on all models, including those not dumped.

## V. WTO JURISPRUDENCE ON ZEROING

In 1999, India challenged the EC on model zeroing in *EC – Bed Linen*. The Panel agreed with India that model zeroing was not allowed under Article 2.4.2, first sentence.

The Panel started out by noting that in light of Article 2.1 of the ADA, the 'margins of dumping' established under Article 2.4.2 must relate to the product at issue. Thus, a margin of dumping can only be established for the product at issue, and not for individual transactions concerning that product, or discrete models of that product.<sup>27</sup>

The Panel attached importance to the fact that Article 2.4.2 specifies that the weighted average normal value shall be compared with a weighted average of prices of *all* comparable export transactions. By counting as zero the results of comparisons showing a negative margin, the EC, in effect, changed the prices of the export transactions in those comparisons. The Panel considered it impermissible to zero such negative margins in establishing the existence of dumping for the product under investigation, since this had the effect of changing the results of an otherwise proper comparison.<sup>28</sup>

On appeal, the AB agreed with the findings of the Panel:

By 'zeroing' the 'negative dumping margins', the European Communities . . . did not take fully into account the entirety of the prices of some export transactions, namely, those export transactions involving models of cotton-type bed linen where 'negative dumping margins' were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping . . . Furthermore, we are also of the view that a comparison between export price and normal value that does not take fully into account the prices of all comparable export transactions – such as the practice of 'zeroing' at issue in this dispute – is not a 'fair comparison' between export price and normal value, as required by Article 2.4 and by Article 2.4.2.<sup>29</sup>

The AB also rejected the argument that model zeroing should be allowed to offset *targeted model dumping*. In the view of the AB, the exception in Article 2.4.2 only allowed Members to address three kinds of targeted dumping: dumping targeted at certain purchasers, certain regions, or certain time periods. Neither Article 2.4.2 nor any other provision of the ADA referred to dumping targeted to certain models or types of the same product under investigation: Had the drafters of the ADA intended to authorize Members to respond to such kind of targeted dumping, they would have done so explicitly in Article 2.4.2, second sentence.<sup>30</sup>

Last, the AB rejected the argument of the EC that the Panel had violated Article 17.6(ii) ADA by not considering model zeroing a permissible interpretation.<sup>31</sup>

It appears clear to us from the emphatic and unqualified nature of this finding of inconsistency that the Panel did not view the interpretation given by the European Communities of Article 2.4.2 of the ADA as a 'permissible interpretation' within the meaning of Article 17.6(ii) of the ADA. Thus, the Panel was not faced with a choice among multiple 'permissible' interpretations which would have required it, under Article 17.6(ii), to give deference to the interpretation relied upon by the European Communities. Rather, the Panel was faced with a situation in which the interpretation relied upon by the European Communities was, to borrow a word from the European Communities, 'impermissible'. We do not share the view of the European Communities that the Panel failed to apply the standard of review set out in Article 17.6(ii) of the ADA.<sup>32</sup>

In rejecting the practice of model zeroing, the AB was emphatic that dumping margins are established for the product under investigation as a whole and not just for those exports sold at prices below normal value. 'From the wording of [Article 2.4.2], it is clear to us that the [ADA] concerns the dumping of a *product*, and that, therefore, the margins of dumping to which Article 2.4.2 refers are the margins of dumping for a *product*.'<sup>33</sup> Since the EC identified the product under investigation as 'cotton-type bed linen', the AB found that the EC was 'bound to treat that *product* consistently thereafter in accordance with that definition,'<sup>34</sup> in particular in its establishment of the existence of margins of dumping for the product subject to the investigation.

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27 *EC – Bed Linen*, Panel, para. 6.114.

28 *Ibid.*, para. 6.115.

29 *EC – Bed Linen*, AB, para. 55.

30 *Ibid.*, para. 62.

31 *Ibid.*, para. 65.

32 *Ibid.*

33 *Ibid.*, para. 51.

34 *Ibid.*, para. 53.

