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Solutions to U.S. Antidumping and Countervailing Duty Actions Against Latin American Companies

Homer E. Moyer Jr.

Catherine Curtiss

SOLUTIONS TO U.S. ANTIDUMPING AND COUNTERVAILING DUTY ACTIONS AGAINST LATIN AMERICAN COMPANIES†

HOMER E. MOYER, JR.* AND CATHERINE CURTISS**

This article considers U.S. antidumping and countervailing duty laws from the viewpoint of a Latin American company, or a U.S. company doing business with a Latin American company which exports to the United States. In the U.S. Government's fiscal year 1988, the Department of Commerce initiated one hundred antidumping and countervailing duty investigations involving 190 companies. Five percent of these new cases involved Latin American countries. Of all existing orders and suspension agreements, ten percent of the antidumping cases and fifty percent of the countervailing duty cases involve Latin America.

This article will focus on the "preventive maintenance" a company can undertake to avoid or minimize U.S. antidumping or countervailing duty liability. These preventative steps include internal auditing and monitoring programs and certain marketing strategies. This article will also briefly address strategies for getting out of an antidumping or countervailing duty trade case.

I. LATIN AMERICA AS A TARGET OF U.S. ANTIDUMPING AND COUNTERVAILING DUTY ACTIONS

A. *Summary of Past Actions*

Latin America has been a frequent target of U.S. dumping and countervailing duty actions. As of November 1, 1988, seventeen dumping findings or orders and forty-six countervailing duty or-

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* Member, Miller & Chevalier, Washington, D.C. Former General Counsel, United States Department of Commerce.

** Member, Miller & Chevalier, Washington, D.C.

ders or suspension agreements existed against Latin American countries and products.

Cases against Brazil and Mexico account for a substantial portion (approximately half) of the total cases involving Latin America. Argentina, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, Peru, Uruguay, and Venezuela have also been targets. Many cases involved unfinished or semifinished steel products, such as pipe fittings from Brazil and wire rod from Argentina; agricultural products, such as orange juice from Brazil and flowers from Colombia, Mexico, and elsewhere; and textile and apparel cases, such as leather apparel, from Argentina, Mexico, Uruguay, and Colombia. Other cases have involved products as diverse as cement, castor oil, auto glass, toy balloons, chemicals, and cookware. As the industrial bases of Latin American countries develop, the range of exports involved in U.S. trade cases should increase.

B. *Current Investigations*

As of November 1, 1988, two active antidumping investigations and one active countervailing duty investigation involved Latin America, namely pipe and tube from Argentina and steel wheels from Brazil. There also has been a recent antidumping case against shock absorbers from Brazil, terminated by a negative preliminary injury determination in October 1988.

Most of the current cases, however, target Pacific Rim and Western European trading partners. With changes in the laws from the Omnibus Trade and Competitiveness Act of 1988,[1] the overall number of cases may increase. Additionally, as Latin American economies diversify, their exports may be increasingly perceived as a threat.

C. *Future Possibilities*

Certain products and countries are likely targets. For instance, steel products from countries not currently party to a Voluntary Restraint Agreement ("VRA") or a bilateral arrangement (*e.g.*, Argentina) may be hit with a dumping or countervailing action, to pressure those countries into a VRA.

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1. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §§ 1311-1337, 102 Stat. 1184-1211 (codified in scattered sections of 19 U.S.C.)

Processed agricultural products, particularly tropical products and products from developing countries, may be the subject of trade cases as an outgrowth of general concern about trade barriers on agricultural and tropical products. Multilateral talks on these subjects in the Uruguay Round may also spur trade cases, either as a bargaining tool or as an alternative recourse for U.S. companies where negotiations are not considered useful. Recent amendments to U.S. trade laws that make it easier for growers of raw agricultural products to bring cases against manufacturers of processed products may also spur trade cases.[2]

Argentine soybeans, Argentine and Brazilian pharmaceutical products, and Brazilian copper and brass semi-manufactured products are also candidates for antidumping or countervailing duty cases because of Section 301 cases or petitions pending against these products. These products may be treated much as the Japanese semiconductor cases, which illustrate the potency of combining Section 301 and antidumping or countervailing duty cases to create additional leverage for a bilateral agreement settling the dispute.

