

AN EXPORT PRIMER: LEGAL ASPECTS OF EXPORTING FROM THE UNITED STATES

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The United States' severe balance of payments deficit¹ is partly due to the U.S. desire to help develop other nations' economies, stabilize their governments, and strengthen their ability to resist revolutionary change.² Another major factor has been the opening of U.S. markets to foreign goods through reduction of tariffs on imports—a reduction which had generally desirable political effects, but which led to an imbalance in trade affecting the strength and stability of the U.S. dollar abroad.³ This, in turn, has helped to fuel domestic inflation. Realizing the importance of exporting to the U.S. economy, the government is now taking steps to increase our exports.

This article is designed to provide the American exporter and the attorney who is not an expert in export matters with an overview of the legal problems they may face. It is not intended to be comprehensive or to answer specific questions or problems. By reviewing this outline, however, the exporter should gain a realization of the techniques that are available to him in structuring his transaction and some of the pitfalls to avoid.

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1. The relative importance of this trade deficit may be seen statistically by comparison with that of other nations in F. ROOT, *INTERNATIONAL TRADE AND INVESTMENT* 44 (3d ed. 1973).

2. See generally Cooper, *National Economic Policy in an Interdependent World Economy*, 76 *YALE L.J.* 1273 (1967).

3. The evolution of U.S. tariff policy is traced in *STUDIES IN UNITED STATES COMMERCIAL POLICY* (W. Kelly, Jr., ed. 1963). On current law, see Metzger & Dunn, *Trade Agreements Program of the United States*, reprinted in *A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS* (Suitey & Wallace, eds. 1977).

I. LICENSES

The first step of any U.S. exporter is to decide what goods to export and the countries to which they will be sent. He should then review the Export Administration Regulations issued by the U.S. Department of Commerce to determine any restrictions on exporting these goods to the targeted countries.⁴

Most exports are made pursuant to a general license.⁵ However, the exporter is not required to "obtain" this license; a general license authorization to ship most types of goods to most countries is provided in the law.⁶ There is only one compliance step required under a general license: the exporter or his agent, usually a customs house broker, must present a Shipper's Export Declaration to the exporting carrier before the shipment can depart from the United States.⁷ The general license symbol for the particular goods must be entered on the Shipper's Export Declaration; therefore, the exporter or his agent must be familiar with the general license categories. Exports to U.S. territories and Canada do not usually require even a general license.⁸

If there are any restrictions on exporting the particular goods, then the exporter will be required to obtain a validated export license.⁹ To obtain this type of license, the exporter must apply to the U.S. Office of Export Administration.¹⁰ Most exported goods that are controlled fall into one of three categories: (1) those which would have an adverse

4. Export Administration Bulletin (Supp. to Export Administration Regulations, No. 192, 1-19-79), Introduction to the Export Administration Regulations. For an introduction to export controls in the United States, see Berman & Garson, *United States Export Controls—Past, Present and Future*, 67 COLUM. L. REV. 791 (1967).

For an examination into investigations conducted by the Office of Export Control regarding evasions of export controls, see McQuade, *U.S. Trade with Eastern Europe: Its Prospects and Parameters*, 3 LAW & POL'Y INT'L BUS. 42, 80 (1971). For an example of one of the few prosecutions for violation of the Export Control Act, see *United States v. Brumage*, 377 F. Supp. 144 (E.D.N.Y. 1974). See Davison, *Exports of Technical Data and the Export Control Act: Hearing Examiners and Consent Decrees*, 33 GEO. WASH. L. REV. 209, 235-39 (1964) for a discussion of general enforcement under the provisions of the act.

Some representative cases of export control enforcement are reprinted in A. LOWENFELD, *TRADE CONTROLS FOR POLITICAL ENDS* 20 (1977).

5. The measures necessary to comply with general license requirements are set out in A. LOWENFELD, *supra* note 4, at 20-22.

6. 15 C.F.R. § 371.1 (1979).

7. 15 C.F.R. § 371.2(a) (1979). It may also be filed with the Postmaster at place of mailing.

8. 15 C.F.R. §§ 370.4, 385.6 (1979).

9. 15 C.F.R. § 372.1(b) (1979). The Export Administration Act of 1979, 50 App. U.S.C.A. § 2401 (West Supp. 1980), introduced a new license category entitled a "qualified general license" authorizing multiple exports pursuant to an application by the exporter. 50 App. U.S.C.A. § 2403(a)(3) (West Supp. 1980).

10. 15 C.F.R. § 372.4 (1979). These forms are available from any regional office of the Commerce Department or from the Office of Export Administration in the Department of Commerce, Washington, D.C. The forms are reproduced in Metzger & Dunn, *supra* note 3, at 171-81.

effect on national security, such as weapons systems and certain types of technology that could be used in a military effort,¹¹ (2) those which are scarce in the United States and whose export would lead to shortages or increased inflation,¹² and (3) unpublished technical data to certain destinations.¹³ Most of the countries to whom exports are controlled fall into three categories: (1) nations which are enemies, or potential enemies of the United States, such as the Soviet Union or Vietnam,¹⁴ (2) nations which are deemed to have engaged in a pattern of human rights violations,¹⁵ and (3) nations where controls are necessary to significantly further the foreign policy of the United States or to fulfill its international obligation, e.g. the past embargo on trade with Rhodesia.¹⁶ If a commodity requiring a validated export license is to be shipped to one country and then reexported to a third country, the U.S. exporter must request reexport authorization, which will be subject to the same goods and country restrictions as if a direct export was being made.¹⁷

Country and goods restrictions and licensing are generally insignificant in most exporting, but they should always be checked at the outset of a transaction in order to properly structure the agreement and to save time and expense if they do apply. Information on what must be licensed and when restrictions will apply may be obtained from the U.S. Department of Commerce or its district offices, customs house brokers, or attorneys familiar with export procedures.¹⁸

11. 50 App. U.S.C.A. §§ 2402(1),(2) (West Supp. 1980).

12. 50 App. U.S.C.A. §§ 2402(2), 2403(i) (West Supp. 1980); 15 C.F.R. § 377.1(a) (1979).

13. 15 C.F.R. § 379.5(a) (1979). HOUSE COMM. ON GOV'T OPERATIONS, EXPORT OF PRODUCTS BANNED BY U.S. REGULATORY AGENCIES, H.R. REP. NO. 1686, 95th Cong., 2d Sess. (1978).

14. 15 C.F.R. §§ 385.1-2 (1979). For recent news accounts of attempted sales to "sensitive" countries, see *U.S. Judge Acquits Firms, Executives in Conspiracy Case*, Wall St. J., Oct. 17, 1978, at 16, col. 3, and *NATO Group Mulls Revising Sales Curbs on Strategic Technology to Communists*, Wall St. J., Nov. 15, 1978, at 15, col. 1.

15. 15 C.F.R. §§ 385.3-5 (1979). See, e.g., Export Administration Bulletin No. 189, Oct. 26, 1978, limiting exports to Uganda until determination of cessation of violations of human rights. For an example of problems encountered in sales to countries engaged in a pattern of violating human rights, see *Argentina's Orders For Five Boeing Jets Snag on Rights Issue*, Wall St. J., Aug. 10, 1978, at 31, col. 3.

