Understanding “Zeroing” in Anti-Dumping Procedures and Korea’s Negotiation Strategy

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Abstract

This paper aims to understand the legal issues of “zeroing” and analyze its practical applications in order to draw implications for Korea’s strategy in Doha Development Agenda (DDA) and Free Trade Agreement (FTA) negotiations. For this purpose, this paper refers to World Trade Organization (WTO) members’ proposals submitted to the DDA negotiation Group on Rules, and to FTA agreements that Korea has negotiated so far. It also suggests some guidelines for the reform of current rules in the context of the calculation of dumping margins, and implies Korea’s negotiation strategies.

The main conclusions of this paper are as follows. First, it is important to understand the terms of “zeroing” and “participate” in WTO disputes involving zeroing as a third country, in order to avoid losing a suit with respect to prohibiting the use. Second, it is crucial to find more allied countries so that they support influences on amendment to the provisions of Anti-Dumping Agreements (ADA), under WTO agreements concerning the practice of zeroing. Third, this paper identifies whether Korea’s previous FTA agreements have texts which clarify the principle of calculating dumping margins. It is imperative to prevent other countries from adding more dumping margins, and to suggest Korean government find out whether their future negotiating partners are concerned with the zeroing issue.

Keywords: Zeroing, Dumping Margin, WTO, DDA, FTA

I. Introduction

There have been heated arguments over the practice of zeroing, regarding the determining of dumping margins. Especially in South Korea, where a case was brought to the WTO DSB against the United States’ dumping margin calculation, known as

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“zeroing” practice which raises prices on imports of steel from Korea.\(^1\) For Korea, it is crucial to have an appropriate negotiation strategy on zeroing. Although Article 2.4 of the Anti-Dumping Agreements (ADA) deals with how to make a fair comparison between a normal value and an export price, and Article 2.4.2 of the ADA indicates how a dumping margin is calculated and explains an exception to the dumping margin calculation, some investigating authorities treat the negative dumping margin as a zero dumping margin. This has the effect of increasing overall dumping margins. As for exporting countries, this is not ‘a fair comparison,’ and they have asserted that the zeroing practice violates Article 2.4.2 of the ADA, and have, moreover, proposed a change in the AD laws for clarifying it. However, the number of disputes has increased since the US Steel Plate and Korean Steel Sheet case\(^2\) in 2001, when even the Panel and Appellate Body (AB) concluded that the zeroing practice is not consistent with Article 2.4.2. Other countries still used other kinds of zeroing methods for the calculation of dumping margins, so as to avoid applications of Article 2.4.2 of the ADA.

This paper aims to understand the zeroing procedures themselves and the methodologies for the calculation of dumping margins on the basis of the three kinds of comparisons: a weighted average of normal values with that of the export price (A-A), normal values and export prices on a transaction-to-transaction basis (T-T) and the weighted average of normal values of all transactions and the individual export prices of a single transaction (A-T) in special circumstances. Moreover its purpose is to analyze legal claims of zeroing disputes, grasp the main arguments of both advocates and opponents of the zeroing practice under the WTO in DDA negotiations, and evaluate Korea’s FTA provisions, whether there are rules prohibiting the use of the zeroing practice in past investigations or reviews. Therefore this paper tries to present an adequate solution, in order to prohibit the use of zeroing methodology and practices in the international and regional anti-dumping system. It also pursues this argument, suggesting that Korea have a negotiation strategy, and take proper action to negotiate with its next trade partner.

The scope of the paper is to study Panel and AB reports in previous WTO disputes involving zeroing, proposals submitted to the Negotiating Group on Rules in the DDA negotiation process, and Korean FTA Agreements that have already been signed. The principle resources for this study are Article 2.4.2 of the ADA from GATT 1994, Panel and AB reports with respect to zeroing, proposals such as Consolidated Texts by Chairs and Working Documents on Rules, and seven Korean FTA’s, including the Korea-Chile FTA, the Korea-Singapore FTA, the Korea-EFTA FTA, the Korea-US FTA, the Korea-ASEAN FTA, the Korea-India CEPA and the Korea-EU FTA.

This paper is organized as follows. After this Introduction, Chapter II illustrates the definition of dumping and a methodology for the calculation of an overall dumping margin. It also explains the definition of zeroing and classifies the zeroing methodology thoroughly. Chapter III is devoted to dealing with several panels and AB reports which examined whether or not zeroing practice is consistent with ADA Article 2.4.2. Comparison

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with prior AB disputes involving zeroing suggests key findings, for example, what the main decisions are and how the zeroing practice has developed, and why this practice has repeated itself in another way. It also anticipates future disputes between Korea and other countries. Chapter IV analyses the Chair’s Texts based on several proposals from many countries, and looks at the positions of major member countries. According to Article 2.4.2 of the ADA, it has been revised based on proposals, and contents prohibiting the use of zeroing have been excluded. Even though there are a lot of debates on whether or not to use the zeroing practice, the WTO AD rule has not been changed in DDA negotiations. Moreover, Chapter V discusses each Korean FTA Policy and evaluates each Korean FTA, whether there are the provisions related to the prohibition of zeroing. Then it describes Korea’s challenges with the zeroing practice. Lastly, Chapter VI provides lessons from previous disputes concerning zeroing and its current status in DDA and FTA negotiations. It also suggests implications for Korea’s negotiation strategy in order to prevent other countries from inflating the calculation of the dumping margin.

II. “Zeroing” Issues in Legal and Practical Context

1. Definition of Dumping

The Anti-Dumping Agreement contains numerous and detailed rules for national anti-dumping investigation procedures, and stipulates methods for defining the phrases used in Article VI, such as “dumping,” “normal value,” “export price” and “injury.” In order to make zeroing practice clear, many exporting countries try to interpret this article thoroughly.

“Dumping” refers to the comparison of two prices of a product, namely the “normal price,” the usual price for a product, and the “export price,” at which price the product is exported into the market of a foreign country. Dumping within the meaning of the WTO ADA occurs when the export price is significantly less than the products normal value.3 Thus, “anti-dumping” refers to national measures by an importing member to counteract the process of dumping, namely the levying of an anti-dumping duty. Through this additional duty the price of the product in the importing members market is raised to the products normal value (Stoll and Schorkopf, 2006: 153).

2. Dumping Margin Calculation

The methodology for the calculation of dumping margins is filled with very technical procedures, involving burdensome accounting processes. For this reason, it is

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3 Agreement on Implementation of Article VI of the GATT 1994, Part I, Article 2 Determination of Dumping 2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.
often modified but rarely eliminated. In this chapter, certain factors such as the wage structure and social costs of production are not to be taken into account in the calculation of the normal value and the export price. In order to ensure a fair comparison between these two, Article 2.4’s AD Agreement contains detailed provisions on allowances. As the comparisons are generally to be made at the same level of trade, allowances must be made for differences which affect price comparability, such as taxes, costs, profits, quantities, physical characteristics, and currency conversions. (Stoll and Schorkopf, 2006: 154-155) For example, if a company in Korea sells its products at one thousand Won, and exports to other countries at eight hundred Won, it means that this company dumps the products and that its dumping margin is two hundred Won. Therefore the rate of the dumping margin could be twenty five percent, calculated by dividing the dumping margin by the export price.