Finally, auto parts may attract new cases, as reflected in Mexican and Brazilian cases against disc wheels, steel wheels, shock absorbers, auto glass, and other products.

In analyzing vulnerability, one should keep several key factors in mind. One factor is whether there have been antidumping or countervailing duty cases against the same product from a different country. For example, the U.S. pipe and tube producers filed a countervailing duty case against pipe and tube from Brazil in 1982 and 1984, against Mexico in 1984, against Venezuela in 1985, and against Argentina in 1988. This type of seriatim filing reflects the "learning curve" of U.S. petitioners. It also reflects their attempt to cover all source countries, regardless of export levels, in order to avoid shifting of facilities or products to countries not covered by an antidumping or countervailing duty order. Seriatim filings of this sort may become increasingly common, because recent amendments to U.S. trade laws permit "cumulation" of a relatively small level of exports from one country with the exports of a major source country, in determining whether a U.S. industry has been or will be injured by dumped or subsidized imports.[3]

2. *See* 19 U.S.C. §§ 1677-1, 1677(4) (1988).
3. *See* 19 U.S.C. § 1677(7)(C)(iv) (1988).

A second element is whether there have been antidumping or countervailing duty actions against a related product from the same country. In 1983, various U.S. cement companies and the United Cement and Lime Workers filed a countervailing duty case against cement from Mexico. The next year, the United Cement and Lime Workers, along with various U.S. lime companies, filed a countervailing duty action against lime from Mexico. This kind of pattern also doubtlessly refects a U.S. petitioner's "learning curve," as well as the U.S. petitioner's attempt to prevent the foreign producer's circumvention of an order through subsequent processing before export. "Related product" cases will likely become increasingly common as prospective U.S. petitioners take advantage of recent amendments to antidumping and countervailing duty laws dealing with "upstream subsidies,"[4] "input dumping,"[5] and "downstream product monitoring."[6]

The third consideration in analyzing vulnerability is whether there is a pending Section 301 or other trade action against the product. Related to this factor is whether the product is a source of controversy or political action in the United States, short of a trade case.

The fourth factor is whether the product is manufactured in a country that has been a popular target, especially in countervailing duty cases where programs found to be subsidies in one case may apply to other products as well. Brazil and Mexico have plainly suffered from this phenomenon.

A fifth element is the condition of U.S. companies that manufacture the product in question. If these companies are closing plants or moving offshore to remain viable, trade cases against foreign competitors may be viewed as helping to buy time for developing an improved product or building market share.

A sixth factor of importance is a particular company's pricing strategy. Selling in the United States at a deep discount to gain a toehold in the market may not only invite a dumping case, but also may expose the company to substantial antidumping liability.

Finally, the level of market penetration of all importing countries in the relevant U.S. market is a factor indicating vulnerability to a trade case. Although exports from one Latin American country

4. 19 U.S.C. § 1677-1(a) (1988).
5. 19 U.S.C. § 1677b(e) (1988).
6. 19 U.S.C. § 1677i (1988).

may be relatively small, if U.S. companies or workers are incensed about high or increasing levels of imports overall, minor exporters can become embroiled in a series of cases against many countries. Because of the "cumulation" provisions mentioned previously, a relatively small U.S. market share will not shield a Latin American exporter from involvement in a trade case.

II. "Preventive Maintenance" to Avoid or Minimize U.S. Antidumping or Countervailing Duty Liability

The best solution to U.S. trade cases is to avoid them altogether, by not dumping or using government subsidies. These options, however, may not be realistic. For a company "preventive maintenance" might thus consist primarily of internal corporate financial controls in the form of an audit and monitoring program.

A. *The Obvious Solutions*

1. Avoiding Dumping

To avoid dumping, foreign manufacturers which export to the U.S. should keep their U.S. prices no lower than their home market prices for the same product, on a net or "ex-factory" basis. The reason is that the U.S. Department of Commerce usually calculates antidumping duties by comparing U.S. prices of products to prices of the same or similar products sold in the home market or third country all on a net or "ex factory" basis. Thus, deep discounts or extremely lucrative sales terms to U.S. customers should be parallelled by similar practices in the home market. Preferably, U.S. prices should be higher than home market prices. Home market prices should be lower than U.S. prices, but no lower than a fully absorbed cost of production. If exporters have no or few home market sales but have third country sales, they should apply this same pricing analysis to third country sales.