Since the publication of the AB report in *EC – Bed Linen*, the EC has modified its administrative practice and no longer resorts to model zeroing, although it continues to apply simple zeroing where it considers the conditions of Article 2.4.2 satisfied.<sup>35</sup>

In *United States – Zeroing (EC)*, brought by the EC, the Panel concluded that the United States acted inconsistently with Article 2.4.2 in 15 separate anti-dumping investigations by not properly accounting for negative dumping margins in the calculation of weighted average dumping margins. It also concluded, and the AB upheld, albeit for different reasons, that the USDOC model zeroing methodology, as it relates to original investigations in which the *weighted average-to-weighted average* comparison method is used to calculate dumping margins, is inconsistent, *as such*, with Article 2.4.2.<sup>36</sup>

Since Article 2.4.2 contains the phrase ‘during the investigation phase’, some question remained regarding the issue of whether the obligation to not zero applied in the context of anti-dumping reviews, including duty assessment reviews in the United States. Indeed, in *United States – Zeroing (EC)*, the Panel majority ruled that Article 2.4.2 did not preclude *simple* zeroing in duty assessment reviews nor in other reviews:<sup>37</sup>

Based on our analysis of the textual and contextual elements discussed in the preceding paragraphs – the use of ‘investigation phase’, the textual similarity between ‘the existence of margins of dumping during the investigation phase’ in Article 2.4.2 and the wording in Article 5.1; the fact that the ADA consistently uses the word ‘investigation’ in relation to proceedings under Article 5 and uses different terminology in relation to proceedings under Articles 9 and 11; the express cross-references in Articles 11 and 12; and the express distinction between investigations and reviews in

Article 18 – we conclude that Article 2.4.2 of the ADA must be interpreted to apply only to determinations of dumping in the context of investigations pursuant to Article 5 of the ADA.<sup>38</sup>

But on appeal, the AB overruled the Panel findings on Article 9.3<sup>39</sup> and did not address the EC’s appeal of the Panel findings on Article 2.4.2, which was conditioned on the AB affirming the Panel’s Article 9.3 findings. However, the AB emphasized that it did not express any view on ‘the important issue’ whether Article 2.4.2 is applicable or not to administrative reviews under Article 9.3 and therefore did not necessarily endorse the Panel’s views on this point.<sup>40</sup>

In *United States – Softwood Lumber V*, Canada attacked model zeroing applied by the USDOC. While two of the three Panelists firmly rejected the practice, one Panel member strongly disagreed with the other two in a dissenting opinion and endorsed the zeroing applied by USDOC. On appeal, however, the AB summarily affirmed its findings in *EC – Bed Linen* and paid no attention to the dissenting opinion:

Zeroing means, in effect, that at least in the case of some export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the entirety of the prices of some export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price. Zeroing thus inflates the margin of dumping for the product as a whole.<sup>41</sup>

In order to implement the AB report, the USDOC recalculated the dumping margins. In the new calculations, it used the *transaction-to-transaction* method and zeroed the non-dumped transactions. The zeroing was upheld by the Panel in the subsequent compliance case, but the Panel’s findings were overturned by the AB.<sup>42</sup>

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35 European Commission practice with respect to simple zeroing was upheld by the European Court of First Instance as recently as October 2006 in case T 274-2, *Ritek, Prodisc v Council*, judgment of 24 October 2006, where the Court of First Instance held, among others, that:

103 . . . neither the wording of Article 2.4.2 of the 1994 Anti-Dumping Code, interpreted in the light of the Bed linen report, nor that of Article 2(11) of the basic regulation prohibits use of the zeroing technique in the context of the asymmetrical procedure.

109 In any event, and as the Council pointed out in its written proceedings, the zeroing technique has proved to be mathematically necessary in order to distinguish, in terms of its results, the asymmetrical method from the first symmetrical method. In the absence of that reduction, the asymmetrical method will always yield the same result as the first symmetrical method . . .

110 In addition, contrary to what the applicants claim, the zeroing technique in the context of the asymmetrical method, as performed in the present case, did not consist in distorting the prices of the individual export transactions. The actual value of each export transaction was taken into account by the Council in the comparison with the normal value. It was only where the dumping margin yielded by that individual comparison proved to be negative that that margin was set at zero to prevent it from disguising dumping found to have taken place elsewhere.

36 *United States – Zeroing (EC)*, AB, para. 222. The Panel in *United States – Zeroing (Japan)*, took the same approach. See paras 7.82–7.86.

37 *United States – Zeroing (EC)*, Panel, para. 8.1. Compare *United States – Zeroing (Japan)*, Panel, paras 7.210–7.215.

38 *United States – Zeroing (EC)*, Panel, para. 7.170.