Simply, the dumping margin represents the difference between the export price of a good and the normal value in its home market. Article 2.4.2’s AD Agreement provides further details on how comparisons may be made, distinguishing between three methods. It expresses a preference for comparing normal values and export prices on a ‘weighted average to weighted average’ (W-W) basis, or on a ‘transaction-to-transaction’ (T-T) basis. It also, however, allows for a third method-comparison of a weighted-average normal value to individual export transaction (W-T) basis, if particular conditions exist, such as differences of purchasers, regions or time periods, in order to solve hidden dumping called ‘targeted dumping.’

**Figure 1: Calculation of the Dumping Margin**

![Diagram of the Calculation of the Dumping Margin]

*Source: Judith Czako et al., A handbook of Anti-Dumping Investigation, 2003.*
This section omits discussion of sales-below costs, constructed values, constructed export prices, and adjustments other than those relating to differences in circumstances of sale and differences in taxation. To better understand the calculation of a dumping margin, (Figure 1) is represented above. This chart indicates that the first step is to select methods, the two of which here represent W-W and T-T. These two methods follow in the same way, calculating the normal value and the export price. Finally, based on each method, the dumping margin is able to be calculated.

3. Definition of Zeroing

Although the AD Agreement contains some guidance on the methodologies to be applied in calculating the margin of dumping, it does not offer comprehensive and exhaustive provisions to deal with all the issues involved. In some instances, the AD agreement provides for different options such as ‘targeted dumping’ and leaves it to investigating authorities to decide which methodology to apply depending on interpretation. For this reason, the AD Agreement does not provide clear guidance of the zeroing method, the practice of which members rely on from case to case.

Zeroing, in the legal perspective, refers to the practice of substituting the dumping margin, in order to eliminate negative dumping margins, when the export price exceeds the calculated normal value for the actual amount of the dumping margin. The practice of zeroing, therefore, tends to raise the resulting margin of dumping. Because the zeroing method drops transactions that have negative margins, it has the effect of increasing the overall dumping margin (Prusa and Vermulst, 2009: 217-8).

In (Table 1), suppose the home market price for a certain product is one hundred like in the table below. If there is one shipment of the product made at an export price of one hundred, there is no dumping. If, however, the same quantity is exported in two shipments, one at a price of seventy, and the other at one hundred thirty, the dumping margin established will be thirty (“positive” dumping) plus 0 (“negative” margin of 30 counted as zero) divided by two = fifteen.

<table>
<thead>
<tr>
<th>Export Shipment</th>
<th>Home market sale price</th>
<th>Export market sale price</th>
<th>Margin before Zeroing</th>
<th>Margin after Zeroing</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>100</td>
<td>130</td>
<td>-30</td>
<td>0</td>
</tr>
<tr>
<td>2</td>
<td>100</td>
<td>70</td>
<td>30</td>
<td>30</td>
</tr>
<tr>
<td>Total Dumping Margin</td>
<td>0</td>
<td>30 (or 15 per shipment)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


This example illustrates the effects of fair zeroing. Without zeroing, there would
be no dumping margin given with these facts; with zeroing, however, there is a dumping margin of thirty. It means that dumping with zeroing inflates the dumping margin and makes it beneficial for importing countries to protect their weakened industry. Apparently, the restraints of zeroing practice clarify the principle of AD agreements, and violate its goal, trade liberalization. That is why there is a controversial debate in terms of the zeroing issue, which has to be added in Article 2.4.2 of the WTO.

4. Issues Surrounding Zeroing

4.1 Calculation Methodology

The types of “zeroing” at issue differ based on the nature of their proceeding. The Panel of the US-zeroing (EC) case described the different types as follows: simple zeroing and model zeroing.

Through the “simple zeroing” method, when comparing a weighted-average normal value with an individual export transaction, the amount by which the normal value exceeds the export price is considered to be the “dumping margin” or dumped amount for that export transaction. If export price exceeds the normal value which means the margin is negative, the “dumping margin” for that export transaction is considered to be zero, rather than a negative number. The overall margin of dumping is calculated by combining the results of each comparison. The total dumping amount is expressed as a percentage of the total export price.4

With the “model zeroing” method, the investigating authority will, in applying the weighted-average-to-weighted-average comparison method, identify the sales of sub-products that are considered “comparable,” and include such sales in an “averaging group.” The weighted-average-to-weighted-average comparison between the normal value and the export price is then made within each averaging group. The amount by which the normal value exceeds the export price is considered to be a “dumping margin,” or dumped amount. If the export price exceeds the normal value for a particular averaging group (i.e., the margin is negative), the “dumping margin” for that group is considered to be zero, rather than a negative number. The dumping margin for the product as a whole is calculated by combining the averaging group results. The total of the dumped amounts is expressed as a percentage of the total export price.5

Regarding zeroing under various comparison methods, those being simple zeroing and model zeroing, the Panel and Appellate Body has discussed and ruled out that zeroing will almost always inflate the dumping margins and can never lower the margins. Only when all export prices are lower than the corresponding comparable home-market prices, will zeroing have no impact. Thus, in more typical circumstances when prices differs in the two markets, zeroing will always raise the calculated margin.

5 Ib. background para.3.
4.2 Calculation Period

The zeroing practice has caused over the course of investigations, such as in an original investigation phase, administrative reviews, sunset reviews, interim reviews and new-shipper reviews by national authorities, like the US Department of Commerce (USDOC), for example. This section illustrates when zeroing can be used and provides problems involving zeroing.

Figure 2: US/EC Antidumping Mechanism

<table>
<thead>
<tr>
<th>Petition Determination</th>
<th>Preliminary Determination</th>
<th>Final Determination</th>
<th>Administrative (US)/Interim(EC) Review</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 yrs</td>
<td>12 mos</td>
<td></td>
<td>5 yrs</td>
</tr>
</tbody>
</table>

Provisional Duty | Definitive Duty | Sunset Review

Source: Ahn, Dukgeun. Anti-Dumping Mechanism, 2008: 13-4

As shown in (Table 1), the administrative authorities decide the method of calculation, and then calculate the dumping margin in the initial investigation before the preliminary determination. Within twelve months, they have to assess the dumping duties from a retrospective or prospective basis, when the former is called an “administrative review” and the latter an “Interim review.” Especially during interim reviews, the authorities review only the reason why the duty has been continued or not. No later than five years after, any determined duties have to be eliminated, called sunset reviews. If the authorities did find export duties which were not imposed during the period of investigation, they would be determined an individual dumping margin without delay. Such review is called new-shipper review. It can be carried out after the final determination.

