

ZEROING IN ON ZEROING

Anti-dumping in WTO dispute settlement

by

Brian Hindley and Edwin Vermulst *

GATT/WTO regulation of the practices of national anti-dumping authorities has never been strong, and the Uruguay-Round Anti-Dumping Agreement (ADA) seemed firmly in that tradition. Recent dispute-settlement decisions, however, come to grips with the worst practices of the EC and the US. Two recent decisions on “zeroing” indicate the trend.

At issue is averaging. Schoolchildren know that the average of 22 and –18 is 2. Persons who work for anti-dumping authorities, however, get full marks if they answer 11. Stripped of its legal camouflage, “zeroing” is the practice of counting negative numbers as zero to construct an average.

Dumping occurs when a product is sold for a lower price when exported than when sold on the exporter’s home market. Finding dumping is a major step towards exercising the WTO-sanctioned right to impose anti-dumping duties. Sometimes, however, the export price is higher than the home-market price – there is, so to speak, negative dumping.

Anti-dumping authorities routinely divide sales under investigation into sub-groups (different models, for example). Dumping found in sub-groups must then be averaged; and anti-dumping authorities commonly “zero” when doing that -- so sub-groups for which negative dumping appears count as zero. Hence, a dumping margin (the difference between home-market price and export price, expressed as a percentage of the latter) of 22 per cent for one sub-group and –18 per cent for another, of equal weight, yields an “average” dumping margin of 11 per cent.

* Hindley is Emeritus Reader in Trade Policy Economics at the London School of Economics. Vermulst is a partner in Vermulst Waer & Verhaeghe Advocaten, a Brussels law firm, and was a member of the Indian delegation to the WTO for the bed linen case discussed in this article.

The US Department of Commerce (DOC), for example, testing allegations that steel plate from Korea was dumped, considered two sub-periods, one before the massive 1997 devaluation of the won, the other after. It found a negative margin in one of them, but then zeroed it. Korea protested, and the WTO dispute-settlement panel agreed with Korea that the DOC tactic was incompatible with the ADA.

EC treatment of imports of bed linen from India is the subject of a recent report of the WTO Appellate Body (AB). The Commission calculated dumping margins for different “models” (for example, pillowcases and sheets), finding negative dumping margins on a number of them. It then zeroed these to obtain a dumping margin for “bed linen”.

The panel ruled that the calculation did not take account of all transactions, as WTO rules required it to do. The AB agreed. “We are also of the view”, it said, “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 [that is, the price in the exporter’s home market] ...” (Emphasis in original).

That view narrows the legal scope for zeroing. It may even prove to have eliminated it. “We recognize that Article 2.4.2 does not, in so many words, prohibit ‘zeroing’”, the panel in *Bed linen* said, “However, this does not mean that the practice is permitted, if it produces results inconsistent with the obligations set forth in that Article, as we believe it does.”

Zeroing, though, will not stop immediately. The Commission will abandon zeroing *between* models, which the AB expressly condemns, but it will zero *within* models, which it believes the WTO authorises, until the WTO says it cannot. Indeed, authoritative voices in Brussels suggest that the change in application may sometimes result in higher dumping margins.

The general case against zeroing, though, is strong. Zeroing means taking an average of positive dumping margins and zero. The resulting number *must* be positive -- *must* yield a finding of dumping – so long as *any* export sales have been priced at less than normal value.

The EC and the US argue that zeroing *should* be authorised by the WTO. Zeroing, of course, makes dumping easier to find. But that is an unsatisfactory rationale for public consumption: the EC and the US both make much of their commitment to “free trade”.

The Commission explains that zeroing is needed to combat “targeted dumping”. A dumper, it says, may conceal dumping by selling at high prices at other times or places. It is an odd theory, especially from the Commission. Presumably targeted dumping is an attempt to harm, say, German producers. But if the dumper can simultaneously sell at higher French prices, why can't the targeted German producers? The Commission's theory requires highly imperfect EC markets -- and foreign sellers who operate more effectively in those markets than EC sellers.

Even if targeted dumping is accepted as a plausible possibility, moreover, the ADA (Article 2.4.2) allows national authorities to follow unusual practices if “export prices ... differ significantly among different purchasers, regions or time periods”. To justify zeroing under that provision, however, the authority must explain why zeroing is necessary. If national authorities continue to zero, their explanations seem likely to come under increasingly intense scrutiny in the WTO.

(Computer count of body of text is 808 words)