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Competitive Advocacy Opportunity: Zeroing in U.S. Antidumping Enforcement

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ECONOMIC ANALYSIS GROUP
DISCUSSION PAPER

Competitive Advocacy Opportunity: Zeroing in U.S. Antidumping Enforcement

By

William W. Nye*

EAG 08-13 December 2008

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Abstract

Almost all countries have antidumping laws which regulate their imports. The United States and other countries enforce these laws within the terms of the World Trade Organization ("WTO"). There is a difference between U.S. enforcement and the enforcement approach of other countries, however. The United States–but not other countries of which I am aware--now uses 'zeroing' in its determination of whether imports are dumped. The use of 'zeroing' will almost always increase the level of any antidumping duty, and will sometimes create a duty where none would have been imposed, had the methodology not been used.

All countries test for dumping by attempting to determine whether imports are being sold at less than 'normal' value. Other countries generally do this by directly comparing the average price at which the product is sold in the country of production with the average price at which the same product are sold in the importing market. If the average of the observed prices in the importing country is lower than the average price in the country of production (the 'normal' value), then the foreign firm is said to be dumping. Using zeroing, however, the U.S. treats import price observations above the 'normal' value as if they occurred at the 'normal' value (rather than at their observed level). Transactions at prices below the normal value are treated at their observed levels. The result of zeroing has been to make the U.S. antidumping laws more restrictive than they might appear, with a positive antidumping margin potentially being found if any single transaction occurs below 'normal' value, even if the average of the import prices in the U.S. is much higher than the 'normal' value.

The U.S. practice of zeroing has recently been challenged at least six times before the World Trade Organization (WTO), and has generally been found to be inconsistent with the obligations of the United States under the WTO.

Many economists feel that the antidumping laws of the U.S., or of any other country, are misguided. Antidumping regulations seem ill suited to play the most likely roles according to which import restrictions might be beneficial: addressing the possibility of predation or strategic trade by foreign firms, or serving as an 'optimal tariff'. Zeroing, therefore, may increase the cost to the U.S. of import protection without any corresponding benefit.

The net impact of the zeroing methodology on the United States (compared to antidumping enforcement without zeroing) depends *inter alia* on the dispersion of the U.S. prices obtained by foreign exporters under dumping investigation by U.S. authorities. One estimate is that the cost of zeroing to the U.S. could be in the range of $46-112 million/year, with the higher end of the range being more likely.

The United States has had antidumping laws regulating imports since 1916, and many other countries have adopted similar regulations. The use of antidumping laws is approved by the WTO, and is subject to regulation by that organization.[1] The antidumping laws of the United States and other nations are almost universally viewed by economists as misguided examples of import protection with little merit, but with high costs for the United States (and for other countries using them or affected by them.)

Although the antidumping regulations used by the United States and other countries are similar, there are differences–some of them significant. One way in which the U.S. antidumping regulations differ from those of almost all other countries has been the U.S. practice of 'zeroing'.[2] Using zeroing, the United States computes higher antidumping duties that it would have if zeroing were not used, and higher duties than would other countries if confronted with similar facts. One rough estimate is that the practice of zeroing might inflict a cost on the United States of $46-112 million/year above the cost that the historical U.S. antidumping duties would have inflicted, had zeroing not been used.[3]

A frontal assault on the U.S. antidumping law–although almost surely in the national interest--is hopelessly quixotic. But there is now an opportunity to reduce the cost of these regulations. The WTO has issued several appellate rulings declaring that the practice of zeroing is inconsistent with the obligations of the United States under the GATT. The U.S. Department of Commerce (USDOC) said in the press release dated December 20, 2007, that "...the issue of 'zeroing' remains very fluid." This "fluid" state of affairs should lead to an end of the U.S. practice of zeroing.