39 The AB ruled that simple zeroing is not allowed under Article 9.3.

40 *United States – Zeroing (EC)*, AB, para. 164.

41 *United States – Softwood Lumber V*, AB, para. 98. See also *United States – Zeroing (EC)*, Panel, paras 7.31–7.32.

42 *United States – Softwood Lumber V (compliance)*, AB.

Turning to the transaction-to-transaction methodology, Article 2.4.2 provides that 'margins of dumping' may be established 'by a comparison of normal value and export prices on a transaction-to-transaction basis'. The reference to 'export prices' in the plural suggests that the comparison will generally involve multiple transactions, as was the case in the anti-dumping investigation before us. At the same time, the reference to 'a comparison' in the singular suggests an overall calculation exercise involving aggregation of these multiple transactions. The transaction-specific results are mere steps in the comparison process. This tallies with the term 'basis' at the end of the sentence, which suggests that these individual transaction comparisons are not the final results of the calculation, but, rather, are inputs for the overall calculation exercise. Thus, the text of Article 2.4.2 implies that the calculation of a margin of dumping using the transaction-to-transaction methodology is a multi-step exercise in which the results of transaction-specific comparisons are inputs that are aggregated in order to establish the margin of dumping of the product under investigation for each exporter or producer. Contrary to the United States' submission, the results of the transaction-specific comparisons are not, in themselves, 'margins of dumping'.

Furthermore, the reference to 'export prices' in the plural, without further qualification, suggests that all of the results of the transaction-specific comparisons should be included in the aggregation for purposes of calculating the margins of dumping. In addition, the 'export prices' and 'normal value' to which Article 2.4.2 refers are real values, unless conditions allowing an investigating authority to use other values are met. Thus, in our view, zeroing in the transaction-to-transaction methodology does not conform to the requirement of Article 2.4.2 in that it results in the real values of certain export transactions being altered or disregarded.<sup>43</sup>

The AB therefore held that the use of zeroing in the transaction-to-transaction method violated Article 2.4.2.<sup>44</sup>

In response to the 'as such' AB findings in *United States – Zeroing (EC)*, the US Department of Commerce announced a change in its practice:<sup>45</sup> 'The Department will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons.'<sup>46</sup> But no change in

practice has been announced regarding zeroing under transaction-to-transaction comparisons in investigations or in duty assessment or sunset reviews.

Although the AB ruled against zeroing, 'as applied', under the *transaction-to-transaction* comparison methodology in *United States – Softwood Lumber V*, the case was settled between Canada and the United States. Accordingly, the United States is not obligated to revise its calculations to come into compliance with the AB's findings in that case. However, in its most recent report, *United States – Zeroing (Japan)*, the AB issued the most sweeping indictment of zeroing to date, including 'as such' findings against zeroing under most other circumstances.

Like the dispute initiated by the EC concerning US zeroing procedures, Japan's dispute concerned dumping findings in several cases and contained allegations of 'as such' and 'as applied' violations of the ADA. Reversing the Panel's decisions on every substantive finding under appeal, the AB found that the United States:

- (1) Acts (present tense of the verb corresponds to an 'as such' finding) inconsistently with Articles 2.4 and 2.4.2 of the ADA by maintaining zeroing procedures when calculating dumping margins under the transaction-to-transaction method in original investigation;
- (2) Acts inconsistently with Articles 2.4 and 9.3 of the ADA and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in periodic reviews;
- (3) Acts inconsistently with Articles 2.4 and 9.5 of the ADA and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in new shipper reviews;
- (4) Acted inconsistently with Articles 2.4 and 9.3 of the ADA and Article VI:2 of the GATT 1994 by applying zeroing procedures in 11 periodic reviews at issue;
- (5) Acted inconsistently with Article 11.3 of the ADA when it relied on dumping margins calculated in previous proceedings through the use of zeroing for purposes of conducting sunset reviews.<sup>47</sup>

The decisions on zeroing in WTO dispute settlement cases have created quite a lot of controversy. Whereas

## Notes

<sup>43</sup> *Ibid.*, paras 87–88.

<sup>44</sup> *Ibid.*, paras 122–124.

<sup>45</sup> As of the writing of this draft, the change has not been effected. What was originally announced as a change to take effect on 16 January 2007 has been postponed to allow the US Congress to give further consideration to the issue.