Original antidumping investigations are regulated by Article 5’s AD Agreement. In the course of such an investigation, a dumping margin is calculated on the basis of information provided by the exporters during the investigation period. Simple or model zeroing can be determined by administering authorities at this initial period.

Article 9.3.1’s AD Agreement provides:

when the amount of the antidumping duty is assessed on a retrospective basis, the determination of the final liability for the payment of antidumping duties shall take place as soon as possible, normal within twelve months, and is no case more than eighteen months after the date on which a request for a final assessment of the amount of the antidumping duty has been made.

While most users, especially EC, determine antidumping duties on a prospective basis, the US on the other hand uses the retrospective system. In other words, the US imposes the antidumping duty at the end of the original investigation, only composing an estimate of the future liability. However, at the end of the day, the actual payment of the anti-dumping duties will depend on the calculations made by the US DOC (Department
of Commerce) over the course of the annual administrative or duty-assessment reviews. In the course of such administrative reviews, the US DOC may decide to resort to simple zeroing when comparing the export transactions with the normal value.

Article 11.3 reviews are called expiry or sunset reviews. Article 11.3’s AD Agreement presents:

any definitive antidumping duty shall be terminated on a date not later than five years from its imposition, unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.

The determination of whether the expiry of an anti-dumping duty would be likely or not to lead to the continuation or recurrence of dumping and injury shall be based on positive evidence, and involve an objective examination of all relevant factors. The application of this test does not necessarily entail a detailed re-calculation of the dumping margin. Instead, the authorities may decide to rely on the dumping margins calculated in the original Article 5 investigation. That means model or simple zeroing in the original investigation relates to the Article 11.3 analysis (Prusa and Vermulst, 2009: 225-6).

For explaining an interim review, Article 11.2’s AD Agreement provides,

The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive antidumping duty, upon request by any interested party that submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both.

III. Preceding Zeroing Conclusions from the DSB

1. The Prior Record of Panel and AB’s Decisions

Zeroing is the most controversial single issue in the history of the WTO. There are several disputes regarding zeroing because of the rule’s imperfection. Sometimes some countries use this zeroing practice by circumventing Article 2.4.2 under AD agreements. That is why many zeroing disputes are discussed by the Panel and AB.

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6 ADA Article 11.3.4.  
7 ADA Article 11.3.6.
Table 2: Typology of zeroing claims in WTO disputes

<table>
<thead>
<tr>
<th>Dispute</th>
<th>Z-Type</th>
<th>Z-Method(^8)</th>
<th>Investigation(^9)</th>
<th>Challenge</th>
<th>Decisions(^10)</th>
</tr>
</thead>
<tbody>
<tr>
<td>KR-Steel(^11)</td>
<td>Model</td>
<td>WW</td>
<td>OI</td>
<td>As applied</td>
<td>Consistent</td>
</tr>
<tr>
<td>EC-BL(^12)</td>
<td>Model</td>
<td>WW</td>
<td>OI</td>
<td>As applied</td>
<td>Inconsistent</td>
</tr>
<tr>
<td>US-SL(^13)</td>
<td>Simple</td>
<td>TT</td>
<td>OI</td>
<td>As applied</td>
<td>Inconsistent</td>
</tr>
<tr>
<td>US-Z(EC)(^14)</td>
<td>Model</td>
<td>WW</td>
<td>OI</td>
<td>As such</td>
<td>Inconsistent</td>
</tr>
<tr>
<td></td>
<td>Model</td>
<td>WW</td>
<td>OI</td>
<td>As such</td>
<td>moot</td>
</tr>
<tr>
<td></td>
<td>Simple</td>
<td>TT</td>
<td>OI</td>
<td>As applied</td>
<td>Inconsistent</td>
</tr>
<tr>
<td>US-Z(JP)(^15)</td>
<td>Model/Simple</td>
<td>WW/TT</td>
<td>OI</td>
<td>As such</td>
<td>Inconsistent</td>
</tr>
<tr>
<td></td>
<td>Model</td>
<td>WW</td>
<td>OI</td>
<td>As applied</td>
<td>Inconsistent</td>
</tr>
<tr>
<td></td>
<td>Simple</td>
<td>WT</td>
<td>AR</td>
<td>As such</td>
<td>Inconsistent</td>
</tr>
<tr>
<td></td>
<td>Simple</td>
<td>WT</td>
<td>AR</td>
<td>As applied</td>
<td>Inconsistent</td>
</tr>
<tr>
<td></td>
<td>Simple</td>
<td>WT</td>
<td>NSR</td>
<td>As such</td>
<td>Inconsistent</td>
</tr>
<tr>
<td></td>
<td>Model/Simple</td>
<td>WW/WT</td>
<td>SR</td>
<td>As such</td>
<td>Inconsistent</td>
</tr>
<tr>
<td></td>
<td>Simple</td>
<td>WT</td>
<td>SR</td>
<td>As such</td>
<td>Inconsistent</td>
</tr>
</tbody>
</table>


In (Table 2), most representative issues are briefly summarized by zeroing type, methodology to calculate the dumping margin, and its level during the investigation period. This is helpful to grasp the outline of zeroing issues and give prospects for future disputes.

As shown, the first three cases had fairly modest scope, because the disputes were relevant only to the original investigation and involved a single type of zeroing. That was in fact only with zeroing ‘as applied’ in a concrete case. By contrast, the two AB decisions discussed in the fourth and fifth are rather broad. While both cases involved original investigations, they also argued at times during the anti-dumping cases, where zeroing could be used. The cases also bring both ‘as applied’ and ‘as such’

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\(^8\) WW = Weighted-average-to-Weighted-average comparison; TT = Transaction-to-Transaction comparison; WT = Weighted-average-to-Transaction comparison.

\(^9\) OI = original Article 5 investigation; AR = Article 9.3.1 review; SR = Article 11.3 sunset review; NSR = Article 9.5 new-shipper review.

\(^10\) Decisions represent whether claims are consistent with specific ADA Articles or not. If one claim is inconsistent with certain article, certain zeroing method violate ADA articles.

\(^11\) United States-Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea(WT/DS179/R).

\(^12\) European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India (WT/DS141/R, WT/DS141/AB/R, WT/DS141/RW, WT/DS141/AB/RW).


claims against the practice of zeroing. This paper also handles two recent issues, the US-Zeroing (EC) and US-Zeroing (Japan) cases in detail, and finds key points regarding the zeroing issue. Then it gives the prospects for the next zeroing disputes, and exceptional methods with three considerations:

(1) How can ‘targeted dumping’ be defined or identified?
(2) How is the dumping margin calculated?
(3) Can there be any circumventing action for avoiding disputes?

2. Prior AB Cases and Key Findings

To focus more on the US-Zeroing (EC) and US-Zeroing (Japan) cases, the rest of the cases can briefly explained based on key findings. There are three categories for better understanding the AB’s decisions:

(1) Which zeroing methodology or procedure is being allowed?
(2) During which period is zeroing allowed?
(3) Does the case violate Article 2.4’s AD agreements?