16. 50 App. U.S.C.A. § 2402(2)(B) (West Supp. 1980).

17. 15 C.F.R. §§ 374.1, 385.6 (1979).

18. The objective and scope of U.S. export control regulations and their alleged interference with export promotion are currently undergoing heated debate. See Downey, *Export Controls: Where Are We and Where Are We Headed*, INTERNATIONAL TRADE REPORTER—U.S. EXPORT WEEKLY (BNA), No. 184, Nov. 29, 1977 [hereinafter ITEX]; Norman, *Plan for a National Export Policy Is Sent to President by Administration Officials*, Wall St. J., July 27, 1978, at 16, col. 1; COMPTROLLER'S GENERAL REPORT TO THE CONGRESS: ADMINISTRATION OF U.S. EXPORT LICENSING SHOULD BE CONSOLIDATED TO BE MORE RESPONSIVE TO INDUSTRY (ID-78-60) (Oct. 31, 1978).

Export policy and regulations will be changed yet again as a consequence of legislation

II. STRUCTURE OF EXPORT TRANSACTIONS

An American exporter who sells abroad to an individual or company who will use the product directly rather than reselling it may employ an ad hoc approach in which no agreement is formalized and each sale is taken separately and distinctly. The only significant document used to structure the agreement in most of these transactions is the letter of credit. Even in this situation, the exporter should be careful of the customs of trade and dealing that become an ordinary part of these transactions,¹⁹ for these customs may eventually govern the parties' dealings and decide any disputes. Of course, the same is true in domestic transactions.²⁰

If a series of sales is envisioned, the parties may wish to enter into a formal written sales contract.²¹ At a minimum, the contract should state the names and addresses of the parties, the consideration received by each party, and the length of time that the parties will be bound by its terms. Each party must receive some benefit under the contract if it is to be effective and bind the participants.

Typically, the following provisions should also be spelled out in the contract: (1) how and when payments are to be made and received for the goods sold; (2) when and under what circumstances termination of the contract will be justified; (3) under what circumstances a failure by one of the parties to perform will be excused; (4) the reasons why an order may be declined by the seller; (5) how the contract can be modified; (6) what will constitute a breach of contract and the remedies available to each party when a breach occurs; (7) what warranties cover the goods and for how long they are to be effective; (8) the quality of the goods sold; (9) the export, transportation, and customs procedures to be followed and who is to be responsible for each; (10) who will be responsible for customs charges and taxes; (11) the law that will govern the transactions; and (12) the procedures to be used to settle any disputes that may arise (usually arbitration or the law of a particular state or country).²²

passed by Congress in September 1979. *Export Administration Act of 1979*, see, H. CONF. R. No. 96-480, 96th Cong., 1st Sess. 2, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 1180.

19. *E. H. Perry & Co. v. Langbehn*, 113 Tex. 72, 252 S.W. 472 (1923).

20. *E.g.*, *Easley v. Continental Casualty Co.*, 296 S.W. 487 (Tex. Comm'n App. 1927, jdgmt adopted).

21. On the special risks to be considered in international sales contracts, see A. LOWENFELD, *INTERNATIONAL PRIVATE TRADE* 1-17 (1976). Many such contracts involve dealings with civil law countries. See *Some Comparative Aspects of the Law Relating to the Sale of Goods*, INT'L & COMP. L. Q. SUPPLEMENTARY PUBLICATION No. 9 (1964), and Tunc, *English and Continental Commercial Law*, J. BUS. LAW 234 (1961).

22. Arbitration is generally favored in international transactions. J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 63 (1977). There are several widely used arbitration systems and rules. For guidance see Evans & Ellis, *International Commer-*

An exporter who sells abroad to one who will resell the goods can also use an ad hoc approach and a letter of credit to structure the transaction, but there are more complications in this type of situation and a formal agreement is more in order.²³ If there is no agreement to the contrary and no patent or trademark protection in the country to which the goods are sent, there will be nothing to prevent the importer from copying the goods and manufacturing and selling them himself (unless, of course, the technology is too complicated).²⁴ Furthermore, the exporter can protect himself against many of the peculiarities of the law of the country to which the goods are sent by having a formal sales distribution agreement.²⁵

A distribution agreement should cover the factors mentioned above and contain all the elements of the sales agreement discussed above.²⁶ The agreement should contain a provision stating that the importer will not copy or manufacture the goods shipped to him except under specific agreed-upon terms and it should prevent the distributor from selling competitive goods. It should also provide some trademark and patent protection to the exporter by stating that he is the owner of the exclusive rights to the trademarks and patents on the goods sold while allowing the importer to use the trademarks to promote the goods. A cooperative advertising program may be established and a warranty and servicing program should be provided setting out the re-

cial Arbitration: A Comparison of Legal Regimes, 8 TEX. INT'L L.J. 17 (1973) and C. SCHMITTHOFF, *INTERNATIONAL COMMERCIAL ARBITRATION* (1974). The use of private arbitration outside the United States has been approved by the U.S. Supreme Court. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (discussed in Layton, *Arbitration in International Commercial Agreements: the Noose Draws Tighter*, 9 INT'L LAW. 74 (1975)). For general discussion of the effect given choice-of-forum clauses in the United States and in other countries, see *The Validity of Forum Selecting Clauses: Proceedings of the 1964 Annual Meeting of the American Foreign Law Association*, 13 AM. J. COMP. L. 157 (1964). On litigation of enforcement of judgments, see von Mehren & Patterson, *Recognition and Enforcement of Foreign-Country Judgments in the United States*, 6 LAW & POL'Y INT'L BUS. 37 (1974) and sources cited therein. For examination of considerations in drafting export-import contracts, see LOWENFELD, *supra* note 21, at 1-17 (1976).

23. See C. SCHMITTHOFF, *THE EXPORT TRADE* 162 (6th ed. 1975).

24. On patent, trademark and technology protection overseas, see G. POLLZIEN & E. LANGEN, *INTERNATIONAL LICENSING AGREEMENTS* (1970) and *THE LAW & BUSINESS OF LICENSING* (M. Finnegan & R. Goldscheider eds., 4 vols. 1975-79). The Paris Convention for Protection of Industrial Property is the most important tool in planning overseas protection; reprinted in *DIGEST OF COMMERCIAL LAWS OF THE WORLD* (1977).

25. Bauman, *International Sales Representative and Distributorship Agreements*, 4 N.C.J. INT'L L. & COM. REG. 141 (1979).