I.) Antidumping

Since 1916, the United States has prohibited 'dumping' of imports into the United States. U.S. regulations define dumping as the sale of imports into the United States at a price below 'normal' value in a way that causes 'material' injury to a competing U.S. industry. The U.S. antidumping regulations apply to specific foreign firms. If, for example, a complaint is filed asserting that at least one Japanese firm is dumping machine tools into the United States, then each Japanese

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[1]The General Agreement on Tariffs and Trade (GATT) was first signed in 1947. The general goal of the GATT was to establish common rules for international trade. Since 1947, there have been eight rounds of negotiation among GATT members aiming to remove trade restrictions. On January 1, 1995, members of the GATT reorganized as the World Trade Organization (WTO) in order to create a more effective organizational framework to deal with negotiations, enforce rules, and settle disputes. The WTO now has about 150 member countries. The WTO agreements include both the original GATT and its Article VI, which concerns antidumping, and a new, separate agreement on how to implement Article VI.

[2]As discussed below, the EU used zeroing in one antidumping case in the 1990s, was challenged by India at the World Trade Organization about the practice, and appears to have dropped the practice. It is believed that no country other than the U.S. now uses zeroing in its antidumping enforcement.

[3] For details about this estimate, see "The Implications of 'Zeroing' for Enforcement of U.S. Antidumping Law", William W. Nye, Economic Analysis Group Discussion Paper, EAG 08-10, August, 2008.

firm selling machine tools into the U.S. will be investigated and may be subjected to a duty. The duty levels in this example are determined separately for each major Japanese firm and are generally unique to each such firm.[4] But German firms exporting machine tools to the U.S. will not be investigated unless there is a separate complaint alleging dumping into the U.S. by a German producer.

Most other countries have followed the U.S. in adopting antidumping laws, and the contours of these laws, now regulated by the WTO, are similar.

I A.) The U.S. Standard for a Determination of Dumping

The U.S. interpretation of the antidumping law has evolved over time, but for the past few decades the U.S. antidumping law has had two requirements:

1.) A finding of dumping requires that a foreign firm must be selling in the United States below 'normal' value. 'Normal' value is generally defined as the price in the home market of the exporting firm. For example, if a Japanese producer is selling machine tools in Japan for a mean price of $2, then this becomes the 'normal' value for sale in the U.S. by that firm. [5] It is possible that the United States may find different normal values for each Japanese firm investigated in this example.

2.) A finding of dumping also requires that the dumping result either in 'material' injury to the U.S. industry, or helps to retard the development of a U.S. industry .[6] Material injury is a very low standard.[7]

I. B.) The General Procedure for U.S. Antidumping Enforcement

After preliminary determinations of material injury and sale at less than 'normal' value have been made, the foreign firm must post a bond when it imports into the U.S. This bond is the

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[4]Smaller exporters are likely to be assessed only a general "all others" rate of duty.

[5] There are three alternative ways to define 'normal' value: 1.) If sales in the exporting market (Japan in the example) are very small, then the price at which the firm in question is selling in third country markets may be used. 2.) If the U.S. Department of Commerce believes that the exporting firm is selling in the U.S. at a price that is below its average cost of production, then this average cost of production (plus an 8% profit) can be used to define 'normal' value. 3.) If the exporting firm is located in a non-market economy, then the prices or production costs of other producers in market economies may be used.

[6]The determination of material injury is made by the United States International Trade Commission (USITC).

[7] For example, the USITC web site offers the advice that the material injury standard will not be met if imports from the country in question are 'negligible'. One definition of 'negligible', according to the web site is that total imports of the product in question from the country under investigation must total less than 3% of all U.S. imports of that product.

preliminary antidumping duty (equal to the percentage by which the firm's U.S. price falls short of 'normal value') times the volume of imports by the firm. On the first anniversary of the antidumping order (and on each subsequent anniversary), the USDOC performs an Administrative Review (AR) of the order. It is at the AR that the antidumping duty is finally assessed. If the AR finds that during the past year, the dumping margin of the firm has been only half of the margin originally assessed at the preliminary stage (because either the U.S. price has risen or the foreign price–normal value--has dropped), then the U.S. refunds one half of the collected duty. Conversely, if the USDOC determines that the margin of dumping during the past year has been larger than the assessed preliminary duty, then additional duty is assessed. In the case of both refunds and added assessments, appropriate interest assessments (payments) are made. Until 1995, U.S. antidumping orders remained in effect until a private party successfully sought their removal. Since 1995, orders are reviewed every 5 years under a required Sunset review process.[8]

