

**UNITED STATES – USE OF ZEROING IN ANTI-DUMPING
MEASURES INVOLVING PRODUCTS FROM KOREA**

(DS402)

**FIRST WRITTEN SUBMISSION
OF THE UNITED STATES OF AMERICA**

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Table of Reports

Short Form	Full Citation
<i>Japan – Alcoholic Beverages II (AB)</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
<i>US – Corrosion-Resistant Steel CVD (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R, adopted 19 December 2002
<i>US – AD Measures on PET Bags</i>	Panel Report, <i>United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand</i> , WT/DS383/R, adopted 18 February 2010
<i>US – Shrimp (Ecuador)</i>	Panel Report, <i>United States – Anti-Dumping Measure on Shrimp from Ecuador</i> , WT/DS335/R, adopted 20 February 2007
<i>US – Shrimp (Article 21.5 – Malaysia) (AB)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001
<i>US – Softwood Lumber Dumping (AB)</i>	Appellate Body Report, <i>United States - Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004

1. The Republic of Korea (“Korea”) claims that the United States breached its obligations under the first sentence of Article 2.4.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“Antidumping Agreement”) when the U.S. Department of Commerce applied the “zeroing” methodology to calculate certain dumping margins in the final determinations and amended final determinations in the antidumping investigations of Stainless Steel Plate in Coils from Korea, Stainless Steel Sheet and Strip in Coils from Korea, and Diamond Sawblades and Parts Thereof from Korea.¹

2. As an initial matter, the United States would like to thank the Panel for providing adequate time to prepare this submission. This time was useful in allowing the United States to review the evidence and arguments presented by Korea and in turn helping to narrow the issues presented to the Panel, as indicated below.

3. In WTO dispute settlement, the complaining party bears the burden of proving that a Member has acted inconsistently with an obligation.² In addition, Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts and the applicability of and conformity with the covered agreements. Thus, recently, in *US – AD Measures on PET Bags*, the panel correctly stated that it had to satisfy itself that Thailand had established a *prima facie* case by presenting evidence and arguments to identify the measure being challenged and explain the basis for the claimed inconsistency with a WTO provision, despite the fact that the responding party did not contest the claims made by Thailand.³

4. In this dispute, Korea alleges that when calculating certain dumping margins in the challenged investigations, the Department of Commerce: (i) identified different “models,” i.e., types, of products based on the most relevant product characteristics; (ii) calculated weighted average prices for sales in the United States and weighted average normal values for sales in the comparison market on a model-specific basis, for the entire period of investigation; (iii) compared the weighted average normal value of each model to the weighted average U.S. price for that same model; (iv) calculated the dumping margin for an exporter by summing the amount

¹ Korea’s Request for the Establishment of a Panel, WT/DS402/3 (April 8, 2010), pp. 1-2.

² *US – Corrosion-Resistant Steel CVD (AB)*, paras. 156-157.

³ *US – AD Measures on PET Bags*, paras. 7.5-7.7. The panel in *US – AD Measures on PET Bags* cited with approval the reasoning of the panel in *US – Shrimp (Ecuador)*, which had similarly concluded:

[T]he fact that the United States does not contest Ecuador’s claims is not a sufficient basis for us to summarily conclude that Ecuador’s claims are well-founded. Rather, we can only rule in favor of Ecuador if we are satisfied that Ecuador has made a *prima facie* case.

US – Shrimp (Ecuador), para. 7.9.

of dumping for each model and then dividing it by the aggregated U.S. price for all models; and (v) set to zero all negative margins on individual models before summing the total amount of dumping for all models.⁴

5. The United States does not contest the accuracy of Korea’s description of the zeroing methodology set forth in paragraphs 4 and 17 of Korea’s First Written Submission, as it relates to the investigations challenged in this dispute.

6. Korea specifies that its challenge pertains to the application of “zeroing” in the calculation of certain margins in antidumping investigations of Stainless Steel Plate in Coils from Korea, Stainless Steel Sheet and Strip in Coils from Korea, and Diamond Sawblades and Parts Thereof from Korea.⁵ Specifically, with respect to the investigations of stainless steel plate in coils and stainless steel sheet and strip in coils, Korea’s claim pertains to the use of the zeroing methodology in calculating margins for Pohang Iron & Steel Co. (POSCO) and the “all others” rate. With respect to the investigation of diamond sawblades, Korea’s claim pertains to the use of the zeroing methodology in calculating margins for the three investigated Korean producers as well as the “all others” rate.