26. On distribution agreements, see Graupner, *Sole Distribution Agreements: A Comparative View*, 18 INT'L & COMP. L.Q. 879 (1969); Moore, *Agreements for the Transmission of Technology Abroad: The Distribution Relationship*, 45 DEN. L.J. 52 (1968); Neues, *Exclusive Distribution Agreements in the Common Market*, 22 BUS. LAW. 533 (1967). Sample agreements can be seen in Moore, *supra*, and W. VAN GERVIN & F. LUKOFF, *COMMERCIAL AGENCY AND DISTRIBUTION AGREEMENTS AND RELATED PROBLEMS OF LICENSING IN THE LAW OF THE EEC COUNTRIES AND OF THE EUROPEAN COMMUNITIES* (1970).

sponsibilities of each party. Registration of all patents and trademarks in the country of destination should be considered.²⁷ Ownership of improvements made to the exported goods, enhancement of the value of the trademarks, and goodwill of the exporter's name built up by the distributor in the country in which the products are sold, should be provided for in the agreement.²⁸ The exporter should require indemnity for any actions of the importer that violate the law or cause damage to customers.²⁹ Liabilities caused by defective goods should be considered and the responsibility of the parties fixed. Assignment of the importer's rights under the contract should be limited or prohibited unless agreed to in writing by the exporter, and the importer should be required to report any change in the ownership interests of its business and permit termination by the exporter if the distributor is acquired by a competitor of the exporter.

Within the limits of United States and foreign antitrust laws,³⁰ resale price policy can be established and the distributor's sales territory defined. The distributor should be prohibited from revealing trade secrets and proprietary data. The time at which title and risk of loss passes should be fixed and the distributor prevented from binding the exporter to contracts with others.

An exporter may also consider other forms of contracts such as licensing agreements, mixed licensing and sales distribution agreements, joint venture agreements, technology agreements, and consulting agreements. A licensing agreement³¹ allows the foreign party to manufacture the goods within its country provided that payment of a set fee or commission on the goods manufactured is received by the U.S. party exporting the technology and patents. If sales competition is fierce in the foreign country, this type of agreement may be necessary to eliminate customs duties and make the prices more competitive. A mixed licensing and sales distribution agreement provides that parts of

27. See Bauer, *Trademarks in International Agency Relationships*, 3 IIC WORLD PATENT LAW AND PRACTICE 472 (1972), (8 vols. looseleaf, rev. ed. 1975), and A. SEIDEL, WHAT THE GENERAL PRACTITIONER SHOULD KNOW ABOUT TRADE SECRETS AND EMPLOYMENT AGREEMENTS (1973).

28. On this point it is important to consider the termination compensation rights the distributor may have as a result of an enhancement of the exporter's name or the product. See Cowles, *Indemnities for Terminating Foreign Representatives*, 53 B.U.L. REV. 278 (1973), and Burkard, *Termination Compensation to Distributors under German Law*, 7 INT'L LAW. 185 (1973).

29. See note 36, *infra*.

30. See W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS, chs. 8, 9 (2d ed. 1973), and U.S. DEP'T OF JUSTICE, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (1977).

31. See THE LAW AND BUSINESS OF LICENSING, *supra* note 24. For a practical guide to preparation of licensing arrangements, see Jones, *Fundamentals of International Licensing Agreements and Their Application in the European Community*, 7 INT'L LAW. 78 (1973).

the goods may be manufactured within the foreign country while other parts are imported from the United States. Care should be taken in these agreements to provide that the exporter will continue exclusively to own the patents, trademarks, and any trade secrets.

A joint venture agreement includes capital and technology undertakings by both parties to manufacture and market in the country in which the goods are to be sold.³² This may be necessary where a U.S. company desires to enter the market of a country which requires citizen ownership of a certain percentage of any manufacturing plants established in the country. A joint venture agreement has the advantage of allocating the risks between the parties and making nationalization of the investment less likely.³³ Consulting or technology agreements allow the exporter to provide expertise or technology to the foreign importer for a fee or commission. Each agreement is a little different and may contain distinct provisions.

III. LETTERS OF CREDIT

A letter of credit is a commitment, usually by a bank, to pay a certain sum of money upon terms and conditions specified in the letter.³⁴ A letter of credit offers a high degree of protection to both exporter and importer by eliminating many of the risks involved in international trade.³⁵ Use of a letter of credit benefits the exporter because he is assured of payment for the goods shipped once he obtains the proper documents in good order, usually at or before the time the products are shipped. The importer is benefited because he is assured of receiving documents of title to the goods before payment is released, and he can require, in the letter of credit's terms, independent certification of the quantity and quality of the goods before releasing payment.³⁶

The documents usually required to be provided to the bank before

32. A useful analysis of joint ventures is found in W. FRIEDMAN & G. KALMANOFF, *JOINT INTERNATIONAL BUSINESS VENTURES* (1962).

33. On nationalization and joint ventures see K. BLIVENS & E. LOVELL, *JOINT VENTURES WITH FOREIGN PARTNERS* (1966), and L. FRANKO, *JOINT VENTURE SURVIVAL IN MULTINATIONAL CORPORATIONS* (1971).

34. Harfield, *Letters of Credit and Other Forms of Trade Financing*, PRACTICING LAW INSTITUTE, *INTERNATIONAL BANKING* 1977, at 14 (1977). See also W. WARD & H. HARFIELD, *BANK CREDITS AND ACCEPTANCES* (5th ed. 1974). The definition is based on definition (b) in the 1974 revision of the *Uniform Customs & Practice for Documentary Credits*, INTERNATIONAL CHAMBER OF COMMERCE (I.C.C.) BROCHURE NO. 290 (1974) [hereinafter cited as *Uniform Customs*].

35. See SCHMITTHOFF, *supra* note 22, at 205, 216.

36. *Maurice O'Meara Co. v. National Park Bank of New York*, 239 N.Y. 386, 146 N.E. 636 (1925) and *Sztejn v. Henry Schroder Banking Corp.*, 177 Misc. 719, 31 N.Y.S.2d 631 (Sup. Ct. 1941) make it clear that the bank need not nor should it ordinarily go behind the documents and inspect the goods. However, both cases make it clear that the buyer and

payment include a commercial invoice (the seller's invoice), the bill of lading, and an insurance policy. Additional documents, such as a consular invoice, dock or warehouse receipts, certificates of weight, quality, manufacture, or origin, and an export or import license may also be required.³⁷

A commercial invoice is an exporter's representation as to the quantity and description of the merchandise being shipped under the letter of credit. A description in the letter of credit will normally be a summary of these terms. A bill of lading is a shipping company's representation that the merchandise is in its possession for forwarding. The bill of lading should also show that the goods are loaded on board.³⁸

A U.S. exporter will usually prefer to have an irrevocable letter of credit issued by a U.S. bank or issued by a foreign bank and confirmed by a U.S. bank.³⁹ An irrevocable letter of credit binds the bank to pay the exporter provided he complies with the credit's terms and conditions by producing the proper documents to the bank. A revocable letter of credit gives little protection to the exporter since it may be revoked by the bank issuing it at any time before payment. For this reason, revocable credits are rarely used.⁴⁰ An issuing bank and a confirming bank are under a direct obligation to pay according to the terms of the letter of credit regardless of whether the buyer or another bank can pay.⁴¹

A letter of credit is normally obtained by the importer's application to his bank for an open line of credit of an amount equal to the purchase price of the goods to be paid to the exporter upon presentation of the stated documents.⁴² If the importer's bank agrees to issue a letter of credit, the bank becomes the issuing or opening bank and will notify the importer and the exporter, or a bank near the exporter, that a credit has been issued in his favor. The issuing bank may notify the exporter through a nearby bank with which it has a correspondent relationship or through a bank selected by the exporter in the sales con-

seller may agree with the bank, by provision in the letter of credit, for the bank or an agent to inspect or certify goods represented in the documents.

