

Brief Overview of Targeted Dumping Rules

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doi:10.56397/SLJ.2023.09.02

Abstract

In light of increasing trade friction between China and developed economies, protecting the legitimate rights and interests of domestic enterprises in anti-dumping investigations is of great importance. Targeted dumping, which emerged during the Uruguay Round negotiations in 1994, has become a central issue in anti-dumping investigations. This paper aims to provide a comprehensive definition of targeted dumping while analyzing its historical evolution from the zeroing method to the concept of targeted dumping, alongside assessing the rules and frameworks for its application in the United States, which have reflected its ambiguity and uncertainty. The paper will also analyze the case of United States - Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China ("DS471") and discuss the relevant central issues of targeted dumping. What we would conclude is that by analyzing the findings from the Panel and the Appellate Body of the World Trade Organization ("WTO") regarding this case and other relevant favorable verdicts of illegality or ineffectiveness of methods used to determine target dumping in recent years in-depth, it would be a benefit for Chinese enterprise from the perspective of the response to the determination of anti-dumping measures regarding target dumping.

Keywords: targeted dumping, anti-dumping, zeroing method, DS471

1. Introduction

In today's rapidly evolving world economy, trade relationships between countries play a significant role in promoting growth, but would also lead to trade conflicts and frictions. To counterbalance these effects, countries have introduced various trade policies aimed at minimizing negative impacts while promoting the overall development of their economies, leading to the continued improvement and evolution of the international trade legal system. Under this framework, the WTO has developed a series of legal rules to achieve a fair and open multilateral trading system.

America has been active in introducing numerous trade protection measures. In the context of anti-dumping investigations, the U.S. Department of Commerce ("the DOC") employs three methods for calculating dumping margins, including the weighted average to weighted average ("A-A"/"W-W") test, the single transaction to the single transaction ("T-T") test, and the weighted average to a single transaction ("A-T"/"W-T") test for targeted dumping. Although the first two approaches are generally preferred, the U.S. has adopted the targeted dumping rule to strengthen the determination of dumping facts. Given that the zeroing practice used in the A-A and T-T tests were deemed

inconsistent with WTO rules, the DOC updated the methodology used in the testing for targeted dumping investigations to reach a revised zeroing application strategy. However, many consider this methodology to be in violation of WTO rules and have criticized its elements as unreasonable and unlawful. For instance, in a 2016 article, Sun Shaohua reported on the WTO finding that certain U.S. targeted dumping practices constituted violations in this regard¹.

2. Definition of Target Dumping and Its Characteristics

Article 2.4.2 of the Agreement on Anti-Dumping (“ADA”) provides that targeted dumping occurs when the price of an export significantly differs among purchasers, regions, or times, and such differences cannot be properly taken into account by using A-A or T-T test comparisons. In such cases, the A-T test can be used for comparison. This method is used to identify dumping by an exporting country for a particular buyer, a specific geographic area, and a particular period of time. Although similar words can be found in the U.S. Tariff Act of 1930, the U.S. Code of Federal Regulations no longer specifically limits the application of the A-T test to target dumping.

Targeted dumping is characterized by a) dumping behavior by a country’s producers or exporters; b) targeted dumping behavior that is focused on narrowly defined markets; and; c) a significant price difference for specific buyers in a specific region or time, resulting from selective dumping behavior chosen by producers or exporters.

Targeted dumping is often considered a continuation of the zeroing method (See the third part under this paper), which is widely used due to its similarity to the effects achieved by the zeroing method.

3. Definition of Zeroing Method and Its Controversy

In America, before employing the targeted dumping methodology, A-A or T-T test was used to measure the dumping margin, which was then combined with the zeroing method to calculate the dumping margin. Zeroing method involves setting some of the dumping margins to zero value, and some values in the dumping margin will not produce any actual effect in order to achieve the appropriate adjustment of the normal value. Once the export price and normal value are compared, the dumping

margin can be obtained.