I. C.) Approximate Frequency and Level of U.S. Antidumping Duties

Between 1980 and 1995, about 21 new U.S. antidumping orders were put in place each year.[9] From 1995-1999, new antidumping orders decreased to about 16 per year.[10] The 267 outstanding U.S. dumping duties in 1999 had a mean level (not weighted by volume of commerce) of 47.6%. The median U.S. antidumping duty levied between 1980 and 1995 was about 26%. By 2003, the number of outstanding U.S. antidumping orders had increased to 359.[11] These antidumping duties plus the U.S. countervailing duties then in effect, covered about $24 billion of U.S. imports.[12] One estimate of the welfare cost to the United States of the U.S. antidumping and countervailing duties in place in 1999 was $3.95 billion.[13] Antidumping duties are more common than countervailing duties, and there is little doubt that antidumping duties account for the large majority of the affected

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[8] See "What is the Effect of U.S. Antidumping Duties on Imports? Some Evidence from the Sunset Review Process", William Nye, EAG Discussion Paper, EAG 06-2, February, 2006.

[9] Both of these figures are from the NBER data set on U.S. antidumping duties assembled by Bruce Blonigen and his associates.

[10] Michael Gallaway, Bruce Blonigen and Joseph Flynn, "Welfare Cost of U.S. Antidumping and Countervailing Duty Laws", *The Journal of International Economics*, Vol. 49, (1999), pp. 211-244.

[11] Blonigen, *op. cit.*

[12] Countervailing duties are distinct from antidumping duties and are imposed to offset specific government subsidies given to foreign firms exporting to the U.S.

[13] This estimate is from the Gallaway, Blonigen and Flynn paper cited above. The trade effects and welfare loss in this model are estimated with a computable general equilibrium model. A large share of the estimated welfare loss comes from foreign firms responding to U.S. antidumping orders by raising their price for sales to the U.S., and thereby reducing their antidumping duties, and capturing much of the rent from the transaction that might have been captured by U.S. consumers in the absence of the duty.

commerce and of the welfare loss. So the net cost to the U.S. of its antidumping duties is very likely over $2 billion /year.

II.) The Doubtful Economic Basis for the Antidumping Law: Prevention of Predation

II A.) How Much Predation Occurs?

Almost the only plausible economic basis for antidumping laws in the U.S. is to guard against predation by foreign firms exporting to the U.S. Before about 1980, the broad consensus of the economics profession was that predation was–on theoretical grounds-- very unlikely to occur.[14] Since 1980, there has been a variety of theoretical work in the economics of industrial organization that demonstrates that models of predatory behavior can be constructed in which the predation is rational and profitable.[15] But the practical relevance of these models–and the actual frequency of predation–remain open to doubt.

II B.) The Costs and Benefits of a Legal Predation Standard

Even if predation were a common phenomenon, however, a question would remain about the most efficient legal rule to prevent it. The issue, clearly, is that any gains from a legal predation rule may well be more than offset by losses if aggressive competition is restrained. Ordover and Saloner seem quite justified in their observation that the large volume of recent economic research into the question of predation has provided only limited guidance to policymakers about this key question. The most frequently discussed rules in the legal literature involve a comparison of the allegedly predating firm's price to some measure of cost–most often marginal cost, average variable cost, or avoidable cost.[16] In *Matsushita* (1986), and again in *Brooke Group* (1993),[17]the Supreme Court

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[14]I am relying, for most of this brief discussion of the economics of predation, primarily on two surveys of the subject: "The Law and Economics of Predatory Pricing" Bruce Kobayashi, George Mason University Law and Economics Research Paper, 08-41, Forthcoming in *Antitrust Law and Economics*, Edward Elgar Publishing, Keith Hylton, ed.), and "Predation, Monopolization, and Antitrust", Janusz Ordover, and Garth Saloner, *Handbook of Industrial Organization, Volume 1*, edited by Richard Smallensee and Robert Willig, North Holland, 1989, pp. 537-596.

[15]Kobayashi divides most of these models into three categories: 1.) Financial (or deep pockets) predation, 2.) Predation involving the establishment of a reputation for aggression, especially in the context of multiple markets, and 3.) Predation involving (false) signalling about costs or industry demand.