37. See *Uniform Customs*, *supra* note 34, section D. See also *LOWENFELD*, *supra* note 21, at 123.

38. The technical requirements for invoices and bills of lading are set out in the REVISED AMERICAN FOREIGN TRADE DEFINITIONS—the standard used throughout the United States as reprinted in *LOWENFELD*, *supra* note 21, at 277.

39. See *WARD & HARFIELD*, *supra* note 34, at 37-38.

40. On the distinctions and duties of revocable and irrevocable letters of credit, see *id.* at 38-45.

41. *Id.* at 44-45.

42. For a sample application and agreement for commercial letter of credit, see *id.* at 310-17.

tract. Either way, the notifying bank has no obligation except to give notice unless it agrees to confirm the letter of credit.⁴³

The exporter then ships the goods and obtains the documents listed in the letter of credit at certain points during the transportation of the goods to the importer. The exporter presents these documents to the issuing bank, or to a bank nearer to him such as a confirming bank, and is paid by the latter bank if the documents are in order.⁴⁴ The documents obtained are then shipped by the confirming bank to the issuing bank and presented to the importer who needs them to take possession of the shipment and obtain title.

The letter of credit by the issuing bank represents a loan by it to the importer who, in turn, will pay the issuing bank the amount of the letter plus a commission or interest. Most letters of credit are expressly made subject to the terms of the Uniform Customs and Practice for Documentary Credits.⁴⁵ The exporter should check the terms of this document before shipping to learn what is required to obtain payment under the terms of the letter of credit.

The anti-boycott legislation of 1977 provides that "paying, honoring, confirming or otherwise implementing a letter of credit" with prohibited clauses is illegal, and no U.S. person is obligated to pay or otherwise honor or implement a letter of credit containing these clauses.⁴⁶ The Tax Reform Act of 1976 also provides that a foreign tax credit is denied to U.S. taxpayers for foreign taxes incurred on income received from participation in a foreign boycott.⁴⁷ The anti-boycott provisions will be discussed *infra*,⁴⁸ but they should be kept in mind when preparing a letter of credit.

IV. FINANCING AND INSURANCE

The Export-Import Bank of the United States (Eximbank), Private Export Funding Corporation (PEFCO), and the Foreign Credit Insurance Association (FCIA) have been formed to provide favorable financing and insurance terms to U.S. exporters. A comprehensive

43. On the legal duties of a notifying bank, see *id.* at 34-35.

44. The strict duties of a bank in inspecting documents are set out in *Uniform Customs*, *supra* note 34, arts. 7, 8 and section C; and in WARD & HARFIELD, *supra* note 34, at 70-86. See also *Barclays Bank v. Mercantile National Bank*, 481 F.2d 1224, 1231 (5th Cir. 1973) for a bank's duty to inspect in business transactions other than the sale of goods.

45. See *Uniform Customs*, *supra* note 34. A current list of countries and territories whose banks have adhered to the Uniform Customs is available from the International Chamber of Commerce. A recent listing is reprinted in LOWENFELD, *supra* note 4, at 275-76. See also LOWENFELD, *supra* note 21, at 111-14 for a brief history of the Uniform Customs and their relation to the U.C.C.

46. 50 App. U.S.C.A. § 2407(a)(1)(F) (West Supp. 1980).

47. I.R.C. § 999.

48. See section X *infra*.

treatment of financing and insurance programs available is beyond the scope of this article, but they are considered very briefly.⁴⁹

Eximbank is an independent government agency designed to facilitate the exporting of U.S. goods and services by providing assistance in financing.⁵⁰ One of its major purposes is to help U.S. exporters compete against subsidized foreign competition.⁵¹ It performs this duty by making and guaranteeing loans to U.S. and foreign banks in order to help foreign customers obtain credit for the purchase of U.S. goods.⁵²

Eximbank provides long-term loans of five or more years to finance U.S. exports of capital goods and services.⁵³ The foreign buyer must put up 15% or more of the price as a down payment.⁵⁴ These loans are usually reserved for transactions involving \$5,000,000.00 or more. In order to qualify for a long-term loan, reasonable assurance of repayment must be shown and U.S. goods shipped by ocean freight must be transported by vessels of U.S. registry, unless a waiver is obtained from the U.S. Maritime Administration.⁵⁵

Eximbank also provides a discount loan program for U.S. banks. Advance commitments are issued by Eximbank to make loans to, and buy notes from, U.S. commercial banks when such banks will not finance U.S. export sales without a discount loan.⁵⁶ The commitment covers 100% of the initial loan and is given at an interest rate of 1%

49. For a survey of public and private export financing, see Note, *Financing Exports: Private Methods and Public Assistance*, 2 N.C.J. INT'L L. & COM. REG. 59 (1977) [hereinafter cited as *Financing Exports*].

50. 12 U.S.C.A. §§ 635(a)(1), 635(a)-1(b) (West Supp. 1980). See *Financing Exports*, *supra* note 49, at 70.

51. 12 U.S.C.A. § 635(b)(1)(A) (West Supp. 1980). Among the statutory tools available to the Export-Import Bank for implementing these purposes are included the matching of foreign financing (§ 635a-3) and the providing of guarantees, insurance and extension of credit at rates and terms which are competitive with those provided by the government-supported export credit instrumentalities of other nations (§ 635a-1(b)). PRACTICING LAW INSTITUTE, *NEW TRENDS IN SALES FINANCING* 55 (1973) [hereinafter cited as *NEW TRENDS*].

52. See generally the Export-Import Bank Act of 1945, as amended (Eximbank Act). Most of this information can be obtained from the EXIMBANK BROCHURE 8-9 (January 1978) [hereinafter cited as EXIMBANK]. The funds, normally paid to the exporter, will be reimbursed to the importer if he has already paid. See *Financing Exports*, *supra* note 49, at 70 n.59. Eximbank guarantees are backed by the full faith and credit of the United States. 42 Op. Att'y. Gen. 327 (1966). See also 42 Op. Att'y. Gen. 429, 433 (1971).

53. See *Financing Exports*, *supra* note 49, at 70.

54. The Master Guarantee Agreement between Eximbank and the private bank contains two provisions of importance to the exporter. First, he must receive in advance of delivery ten percent of the price and take the balance in dollar denominated promissory notes. Second, ten percent of the loan must be retained at his own risk. *NEW TRENDS*, *supra* note 51, at 58-61.

55. See *Financing Exports*, *supra* note 49, at 71, for the criteria essential to obtaining a loan. See also Streng, *Export Financing*, 11 SAN DIEGO L. REV. 104, 112 (1973) [hereinafter cited as Streng]. Reasonable assurance of repayment is required by 12 U.S.C.A. § 635(b)(1)(B) (West Supp. 1980).

56. Eximbank discounts export loans in much the same way as the Federal Reserve

below the commercial bank's rate.⁵⁷ To be eligible, the commercial loan must be issued at a fixed interest rate for a medium term.⁵⁸

Another service offered is the bank-to-bank guarantee program. Eximbank guarantees medium term loans made by U.S. banks to financial institutions in developing countries.⁵⁹ The loans are used by the foreign banks to finance purchases of U.S. capital goods.