<sup>46</sup> US Department of Commerce, International Trade Administration, Import Administration, United States Federal Register, Final Modification: Calculation of the Weighted-Average Dumping Margin During an Anti-dumping Investigation.

<sup>47</sup> *United States – Zeroing (Japan)*, AB, para. 190.

the Panels appear to have gone out of their ways to accommodate the due deference provisions under Article 17.6, on several occasions the AB has overturned decisions of the Panels and has used relatively broad language to condemn the zeroing practice under all circumstances considered thus far. It remains to be seen how the United States will respond to the latest AB report indicting, *as such*, zeroing under the transaction-to-transaction methodology in investigations, zeroing in periodic and new shipper reviews, and zeroing in sunset review determinations.

The fairly consistent divergence of opinions between the Panels and the AB on the issue of zeroing in combination with strong political support for the anti-dumping law in the US Congress could foreshadow a prolonged period before resolution, even non-compliance and intransigence. Many US policymakers have registered displeasure with AB decisions concerning anti-dumping issues in the past, citing overreaching on the part of the AB.<sup>48</sup> And many in Congress are of the view that a legislative change is required to revise US zeroing practice, and that the Commerce Department's decision to change its practice regarding *weighted average-to-weighted average* comparisons in investigations circumvented Congress illegally.<sup>49</sup>

However the United States responds to the latest WTO indictment of zeroing, it is important to note that, while the AB has now shut the door on zeroing under most circumstances, it has not yet ruled on the permissibility of *simple* zeroing under the exceptional method of Article 2.4.2.

## VI. CATCH-22?

Parties have argued – and Panels seem to have accepted the argument – that zeroing must be permissible under the exceptional *weighted average-to-transaction* method because a prohibition of zeroing under this method would yield results identical to those found using the *weighted average-to-weighted average* method. This ‘mathematical equivalence’ argument, as it has been termed, posits that there would be no practical reason for the exception to exist if zeroing were precluded, and that would violate the rules of effective treaty interpretation by rendering the exception *inutile*. Although that conclusion might constitute the logical argument in support of zeroing

under the exception, the AB appears to be unsympathetic to that perspective:

[O]ne part of a provision setting forth a methodology is not rendered inutile simply because, in a specific set of circumstances, its application would produce results that are equivalent to those obtained from the application of a comparison methodology set out in another part of that provision.<sup>50</sup>

The AB appears not to be convinced that the exception without zeroing and the *weighted average-to-weighted average* method will lead to the same results in all circumstances. Setting that conclusion aside for the moment (we return to it below), and even if the AB were to accept the ‘mathematical equivalence’ argument, it would still be difficult to reconcile any arguments for zeroing with the AB's prior rulings on the topic, which have given great deference to the fair comparison language in Article 2.4 and to the view that dumping margins are calculated for the product under investigation as a whole.

In previous disputes where the AB has expressed an opinion about zeroing, it has conveyed strongly its belief that any dumping margin calculation methodology undertaken in accordance with Article 2.4.2 is subservient to the overarching requirement of Article 2.4 that: ‘A fair comparison shall be made between the export price and the normal value’. The AB has found the fair comparison obligations to have been (are) breached when zeroing has been (is) performed under the weighed average-to-weighted average method and under the transaction-to-transaction method.

In *EC – Bed Linen*, the first WTO case concerning zeroing, the AB noted that by zeroing the dumping margins for models that produced negative margins, the EC ‘did not take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions . . . where “negative dumping margins” were found’.<sup>51</sup> Such a practice, the AB found, ‘is not a “fair comparison” between export price and normal value, as required by Article 2.4 and by Article 2.4.2’.<sup>52</sup>

At the beginning of its analysis in *United States – Softwood Lumber V (compliance)*, the AB states:

We recall that Article 2.4.2 begins with the phrase ‘[s]ubject to the provisions governing fair comparison in paragraph 4’. Thus, the application of the

### Notes

48 See, e.g., David P. Shark, Deputy Chief of Mission, US Mission to the WTO, US Statements at the WTO Dispute Settlement Body Meeting, Geneva, 23 January 2007, at <<http://www.usmission.ch/Press2007/0123DSB.html>>.

49 See 11 December 2006 letter to US Commerce Secretary Carlos Gutierrez and US Trade Representative Susan Schwab from the United States Senate (signed by 11 Senators).

50 *United States – Softwood Lumber V (compliance)*, AB, para. 99.

