

ISSUES WITH THE EXPORT PRICE CALCULATION IN RELATION TO THE NORMAL VALUE DETERMINATION IN ANTIDUMPING INVESTIGATIONS

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Abstract: The Antidumping Agreement is at the moment the only international provision dealing with the regulation of antidumping. Central to the entire process of identifying if dumping has occurred or not, and therefore if antidumping measures should be enforced is the calculation of the export price because based on this element, normal value determination closely follows. This paper will point out some elements regarding the process of determining the export price and what implications can be identified for normal value calculations.

Keywords: antidumping, normal value, export price

The Antidumping Agreement does not specify if, in the course of the determination of the dumping margin, the export price has to be determined before or after the normal value. However, given that the export price is usually used as a reference for determining dumping margin, the former is usually determined first.

The only reference in the Agreement to the export price concerns the special circumstances in which there is no identifiable export price (due to some type of association or compensatory arrangement between the exporter and importers). The second situation is usually encountered when the distribution chain of the product is complex or the product suffers transformations after importation, in order to make it more suitable to the specific sale conditions in the importing country. In usual circumstances, when there are no suspicions concerning the true nature of the reported export price, this price will be used as a basis for determining the dumping margin. Usually however, the export price is expressed in a manner that includes certain services the exporter provides for the importer, as for example insurance, transportation or service and maintenance. Also, the export price does not reflect the price rebates that may be received by the importer. All these additions to the price have to be removed in order to determine only the price paid for the actual good.

If the authorities consider the export price cannot be trusted because of an association between the exporter and importers, article 2.3 offers the alternative of calculating this price on the basis of the price for which the good is first resold to an independent buyer.⁸⁷ The possibility to ignore the export price in conditions expressed by article 2.3 is due to the lack of any relationship between this price and the true market price of the good (the sale to a related party can represent in fact a simple transfer, at a symbolic price, meant only to avoid high tariffs in certain countries). In the practice of some countries the export price is not ignored in such conditions – it can be considered if it holds in a comparison to the price of sale to an independent buyer. If the selling price to the independent buyer is significantly higher than the average export price to related firms, the latter is ignored as a basis to identify the export price in a transaction. The actual calculation is made starting from the resale price to the first independent buyer (a CIF price in the importing country) and trying to determine an ex-works price in the exporting country by eliminating the additional cost elements that do not relate directly to the production process. Among the elements that have to be considered when making such adjustments there are the ones stipulated by article 2.4.⁸⁸

⁸⁷ “In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine”

⁸⁸ “... allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made.”

The Agreement does not provide anything concerning determination of normal value in a situation like the one described above. In practice, a comparison is made between the export price at the ex-works level with the price of sale to the first independent buyer, without adjusting for discrepancies if they exist between the two. In the interpretation of the European Commission, a good is considered to be sold in the ordinary course of trade in the market of origin, if it is sold to a buyer independent from the producer. Most of the time this means the selling price taken into consideration in an antidumping investigation will be the one from a transaction between a distributor inside the selling chain of the producer and an independent buyer. In this case, the further the distributor is downstream in the selling chain the higher the price of sale to the independent buyer will be. Therefore this way of determination clearly disfavors the producers with long selling chains in their own market. For them, the normal value determined as described in article 2.3 will be significantly higher than for the firms not using many intermediaries to sell their product.⁸⁹

The US authority (the Department of Commerce) also ignores sales to firms inside the distribution chain. It considers normal value to be the first sale price outside this chain. Japan contested to the WTO this practice of the US.⁹⁰ The initial decision of a WTO panel was that sales to independent buyers by firms receiving preferential treatment from the producer cannot be considered when determining normal value in an investigation concerning that producer, because the respective company does not have any direct relationship to the investigated party (the producer).⁹¹

Using sales inside the distribution network to provide price elements for determining normal value can negatively influence its comparability with the export price. This is due in the first place to the fact that the respective sales can be part of significantly different (in terms of volume) patterns of trade than the export sales. Other factors that can greatly influence comparability of the two prices are the different taxes that can arise in the case of sales to related parties, as well as costs and profit margins used by these firms. Therefore, if the authorities decide to use for determining normal value the selling price from a firm related to the producer to an independent buyer, they have to consider the fact that selling prices to related firms contain elements of costs that have to be removed from calculations, otherwise the comparability of the normal value with the export price will be affected.