[16] The marginal cost standard was proposed by Arreda and Turner (Phillip Areeda and Donald Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act", *Harvard Law Review*, Volume 88, Number 4, 1975, pp. 679-773. The avoidable cost standard was proposed by Baumol in "Predation and the Logic of the Average Variable Cost Test", *Journal of Law and Economics*, Volume 39, Number 1, pp. 49-72, 1996. The recent Justice Department report on single firm conduct cautiously endorses the idea that sales priced below average avoidable cost may be one index of possible predation. U.S. Department of Justice, *Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act (2008)*.

[17] *Matsushita Electric Industrial Co. V. Zenith Radio Corp*., 475 U.S. 574 (1986), and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*. 509 U.S. 209 (1993).

noted that some sort of price test must be satisfied for antitrust injury, but did not specify the standard.

II C.) Regarding the Possibility of Predation, Does the U.S. Antidumping Law add Anything Useful to the U.S. Antitrust Law?

As noted, the economics and legal professions are not completely unified in their assessments of the best rule for dealing with the possibility of predation without excessively restricting vigorous competition. But the primary standard for U.S. antidumping enforcement–a foreign firm selling in the United States for a lower price than the firm sells in its home market–is inconsistent with any proposed rule in the economic literature, and has not been mentioned by a court to my knowledge. Such a standard seems, at best, a very inefficient method of deterring predation, and seems likely to inflict high net costs on the U.S. These costs may be on the order of $2 billion per year–mostly caused by raising the price of U.S. imports.[18]

III. Zeroing

III A.) Description of Zeroing

As noted above, the determination by the USDOC of the antidumping margin generally involves a comparison of the price for which the product of interest is sold in the foreign market with the price for which it is sold in the United States. The practice of all other countries--as far as is known--is to test whether imports are being sold at less than 'normal value' by simply comparing the average price at which a given product is being sold by the exporting firm in the country of production with the average price at which the same product is sold in the import market. If the average of the observed transactions prices in the import market is lower than the average price in the country of production, (the 'normal' value), then the foreign firm is said to be dumping.

Using zeroing, however, the U.S. Department of Commerce (USDOC) treats U.S. sales transactions at prices above the 'normal' value as if they had occurred at the normal value (rather than at their observed level). Transactions at prices below the normal value are treated at their observed price. The result of this zeroing procedure has been to make the U.S. antidumping laws

[18] In addition to preventing predation, there are two other ways that antidumping duties might be justified. One is as protection against 'strategic trade' by foreign rivals. But the possibility of strategic trade requires that the exporter have protection in its home market, that the home market of the exporting firm be sufficiently large, and also that some form of scale economy exists. The test for imposition of antidumping duties includes none of these conditions. The'optimal tariff' argument is really a claim that the U.S. might benefit from exercising any monopsony power it has in some imported commodities. If a large country such as the U.S. can reduce the average price it pays for some imported commodity by reducing the volume of the commodity it imports (by imposing a tariff), then the tariff might benefit the U.S. Of course, the 'optimal tariff' only benefits the U.S. if other countries do not respond by imposing their own 'optimal tariffs' on U.S. exports. It is hard to see the 'optimal tariff' argument as a serious justification for antidumping duties.

more restrictive than they might appear. With zeroing (as will be illustrated below), a positive antidumping margin can be found if any single import transaction occurs below normal value, even if the average price in the U.S. is much higher than the average price at which the goods are sold in the home market.

The U.S. practice of zeroing has historically come in two forms: 'model' zeroing, which may be used in the original investigation stage, and 'simple' zeroing, which is used in periodic administrative reviews. Since the administrative review is the stage at which the actual liability of the foreign firm is determined, it is, in many respects, the more important.[19] As will be briefly discussed below, the U.S. Department of Commerce has recently announced that the U.S. is no longer engaging in 'model' zeroing. But 'model' zeroing is not used in the crucial Administrative Review step, where the liability of the foreign firm is actually determined, so the economic significance of this announcement is not clear.

III B.) A Simple Example of Zeroing

A very simple example may help to clarify the slippery procedure of zeroing in U.S. antidumping enforcement.[20]

Suppose a foreign product is being sold in the U.S. by a foreign firm whose home price is $2. Further suppose that there are three observations of sales by this firm in the U.S., each for one unit of the product, one at $1, one at $2 and one at $3. Consider the calculation of the antidumping margins with and without zeroing.