First of all, the other cases focused only on zeroing methodology itself. For example, in the EC-Bed Linen Case one can clarify the zeroing method used in calculating the dumping margin. The AB upheld the Panel’s finding that the practice of “zeroing,” as applied by the EC in this case in establishing “the existence of margins of dumping,” was inconsistent with Art. 2.4.2. In the US-Softwood Lumber case, The Appellate Body upheld the Panel’s findings that the US acted inconsistently with the first sentence of Art. 2.4.2 in determining dumping margins on the basis of a methodology incorporating zeroing in the aggregation of results of comparisons of weighted average normal value with a weighted average of prices of all comparable export transactions. The Appellate Body ruled in this case only on the first methodology provided for W-W methodology in Art. 2.4.2, because “the ‘margins of dumping’ established under this methodology are the results of the aggregation of the transaction-specific comparisons of export prices and normal value,” and “in aggregating these results, an investigating authority must consider the results of all of the comparisons and may not disregard the results of comparisons in which export prices are above normal value.” In terms of the application of subsequent investigations which called for an administrative review in U.S., the Panel found that Canada had failed to establish that the United States had acted inconsistently with Art. 5.2. This paper brings home the point according to the three categories.

First, in terms of zeroing methodology, in the US-Zeroing (EC) case, the AB concluded that the zeroing methodology could be challenged ‘as such,’ since it is

\[\text{References:}\]


relevant to an initiation in which a W-W comparison method could be used to calculate the dumping margins. Similarly, in US-Zeroing (Japan), the AB upheld the Panel’s finding that the ‘zeroing procedures’ could be challenged ‘as such.’ The AB further considered that it is necessary for the Panel to have enough evidence before it can conclude the zeroing procedures in any method or period.

Second, regarding the stages of the proceedings (original investigation, administrative review, expiry review, new-shipper review, or interim review), in US-Zeroing (EC), the AB found that the simple zeroing methodology, as applied by the US in its administrative reviews at issue, was inconsistent with ADA Art. 9.3 and GATT Art. VI: 2 GATT 1994. In US-Zeroing (Japan), the AB found that simple zeroing in Article 9.3.1 and Article 9.5 reviews ‘as such’ violated Articles 9.3 and 9.5 of the AD Agreement and Article VI: 2 of GATT. The AB reversed the Panel’s finding that simple zeroing in administrative and new-shipper reviews ‘as such’ is not inconsistent with ADA Articles 2.1, 9.1, and 9.2 of the AD Agreement and Article VI: 1 of GATT, but did not find it necessary to complete the analysis. The Appellate Body found that the United States had acted inconsistently with ADA Articles 9.3 and 9.5 and GATT Art. VI: 2, and with the “fair comparison” requirement of ADA Art. 2.4, as explained above.

Lastly, in US-Zeroing (Japan), the AB ruled that simple zeroing in Articles 9.3.1 and 9.5 reviews ‘as such’ violated Article 2.4 of the AD Agreement. The AB reversed the Panel’s finding regarding the simple zeroing ‘as applied’ used in the eleven administrative reviews and found that the U.S. had violated Articles 2.4 and 9.3 of the AD Agreement and Article VI: 2 of GATT 1994. Moreover, the AB also found that simple zeroing under the T-T method in original investigations ‘as such’ violated the fair comparison requirement of Article 2.4.

However, on 2 October 2006, the European Community requested consultations with the United States concerning its continued application of “zeroing” methodology. In particular, the request for consultations concerns (i) the implementation of regulations (19 CFR Section 351) of the US Department of Commerce, especially section 351.414 (c)(2); and (ii) the Import Administration Antidumping Manual (1997 edition), including the computer programs to which it refers. The European Community claims that, based on these regulations, the US Department of Commerce continued to apply a “zeroing” methodology in determining the margin of dumping in the final results of the anti-dumping administrative reviews concerning various EC goods, and any assessment instructions issued pursuant to those final results.

Even though, it was estimated that the Appellate Body’s report would have been circulated on 4 February 2009, it is doubtful that the U.S. government implemented the AB’s conclusion, because of the continued and repeated existence and application of
zeroing methodology by the U.S.

Therefore, the AB has concluded that the zeroing practice is inconsistent with Articles and virtually prohibits the practice no matter its method or period. As these cases reveal, an exceptional method does not require zeroing to produce dumping margins.

IV. Current Status of Zeroing in DDA

1. Positions of Major Members’ Countries

Delegations remain profoundly divided on this issue. Positions range from insistence on a total prohibition of zeroing irrespective of the comparison methodology used and in respect of all proceedings to a demand that zeroing is specifically authorized in all contexts.

Most nations, especially developing countries which include the Friends Group of Anti-Dumping,22 India and African countries have asserted the former position, on the one hand, while the United States and the EC have acknowledged the existence of a traditional zeroing practice, insisted on by claims that it is unnecessary to adopt the clause, and that rules in the Article 2.4.2 already prohibit zeroing, while they also demand that the zeroing practice can be used in the review system.

Regarding zeroing issues there are several debates on whether zeroing is prohibited or not. Reuters reported that “the United States squared off against other WTO members on Wednesday over its use of import penalties, an issue which diplomats see as the latest obstacle to a new global trade deal.” The U.S. ambassador to the WTO, Peter Allegeier said after a heated negotiating session at the trade body’s Geneva headquarters and has previously said, “It is a very serious issue and the United States cannot envisage an outcome to the negotiations without addressing zeroing.” The Japanese WTO ambassador, Ichiro Fujisaki, told diplomats that his country was “both perplexed and disappointed” with the rules’ text, stressing “the negative impact of zeroing on future world trade.” And China’s ambassador Sun Zhenyu said that if all WTO members were to use zeroing, the level of protectionism worldwide would surely increase “which is clearly not the objective of this organization.”23

Main advocates for prohibiting zeroing are the Friends of Anti-Dumping group, which proposed that average dumping margins, by definition, should be based on the average of all comparisons, including those that generate negative margins. Article 2.4.2 currently recognizes this general principle. The Appellate Body, as well as the panel has ruled that the zeroing practice is inconsistent with Article 2.4.2 (TN/RL/W/6, 2002). They also tried to clarify and improve rules to prevent the abusive of and excessive anti-dumping measures such as inter alia, the definition of an ordinary course of trade, zeroing, and so on (TN/RL/W/28, 2002).