There are generally three main types of negative zeroing method (Yi Siyang, 2015): a) simple zeroing, where a single sales price is compared to the domestic sales price, leading to a negative value; b) model zeroing, where the product model sometimes requires a weighted average, leading to a negative value; and c) stage zeroing, where an investigation is divided into different stages of the process due to the weighted average, again leading to a negative value. The above three types are utilized to identify dumping when the normal value of the part below the export price is disregarded, and consequently making a second determination of loss. The zeroing method artificially increases the dumping margin, which would result in the erroneous determination of dumped products and lead to increased anti-dumping duties. This is because only the nature of this practice means that “positive dumping margin value” is counted, while the “negative dumping margin value” is ignored.

The zeroing approach has faced numerous challenges within the WTO. Approximately 19 cases involving the zeroing approach have been brought, with about 16 directed at America. In 2003, the EU filed a lawsuit with the WTO, arguing that the U.S. zeroing methodology violated WTO rules in terms of laws, regulations, and administrative procedures.

The WTO has repeatedly denied the zeroing method in prior rulings, with about 16 cases directed at America alone. However, it would only have an impact on individual cases, and not could be applied to other cases. For example, in the case named United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“DS294”), the Appellate Body found the zeroing method to be illegal in fact but not in law. Consequently, it is difficult to conclude that the dispute settlement mechanism has put an end to the zeroing method (ZHANG Zhengyi & PAN Xin, 2016).

4. Evolution of Target Dumping Determination Method

Before delving into case analysis, it is necessary to identify the general elements of the U.S. test for targeted dumping determinations, namely the Nails II (“Steel Nail Test”) and the Differential Pricing Methods (“DPM”). The Nails II method comprises two steps, the pattern test and the gap test. The former determines

whether a comparable counterpart exists in the same situation. If not, no pattern test is performed. The latter compares the specified sales price with the unspecified sales price. The DPM is a test for specific product models and different time periods (Kunio MIYATAOKA, 2021).

4.1 *The Nails II*

4.1.1 Pattern Test

Pattern test is also known as the standard deviation test, which requires the targeted dumping price to be lower than the benchmark price, followed by the benchmark price sales quantity being higher than the sales to the target customer of all sales quantity by 33%. Assuming that there are two classes, A and B, where A targets three customers: a, b, and c, and B targets only customer a. Now, customer a has become the target of dumping. While it is found that both class A and B products target customer a, class B products lose the model testing condition because they are targeted only at customer a. Next, the benchmark price is calculated, which requires calculating the weighted average price for product type A, then subtracting the standard deviation to obtain the benchmark price. During the comparison process, the prices targeting customer a under class B are weighted and compared with the benchmark price. At the same time, it is determined whether the sales quantity for customer a under class B accounts for 33% of the total sales quantity for customer a. If both condition one and condition two are met, then customer a has achieved the targeted dumping standard.

4.1.2 Gap Test

Gap test is also known as the significant test. DOC usually employs a three-step test method to determine the existence of a gap test. First, the average price of the product for a specific customer and the average price of the product for a non-specific customer are determined, and the difference between the two average prices is calculated. This difference is then compared to the general average price difference. If the difference exceeds the average price difference, then the presence of targeted dumping is established.

Furthermore, if the targeted dumped product exceeds 5%, then the final determination is that targeted dumping exists. It is also noteworthy that during the gap test, DOC excludes all sales prices of non-target dumped customers that are

lower than the sales price of the targeted dumping customer (Bai Ming, 2012).

4.2 *The DPM*

4.2.1 Specific Steps

The differential pricing approach involves two steps, Cohen's d test and the ratio test, followed by the Meaningful Difference test. Cohen's d test evaluates the significance of price differences by buyer, region, and time of day, taking only the quantitative criteria into account and disregarding any implied qualitative elements. The first step is used to identify pattern transactions. In the ratio test, the determination of which type of targeted dumping is appropriate is determined based on whether the value of mode transactions is less than 33%, between 33% and 66%, or greater than or equal to 66%. If the value is less than 33%, both A-A and T-T tests are applicable to all export transactions. If the value is between 33% and 66%, then the A-T test is applicable to mode transactions, while A-A and T-T tests are applicable to all non-mode transactions. If the value is greater than or equal to 66%, then the A-T test is applicable to all export transactions.