Case A: No Zeroing

Normal Value: $2

U.S. sales observations: One unit each at $1, $2 and $3.

Average U.S. price: $2 [$2 = ($1 + $2 + $3)/3]

Margin of Dumping: Zero (because the average U.S. price equals the normal value.)

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[19]In 'model' zeroing, the USDOC divides the product under investigation into a number of 'models'. (It is unclear how the USDOC definition of a 'model' relates to the DOC definition of a 'product' that can potentially be the subject of an antidumping order.) The initial antidumping margin for the product under investigation is determined by averaging the difference between export and home prices for only for models for which the U.S. export price average is below the home price average. [First Written Submission before the World Trade Organization "United States-Measures Relating to Zeroing and Sunset Reviews" WT/DS322, May 9, 2005.] Because of this use of 'models', 'model' zeroing is sometimes referred to as a 'average-to-average' comparison. The 'simple' zeroing used in the AR stage is an 'average-to-transaction' methodology in this terminology. (U.S. Antidumping Manual, Chapter 6, III A.)

[20]Since this example involves a comparison of a 'normal' value (which is the average of prices in the country of production) to particular observations of price transactions in the U.S., this is an example of 'simple' zeroing.

Case B: Zeroing

Normal Value: $2

U.S. sales observations: One unit each at $1, $2 and $3

Average U.S. price with zeroing: $1.66 [$1.66 = ($1 + $2 + $2)/3] (The third U.S. sales price observation, at $3, is adjusted to the normal value of $2, since the U.S. sales price observation exceeds the normal value.)

Margin of Dumping: 16.6 % [16.6 % = ($1 of dumping/$6 of imports)]

The transaction at $3 (above normal value) does not offset the transaction at $1 (below normal value). The observed total value of imports is used as the denominator, however.

IV.) Current State of the Dispute Over Zeroing at the World Trade Organization

As noted above, the decision by the United States to engage in zeroing when calculating antidumping margins has provoked complaints by U.S. trading partners who claim that it is not consistent with World Trade Organization (WTO) rules for antidumping regimes.[21] The United States has apparently been using some form of zeroing on all antidumping cases for some time. The U.S. has been challenged at the World Trade Organization at least six times with regard to its use of zeroing in antidumping investigations. The Table below shows these six WTO challenges to U.S. zeroing.

[21] The EU appears to have flirted briefly with zeroing in the 1990s. In 1998, India requested that the WTO determine that the EU had acted contrary to its WTO obligations in the case of an antidumping order against cotton-type bed linens from India. After the complaint, the EU recalculated the antidumping margin in this case without the use of zeroing. (This matter is WTO DS141.) I do not believe any other country now uses zeroing in its antidumping determinations.

Table 1

Recent WTO Challenges to the U.S. Use of Zeroing in Antidumping Investigations

Complaining Country	**Product**	**WTO Dispute Resolution Number**
Canada	Softwood Lumber	DS 264
Japan	Ball Bearings	DS 322
EU	U.S. Use of Zeroing in 21 Antidumping Matters	DS 294
Ecuador	Frozen Warmwater Shrimp	DS 335
Thailand	Shrimp	DS 343
Mexico	Stainless Steel	DS 344

The Japanese Ball Bearing matter and the Mexican Stainless Steel matter are probably the most important challenges to the U.S. practice of zeroing among the six listed in the Table. They will be discussed in a bit more detail below.

IV A.) The Japanese Complaint Concerning Ball Bearings

On November 24, 2004, Japan sought consultations under the procedures of the World Trade Organization about the zeroing issue and several other matters. Japan complained about zeroing at each stage of a U.S. antidumping investigation–original investigation, administrative review, new shipper review, changed circumstance review, and sunset review. In December, 2004, India, Norway, Argentina, China Taipei, the EU and Mexico joined Japan in the request for consultations. In February, 2005, Japan asked for the establishment of a WTO panel on the matter.[22] On September, 2006, the WTO panel upheld Japan's claim that U.S. zeroing in the original investigation was not consistent with WTO rules, but rejected Japan's claims that zeroing was inconsistent with WTO rules at other stages of the other stages of the U.S. antidumping process listed above–administrative review, new shipper review, changed circumstances review, and sunset review. But on January, 9, 2007, the WTO Appellate Body found that both the U.S. practice of 'model' zeroing at the initial investigation stage, as well as the U.S. practice of 'simple' zeroing' at the administrative Review, were contrary to U.S. WTO obligations.