Finally, Eximbank provides direct loans to foreign banks through its Cooperative Financing Facility.⁶⁰ The loans are used to finance foreign purchases of U.S. goods and services.⁶¹ The loans financed require a 15% down payment by the foreign buyer and are medium term.⁶² Eximbank provides up to 50% of the financed portion of the export sale while the foreign bank provides the remainder. The purchaser normally receives a blended interest rate based on a fixed rate for Eximbank's funds and a floating rate for the foreign bank's funds.⁶³

PEFCO is an association of U.S. commercial banks designed to help foreign importers finance their purchases of U.S. goods. It provides fixed interest rates for medium and long-term obligations as a supplement to loans made by commercial banks and Eximbank; but all loans made by PEFCO must be guaranteed by Eximbank.⁶⁴

FCIA is an association of several leading U.S. insurance companies designed to help U.S. exporters reduce the commercial and political risks of trading abroad. Most of the commercial risks are underwritten by the member companies, although some may be reinsured by Eximbank. Eximbank provides the political risk coverage for exporters.⁶⁵

Political risks that can be insured against include: (a) wars, revolutions, and insurrections; (b) expropriation and confiscation; (c) currency exchange restrictions; and (d) cancellation of import or export licenses.⁶⁶ The policy covers commercial risks such as inventory and

Bank does domestic loans. See *Financing Exports*, *supra* note 49, at 72; Streng, *supra* note 55, at 120-22.

57. EXIMBANK, *supra* note 52, at 10.

58. *Id.* at 9.

59. Streng, *supra* note 55, at 115; EXIMBANK, *supra* note 52, at 9.

60. EXIMBANK, *supra* note 52, at 8-9.

61. Through the Cooperative Financing Facility (CFF), Eximbank and foreign financial institutions will cooperate to extend credit to U.S. exporters. NEW TRENDS, *supra* note 51, at 88; Streng, *supra* note 55, at 122-24.

62. EXIMBANK, *supra* note 52, at 8-9. "Medium term" is generally defined as the period from 181 days up to five years.

63. *Id.* at 9.

64. *Id.* at 18.

65. See Streng, *supra* note 55, at 118-19; NEW TRENDS, *supra* note 51, at 61.

66. See *Financing Exports*, *supra* note 49, at 71 n.62.

receivables financing, and can be specially amended to cover pre-shipment losses due to commercial or political occurrences.

Each policy covers a certain percentage of the losses, usually 90-95%.⁶⁷ At least half of the goods exported must be of U.S. origin before many of these loans or insurance policies will cover the transactions.⁶⁸ Short-, medium-, and long-term financing and insurance plans are available.

Financing and insurance terms are also available for direct U.S. project investment in developing countries. The Overseas Private Investment Corporation (OPIC)⁶⁹ makes direct loans to, or guarantees loans of, U.S. financial institutions for U.S. investment abroad at favorable interest rates.⁷⁰ OPIC encourages joint ventures between U.S. companies and foreign local investors.⁷¹ OPIC also provides insurance covering the same types of risks as FCIA in an amount up to 90% of the initial investment to cover the investment itself and another 180% of the initial investment to cover accrued earnings and interest.⁷² The insurance may be effective for as long as twenty years.⁷³

V. TAX INCENTIVES

The U.S. government taxes American citizens and corporations on their income regardless of whether it comes from within or without the United States.⁷⁴ Most countries, including the U.S., tax income derived from within their borders regardless of the citizenship or residence of the taxpayer. But the possibilities of double taxation are greatly reduced or eliminated by international tax treaties and by the foreign tax credits given by the United States to its taxpayers who pay foreign taxes. Furthermore, the U.S. government provides certain tax benefits for selling goods abroad in order to encourage exporting.

67. FCIA EXPORT CREDIT INSURANCE 7-11; Streng, *supra* note 55, at 119.

68. Owen, *Export Sales*, in TEXAS STATE BAR, INTERNATIONAL LAW at B-11 (1977).

69. For general information on OPIC, see 1978 Annual Report; *Hearings before the Subcommittee on Foreign Assistance of the Senate Committee on Foreign Relations*, on S. 1771 to Amend the Foreign Assistance Act of 1961, 95th Cong., 1st Sess. (statement of Rutherford Poats) (memo available from OPIC).

70. OVERSEAS PRIVATE INVESTMENT CORPORATION, INVESTMENT FINANCING HANDBOOK 3, 5 (June 1978).

71. *Id.* at 7.

72. See OPIC, GENERAL TERMS AND CONDITIONS FOR CONTRACT OF INSURANCE, Publication 001 P6T 6-75 (1975).

73. OVERSEAS PRIVATE INVESTMENT CORPORATION, *supra* note 70, at 15.

74. I.R.C. § 61. A consideration of tax consequences may be found in TILLINGHAST, TAX ASPECTS OF INTERNATIONAL TRANSACTIONS 1-13 (1978). Another useful treatise is W. STRENG, INTERNATIONAL BUSINESS TRANSACTIONS-TAX AND LEGAL HANDBOOK 102-23 (1978) [hereinafter cited as STRENG II]. In addition, see EBB, INTERNATIONAL BUSINESS 237-40 (1964).

A. *Domestic International Sales Corporation.*⁷⁵

The biggest benefit to a U.S. exporter under U.S. law is the provision for tax deferral when selling abroad through a Domestic International Sales Corporation (DISC).⁷⁶ A DISC is not subject as a separate entity to the U.S. corporate income tax, the minimum tax on tax preferences, or the accumulated earnings tax.⁷⁷ While it is subject to other taxes, the exemption from corporate taxation avoids double taxation experienced by most domestic corporations. During the first four years of the DISC's existence, its shareholders are taxed currently on 50% of the DISC's income as a constructive dividend whether or not any funds are distributed.⁷⁸ The remaining income of the DISC is deferred from current taxation and may be retained by the DISC and reinvested in its export business, or invested in producer's loans, or certain Eximbank obligations.⁷⁹ After nine years of operation, deferral of income for a DISC is limited to the amount that its export income exceeds 67% of its average annual export income for the fourth, fifth, sixth, and seventh years preceding.⁸⁰

Another important benefit is provided in the allowance for making "producer's loans" from accumulated nontaxed earnings. A producer's loan is a loan made by a DISC to its parent manufacturing company or to any other U.S. export manufacturing company provided certain conditions are met. Among other conditions, the loan must be evidenced by a note of not more than five years duration, it must be made to a U.S. company engaged in manufacturing, production, growing, or extraction of export property, it must be designated as a producer's loan when made, it must not exceed the DISC's accumulated income, and it will qualify only to the extent of both the increase of the borrower's assets during the year in which the loan was made and the borrower's expenses for experimental activities and research.⁸¹ Finally, certain options are given to DISCs that are not given to other U.S. companies whereby the DISC and its parent company can choose how much income will be allocated to the DISC and how much will be allocated to the parent company.⁸²

75. P.L. 92-178, 85 Stat. 497 (1971).

76. More detailed materials are found in U.S. Treasury DISC Handbook; Brudno & Swayze, *Domestic International Sales Corporations*, 264 TAX MNGM'T (BNA) (1972); Rendell, *Use of a Domestic International Sales Corporation to Reduce Federal Income Tax on Export Earnings*, 11 SAN DIEGO L. REV. 138 (1973).