These obvious solutions do not always work to prevent U.S. dumping liability. Sometimes companies cannot tell whether they are dumping, because U.S. dumping calculations are complex and price disparities in the various markets may not be large. Companies may not be dumping according to the company's own accounting methods, but the Department of Commerce's definition and calculation of dumping often bears little resemblance to business reality or a particular company's way of doing business.

2. Refusing Government Subsidies

The obvious solution to U.S. countervailing duty liability is to refuse government subsidies. To do so, foreign manufacturers must be aware of which of their government's actions or programs and which programs in other countries, especially in Latin America, have already been found to be subject to countervailing duties. In this exercise, it should be noted that "government" means not only direct government agencies but government-owned companies. It should also be noted that "subsidies" refers not only to direct payments based on export performance, but also to loans, loan guarantees, goods, and services provided at preferential rates, and to equity or capital investments in losing propositions, or in statutory language, "on terms inconsistent with commercial considerations."[7] Subsidies also refers to funds or debt forgiveness to cover operating losses and the assumption by the government of manufacturing, production or distribution costs.

This obvious solution also does not always work. Reliance on subsidies may be an integral part of a company's business plan and, once accepted, subsidies may be difficult to eliminate.

B. *Internal Antidumping Audits and Monitoring Programs*

1. Purposes

An antidumping audit and monitoring program should identify which products among a company's U.S. exports may give rise to antidumping liability under U.S. law. The audit should specifically identify the customers, pricing strategies and cost considerations that create the problem. Assuming corrective action is taken, a monitoring program should ensure no new problems develop. Monitoring can also be used to analyze the antidumping consequences of particular sales at specified prices or across-the-board pricing changes.

2. Coverage

An effective audit and monitoring program can either cover all products exported to the United States or just those products at "high risk" of antidumping or countervailing duty liability. A com-

7. 19 U.S.C. § 1677(5)(B) (1988).

plete program would examine and monitor all aspects of costs and pricing, the production process and process changes, cost accounting and financial reporting methods, sales transactions, and price-related policies (*e.g.*, rebates and discounts). Although a comprehensive audit may demand substantial effort, an audit monitoring program can and should be tailored to the specific needs of the company.

3. Timing and Sequence

An audit and monitoring program should be in place before a company becomes involved in an antidumping or countervailing duty case. Nonetheless, it is never too late. Companies who have been through a U.S. trade case can put their knowledge to beneficial use by developing a program to not only avert future cases, but also to minimize the antidumping or countervailing duties assessed on future exports of the products subject to an existing order.

It may be prudent to tackle only one product at a time. A sequential approach enables the company's successive audits of other products to be informed by previous audit experiences.

a) Stage One: Assigning Responsibility

An audit typically requires imposing an additional burden on already busy company employees, such as the comptroller, the head of marketing, and the production manager. Company officials who conduct the audit must have sufficient authority to require any additional work, inspect all records, and be informed of all company practices. The highest company management must give them such authority and support.

b) Stage Two: Education

An audit and monitoring program requires immersing the company team on U.S. antidumping and countervailing duty law. All company employees should be advised that an audit and monitoring program will be undertaken, and their full cooperation should be requested.

c) Stage Three: Initial Survey

An initial survey of the company's products and pricing can identify what future detailed audit work would be useful. The survey should gather at least five important pieces of information that will shape subsequent auditing and monitoring efforts. This information includes:

1) *What products the company sells in the normal course of business in the United States.* Because antidumping duties are based on the pricing of products sold in the United States, the precise definition of these products can significantly affect the outcome of an antidumping case. For example, the Department of Commerce might, although not necessarily, consider a second-quality product sold in the United States to be included in a case directed at first-quality products. Because second-quality merchandise is usually priced below first-quality products, the exporting manufacturer typically would like the Department of Commerce to ignore these sales. As another example, the Department of Commerce may, although again not necessarily, consider a small quantity of goods sold as samples to be a valid subject of inquiry. Because such sales would also be at dramatically reduced prices, including them in an antidumping case can hurt the exporting company's position. Thus, an important preliminary step in an audit survey is to identify precisely all products exported to U.S. customers under any circumstances.