[22]In the World Trade Organization process, a 'panel' is a three person group selected to adjudicate a dispute. If a party to a dispute disagrees with a panel, it may appeal to the WTO Appellate Body.

IV B.) The Mexican Complaint Concerning Stainless Steel and the U.S. Reaction

Shortly after the resolution of Japan's complaint about U.S. antidumping in the ball baring matter, another WTO panel, adjudicating a Mexican complaint regarding U.S. zeroing in an antidumping order involving Stainless Steel from Mexico, muddied the legal waters somewhat. In this matter, the WTO panel hearing Mexico's complaint decided that the previous decisions of the WTO Appellate Body (for the most part declaring zeroing to be contrary to WTO rules concerning antidumping) did not serve as binding precedent for its own decision. Further, the Panel ruled that, at least in the case of stainless steel from Mexico, the U.S. was not violating its WTO obligations by the use of zeroing.[23] The WTO panel ruled that WTO panels "...are not, strictly speaking, bound by previous Appellate Body or panel decisions that have addressed the same issue." Repeating the earlier scenario in the ball bearings case, in May, 2008, the WTO Appellate Body reversed the WTO panel with regard to the issue of U.S. zeroing in the Mexican stainless steel case, and declared the U.S. use of zeroing to be contrary to U.S. WTO obligations.

On December 20, 2007, the Office of the United States Trade Representative (USTR) hailed the decision of the WTO panel in the stainless matter, and said that it demonstrated "...that WTO rules do not prohibit 'zeroing'."[24] The USTR also said that as of February, 2007, the U.S. Department of Commerce had no longer been using zeroing "...in investigations where weighted average calculations are performed." (i.e, in determinations of preliminary antidumping margins.) Because, as noted above, the Administrative Review stage is where the final liability of importing firm is determined, the significance of this announcement is open to question.

The statement by the United States Department of Commerce on December 20, 2007, that "...the issue of 'zeroing' remains very fluid..." seemed accurate.

V.) What Can be Done to End the U.S. Practice of Zeroing in U.S. Antidumping Enforcement?

Zeroing appears to be a classic case of protectionism being created by the subtle use of the administrative processes of the United States Government. As such, it is a particularly good target for competitive advocacy efforts. The antidumping laws are, themselves, quite baroque in their complexity, and are poorly understood by the general public, which pays the price for the trade barriers these laws create. Zeroing simply makes the antidumping laws more restrictive. The U.S. practice of zeroing should end.

V A.) A Possible Strategy: Trading Zeroing for Trade Policy Concessions of Other Countries

Trade restrictions, such as antidumping orders, confer large benefits on small numbers of

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[23] WT/DS344/R, December, 20, 2007. In the case of the U.S. antidumping order on stainless steel from Mexico, the WTO panel was ruling on the issue of simple zeroing (in the context of Administrative Review.)

[24] United States Trade Representative Web site posting "United States Wins WTO 'Zeroing' Dispute with Mexico", December 20, 2007.

Americans manufacturers, while inflicting costs on a much larger, less–well–coordinated group of Americans consumers. The losses of the dispersed group of consumers almost always exceeds the gains of the protected producers. The complexity of antidumping regulations ensures that most of the U.S. victims of U.S. antidumping orders are unaware of the way these costs are being imposed. Because of this political reality, a reduction of restrictions on U.S. imports is often viewed as a 'concession', by which the United States is helping foreign exporters, rather than as a simple act of self interest.

One possible way that U.S. trade negotiators might be able to escape this political dilemma might be to offer to trade U.S. abolition of zeroing for reduction of some other trade-distorting practice by U.S. trading partners that harms U.S. interests. Perhaps foreign agricultural policies might offer such an opportunity. Use of zeroing as a bargaining chip, might allow the United States to save face while backing away from a harmful and expensive trade policy.