77. Treas. Reg. § 1.991-1(a) (1974).

78. I.R.C. § 995. See STRENG II, *supra* note 74, at 119-23.

79. I.R.C. § 993(b).

80. I.R.C. §§ 995(b)(1)(E), 995(e)(3), 995(e)(5).

81. I.R.C. § 993(d).

82. I.R.C. §§ 994, 482.

A DISC must be a U.S. corporation not engaged in manufacturing.⁸³ DISCs are generally created as subsidiary corporations to handle exporting for parent manufacturing companies. A DISC can be set up as a Webb-Pomerene corporation to perform exporting functions for several U.S. companies.⁸⁴

To qualify as a DISC, an American corporation must meet the following requirements: 95% or more of its gross receipts must be from export-related activities; 95% or more of its assets must be used in export-related activities; it must have only one class of stock and at least \$2,500 of par or stated value stock outstanding on each day of the year; it must elect to be treated as a DISC; it must have its own bank account on each day of the year; it must maintain separate books and records, and it must not be a tax-exempt corporation, a financial institution, a personal holding company, a sub-chapter S corporation, an insurance company, or an investment company.⁸⁵ A corporation may qualify as a DISC even though not meeting the first two requirements if within a certain time period after the close of the taxable year the DISC makes a pro rata distribution to its shareholders of its taxable income not attributable to export-related receipts or the fair market value of non-export related assets or both.⁸⁶

B. Tax Treaties.

Generally, a U.S. exporter will not be taxed by the country to whom he sells goods unless he is deemed to have a "permanent establishment" in that country.⁸⁷ Simply selling to an independent foreign individual or company for use or for resale within that country will not cause the exporter to be taxed by that nation.

A "permanent establishment"⁸⁸ is usually defined as a fixed place of business through which the business of an enterprise is carried on in whole or in part, and includes a branch, an office, a factory, a work-

83. Treas. Reg. § 1.992-1(a), T.D. 7420, 1976-1 C.B. 211.

84. See STRENG II, *supra* note 74, at 160 n.16.

85. I.R.C. § 992(a); Treas. Reg. § 1.992-1 (1980); STRENG II, *supra* note 74, at 107-10.

86. If at least 70% of the gross receipts of the corporation for the taxable year consist of qualified export receipts, and at least 70% of the sum of the adjusted basis for all of the corporation's assets are qualified export assets, then a distribution made within eight and one half months after the close of the taxable year will qualify the corporation for DISC status. I.R.C. § 992(c)(3). Otherwise, the corporation must show reasonable cause for failure to meet the general DISC requirements and pay 4.5% of the distribution multiplied by the number of taxable years after the taxable year for which the distribution is made and before the distribution is made. I.R.C. § 992(c)(2).

87. U.S. TREASURY MODEL INCOME TAX TREATY, *reprinted in* 1 TAX TREATIES (CCH) (1979) [hereinafter cited as MODEL TREATY]; Treas. Reg. § 1.922-3(a)(4), T.D. 7420, 1976-1 C.B. 212.

88. On the meaning of permanent establishment, see STRENG II, *supra* note 74, at 104; OECD, DRAFT DOUBLE TAXATION TREATY (1977).

shop, or an oil and gas well or other place of mineral extracton.⁸⁹ A construction site or a drilling rig must exist more than two years to be a permanent establishment. Use of facilities or maintenance of a stock of goods solely for the purpose of storage, display, or delivery, and maintenance of a fixed place of business solely for the purpose of purchasing goods or collecting information will not constitute a permanent establishment.⁹⁰ Carrying on business in another country through an independent agent or broker does not constitute a permanent establishment if the agent or broker is acting in the ordinary course of his business.⁹¹ A company will be deemed to have a permanent establishment if a person, other than an independent agent, habitually exercises authority on behalf of the company to conclude contracts in the foreign state.⁹²

This relief from taxation abroad is provided for in the international tax treaties between the United States and other nations.⁹³ Each tax treaty is a little different, however, and should be consulted before the transaction is structured.⁹⁴ If a company has a permanent establishment abroad, usually only the income attributable to that establishment is taxable by that nation. Income of a U.S. businessman on a temporary business visit to another nation is normally exempted from taxation by the visited country.⁹⁵ These treaties usually provide that royalties from personal property and capital gains are taxable only by the country of residence of the taxpayer.⁹⁶

C. Tax Credits.

The U.S. tax laws allow either a deduction from gross income or a credit against taxes for any income, war profits, or excess profits taxes, or any tax imposed "in lieu of" an income tax, paid to foreign governments on income earned outside the United States.⁹⁷ The taxpayer

89. MODEL TREATY, *supra* note 87, art. 5(1).

90. *Id.* art. 5(5).

91. See W. DIAMOND & D. DIAMOND, INTERNATIONAL TAX TREATIES OF ALL NATIONS (1976).

92. *Id.*

93. *Id.*; [1980] TAX TREATIES (CCH). For commentaries, see Irish, *International Double Taxation Agreements and Income Taxation at Source*, 23 INT'L & COMP. L.Q. 292 (1974); Owens, *United States Income Tax Treaties: Their Role in Relieving Double Taxation*, 17 RUTGERS L. REV. 428, 430-31 (1962); Suttrey, *International Tax Conventions: How They Operate and What They Accomplish*, 23 J. TAX. 364 (1965).

94. Hadari, *Tax Treaties and Their Role in the Financial Planning of the Multinational Enterprise*, 20 AM. J. COMP. L. 111 (1972).

95. MODEL TREATY, *supra* note 87, arts. 14(a) and 15(2).

96. *Id.* art. 12.

97. I.R.C. §§ 164, 275, 901(a)-(b), 903. See Dale, *The Reformed Foreign Tax Credit: A Path Through the Maze*, 33 TAX. L. REV. 175 (1978). The most comprehensive studies are

must elect whether to claim a deduction or a credit. Generally, the credit provides greater tax savings and is preferred.

Several limitations apply, however, to reduce the credit allowed to a U.S. taxpayer. These restrictions include recapture of foreign losses and several limitations on use of the foreign tax credit for oil and gas operations abroad.⁹⁸ The general rule provides that the maximum foreign tax credit permitted for a particular year is the proportion of U.S. tax liability (computed with deductions) that the taxpayer's foreign source income from all countries (computed without deductions) bears to its total worldwide income (computed without deductions).⁹⁹ This formula can be stated mathematically as: U.S. tax liability x total foreign sources income ÷ entire worldwide income = maximum foreign tax credit. In other words, U.S. tax liability must first be computed upon the entire worldwide income and then multiplied by the percentage that the foreign source income bears to the worldwide income of the taxpayer.

A portion of the taxpayer's capital gains for the year is included in this computation.¹⁰⁰ If the amount of the foreign tax credit that the taxpayer is allowed in a given year exceeds the limitation under this formula, then the excess credit can be carried back one or two years or forward up to five years to the extent that the limitation on the credit in the year to which it is carried exceeds that year's allowable foreign tax credit.¹⁰¹ In this way, the credit can still be used to its full extent to reduce U.S. tax liability.