2) *What products sold in the home market or a third country are the same or similar to products exported to the United States.* A second step is to identify which products are sufficiently comparable to those exported to the United States to be used in the antidumping calculations. The Department of Commerce prefers to compare prices of identical products sold in the United States and home or third country market. If, however, a comparison of identical products is not possible, the Department may rely on the prices of a similar product. In the language of the antidumping law, the question is which products are most likely to be judged as "such or similar merchandise" to the particular product under investigation.[8]

3) *The basis for "United States price"*[9] *of each product sold in the United States.* The first half of the Department of Commerce's antidumping calculation is the net or "ex-factory" price at which a product is sold to an unrelated buyer in the United States.

8. 19 U.S.C. § 1677(16) (1988).
9. 19 U.S.C. § 1677a(a) (1988).

The Department of Commerce still relies on the price to the unrelated U.S. customer even if there has been an intervening transfer by the foreign manufacturer to a U.S. sales subsidiary. This situation, however, involves different pricing considerations that may affect the outcome of the antidumping calculations. Thus, an important initial consideration is to identify the sales channels for the products sold to the United States.

In the language of the antidumping law, the question is whether the U.S. price of the products in question should be defined as the "Purchase Price" of the merchandise, a transaction in which the merchandise is deemed to have been sold directly from the foreign manufacturer to the unrelated U.S. customer,[10] or as the "Exporters Sales Price" ("ESP"), a transaction in which the merchandise is deemed sold by the related U.S. subsidiary.[11] The classification of U.S. sales as "Purchase Price" or "ESP" becomes important in identifying the charges and "adjustments" applicable to each transaction.

4) *The basis for the foreign market value of the products.* The U.S. price is only one-half of an antidumping equation. The other half is what the antidumping law calls "foreign market value" ("FMV").[12] Depending on the particular circumstances, FMV can be based on sales prices in the country of manufacture, sales prices in a third country market, or "constructed value," which is cost of production plus profit. The choice of FMV can dramatically affect the outcome of an antidumping case and is often the subject of debate. Therefore, an initial antidumping audit survey should identify the most likely basis for FMV for each product sold to the United States.

5) *Major transportation and selling charges.* The Department of Commerce tries to calculate what the price of the product would be if sold at the factory gate, without amounts for transportation, insurance, and so on. The initial audit survey should identify major transportation expenses or sales circumstances that affect the price of the final sale to the unrelated customer.

6) *Comparison of net U.S. price and FMV of each product.* Once the initial five judgments have been made, the company can do a "quick and dirty" comparison of the net U.S. prices and FMV

10. 19 U.S.C. § 1677a(b) (1988).
11. 19 U.S.C. § 1677a(c) (1988).
12. 19 U.S.C. § 1677b (1988).

for each "pair" of products, that is, the products sold to the United States are paired with identical or similar home market or third country sales, or constructed value. This survey should identify the products at the highest risk of antidumping liability.

d) Stage Four: Antidumping Audit

The most logical target for a company's internal audit would be one of the products identified by the initial survey as at a high risk of high antidumping margins. An in-depth audit should reveal not only the precise antidumping profile in the event of an antidumping action against that product, but also problems or complications in accounting procedures, financial reporting or sales transaction processes that would apply to other U.S. exports. An audit would essentially consist of a mock antidumping investigation and verification.

Assuming a product "pair" has been selected as the subject of such an audit, the following basic procedures would be:

1) *Selection of reporting period and identification of sales in the period.* Antidumping investigations normally cover a six-month period, ending the month the antidumping petition is filed. Therefore, a company's internal audit could cover up to six months. If it is the first in-depth audit the company has conducted and the company has never been involved in an antidumping case, a shorter period may be more manageable. When the period is selected, sales occurring within the period must be identified. This process is often more complicated than it first appears since there are many different stages in sales transactions where one could consider the "sale" to have been completed. If there are two good alternatives, such as date of invoice or date of shipment, the company might consider running parallel analyses, one including the universe of sales as defined by one alternative date of sale, and the other using the different universe of sales created when a different date of sale is used.