51 *EC – Bed Linen*, AB, para. 55.

52 *Ibid.*

comparison methodologies set out in Article 2.4.2 of the Anti-Dumping Agreement . . . is expressly made subject to the 'fair comparison' requirement set out in Article 2.4.<sup>53</sup>

The AB then provides reference for the term 'fair', offering that it is understood to connote 'impartiality, even-handedness, or lack of bias'.<sup>54</sup> Then it concludes that:

. . . the use of zeroing under the transaction-to-transaction comparison methodology artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination more likely. This way of calculating cannot be described as impartial, even-handed, or unbiased. For this reason, we do not consider that the calculation of 'margins of dumping' on the basis of a transaction-to-transaction comparison that uses zeroing, satisfies the 'fair comparison' requirement within the meaning of Article 2.4 of the [ADA].<sup>55</sup>

In the most recent report, the AB speaks more broadly to the requirement that all export transactions be considered in the calculation of dumping margins: "The [ADA] contemplates the aggregation of all the comparisons made at the transaction-specific level in order to establish an individual margin of dumping for each exporter or foreign producer examined."<sup>56</sup>

It is difficult to conceive of how the logic invoked by the AB under these methods would cease to apply for the exceptional method. Under the exception, individual export transactions are compared to an average domestic price. If disregarding certain export transactions because they are higher-priced than the weighted average domestic price to which they are compared is forbidden under the transaction-to-transaction approach, it would seem inconsistent to ignore the identical logic and not reach the identical conclusion with respect to the exceptional method, which, too, considers individual export transactions.

It is possible, as the AB suggests in *United States – Zeroing (Japan)*, that there may never be the need to invoke the exception in Article 2.4.2. The condition of a 'pattern of export prices which differ significantly among different purchasers, regions or time periods' might never materialize, or if that pattern exists, it still might be taken into account by one of the two

preferred methodologies set out in the first sentence of 2.4.2. Certainly, that would seem to be possible where there are price differences between time periods. *Transaction-to-transaction* comparisons seem particularly well suited to overcoming any potential skewing of the overall margin caused by significant price fluctuations over the period. Likewise, there is nothing wrong with creating multiple averaging periods in both markets in determining the margin of dumping as long as it results in a fair comparison.<sup>57</sup> Addressing dumping targeted to particular purchasers or regions would appear to be more complicated under the preferred methods, since there is almost certainly no appropriate corresponding subgroup in the domestic market. It is these circumstances that are most likely to warrant use of the exceptional method, but without zeroing, it is argued, the results would be the same as those produced under the *weighted average-to-weighted average* method.

However, the AB seems to have an alternative suggestion. Although the specific question of zeroing under the exception was not before the AB in *United States – Zeroing (Japan)*, the AB was compelled to address the mathematical equivalence argument. To support its own implication that the exception without zeroing could yield a unique result, the AB offered an exit from the 'Catch 22':

The emphasis in the second sentence of Article 2.4.2 is on a 'pattern,' namely a 'pattern of export prices which differs significantly among different purchasers, regions or time periods.' The prices of transactions that fall within this pattern must be found to differ significantly from other export prices. We therefore read the phrase 'individual export transactions' in that sentence as referring to the transactions that fall within the relevant pricing pattern. This universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply. In order to unmask targeted dumping, an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern.<sup>58</sup>

## Notes

53 *United States – Softwood Lumber V (compliance)*, AB, para. 132.

54 *Ibid.*, para. 138.

55 *Ibid.*, para. 142.

56 *United States – Zeroing (Japan)*, AB, para. 127.

57 Indeed, in *United States – Stainless steel plate in coils and stainless steel sheet and strip from Korea*, Panel, paras 6.121–6.123, the Panel ruled that use of multiple averaging periods could be appropriate in order to insure that comparability is not affected by differences in the timing of sales within the averaging periods in the home and export markets. This might be the case, e.g., where changes in normal value or export price during the course of the investigation period are combined with differences in the relative weights by volume within the investigation period of sales in the home market as compared to the export market. The use of weighted averages for the entire investigation period might then indicate the existence of a margin of dumping that did not reflect the situation at any given moment within the investigation period.

58 *United States – Measures Relating to Zeroing and Sunset Reviews (Japan)*, AB, para. 135.