The Meaningful Difference test is mainly used to explain why the A-A test cannot be used for targeted dumping, in line with the stipulation under Article 2.4.2 of the ADA. It does not, however, account for the reasonableness factor of the T-T method.

4.2.2 Evaluation of the DPM

The DPM has been proposed as a replacement for the Nails II in targeted dumping investigations. Its primary aim is to test the reasonableness of the A-T model. The DOC has solicited comments from the parties involved in the investigation², and the following main issues are highlighted (Wang Chunshi, 2017).

4.2.2.1 The Discretionary Authority of the DOC

The initiation of investigations into targeted dumping typically requires an accusation of targeted dumping to be raised. However, the exclusion of this requirement in the DPM allows for a systematic evaluation of all buyers, sales territories, and sales periods by the DOC. However, this presents a new challenge to the investigative skills of the DOC, but also allows them to independently uncover cases of low-priced or high-priced sales and categorize transactions for identification of a differential pricing practice. This transforms the A-T test

from being the exception to being generally applicable.

4.2.2.2 Insufficient Reasons for the Significant Differences by Using A-T Test

The DOC arbitrary comparison of conclusions reached through different calculation methods leads to a natural assumption that the A-T test is the only one that can take significant differences into account. The T-T test is directly excluded from the application, and the core difference between A-A and A-T test is in the application of the zeroing method, leading to a bias in the result itself.

4.2.2.3 The Doubt Regarding Cohen's D Test

Cohen's d test is originally applied as a standardized method to determine the magnitude of impact between two sets of data and is often used to assess the impact of a social phenomenon. The DOC ignores the true relationship with all sales and only uses it to reflect the deviation between the two sets of price averages. This selection process is arbitrary and does not ensure that the DOC's test results in the differential pricing survey meet the requirements.

5. The Determination of the Domestic Legality of Target Dumping from the Perspective of Litigation in the U.S. Domestic Courts

Since 1994, targeted dumping has gradually become the most contentious issue in the field of anti-dumping and has evolved into a brand new area in trade litigation cases. The United States Court of International Trade ("the USCIT") and the Court of Appeals for the Federal Circuit ("the CAFC") have taken this issue seriously, and WTO members have initiated numerous lawsuits against America. The DOC has abandoned its previous approach of zeroing method and adopted a target dumping approach with similar effects, which will inevitably lead to a new round of litigation. As mentioned earlier, the DOC continues to change its target dumping investigation method and cannot provide guidance for reference. Targeted dumping is expected to be at the forefront of international trade court litigation in the future.

Anticipated litigation issues in U.S. domestic trade courts include the application of targeted dumping regulations, what constitutes a "price pattern" under targeted dumping, what constitutes a "significant difference" under targeted dumping, and how courts will consider

these issues in different market realities. Finally, since the law does not specify the content of targeted dumping, the court will have to innovate when introducing targeted dumping remedies. We can analyze the application of international treaties and laws through U.S. domestic practice rules.

5.1 The Principle of Consistent Interpretation

In general, the application of any agreement in America requires adherence to the principle of consistent interpretation ("Charming Betsy Principle"). After a unified interpretation by U.S. courts, the treaty rules do not need to be applied directly. This principle has greatly protected its interests in the past. However, it has also become a serious impediment to its economic interests. The principle of interpretation still applies, and therefore, it should not completely ignore it when considering issues related to targeted dumping from the perspective of its domestic court.

As for agreements under the WTO system, the courts cannot necessarily apply them directly even if interpreted consistently. In practice, the courts can only apply those provisions that can be adopted by domestic legislation or relate to the rights and obligations of the state. The courts apply the content of the rights and obligations of citizens flexibly, and under the WTO agreement, most of the content is related to the member states and has little to do with the content of the rights and obligations of citizens. Therefore, in most cases, it does not apply the agreements universally in the courts, but not completely reject them either. Instead, it may transform them to deal with disputes.