In later proposals, they suggested Article 2.4.2, which sets forth the basis of

22 Brazil, Chile, Colombia, Costa Rica, Hong Kong, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Taiwan, Thailand, Turkey.
comparison between export prices and normal values, needs to be clarified so as to explicitly rule out the practice of zeroing in investigations and in reviews under Articles 9 and 11 (TN/RL/W/83, 2003, TN/RL/W/113, 2003, TN/RL/GEN/8, 2004), and proposed to add a provision to Article 2.4 clarifying that, regardless of the comparison methodology, if margins of dumping are determined separately for imports during multiple portions of the entire period of an investigation or review, the margin of dumping to be determined in the investigation or review must be a single margin of dumping for all imports during the entire period of the investigation or review. It is possible to affect “zeroing” by subdividing the period of investigation or review, and calculating separate margins for each such period (e.g. month, quarter, semi-annual). Calculating margins for subdivided periods separately and not offsetting the positive margins with negative margins for the entire period of investigation or review can have the same effect as zeroing (TN/RL/W/113, TN/RL/GEN/8).

On the same hand, India and China provided a submission that the Article 2.4.2 has to be revised. India pointed out that the zeroing practice violates obligations under Article 2.4.2. There should be an explicit clarification in Article 2.4.2 prohibiting those comparisons between export prices and normal values that do not fully take into account the prices of all comparable export transactions, such as the practice of zeroing while establishing the margins of dumping on the basis of the comparison of a weighted average normal value with the weighted average prices of all export transactions. TN/RL/W/26, 2002) As well as India, The People’s Republic of China also proposed that Article 2.4.2 should clarified to explicitly prohibit the practice of zeroing (TN/RL/W/66, 2003).

While, in terms of specifying in that provision that all positive and negative margins of dumping found on imports should be added up, there are two opponents, Australia and Egypt. The paper from Australia indicated that the zeroing practice seemed to be at odds with the requirements of Article 2.4.2 which never allowed this form of manipulation by the investigating authorities. As the words used in Article 2.4.2 do not imply or expressly admit a construction which permits “zeroing” of negative margins, Australia considered that Article 2.4.2 does not require any clarification to expressly rule out zeroing (TN/RL/W/22, 2002). Egypt also addressed the questions saying that it is superfluous to insert in the ADA a provision prohibiting the practice of zeroing. Egypt believed that the provisions of the ADA and the dispute settlement mechanism provide sufficient protection to WTO Members against unwarranted actions under the ADA. Compared to the negotiations of the Friends of AD, who sought to amend Article 2.4 to specify that if different margins of dumping are determined for different portions of the entire period of investigation, Egypt considered that the provisions of the AD Agreement must not be clarified in this respect, since they prohibit the determination of different and independent margins for a given period within the period of investigation (TN/RL/W/141, 2003).

While Friends of AD asserted that zeroing has to be banned, whatever the calculation of dumping margin methodology, the European Community had a different idea, that zeroing should be allowed in specific cases, such as target dumping. It questioned whether the prohibition of zeroing also covered the method set out in the last sentence of Article 2.4.2 (TN/RL/W/20, 2002).

On the other hand, most frequent users of zeroing, like the United States, questioned in writing submitted to the rules negotiating group, that Article 2.4.2 be clarified to
explicitly rule out “zeroing.” It asked for an explanation on whether or not average dumping margins should be based on an average of “all” comparisons, considering that such a requirement is not included in Article 2.4.2 (TN/RL/W/25, 2002). Moreover, the United States submitted a document, with the intention of adding a calculation of the overall weighted average margin in Article 2.4.2.

The United States believed the 2.4.2 Agreement was not clear as to the manner in which the overall weighted average margins were to be calculated. If there were to be any WTO obligations regarding such calculations, they should be the result of an agreement by the members. Thus, in the process of clarifying the ADA, this Group should consider clarifying both the obligations already agreed to by the Members in this respect, as well as any areas where agreement was not previously reached (TN/RL/W/72, 2003). Thus the United States strongly argued that Article 2.4.2’s AD Agreement did not contain an obligation to calculate an overall dumping margin, and could not be read as imposing an obligation to offset negative dumping. The United States also asserted that the obligation under Article 2.4.2’s AD Agreement applied only to the investigation phase of an anti-dumping proceeding and not to the assessment proceeding.

In recent times, concerning the Rules Chair’s first draft text (TN/RL/W/213), in particular on the issue of “zeroing,” the Friends of AD group has briskly submitted several proposals which contain revisions of Article 2.4.2, adding the prohibition of zeroing. That is, the Chair’s text permitted the practice of zeroing. The vast majority of the Friends of AD Members supported the Statement on ‘Zeroing’ in the Anti-dumping Negotiations. They found that the Chair’s text lacked balance (TN/RL/W/214/Rev.3, 2008). Their negotiating objective is to clarify, whether or not zeroing is prohibited at all stages of procedures; hence they proposed a modification to the Chair’s texts in terms of a general prohibition of zeroing methodology, the time period of transactions and the consistent use of the margin calculation methodology in reviews, especially the phrase, ‘in an investigation initiated pursuant to Article 5. It aims to remove particular time periods, such as investigation phases only (TN/RL/W/215, 2008).

Based on several proposals, it might be resolved that zeroing is still a controversial issue, particularly for the Friends of AD group. Korea tries especially hard to find further ways to restrict the zeroing practice in WTO agreements or FTA rules. Korea’s efforts are geared towards making a strategy under which there is no existence of a zeroing clause in 2.4.2.

2. Analysis on Chair’s Texts

Although the zeroing practice has been implemented by each country, especially the United States and the European Community, as a customary dumping margin calculation, this practice will not be changed until Article 2.4.2 is inserted completely into the Uruguay Round Anti-Dumping Agreement. The overall purpose of the text is to limit the use of unbalanced transaction-to-weighted average comparisons, instead of weighted average-to-weighted average or transaction-to-transaction comparisons. Based on proposals from delegates, the Chair’s texts in the DDA rule negotiations have been changed into two parts. In (Table 3), Article 2.4.2, which has been reflected upon more, due to proposals concerning zeroing issues, has been revised by the Chair based on delegates’ opinions.
Table 3: Changes in Chair’s Texts Reflecting Delegates’ Thoughts

<table>
<thead>
<tr>
<th>Consolidated Proposal (prior to TN/RL/W/213)</th>
<th>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.[^{14}] 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.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chairman’s Texts (TN/RL/W/213, 30 Nov 2007)</td>
<td>Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase initiated pursuant to Article 5 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.</td>
</tr>
<tr>
<td>New Draft Consolidated Texts (TN/RL/W/236, 19 Dec 2008)</td>
<td>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.</td>
</tr>
</tbody>
</table>

\[^{14}\] The establishment of margins of dumping by a comparison of normal value and export prices on a transaction-to-transaction basis may imply the selection of a limited number of comparable transactions. In cases where the authorities resort to a selection of transactions, such selection shall be made in a fair and objective manner. Export transactions not considered for the establishment of the margin of dumping shall not be deemed to be dumped.

Source: TN/RL/W/213, 236.
Delegations remain profoundly divided on this issue. Positions range from a total prohibition of zeroing, irrespective of the comparison methodology used or other proceedings, to a demand that zeroing be specifically authorized in all contexts (TN/RL/W/236, 2008).