Chart 5:

Sales date	With Zeroing										Exception 1		Exception 2	
	Export trans.	Domestic trans.	Export avg.	Domestic avg.	Avg-to-trans	Trans-to-trans	Avg-to-trans	Trans-to-trans	Export customer	Avg-to-trans/	Avg-to-trans/	Avg-to-trans/	Trans-to-trans	
2 Sept.	5	20	30	30	0	15	25	15	25	A	25	25	25	
4 Sept.	5	25	30	30	0	20	25	20	25	A	25	25	25	
8 Sept.	25	25	30	30	0	0	5	0	5	B	0	0	0	
10 Sept.	30	25	30	30	0	-5	0	0	0	B	0	0	-5	
12 Sept.	35	25	30	30	0	-10	-5	0	0	B	0	0	-10	
16 Sept.	35	35	30	30	0	0	-5	0	0	C	0	0	0	
18 Sept.	40	35	30	30	0	-5	-10	0	0	C	0	0	-5	
20 Sept.	45	40	30	30	0	-5	-15	0	0	C	0	0	-5	
24 Sept.	50	40	30	30	0	-10	-20	0	0	D	0	0	-10	
Amount dumping					0	0	0	35	55		50	15	15	
Dumping %					0.0%	0.0%	0.0%	13.0%	20.4%		18.5%	5.6%	5.6%	

The AB seems to be suggesting that a hybrid methodology, whereby sales not exhibiting a pattern of significant price differences would be compared using one of the two preferred methods, and those exhibiting significant differences would be subject to the exceptional method.<sup>59</sup> A prohibition of zeroing under this manifestation of the exception would not necessarily produce a result mathematically equivalent to that stemming from use of one of the preferred methodologies.

Chart 5 is a continuation of the example used earlier, which relies on an objective set of sales transactions to demonstrate the unique results associated with the various methodologies. The last three columns are new.

To invoke the exceptional method, the authorities must find a pattern of export prices that differ significantly by time period, purchaser or region. Assume that the authorities find that the selling prices to export customer A are significantly lower than the selling prices to other export customers (prices are 5 compared to an average of 30). Using the hybrid methodology envisaged by the AB, the average domestic price would be compared to those lower-priced export sales (the exceptional method), but the remaining export sales would be evaluated using either the *average-to-average* or *transaction-to-transaction* method and this without recourse to zeroing.

Thus, even without zeroing, the results under the hybrid method are different from the *average-to-average* and the *transaction-to-transaction* methods, which presumably demonstrate the fallibility of the *inutile* argument.

## VII. CONCLUSIONS

The Appellate Body has issued five reports in which it has addressed various aspects of the practice of zeroing. In each successive report, the AB has grown seemingly more strident in its view that zeroing is distortive and cannot be reconciled with the requirements of the ADA. With its latest decision in *United States – Zeroing (Japan)*, the AB seems to have shut the door entirely on zeroing in every conceivable context. Although not explicitly forbidden by the AB, zeroing under the exceptional methodology of the second sentence of Article 2.4.2 was implicitly indicted in its latest report.

In *United States – Zeroing (Japan)*, the AB responded to the argument that zeroing must be permissible under the exception lest the results be identical to those generated using the *average-to-average* method by demonstrating how that might not always be true. The AB offered a hybrid methodology that seemingly allows authorities to address targeted dumping, while simultaneously preserving the sanctity of the fair comparison language in Article 2.4.

It remains to be seen whether a case concerning zeroing under the exception arises in dispute settlement, and whether such a case makes it to the AB. In the meantime, the AB's most recent indictment of zeroing more broadly is likely to produce more controversy, as the United States appears to be questioning the legitimacy and efficacy of that decision.

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### Notes

59 We would note that in *United States – Zeroing (EC)*, AB, para. 133, the AB would appear to have prohibited zeroing under the WA-T method in the context of reviews under Article 9.3. Since the AB did not endorse the distinction of the Panel between the investigation phase and the review phase, one may wonder what the implication is of this prohibition of zeroing under the WA-T method under Article 9.3 for the WA-to-T method under Article 2.4.2? Does the AB consider that the hybrid approach does not constitute zeroing or is the hybrid approach a refinement of *United States – Zeroing (EC)*, AB? Supposedly, the hybrid approach would apply in Article 9.3 reviews too because otherwise, the AB would have created a new distinction between the investigation phase and the review phase.