

U.S. Government Expands the Use of Zeroing in Antidumping Investigations

Introduction

Foreign exporters and U.S. importers should take note of a recent antidumping decision that represents a significant change in the U.S. Government's antidumping duty calculations. The decision, which involved imports of certain retail carrier plastic bags from Taiwan, expands the use of a controversial practice known as "zeroing" through the use of a "targeted dumping" analysis. *Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less than Fair Value*, 75 Fed. Reg. 14569 (Mar. 26, 2010) ("*Taiwan Bags*"). We discuss this below.

Background

Antidumping laws were intended to address certain "unfair" trading practices between countries, thereby "leveling the playing field." Generally speaking, "dumping" is when a foreign company sells its goods in the United States for less than it sells the same products in its home country (or when it sells its products for less than it costs to produce them, plus a "reasonable" profit), causing injury to the U.S. industry. The U.S. Department of Commerce ("Commerce") is the agency primarily responsible for enforcing U.S. antidumping laws. If Commerce determines that a foreign company is dumping its products in the United States (and the U.S. International Trade Commission finds injury), it imposes an antidumping duty to offset the amount of dumping. Commerce uses very complicated computer calculations to determine whether and by how much a foreign company is dumping its goods in the United States.

Under U.S. law, Commerce has discretion in how it chooses to calculate the amount of dumping (known as the "margin" of dumping). At times, Commerce has used its discretion to calculate dumping margins as high as possible. A practice known as "zeroing" is one method Commerce has used regularly to increase dumping margins. Zeroing is when Commerce does not give a foreign company any credit for non-dumped sales in the dumping calculations. Instead, Commerce "zeros" out non-dumped sales and calculates the margin based only on dumped sales. This approach tends to increase the overall average amount of dumping. Commerce's zeroing practice has been repeatedly declared unlawful by the World Trade Organization ("WTO"), the international organization responsible for overseeing international trade disputes.

Commerce has refused on numerous occasions and under different scenarios to fully abide by the WTO's decisions declaring zeroing unlawful. In fact, Commerce has used several legal technicalities to evade compliance with adverse WTO zeroing decisions. One such tactic has been its use of a "targeted dumping" analysis, like that employed in the *Taiwan Bags* decision. "Targeted dumping" is when an exporter is not dumping to all customers or during all time periods, but is instead limiting (*i.e.*, targeting) its dumping to a specific region, time period, or customer. The theory behind a targeted dumping analysis is that an exporter can use targeted dumping on a few sales to hide or "mask" its overall dumping.

Importantly, if Commerce uses its targeted dumping methodology, *it calculates dumping rates with zeroing*; this calculation typically increases the dumping margins. Commerce used its targeted dumping methodology in *Taiwan Bags*, thereby enabling it to use zeroing to increase the exporter's amount of dumping. In *Taiwan Bags*, however, Commerce went a step further. In that decision, Commerce revised its targeted dumping methodology to use zeroing on virtually every sale, regardless of the extent of any actual targeted dumping. This is in contrast to its past practice of zeroing only the identified targeted sales. Through its expanded zeroing practices, Commerce

appears to have essentially resumed its use of zeroing in dumping calculations without regard to WTO decisions declaring the practice unlawful.

While Commerce has used targeted dumping previously, it has never used it as broadly as was done in *Taiwan Bags*. This is a sharp departure from Commerce's past practice and it remains to be seen whether this new targeted dumping methodology survives any legal challenges.

Conclusion

It is not yet clear whether Commerce will use the *Taiwan Bags* targeted dumping methodology in other antidumping cases. Nevertheless, this decision provides Commerce with a potential avenue to resume its use of zeroing in virtually all new antidumping investigations in the future. Indeed, U.S. industries have argued in court that Commerce is *required* to use "zeroing" in dumping calculations as a matter of U.S. law. See *e.g., United States Steel Corp. v. United States*, Slip op. 09-74 (Ct. Int'l Trade 2009). A concerted effort by Commerce to use the *Taiwan Bags* methodology in other antidumping cases would greatly increase the chances that Commerce would find that a company had engaged in dumping, and such an effort would likely increase overall antidumping duty rates. U.S. importers and foreign exporters should remain mindful of this possibility in future antidumping cases and be prepared to challenge both the U.S. industry and Commerce when such a methodology is used or considered.

If you have any questions or need more information about this topic, or about antidumping proceedings in general, please contact [Robert L. LaFrankie](#) or [Alicia R. Winston](#) of Hughes Hubbard & Reed, or the attorney in the firm with whom you are regularly in contact.

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