7. Korea provides the following descriptions of the calculation of the dumping margins at issue:

In the SSPC [stainless steel plate in coils] investigation, the USDOC’s use of the zeroing methodology affected the determination of dumping margins for the Korean exporter Pohang Iron & Steel Co., Ltd. (“POSCO”). In addition, . . . use of the zeroing methodology affected the determination of the “all-others” rate, which was equal to the rate established for [POSCO]⁶

In the SSSS [stainless steel sheet and strip in coils] investigation the USDOC . . . applied its zeroing methodology to the determination of dumping margins for POSCO. In addition, the use of the zeroing methodology affected the determination of the “all-others” rate, which was equal to the rate calculated for POSCO⁷

⁴ First Written Submission of The Republic of Korea, paras. 4 and 17 (hereinafter “Korea’s First Written Submission”).

⁵ Korea’s First Written Submission, para. 2.

⁶ Korea’s First Written Submission, para. 8.

⁷ Korea’s First Written Submission, para. 11.

[Referring to the investigation of Diamond Sawblades], [t]he USDOC applied its zeroing methodology to the determination of dumping margins for the three investigated Korean producers: Ehwa Diamond Industrial Co., Ltd. (“Ehwa”), Hyosung Diamond Industrial Co. (“Hyosung”), and Shinhan Diamond Industrial Co., Ltd. (“Shinhan”). In addition, . . . use of the zeroing methodology affected the determination of the “all others” rate, which was calculated as the weighted-average of the responding companies’ dumping margins⁸

8. To substantiate its factual claims, Korea has provided evidence consisting of the Department of Commerce’s published determinations, issues and decision memoranda, and computer programs used to calculate the margins of dumping related to the final determinations in the original investigations at issue.

9. The United States has reviewed the factual evidence submitted by Korea and does not contest that the submitted documentation, including the computer programs used to calculate the dumping margins, were generated by the Department of Commerce during its conduct of the three original investigations at issue.

10. Korea argues that the zeroing methodology applied to certain exporters in the three challenged original investigations is the same as the methodology found by the Appellate Body to be inconsistent with Article 2.4.2 of the Antidumping Agreement in *US – Softwood Lumber Dumping*.⁹ The United States recognizes that in *US – Softwood Lumber Dumping*, the Appellate Body found that the use of “zeroing” with respect to the average-to-average comparison methodology in investigations was inconsistent with the first sentence of Article 2.4.2 when it interpreted the terms “margins of dumping” and “all comparable export transactions” as used in the first sentence of Article 2.4.2 in an integrated manner.¹⁰ The United States acknowledges that this reasoning is equally applicable to the margins at issue in this dispute.

11. To the extent that Korea suggests that the Panel should simply base its findings upon a “consistent line of Appellate Body Reports,”¹¹ however, it should be noted that prior panel and Appellate Body reports are not binding on panels considering other disputes.¹² The rights and

⁸ Korea’s First Written Submission, para. 14.

⁹ Korea’s First Written Submission, para. 18.

¹⁰ See *US – Softwood Lumber Dumping (AB)*, paras. 62-117.

¹¹ Korea’s First Written Submission, para. 24.

¹² See *US – Softwood Lumber Dumping (AB)*, para. 111 (citing *Japan-Alcoholic Beverages II (AB)* and *US – Shrimp (Article 21.5 – Malaysia (AB))*). As the Appellate Body noted

obligations of Members flow from the text of the covered agreements. While prior adopted panel and Appellate Body reports may be taken into account, the Panel in this dispute is not bound to follow the reasoning set forth in any prior report. Rather, as noted above, under Article 11 of the DSU, the Panel is charged with making its own objective assessment of the matter before it, including its own objective assessment of the facts, and the applicability of and conformity with the relevant covered agreements.

in its *US – Softwood Lumber Dumping* report, adopted reports “are not binding, except with respect to resolving the particular dispute between the parties to that dispute.” *US – Softwood Lumber Dumping (AB)*, para. 111 (quoting *Japan – Alcoholic Beverages II (AB)*).