First, this provision considered that the Chairman’s text on zeroing was unacceptable. Accordingly, twenty delegations co-sponsored a Working Paper that proposed alternative language that would prohibit a Member from disregarding the amount by which the export price exceeds the normal value for any comparisons in all proceedings, including original investigations, proceedings under Articles 9.3 and 9.5 and reviews under Articles 11.2 and 11.3, and in respect of all methodologies. (TN/RL/W/215, 2008) They further proposed to make clear that Article 2.4.2 applies in all proceedings, to set a minimum time period on the basis of which a margin of dumping could be calculated, and to require consistency between the methodology used in an original investigation and a subsequent proceeding pursuant to Article 9.3.

Second, other delegations had different views about the Chairman’s text. Some of these delegations believed that, while the draft text went too far, zeroing could be permitted within some contexts. In particular, a number of delegations expressed the view that zeroing should be permitted in the context of the weighted average-transaction comparison methodology (“targeted dumping”), while it was also suggested that the same methodology need not necessarily be applied in original investigations, as in the context of duty collection. One delegation considered that the Chairman’s text permitted zeroing in certain contexts, but prohibited it in the most common comparison methodology during investigations. They insisted that a restoration of zeroing in all contexts was necessary to return to the status quo that emerged from the Uruguay Round. This delegation could not conceive of a result that did not address zeroing (TN/RL/W/232, 2008).

Therefore, if the second delegation’s ideas were reflected in the final Chairman’s texts, zeroing would be applied to any phase of ‘investigation,’ and the issue of ‘targeted dumping’ methodology, which permits weighted average-to-transaction comparisons when export prices are very low, would be allowed for a zeroing practice of negative dumping margins. This means that this provision cannot completely restrain the zeroing practice, and that it is going to be long time waiting for this provision to be settled. Another, easier way of prohibiting the zeroing practice is to put obligatory provisions within each FTA.

V. Current Status of Zeroing in Korean FTA Agreements

As has been shown in previous case studies and DDA negotiation results, Korea, as a mainly exporting country, ascertains another strategy for the prohibition of zeroing. This section aims to describe current Korean FTA agreements and Korean FTA policy, and find out the current status in FTA’s, whether or not there are provisions covering the restriction of zeroing. Finally, it also discusses prospects for future FTA negotiations, in terms of zeroing issues.
1. Korea’s FTA Policy

In response to the rapid proliferation of regionalism throughout the world, Korea has been actively pursuing FTA’s with major trading partners since the Roh Government announced its ‘Roadmap for Pursuing FTA’s’ in August 2003. While remaining a strong supporter of the multilateral trading system, Korea aims to pursue FTA’s that are complementary to, but go beyond WTO liberalization. In this regard, Korea’s FTA policy can be summarized as follows:24

First, Korea adopts a multi-track approach when negotiating FTA’s, meaning that the negotiations can be carried out simultaneously with more than one country, when necessary. In the beginning stages of Korean FTA’s, the policy focused on how the damage of trade could be reduced. At that time the Korean government was trying to negotiate an FTA with Chile, which is far from Korea geographically. It also negotiated with Singapore and the EFTA, neither of which are frequent trade partners looking at (Table 4). However, damage and resistance have still remained even after negotiations.

Based on the examples of previous FTA policy, Korea aims to follow FTA’s with large, advanced economies or economic blocs and promising emerging markets because they provide more gains than controls, even if Korea’s competitiveness is much lower than larger, more advanced economies, and if Korea’s expenditure for changing its economic structure has to become a lot higher. That is why Korea has chosen the US, the EU, Japan and China as FTA partners, as shown in in (Table V.1).

Table 4: Current Situation of Korea’s FTA Negotiation

<table>
<thead>
<tr>
<th>FTAs in effects</th>
<th>Concluded FTAs</th>
<th>FTAs under negotiation</th>
<th>FTAs under consideration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Korea-Chile FTA (2004. 4. 1)</td>
<td>Korea-U.S. FTA (2007. 6. 30 signed)</td>
<td>Korea-Canada FTA</td>
<td>Korea-Japan FTA</td>
</tr>
<tr>
<td>Korea-Singapore FTA (2006. 3. 2)</td>
<td>Korea-India CEPA (2009. 8. 7 signed)</td>
<td>Korea-Mexico FTA</td>
<td>Korea-China FTA</td>
</tr>
<tr>
<td>Korea-EFTA 25 FTA (2006. 9. 1)</td>
<td>Korea-EU FTA (2009. 10. 15 initial)</td>
<td>Korea-GCC FTA</td>
<td>Korea-MERCOSUR FTA</td>
</tr>
<tr>
<td>Korea-ASEAN FTA (G - 2007. 6. 1)</td>
<td></td>
<td>Korea-Australia FTA</td>
<td>Korea-Turkey FTA</td>
</tr>
<tr>
<td>(S - 2009. 5. 1)</td>
<td></td>
<td>Korea-New Zealand FTA</td>
<td>Korea-Russia BEPA</td>
</tr>
<tr>
<td>(I - 2009. 9. 1)</td>
<td></td>
<td>Korea-Peru FTA</td>
<td>Korea-Israel FTA</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Korea-Columbia FTA</td>
<td>Korea-SACU FTA</td>
</tr>
</tbody>
</table>


Moreover, Korea aims to gain high-level and comprehensive FTA’s in terms of the degree of liberalization and coverage, as well as scope. Additionally, in order to achieve a national consensus as part of the negotiation process, Korea pursues a wide range of outreach efforts with the public and private sectors. Regarding these policies,

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25 It consists of four countries such as the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Swiss Confederation.
strategy concerning a ban on zeroing has become complicated, since larger, more advanced economies and huge importing market countries, which try to use zeroing in dumping margin calculation, could nowadays be one of Korea’s FTA partners. Without any preparation for FTA negotiations, these countries would stick to maintaining a zeroing practice as protectionism. After investigating Korea’s FTA Agreements, each is compared in detail in next chapter.

2. Analysis on Zeroing in Korea’s FTA Agreements

(Table 5) shows the pattern of the WTO’s AD agreements, and whether or not each FTA agreement has provisions related to the prohibition of zeroing. As can be seen, most countries seek to attain protectionism measures by rigidly applying the AD Agreements under WTO rules, even when they are made through domestic AD law. This means most countries try to achieve AD measures or duties firmly through an FTA.

In (Table 5), an overall summary of FTA trends and zeroing issues has been presented, which suggests the Korean government’s overall FTA policy. According to (Table 5), only two economies, Singapore and India permit adding a clause on the prohibition of zeroing, where the other five economies do not want to insert provisions on zeroing into their FTA’s. Moreover, it almost seems the stronger the AD rules in FTA’s, the fewer the provisions on zeroing, which means protectionists tend to pursue zeroing practices for their own countries’ interests.