2) *Listing of all U.S. sales.* To mimic an actual antidumping investigation, the auditing company should separately list each U.S. sale falling within the investigation period. For each transaction, the list can contain up to thirty or more items concerning that sale, including a product description, invoice number, sale date, payment receipt date, customer code, quantity, total sales price, unit price, freight charges, insurance charges, packing, com-

mission, rebates, credit expenses, and warranties. Identifying this information for every U.S. sale during an investigation period commonly overwhelms companies involved for the first time in an antidumping case. A dry run can serve the dual purpose of avoiding or minimizing antidumping liability and preparing the company to deal more efficiently with an actual antidumping investigation.

3) *Listing all home market or third country sales or calculating constructed value.* A list similar to the U.S. sales list should be prepared for all home market or third country sales, including the same type of breakdown of invoice price into various subsidiary charges. If FMV is based on constructed value, then this portion of the in-depth audit is devoted to calculating the particular cost of production for the product in question. These calculations can be quite complex, because a company's cost and financial accounting records may not separately break out the cost for the particular product or reflect other allocations required by the Department of Commerce in an actual antidumping case.

4) *Calculation of antidumping margins.* The sales listings compiled in a mock investigation are most useful if the antidumping margins reflected in the listings are also calculated. If the margins on individual transactions and the weighted averages are calculated, useful information can be provided concerning any weak spots in the company's pricing policies.

5) *Conducting a mock "verification."* Every antidumping investigation involves a "verification," which is an audit by Department of Commerce officials on the company premises of the documents on which the base of the sales listings are based.[13] In a mock investigation in an in-depth audit, it would be prudent for the company also to undertake a mock verification.

e) Stage Five: Response and Special Follow-Up Review

A mock investigation and verification should create a wealth of information. The resulting information then can be analyzed to develop specific recommendations for changes in the company's operations. Special follow-up might be warranted for particularly troublesome practices unearthed by the audit, to ensure that changes were implemented.

13. 19 U.S.C. § 1677e (1988).

f) Stage Six: Monitoring

Based on the results of the audit, the company may believe it prudent to establish a continuous monitoring program. The program can be established in any degree of detail and formality. Although monitoring programs must be tailored to the needs of the individual company, some general observations apply.

In developing a monitoring program, the company should focus on products where the risk of antidumping exposure is the greatest. Depending on the basis for FMV, the company should decide whether it needs to monitor home market or third country prices, or production costs, or some combination.

Further, a monitoring program should observe not only price and cost movements, but also the movements of price-related or cost elements identified by the initial audit as significant. These elements might include, for example, price adjustments given to large customers, proposed changes in formal rebate or discount programs, or credit terms given to customers in the various markets. Monitoring costs might involve a periodic assessment of start-up costs or the trend of unusual repair costs in a plant with high overall production costs. It might also involve scrutiny of the effect on cost calculations of refinements in production processes. It is important to note that the type and extent of monitoring activities may vary from product to product. For example, a product shown by the initial audit to have a comfortable distance between high U.S. prices and low FMV may require only an occasional check on the movement of the invoice prices, whereas a product with potentially severe antidumping margins may require more frequent observations and closer involvement in company practices.

To the extent possible, the monitoring program should minimize the need for additional paperwork or analysis. It may be possible to use existing reports provided by production or sales groups in the normal course of business. It may also deal with some issues informally, for instance, through occasional meetings with sales, accounting or production personnel.

4. Computerization

The Department of Commerce demands that companies computerize sales listings in antidumping cases. Further, the companies themselves are increasingly relying on computer-generated financial records. Depending on the company's circumstances, it may be sensible to develop a computer model with varying degrees of complexity for an antidumping monitoring program.

5. Record-keeping

The previous discussion of audit and monitoring efforts presumed that maintenance of a company's sales, financial, production, inventory, and accounting records can be significant elements in efforts to minimize potential antidumping liability. These records can be maintained in ways that will potentially improve the result of an antidumping investigation and the company's ability to respond quickly and effectively in the event of an antidumping investigation. In no event should existing documents be altered as a result of an antidumping audit. However, an audit could suggest changes in format or content that may be prudent for future documents.

6. Customs Documentation

Another useful element in a preventive maintenance program is the coordination of a company's audit and monitoring efforts with its importer or customs broker. One purpose of such coordination is to ensure that all imports are classified correctly. For example, a company's products may be imported under a broad or "basket" category under the Harmonized Tariff Schedules ("HTS"). A dumping case may be brought against a different product imported under the same HTS number, potentially causing difficulty at the U.S. border for the innocent exporter. This difficulty can be avoided if there is a more specific and correct classification of the company's export under a different HTS number.