5.2 Chevron Principle

However, this is not the majority of cases under Section 5.1 as America prioritizes the application of domestic law, which may reduce its compliance with WTO provisions. Under the Chevron Principle, if domestic law lacks relevant provisions or is unclear, the administrative agency can make the corresponding interpretation, and as long as it is reasonable, the court should pay attention to it. This would result in the courts finding that the actions of the DOC are lawful. For example, the DOC believes that the mode of relief taken under target dumping should not be the same as other relief, or applies the target dumping remedy to all commodity transactions, or allows the zeroing method to be applied to all

transactions, despite causing a deviation from the intrinsic purpose target dumping. Such an interpretation is reasonably made by authorities, and domestic courts regard it as legitimate.

This is certainly a case of the DOC extending the interpretation of statutory provisions independently and under judicial conditions, which creates a certain deviation from the core essence of the ADA. This principle will directly influence the enforcement of related WTO rules in America.

Therefore, in analyzing the legality of targeted dumping, both principles must be balanced. Chevron Principle can be applied to the analysis of targeted dumping, but in reviewing the appropriateness of targeted dumping, the Charming Betsy Principle should be applied, which would effectively restrict the behavior of the U.S. authorities through the responsibilities and obligations of international law (GAO Jiangnan, 2002). According to the principle of equality in trade, America also needs to bear corresponding international obligations. Hence, if the DOC insists on using the zeroing method in the system of targeted dumping, it is undoubtedly unreasonable.

6. DS471 Case

6.1 Basic Introduction of DS471 Case

On December 3, 2013, China initiated a WTO lawsuit against America for taking anti-dumping measures against 13 products, including oil well pipes imported from China. The DOC found target dumping in the initial phase of the anti-dumping investigation for three products, including oil well pipes, and used the A-T test to calculate the dumping margin. In the administrative review of the investigation of mylar film, the DOC also used the zeroing method to artificially increase the anti-dumping duty rate.

In December 2013, China requested to consult with America on the methodology to be used in the anti-dumping investigation of Chinese products, as it violated relevant regulations in the ADA.

China's primary complaints filed were as follows (Qiu Yun, 2019): (a) the A-T test violates Article 2.4.2 of the ADA in that DOC failed to conduct the required tests and determine whether the export prices were significantly different in nature; (b) the DOC did not sufficiently explain why the T-T test could not

be used and the explanation that the A-A test cannot be applied was inadequate; and (c) the use of the zeroing method in the administrative review of mylar films is inconsistent with Article 9.3 and Article 6.2 of the ADA.

The Panel was formed in 2014, and the Panel report was completed in June 2016. On October 19, 2016, a formal panel report was issued, supporting China's primary claim and finding that DOC violated WTO rules related to target dumping claims.

6.2 Analysis of Controversial Points

This paper exclusively examines the controversial points under the report of the Panel and the Appellate Body regarding target dumping.

6.2.1 Whether A-T Test Breached Article 2.4.2 of the ADA

China argued that America failed to accurately identify price differences between purchases or exports at different times in three of DOC's anti-dumping investigations. DOC believed that the Nails II revealed the price difference, and did not use the zeroing method when using the A-A test, but only utilized the A-T test with the zeroing method, resulting in the mentioned findings.

The Panel contends that the A-A or T-T test is generally required to calculate the dumping margin, but must satisfy certain criteria before using the A-T test, such as the investigating authority finding a significant export price pattern difference and providing an explanation why the A-A or T-T test cannot be used when such differences exist³. While DOC did not utilize the zeroing method in the A-A test, only used the zeroing method in the A-T test and did not explain why the A-T test has a justifiable application.