<table>
<thead>
<tr>
<th>Korea’s FTA</th>
<th>The Degree of Application of WTO’s ADA</th>
<th>Domestic Law applied</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Not applied</td>
<td>Not applied but replaced</td>
</tr>
<tr>
<td>K-Chile</td>
<td>O/X Article 7.1</td>
<td></td>
</tr>
<tr>
<td>K-Singapore</td>
<td>O/O Article 6.2</td>
<td></td>
</tr>
<tr>
<td>K-EFTA</td>
<td>O/Δ Article 2.10</td>
<td></td>
</tr>
<tr>
<td>K-ASEAN</td>
<td></td>
<td></td>
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<tr>
<td>K-US</td>
<td></td>
<td></td>
</tr>
<tr>
<td>K-India</td>
<td>O/O Article 2.18</td>
<td></td>
</tr>
<tr>
<td>K-EU</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

In (Table 6), Korea’s AD provisions in FTA agreements are described briefly and respectively. The first FTA for Korea, the Korea-Chile FTA, deals only with a general provision, which maintains the rights and obligations under Article VI of GATT. At that time, Korea, as a beginner at FTA negotiations, did not include various kinds of issues on AD agreements. On the other hand, the second FTA, the Korea-Singapore FTA and the sixth FTA, the Korea-India Comprehensive Economic Partnership Agreement (CEPA) directly present the prohibition of zeroing in FTA Agreements. India is especially one of the main advocates for interdicting the method of zeroing. Particularly, the third FTA, the Korea-EFTA FTA tried to input a provision related to a ‘lesser duty rule’ within the FTA. This means that it can be applied to the zeroing issue indirectly as well.

**Table 6: Anti-Dumping Provisions in Korea’s FTA Agreements**

<table>
<thead>
<tr>
<th>FTA</th>
<th>Article</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Korea-Chile FTA</strong></td>
<td>Article 7.1: Anti-Dumping and Countervailing Duty Matters</td>
</tr>
<tr>
<td>1. The Parties maintain their rights and obligations under Article VI of GATT, the Agreement on Implementation of Article VI of GATT (“Agreement on Antidumping”) and the Agreement on Subsidies and Countervailing Measures, which are part of the WTO Agreement.</td>
<td></td>
</tr>
<tr>
<td><strong>Korea-Singapore FTA</strong></td>
<td>Article 6.2: Anti-Dumping Measures</td>
</tr>
<tr>
<td>1. The Parties maintain their rights and obligations under Article VI of GATT 1994 and the Agreement on Implementation of Article VI of GATT 1994 (“WTO Agreement on Anti-dumping”).</td>
<td></td>
</tr>
<tr>
<td>3. (a) when anti-dumping margins are established on the weighted average basis, all individual margins, whether positive or negative, should be counted toward the average; and</td>
<td></td>
</tr>
<tr>
<td>(b) if a decision is taken to impose an anti-dumping duty pursuant to Article 9.1 of the WTO Agreement on Anti-dumping, the Party taking such a decision, should apply the ‘lesser duty’ rule, by imposing a duty which is less than the dumping margin where such lesser duty would be adequate to remove the injury to the domestic industry.</td>
<td></td>
</tr>
<tr>
<td><strong>Korea-EFTA FTA</strong></td>
<td>ARTICLE 2.10 Anti-Dumping</td>
</tr>
<tr>
<td>1. The Parties retain their rights and obligations under Article VI of the GATT 1994 and the Agreement on Implementation of Article VI of the GATT 1994 (hereinafter referred to as the “WTO Agreement on Anti-Dumping”), subject to the following:</td>
<td></td>
</tr>
<tr>
<td>(b) If a Party takes a decision to impose an anti-dumping duty pursuant to Article 9.1 of the WTO Agreement on Anti-Dumping, the Party taking such a decision shall apply the “lesser duty” rule by imposing a duty which is less than the dumping margin where such lesser duty would be adequate to remove the injury to the domestic industry.</td>
<td></td>
</tr>
<tr>
<td>Agreement</td>
<td>Article/Section</td>
</tr>
<tr>
<td>-------------------------------</td>
<td>-----------------------------------------------------------</td>
</tr>
<tr>
<td>Korea-ASEAN FTA</td>
<td>Article 7 WTO Disciplines</td>
</tr>
<tr>
<td></td>
<td>Subject to the provisions of this Agreement and any future agreements as may be agreed pursuant to the reviews of this Agreement by the Parties under Article 15, the Parties hereby agree and reaffirm their commitments to abide by the provisions of the WTO disciplines as set out in Annexes 1A and 1C to the WTO Agreement, which include, among others, non-tariff measures, technical barriers to trade (hereinafter referred to as “TBT”), sanitary and phyto-sanitary (hereinafter referred to as “SPS”) measures, subsidies and countervailing measures, anti-dumping measures and intellectual property rights.</td>
</tr>
<tr>
<td>Korea-U.S. FTA (2007. 6. 30)</td>
<td>Chapter 10 TRADE REMEDIES</td>
</tr>
<tr>
<td></td>
<td>Section B: Antidumping and Countervailing Duties</td>
</tr>
<tr>
<td></td>
<td>ARTICLE 10.7: Antidumping and Countervailing duties</td>
</tr>
<tr>
<td></td>
<td>1. Each Party retains its rights and obligations under the WTO Agreement with regard to the application of antidumping and countervailing duties.</td>
</tr>
<tr>
<td></td>
<td>2. Except for paragraphs 3 and 4, no provision of this Agreement shall be construed to impose any rights or obligations on a Party with respect to antidumping or countervailing duty measures. Neither Party may have recourse to dispute settlement under this Agreement for any matter arising under this Article.1.</td>
</tr>
<tr>
<td>Korea-India CEPA (2008. 8. 7)</td>
<td>Section B: Trade Remedies</td>
</tr>
<tr>
<td></td>
<td>Section B-1: Anti-Dumping and Countervailing Duties</td>
</tr>
<tr>
<td></td>
<td>Article 2.18: Prohibition of Zeroing</td>
</tr>
<tr>
<td></td>
<td>When anti-dumping margins are established, assessed or reviewed under Articles 2, 9.3, 9.5, and 11 of the Anti-Dumping Agreement regardless of the comparison bases under Article 2.4.2 of the Anti-Dumping Agreement, all individual margins, whether positive or negative, should be counted toward the average.</td>
</tr>
<tr>
<td>Korea-EU FTA (2009. 10. 15)</td>
<td>Chapter 3 Trade Remedies</td>
</tr>
<tr>
<td></td>
<td>Section D Anti-Dumping and Countervailing Measure</td>
</tr>
<tr>
<td></td>
<td>Article 3.8: General Provision</td>
</tr>
<tr>
<td></td>
<td>1. Except as otherwise provided for in this Chapter, the Parties maintain their rights and obligations under Article VI of GATT, the Agreement on Implementation of Article VI of GATT, contained in Annex 1A to the WTO Agreement (hereinafter referred to as the “Agreement on Antidumping”) and the Agreement on Subsidies and Countervailing Measures, contained in Annex 1A to the WTO Agreement (hereinafter referred to as the “SCM Agreement”).</td>
</tr>
</tbody>
</table>

In recent times, the Korean government has pursued negotiations with large advanced economies in a multi-track approach. This motivated negotiations with the US and the EC, which have often used zeroing practices in the past. Compared to other FTA partners, it is difficult for Korea to achieve its own goals, like the prohibition of
zeroing. Since the EU has applied the zeroing method to compare normal values and export prices, Korea has been trying to attach importance to this issue in Korea-EU FTA negotiations. However, right now Korea has an initial FTA with the EU and a signed FTA with the US without provisions on zeroing. Therefore, Korea should try to forbid large importing countries from calculating AD duties on exports with the zeroing method in original investigations or reviews, and put provisions involving zeroing when it negotiates with future FTA partners.