A second purpose of coordination might be to ensure that the product's entry documents specify the value of a particular input in final product, if that input has been the subject of other antidumping cases or may be the subject of an antidumping case against the country in question. This separate identification helps to ensure that in the case of an antidumping order on the input, the duty is based only on the value of the input, not on the value of the entire product. Other peculiarities in a company's situation may make it worthwhile to include customs considerations as part of an antidumping audit.

C. Internal Countervailing Duty Audits and Monitoring Programs

The purposes and procedures of an internal corporate countervailing duty audit are similar to those of an antidumping audit. Obviously, it is important for company officials to know what constitutes a subsidy under U.S. countervailing duty law. Company officials should also be familiar with what specific government programs have been found to be subject to countervailing duties, both in their country and in neighboring countries that have similar economies.

A fundamental purpose of an initial audit survey is to identify actual or potential subsidies being used by a company. An in-depth audit would focus on these actual or potential subsidies and calculate the probable benefit to the company in the most recent fiscal year. This calculation would be the best indication of the countervailing duty rate that would be assessed if a case were brought, because countervailing duty calculations would likely be based on the most recent calendar year.

As with an antidumping audit, an in-depth countervailing duty audit is effective only if followed by specific recommendations that are then acted upon. For example, it may be possible for a company to reduce its countervailing duty exposure by negotiating a higher interest rate on a preferential government loan. The options available to any particular company depend on the circumstances uncovered in the audit.

The extent to which any follow-up monitoring program would be useful also depends on the company's particular circumstances. Monitoring may be useful to ensure that loan repayments are made on time and in full, and if not, that some additional penalty amount is assessed by the sponsoring government institution. A monitoring program might be useful to ensure that a subsidy-free company remains so. Company employees involved in monitoring would therefore review all new loans and other proposed financial arrangements to ensure that countervailing duty liability is not being created.

A monitoring program can also be more extensive. It could involve computer modeling, which might compare the company's sales levels with the benefit from a particular program perceived to be a subsidy subject to countervailing duties. Because a countervailing duty rate essentially consists of the amount of benefit divided by the level of sales, such a monitoring program would warn in advance of potentially high countervailing duty exposure.

A countervailing duty action involves government-wide programs and the government as a respondent. The most effective audit and monitoring program thus should be done in cooperation with the government agencies involved in administering programs found or perceived to be subject to countervailing duties.

III. Marketing Strategies to Avoid or Minimize Liability: What Does and Does Not Work

A. *Timing of Entry into United States Markets*

The timing of exports to the United States is perhaps the most helpful marketing strategy to avoid or minimize antidumping and countervailing duty liability. Timing is helpful because it can significantly affect duty calculations and is under the control of the company.

On the antidumping side, a company ideally would not begin exporting to the United States until it had established a market for the same product in the manufacturing country or in a third country. This strategy allows FMV to be based on the sales prices in one of those markets, and not on constructed value.

Timing strategy can be further refined. A large sale to a customer in the United States at a deep discount will not necessarily give rise to antidumping liability if the company can simultaneously sell the same product at a comparable price and quantity in the home market or a third country. A note of caution, however, is that in an antidumping case the Department of Commerce normally calculates a weighted average FMV over the entire six month investigation. Thus, a single sale at low prices, even in a quantity comparable to a large sale in the United States, may still not be significant enough to lower FMV sufficiently to avoid liability.

On the countervailing duty side, a subsidized product's entry into the U.S. market ideally should not be undertaken until the company has achieved a relatively high level of sales of the product. The reason is that, in general, the amount of countervailing duty is calculated as the amount of the benefit divided by the value of sales. If the product exported to the United States is deemed to have received a domestic subsidy, the benefit is divided by total sales. If the product received an export subsidy, benefit is divided by export sales. Because of this arithmetic, a company exporting a subsidized product to the United States may nevertheless escape significant countervailing duty liability if it maintains a sufficiently high level of export or overall sales.