D. Possessions Income.

Other tax benefits are given to U.S. residents or companies who derive substantial percentages of their income within U.S. possessions or who set up subsidiary corporations in U.S. possessions or foreign countries.¹⁰² U.S. exporters who plan and structure their transactions properly can achieve significant tax benefits from the use of a DISC, especially when it is combined with a Webb-Pomerene corporation.¹⁰³

E. OWENS & G. BALL, *THE INDIRECT CREDIT* (1975), and E. OWENS, *THE FOREIGN TAX CREDIT* (1961).

98. I.R.C. §§ 901(f), 904(f), 907(a)-(b).

99. I.R.C. § 904(a), (c).

100. I.R.C. § 904(b).

101. I.R.C. § 904(c).

102. I.R.C. § 931.

103. Travaglini, *Webb-Pomerene Act: Overlooked by Exporters* 59 (available from U.S. Department of Commerce, Washington, D.C. 20230).

VI. LIMITED ANTITRUST EXEMPTIONS¹⁰⁴

The Webb-Pomerene Export Trade Act provides an exemption from antitrust enforcement for cooperative efforts by U.S. producers to export to foreign markets.¹⁰⁵ This exemption allows U.S. competitors to share the risks of a new venture and to open new markets.

Any U.S. company or combination of companies can qualify for this exemption by forming a Webb-Pomerene association or corporation that will engage solely in export trade.¹⁰⁶ The only legal requirements of the association or corporation are that it register with the Federal Trade Commission within thirty days of formation and file a verified written statement setting forth the location of its offices, the names and addresses of its officers and stockholders or members, and if incorporated, file a copy of its Articles of Incorporation and Bylaws, and if not incorporated, file a copy of its articles or contract of association.¹⁰⁷ A similar verified statement must be filed on January 1 of each year thereafter setting forth any changes in these matters.¹⁰⁸

One common function of Webb-Pomerene associations is to develop new markets by collecting and disseminating trade information on foreign market conditions, amount of members' inventory available for export, foreign exchange rates, customs requirements, tariff rates, shipping rules and regulations, foreign laws affecting exports, and other valuable data.¹⁰⁹ The association can also develop markets by means of joint foreign promotions, general product advertisement, supplying technical data and samples, market research, and the operation of joint showrooms and trade fairs.¹¹⁰

Qualified associations may also perform the following acts for their members without fear of violating the U.S. antitrust laws: act as the sales agent of its members, fix prices for sales abroad, make joint shipping arrangements, determine quotas and prices at which members should supply the association, fix resale prices for foreign distributors, restrict foreign distributors to handle members' products only, bid on foreign contracts (but not on U.S. government export contracts), and other similar matters.¹¹¹ A qualified association may also buy products

104. A general consideration of antitrust policies in the international trade sphere may be found in H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 987-98 (1976). See generally U.S. DEPARTMENT OF JUSTICE, *ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS* 4 (1977).

105. 15 U.S.C. § 65 (1976). See STRENG II, *supra* note 74, at 43-44.

106. 15 U.S.C. § 65 (1976).

107. *Id.*

108. *Id.*

109. Travaglini, *supra* note 103, at 58; STRENG II, *supra* note 74, at 43.

110. Fugate, *International Distribution Agreements*, 43 *ANTITRUST L.J.* 540, 549 (1974).

111. *Id.* at 549; Travaglini, *supra* note 103, at 57-58.

from its members and sell them abroad, operate as an agent for exporting its members' products, including arranging sales, distribution, and shipping, or merely assist members in exporting.

Most successful Webb-Pomerene associations deal in only one type of product rather than in a large variety of products.¹¹² Natural resources, motion pictures, agricultural products and other foodstuffs, and some types of equipment represent the most common products exported through Webb-Pomerene associations.¹¹³ Nothing prevents producers of other kinds of products from using this device to promote sales of their goods abroad.

Webb-Pomerene associations are not allowed to restrain either trade within the United States or trade of any U.S. competitor abroad, nor artificially raise or lower prices within the United States, except incidental to the lawful activities of the association.¹¹⁴ It cannot be used as a sham by U.S. competitors to agree on prices in the United States or eliminate excess supply to stabilize U.S. prices.¹¹⁵ Nor can it agree with foreign competitors to fix prices or allocate markets,¹¹⁶ and the members must be free to sell to independent U.S. exporters if they so wish.¹¹⁷ These associations also cannot: enter into agreements with U.S. firms that are not association members when the agreements will violate the antitrust laws,¹¹⁸ establish joint manufacturing foreign subsidiaries, restrict members' patents, prevent members from withdrawing from the association upon reasonable notice, force withdrawing members to export through the association indefinitely, accept foreign customers into the association, or prevent imports into the United States.¹¹⁹ An association cannot be used as a vehicle for joint bids on U.S. government export contracts.¹²⁰

The Webb-Pomerene Act allows greater freedom for joint action by exporters than is allowed to nonexporting U.S. companies.¹²¹ A Webb-Pomerene association can also qualify as a Domestic International Sales Corporation (DISC) and can qualify for Export-Import

112. Travaglini, *supra* note 103, at 56.

113. *Id.*

114. 15 U.S.C. § 62 (1976). On the debate over Webb-Pomerene associations and the antitrust law *see* ITEX, No. 218, at A-3 (Aug. 8, 1978).

115. United States v. United States Alkali Export Ass'n, Inc., 86 F. Supp. 59, 79-80 (S.D.N.Y. 1949); Fugate, *supra* note 110, at 549-50.

116. 86 F. Supp. at 79-80; Fugate, *supra* note 110, at 550.

117. Fugate, *supra* note 110, at 550.

118. *Id.*; Travaglini, *supra* note 103, at 58.

119. Travaglini, *supra* note 103, at 58.

120. United States v. Concentrated Phosphate Export Ass'n, Inc., 393 U.S. 199, 208 (1968).

121. Travaglini, *supra* note 103, at 59. *See generally* Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws*, 43 ANTITRUST L.J. 521, 523-24 (1974).

Bank financing and export credit insurance.¹²² By combining the benefits of an association with the tax deferral allowed to a DISC and the favorable loan and insurance terms available, the exporter using this device can achieve substantial benefits for his business.