3. Korea’s Challenge with Zeroing Practice

Exporters in developing countries were the subject of 147 anti-dumping investigations in 2008 and Korea was the second most frequent subject of anti-dumping investigations from 1995 to 2008, as 150 initiations of all the initiations were directed at its exports. This means that Korea is the most targeted country regarding Anti-Dumping measures. As an exporting country and a member of the Friends of Anti-Dumping Group, Korea has challenged AD duties with importing countries which have frequently used protective measures on behalf of their industries. Export-oriented economies are susceptible to protective duties by importing countries, and this implies that they need to prepare for opposing the trend of protectionism and promoting realistic negotiating strategies.

Even though the Panel and AB concluded that zeroing is not allowed in any type or at any time of an investigation, it has still adopted the use of other types of zeroing for the calculation of dumping margins. For example, the US announced that they were not going to use the method of zeroing in an administrative notice after losing the US-zeroing (EC) case, but then other zeroing disputes, like the US-zeroing (Japan) case, occurred again.

As long as Article 2.4.2 under the WTO AD Agreement, providing for the prohibition of the use of zeroing, is amended, the Korean government does not need to be concerned with higher dumping margins. However, to make matters worse, an AD agreement related to the zeroing issue has become stuck in the middle of the DDA rules negotiation process, and there is no other alternative for the revision of Article 2.4.2., this coming from the Working Document from the Chairman Annex A (TN/RL/W/232, 2008). According to delegations’ comments, it is still a disputable debate for two opposing groups of countries, and the matter will not be changing for a long time.

There is another way to strengthen restrictions on the using the zeroing method. That is by inserting provisions on the elimination of the zeroing practice in FTA Agreements. Given the fact that Korea’s FTA Agreements have two successful cases out of seven negotiations that provide provisions for the prohibition of zeroing, it is plausible for the Korean government to expect more success with future FTA partners.

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VI. Prospects and Conclusion

1. Lessons from the Current Status and Case Studies

It is important and meaningful to analyze previous WTO disputes involving zeroing, proposals from member countries in the DDA negotiations and Korea’s FTA Agreements. There are three lessons from this analysis for Korea’s negotiation strategy for the future.

First of all, there is a consensus among the panels and appellate body reports regarding the incorrect nature of the zeroing practice. It is a persuasive argument that the zeroing practice should face an interdiction in all its forms. As for Korea, whenever it tries to take out a lawsuit over zeroing disputes, it is sure that it will achieve success, which would mean that the AB would conclude any form of zeroing as inconsistent with Article 2.4.2’s AD agreements. However, this is not a strong tool for preventing the circumvention of zeroing practices by major countries. As all cases show the use of the zeroing method has recurred in different ways, even after decisions rejecting zeroing. AB decisions do not have effective binding power for prohibiting the zeroing method.

In order to strengthen legal binding force, another regulation, AD Agreements under the WTO should be considered. While AD Agreements have been debated for revision in the DDA rules negotiation process, zeroing is a very controversial topic in the area of rules negotiation. One of the proposed texts, Consolidated Texts by Chairs has been changed in terms of the methodology on zeroing and the investigation period. However, the DDA rules negotiation process does not seem to have a clear end any time soon. Although the Chair stated that new documents are intended to provide a platform for further discussions, to which end he will convene an intensive series of meetings in 2009, the first of which is scheduled for the week of 2 February, the Korean government cannot rely on the revision of the DDA rules, because it is yet to be known when the result of the rules negotiations will be concluded.

The last option for having more binding force is to make legal agreements through bilateral negotiations. Korea can try to find a solution the issue of the interdiction of zeroing through FTA agreements, which can be put into the Trade Remedy Sector or AD Agreements. In examining Korea’s FTA Agreements in terms of the anti-dumping issue, Korea has two apparent FTA negotiations, which put terms for the prohibition of zeroing into AD Agreements in the FTA negotiations. However, the rest of FTA could not clarify the principle of dumping margin calculation, and it gives a lesson for the preparation of other FTA’s with future partners that provisions for prohibiting zeroing are expressly needed.

2. Its Implication for Korea’s Negotiation Strategy

There have been utmost endeavors to promote amendments of provisions related to the zeroing issue in AD Agreements by participating in zeroing disputes. There are

strategies such as understanding the rules themselves as third countries and proposing official documents to the Negotiating Group on Rules. In spite of all the Korean government’s efforts, the result falls short of its expectations. Thus, Korea should make arrangements for strategies step by step.

In the first step, it is important to understand the norms of dumping margin calculation and zeroing, because the interpretation of the legal terms of disputes and the thorough analysis of the arguments of importing countries are all so complicated. Even WTO dispute panels and the AB have consistently found that zeroing is illegal, for example the United States’ continued application of the zeroing methodology within their domestic law and their calculation computer program. Therefore, exporting countries should pay attention to the zeroing issue, and participate in the Panel and AB court as third countries. They can also share ideas of circumventing zeroing processes and resist the zeroing practice with one accord.

In the second step, it is necessary to report suggestions for improving Anti-Dumping Agreements under the WTO. It also requires requests for discussions at the Negotiation Group on Rules’ meeting. As for delegates, Korea needs more advocates who promote the revision of AD rules with respect to Article 2.4.2. Having the same position on the restriction of zeroing, there is China, India and Japan, which are either emerging markets or advanced, large countries, as well as the Friends of AD Group. On the other hand, there is the US and the EU, which have a very strong influence on the world economy. This requires that Korea find more supporters for changing AD Agreements in terms of the zeroing issue. If Korea can assert itself with other proponents of these zeroing issues, and along with the Friends of AD Group, the rule of AD can easily be changed.

The last step is to prepare for future FTA’s with strategy. Previous FTA’s with the US and the EU did not add a rule on zeroing into their AD Agreements. Moreover, Egypt and Australia, as future FTA partners, have opposed the revision of the rule. Australia considers that Article 2.4.2 does not require any clarification in order to rule out zeroing. Egypt also addressed the question, by saying that it is superfluous to insert a provision prohibiting the practice of zeroing in AD Agreements. In considering a future FTA partner, Korea should prepare its negotiation strategy for the clarification of the rule.

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