B. *Avoidance of Certain Suppliers and Distributors*

To minimize antidumping liability, a foreign producer is well advised to stay away from distribution channels in the United States known for aggressive price cutting. Avoiding overcompetitive distributors serves two purposes: minimizing the likelihood of an antidumping case being brought, and decreasing the company's exposure in an actual case, if the offending distribution channel consists of related companies.

On the countervailing duty side, a company is well advised to avoid, if possible, suppliers of major inputs that have already been found to be subsidized. Incorporating such a countervailed input into the product exported to the United States could lead to the allegation of an "upstream subsidy" under relatively new provisions in the countervailing duty law.[14] To illustrate, the Department of Commerce initiated an "upstream subsidy" investigation in the countervailing duty investigation of steel wheels from Brazil, based on the steel input of hot-rolled sheet. Before the entry of a VRA on steel from Brazil, hot-rolled sheet from Brazil was the subject of a countervailing duty order.[15]

C. *U.S. Sales Offices and Shipment Arrangements*

Establishing a sales office in the United States will not avoid a countervailing duty or antidumping case. A sales office in the United States should not affect countervailing duty liability at all. It may affect antidumping calculations, however, because sales through a U.S. office may create ESP rather than Purchase Price transactions. As a general rule, ESP transactions result in higher antidumping margins than transactions treated as Purchase Price sales. Thus, in assessing the business reasons for distributing through an office in the United States, a company should also carefully analyze potential antidumping consequences.

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14. 19 U.S.C. § 1671(e) (1988).

15. Countervailing Duty Order; Certain Carbon Steel Products from Brazil, 49 Fed. Reg. 25,655 (1984).

Antidumping and countervailing duty orders cover all exports of the particular product in question from the particular country named, even if the merchandise is transshipped through a third country.[16] Transshipment will thus not avoid liability under U.S. trade laws.

Moreover, a company cannot avoid antidumping or countervailing duty liability by shipping a product to a third country for the purpose of making minor alterations, at least if an antidumping or countervailing duty order already applies to the product.[17] Minor alterations (such as packaging) that might take place before an antidumping or countervailing duty order is in effect also do not remove products from the scope of an investigation.[18]

Another strategy, attempted without success, is minor processing in the United States of a product subject to an antidumping or countervailing duty order in its finished state.[19] Both case precedent and recent amendments to U.S. statutory law bring such U.S.-processed products within the scope of antidumping and countervailing duty orders.

D. Business Relations with U.S. Producers

Establishing a business relationship with a competing U.S. producer as a supplier or a joint venture partner may be useful for business reasons, but has not historically avoided antidumping or countervailing duty actions. For example, the petitioner in a recent antidumping case involving microdisks from Japan was, at the time of the antidumping petition, involved in a joint venture with a Japanese company. In another case, in an antidumping case involving ethyl alcohol from Brazil, the petitioner itself was a major purchaser of the Brazilian ethanol.

Nevertheless, business relations with U.S. producers may be helpful in two ways. A business relationship establishes a reservoir of goodwill that may diminish U.S. industry support for bringing an antidumping or countervailing duty case. Furthermore, if one or

16. *See, e.g.*, Final Determination of Sales at Less than Fair Value; Color Picture Tubes from Japan, 52 Fed. Reg. 44,171, 44,172 (1987).

17. 19 U.S.C. § 1677j (1988).

18. *E.g.*, Certain In-Shell Pistachios from Iran, Final Determination of Sales at Less than Fair Value, 51 Fed. Reg. 18,919, 18,920 (1986).

19. *See* Gold Star Co. v. United States, 692 F. Supp. 1382 (Ct. Int'l Trade 1988); 19 U.S.C. § 1677j (1988).

more U.S. producers do bring a case, other U.S. producers with significant business relationships with the foreign respondents involved may be willing to oppose the petition and jeopardize the standing of the petitioner.

E. U.S. Political Connections

Even excellent U.S. political connections cannot guarantee that an antidumping or countervailing duty case will be avoided, settled or won. Although there have been exceptions in highly visible and large cases, most cases are unaffected by political intervention by members of Congress, embassies or political appointees.[20]

IV. GETTING OUT OF THE CASE

Once a company is in an antidumping or countervailing duty case, it is difficult to get out.

A. Antidumping Investigations

Although not commonly used, there are several procedures available for terminating an antidumping case. Such procedures are exclusion, termination, suspension, and revocation.