Fixing the artificial discrepancies between the two can be done in the spirit of article 2.4. Without mentioning it explicitly, the WTO panel in the case mentioned above asks the authorities that, when dealing with sales to related parties, they deduce the same price components (costs and profit margin for the producer) that would be deducted in the case of the calculation of export price. This is done in order to arrive at the ex-works price for the good. The panel notices that article 2.2 does not offer any clues as to what can be the ways to determine normal value if one would like to consider sales to related parties.⁹² The appellate body overturned this decision, arguing that article 2.4 offers the authorities the possibility to make a fair comparison between normal value and export price, by using an adequate basis of determination.⁹³

The American authorities make comparisons between the price used in relationship with independent buyers and the price used in relationship with related firms. If the weighted average of sale prices to related partners is less than 95% of the weighted average of sale prices from all the transactions with independent buyers, then the respective sales to related parties will be excluded from the calculations of normal value. A WTO panel invalidated this procedure because it did not lead to the exclusion of sales at a price above the average of prices paid by the independent buyers, and this inevitably enhances chances of identifying dumping (normal value determined on the basis of high prices will be high, enhancing the probability that sale prices will be lower than its level – which means dumping is occurring). The appellate body also rejected the determination algorithm, based on arguments similar to the ones presented above.⁹⁴

⁸⁹ Didier Pierre, *The WTO anti-dumping code and EC practice, issues for review in trade negotiations*, Journal of World Trade, vol. 35, 2001, p. 30.

⁹⁰ WTO Panel Report, *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, 28 February 2001.

⁹¹ *Idem*, par 7.114.

⁹² *Idem*, par 7.117.

⁹³ WTO Appellate Body Report, *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, 24 July, 2001, par. 166-167.

⁹⁴ Durling James, *Deference, but only when due: WTO review of anti-dumping measures*, Journal of International Economic Law, vol. 6, 2003, p. 135.

We consider that normally sales to related firms should not be considered as part of ordinary course of trade (and therefore ignored when determining normal value) only if an illegitimate influence on the price, directly related to the relationship between seller and buyer, can be proved.

Lower prices used when selling to related parties can have legitimate justifications. These can be associated with the low level (or the non-existence) of advertising costs or other pre-sale expenses that can arise if sales are made to independent buyers. In this respect, changing the Agreement to include this alternative of reasoning would be in line with article 2 (a) of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 that stipulates “In determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related within the meaning of Article 15 shall not in itself be grounds for regarding the transaction value as unacceptable. In such case the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price”

It would also be necessary a more clear definition of the notion of association, in the context of article 2.3. In the Agreement there is a reference to relations between firms but it is made in the context of defining the national industry. Footnote 11 (clarifying article 4.1.1) affirms that the producers are related to exporters or importers if “...(a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.”

In order to avoid situations in which the authorities decide that a firm controls another even if, for example, it owns only 5% of the shares, the Antidumping Agreement should include in article 2 more clear stipulations concerning this aspect. Such a provision that could be adopted with little or no modifications is the one in article 15.4 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994, which affirms that “For the purposes of this Agreement, persons shall be deemed to be related only if:

- (a) they are officers or directors of one another's businesses;
- (b) they are legally recognized partners in business;
- (c) they are employer and employee;
- (d) any person directly or indirectly owns, controls or holds 5 per cent or more of the outstanding voting stock or shares of both of them;
- (e) one of them directly or indirectly controls the other;
- (f) both of them are directly or indirectly controlled by a third person;
- (g) together they directly or indirectly control a third person; or
- (h) they are members of the same family”

Conclusions

The modalities in which the export price is determined can influence the normal value determination, as we have shown. Depending on the approach used by the authorities in identifying the price of transactions between related or independent firms, the results can sometimes mean unjustified exclusions of transactions or inclusions of transactions of which price is “tainted” by elements that do not reflect only the costs of production for the good sold. Certain approaches can be used to avoid calculating an unrealistic export price, and some of them have been presented here, along with some strategies used by the authorities in order to influence the outcome of the antidumping investigation.

References

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