Additionally, regarding the rationality of using the Nails II by the DOC, the Panel stated in Article 2.4.2 of the ADA, that the investigating authority should identify a significant price pattern, but did not specify the reasons for such significant differences, implying that it is unnecessary for the investigating authority to consider the impact of relevant factors (Si Xinxin, 2015). As a result, the Panel did not support China's argument of the impact of "seasonal factors" as an influencing factor. However, both the Panel and the Appellate Body insisted on the need for quantitative and qualitative analysis in

the analysis of significant differences, but did not require an explanation for the cause^{4 5}. Both the Panel and the Appellate Body supported the DOC's approach and agreed to grant the investigating authority discretionary power, which only requires specifying the investigated object without specifying the method. Therefore, the differences in price caused by "seasonal" factors did not consider whether such differences were normal market behavior or targeted dumping.

6.2.2 Whether Applying the A-T Test to all Export Transactions Violated the Anti-Dumping Agreement

China argued that the DOC's three anti-dumping investigations against China applied the A-T comparison methodology to all export transactions, which is contrary to Article 2.4.2 specifying that the A-T test could only be used for intra-mode export transactions, not all transactions. The Panel referenced the Appellate Body's ruling in the case of United States—Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea ("DS464"), where the term "individual" in Article 2.4.2 clarified that the A-T test could not be applied to all export transactions, but only to those recognized under the model clause⁶.

As per the A-T test's specifications, it only applies to "export prices that differ significantly by purchaser, region, or period," and the DOC has not demonstrated such a significant difference⁷. The Panel found this approach to be contrary to the three special circumstances outlined in Article 2.4.2.

6.2.3 Whether the Zeroing Method Application in the A-T Test Breached Article 2.4.2 of the ADA

China cited the DS464, where the Appellate Body found that applying the zeroing method under the A-T test violated the relevant provisions of Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement.

The panel recognized that previous WTO cases have declared that utilizing the zeroing method under the A-A and T-T models is clearly invalid. However, regarding the legality of using the zeroing method under the A-T test, the Panel chose to rely on the appeal report in DS464⁸. The second sentence of Article 2.4.2 authorizes the A-T test comparison method to concentrate on modal transactions when determining dumping margins, but it does not permit the exclusion of

the results of a transaction-specific comparison of modal transactions. Therefore, the Panel found that using the zeroing method in the A-T test was incompatible. In other words, although the A-T test's calculation results in an intermediate value, which needs to be identified to compute the dumping margin under the product under investigation's mode, it is not necessary to zero the negative value within the mode, thus failing to conform to determining the dumping margin of "all export transactions" (Si Xinxin, 2015).

7. Conclusion

Although China won the DS471 case, there exists still uncertainty and ambiguity in the interpretation of the target dumping under its verdict results. The principle of uniform interpretation in the U.S. domestic courts and the controversial nature of the Chevron Principle itself have created uncertainty in its implementation. Additionally, because the Panel ruling lacks uniformity in the application, America would not easily give up the zeroing method but will use the ambiguous interpretation of the ADA to indirectly use zeroing through complex statistical calculations to improve the dumping and dumping margin.

Therefore, China's export enterprises need to thoroughly study the relevant cases. Currently, a more positive phenomenon is that the Panel and the Appellate Body have repeatedly confirmed the application of the zeroing method under the A-T test is a violation of the ADA. Once by studying recent cases in depth and understanding the viewpoints and rationales provided by the Panel and the Appellate body in these reports, Chinese enterprises would potentially obtain a favorable position in future WTO dispute settlement practices.

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¹ See Sun Shaohua: WTO Finds U.S. "Targeted Dumping" Practices in Violation, Economic Reference.

² See Differential Pricing Analysis; Request for Comments, 79 Fed. Reg. 26, 720 (May 9, 2014).

³ See United States-Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China, WT/DS471/R, Report of the panel, 19 October 2016, para. 7.1-2.

⁴ See United States-Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China, WT/DS471/R, Report of the panel, 19 October 2016, paras. 7. 107-109.

⁵ See United States-Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China, WT/DS471/R, Report of the panel, 19 October 2016, para. 5.22.

⁶ See United States-Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China, WT/DS471/R, Report of the panel, 19 October 2016, para. 7. 175-176.

⁷ See United States-Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China, WT/DS471/R, Report of the panel, 19 October 2016, para. 7. 177.

⁸ See United States-Certain Methodologies and Their