1. Exclusion

A respondent can be excluded from an antidumping investigation, but only after filing a questionnaire response demonstrating no "dumped" sales in the investigation period. An exclusion determination is normally not made until after the response has been verified and a final determination made.[21] As a practical matter, companies do not consider exclusions appealing and the Department of Commerce rarely grants them.

2. Termination

An antidumping investigation can be terminated as to all respondents by withdrawal of the petition.[22] Situations where termi-

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20. *But see* section IV(A)(3), *infra*.
21. *See* 19 C.F.R. § 353.45 (1988).
22. 19 U.S.C. § 1673c(a) (1988).

nation has been allowed have generally involved the entry of a VRA by the government of the foreign exporter involved, such as in the Brazilian steel cases. Since this option involves all respondents as well as the foreign government, it is rarely used.

3. Suspension

Some antidumping cases have been suspended through the entry of a suspension agreement before the final determination. As of the date of this article, there were six such cases (none involving Latin American countries), compared to a total of 166 pending antidumping orders or findings—a suspension rate of less than five percent. Detailed statutory procedures govern the entry and monitoring of suspension agreements and require exporters who account for substantially all of the imports involved to enter into the agreement.[23] Normally, the exporters agree to eliminate "dumped" sales or cease exporting to the United States. These agreements are not common in antidumping proceedings because of the difficulty of reaching an agreement among all the parties, as well as the administrative burden of monitoring an agreement to eliminate sales at "dumped" prices. Whatever the reasons, the Department of Commerce is generally perceived as reluctant to enter antidumping suspension agreements, and appears to overcome its reluctance only in response to significant political pressure.

4. Revocation

After an antidumping order is issued, a respondent can obtain revocation based on the absence of "dumped" sales for at least two years or on "changed circumstances."[24] Changed circumstances typically occur when there has been a VRA or some other arrangement limiting imports. A revocation also typically includes a questionnaire response and verification, and historically has taken several years to finalize.

B. Countervailing Duty Investigations

The same four options permit a company to extract itself from a countervailing duty case, but with greater ease.

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23. 19 U.S.C. § 1673c(b)-(k) (1988).
24. 19 U.S.C. § 1675(b),(c) (1988); 19 C.F.R. § 353.54 (1988).

1. Exclusion

It is easier for a countervailing duty respondent to obtain exclusion from an order than it is for an antidumping duty respondent. Essentially, a firm desiring exclusion need only show that it does not benefit from the subsidy alleged or found.[25]

2. Termination

The circumstances under which a countervailing duty investigation may be terminated parallel those conditions under which an antidumping investigation may be terminated.[26]

3. Suspension

The key difference between getting out of a countervailing duty case as opposed to an antidumping case lies in the greater availability of suspension agreements in a countervailing duty case. Like its antidumping counterpart, detailed statutory procedures also govern the entry and monitoring of countervailing duty suspension agreements.[27] Normally, suspension agreements are based on a commitment to eliminate or offset the subsidy or cease all exports of the product in question. Suspension agreements are much more common in a countervailing duty case, partly because the Department of Commerce can negotiate them with the government/respondent that is the primary target of the case. It is also simpler to monitor the elimination of all exports or cessation of a particular government program than it is to monitor the cessation of sales at dumped prices. As of the date of this article, there were seventeen suspended countervailing duty cases, compared to seventy-five pending countervailing duty orders—a suspension rate of approximately twenty-five percent.

4. Revocation

Revocation of a countervailing duty order as to a particular company can also be obtained under parallel circumstances to those applicable in an antidumping case.[28]

25. *See* 19 C.F.R. § 355.38 (1988).
26. *See* 19 C.F.R. § 355.30 (1988).
27. *See* 19 U.S.C. § 1671c (1988).
28. *See* 19 U.S.C. § 1675(b),(c) (1988); 19 C.F.R. § 355.42 (1988).

V. Conclusion

Overall, then, the only sure "solution" to antidumping and countervailing duty actions by the United States against Latin American countries is to avoid the pricing and other financial circumstances that give rise to liability. These options may not be realistic, however. A more practical solution is preventive maintenance, consisting primarily of internal antidumping and countervailing duty audit and monitoring programs, with some involvement by the foreign government.