Apart from the Webb-Pomerene Act, U.S. antitrust laws do not usually apply to U.S. exporters' agreements with foreign distributors unless they have an effect upon U.S. commerce.¹²³ A U.S. exporter may appoint an exclusive foreign distributor for a given country or part of a country.¹²⁴ He may also restrict the territory in which the distributor can resell the exported products, except he cannot forbid the distributor from reselling the goods in the United States.¹²⁵ Furthermore, an exporter may set resale prices at which the distributor can sell abroad, but he may not set prices at which the goods can be resold in the United States.¹²⁶

As long as substantial foreign markets are not foreclosed to other U.S. competitors, U.S. exporters can enter into: (1) exclusive dealing arrangements whereby a distributor is compelled to take all or part of his requirements from the exporter or his designated source, (2) tying clauses through which a distributor or a customer is compelled to take a product which he does not want in order to obtain a product that he does want, and (3) full line forcing requirements whereby a distributor or customer is required to take all products in the exporter's line in order to obtain any of them.¹²⁷

On the other hand, antitrust problems can arise from a division of markets by appointing a foreign distributor who is also a competitor of the exporter or by having a common sales agent with a foreign competitor.¹²⁸ It should also be remembered that many of the activities described above may be prohibited by the laws of the country to which exports are made even though not prohibited by American antitrust

122. Fugate, *supra* note 110, at 544. Application of American antitrust laws to international transactions is considered in W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS (2d ed. 1973). Out of date, but basic is K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (1958). Relevant case law may be found in M. KATZ & K. BREWSTER, THE LAW OF INTERNATIONAL TRANSACTIONS AND RELATIONS 551-54 (1960). An additional useful work is C. FULDA & W. SCHWARTZ, REGULATION OF INTERNATIONAL TRADE AND INVESTMENT 29-33 (1970).

123. *United States v. Imperial Chem. Indus., Ltd.*, 105 F. Supp. 215, 244 (S.D.N.Y. 1952); Fugate, *supra* note 110, at 542.

124. Fugate, *supra* note 110, at 543.

125. *Id.* at 543-44.

126. *Id.*

127. *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. General Dyestuff Corp.*, 57 F. Supp. 642 (S.D.N.Y. 1944); Fugate, *supra* note 110, at 545.

128. *E.g.*, *Grundig-Verkaufs-Gmb v. E.E.C. Comm'n*, E.C.R. 299 [1961-66 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8046.

laws.¹²⁹ For example, it is a violation of European Economic Community (EEC) law to restrict the territory in which an EEC distributor can resell.¹³⁰

VII. FOREIGN UNFAIR TRADE PRACTICES

United States trade law provides for possible retaliatory or corrective action when other nations adopt unfair trade practices.¹³¹ Such practices include any actions that are inconsistent with the provisions of, or deny benefits to the United States under, any international trade agreement, or which are unjustifiable, unreasonable, or discriminatory and which burden or restrict United States commerce.¹³² An exporter affected by this conduct can file a complaint with the Special Representative for Trade Negotiations.¹³³ If the Special Representative determines that an investigation is warranted with respect to the petition, he must initiate it and hold a public hearing.¹³⁴

Upon determining that an investigation is required, the Special Representative requests consultations with the foreign country or instrumentality and seeks to resolve the matter informally.¹³⁵ If the matter is not resolved within the time periods for consultation specified in the trade agreement, the Special Representative requests proceedings under the formal dispute settlement procedures provided in the agreement.¹³⁶ Within certain time periods after the initiation of the investigation, the Special Representative must make recommendations to the President concerning the action to be taken on the petition.¹³⁷ If the President, upon recommendation of the Special Representative, determines that action by the United States is appropriate, he is directed to "take all appropriate and feasible action within his power" to enforce

129. On EEC antitrust law *see generally* C. BELLAMY & G. CHILD, COMMON MARKET LAW OF COMPETITION (2d ed. 1978); EUROPEAN INSTITUTE OF THE UNIVERSITY OF LEIDEN, EUROPEAN COMPETITION POLICY (1973); and D. GILSTRA & F. MURPHY, COMPETITION LAW OF WESTERN EUROPE AND THE USA (3 vols., 1976).

130. *See* note 129, *supra*.

131. On U.S. trade law generally, *see* E. ROSSIDES, U.S. CUSTOMS TARIFFS AND TRADE (1977); and Fisher, *The Anti-dumping Law of the United States: A Legal and Economic Analysis*, 5 L. & POL'Y INT'L BUS. 85 (1973). The basic U.S. law applicable in this area is the Tariff Act of 1930 as amended, the Trade Act of 1974, 19 U.S.C. §§ 1201-1654 (1976); 19 U.S.C. § 2101 (1976); the Antidumping Act of 1921 as amended, 19 U.S.C. § 160 (1976); and the countervailing duty law, 19 U.S.C. § 1303 (1976). The Trade Act of 1974 and subsequent multilateral trade negotiations under it are summarized in INTERNATIONAL ECONOMIC REPORT OF THE PRESIDENT 42-46, March 1976, and S. REP. NO. 1298, 93rd Cong., 2d Sess. (1974).

132. 19 U.S.C. § 2411(a) (1976).

133. *Id.* § 2412(a).

134. *Id.* § 2412(b)(2).

135. *Id.* § 2413.

136. *Id.*

137. *Id.* § 2414(a)(1).

U.S. rights under the trade agreement or to obtain the elimination of such restrictions or subsidies.¹³⁸ In his discretion, the President may withhold the benefits of trade agreements with, and impose duties or other import restrictions on products and services from, the foreign country or instrumentality involved.¹³⁹

The legality of international trade practices is gauged not only by the laws of the United States but also by international agreements among countries. The General Agreement on Tariffs and Trade (GATT),¹⁴⁰ first negotiated thirty years ago, is the most important international convention that regulates these practices. GATT has recently been modified and strengthened by the Tokyo talks, the seventh round of the Multilateral Trade Negotiations (MTN).¹⁴¹ The use of subsidies on exports is strongly discouraged, and in some instances banned, by GATT.¹⁴² A U.S. exporter who has been harmed by a foreign competitor's use of subsidies to export his goods must show, in order to gain relief, that the competitor has obtained more than an equitable share of world export trade in the particular product.¹⁴³ The focus under the original GATT rules was on the whole world market. Under the newly revised MTN provisions, this showing can be made by establishing that the U.S. exporter's goods have been displaced in a particular market (i.e., region or country).¹⁴⁴ Equitable share is measured against the shares of the parties in the relevant market during the three most recent calendar years in which normal market conditions existed.¹⁴⁵ Once the facts have been established, a GATT case has been proven.

Under GATT, complaints must be made to the Committee of Signatories.¹⁴⁶ The GATT procedure attempts to bring the parties together to resolve their differences informally (conciliation); but if this is impossible and the allegations are determined to be true and to constitute a violation of GATT rules, the Committee can permit the nation victimized by the unfair trade practices to take appropriate countermeasures, including the withdrawal of GATT concessions or obliga-

138. *Id.* § 2411(a).

139. *Id.* § 2411(b).

140. Text published in Appendix A of J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 800 (1969) [hereinafter cited as J. JACKSON].

141. Text published in 18 *INT'L LEGAL MATERIALS* 553 (1979) [hereinafter cited as *MATERIALS*].

142. GATT, Art. 16, § B in J. JACKSON, *supra* note 140, at 828, and Art. 10 in *MATERIALS*, *supra* note 141, at 599.

143. GATT, Art. 16, § B(3) in J. JACKSON, *supra* note 140, at 828.

144. Art. 10(2)(a) & (b) in *MATERIALS*, *supra* note 141, at 600.

145. *Id.* Art. 10(2)(c).

146. *Id.* Arts. 16 and 17, at 608-09.

tions.¹⁴⁷

VIII. PRODUCTS LIABILITY ABROAD

Most countries, unlike the United States, do not have a well-developed law of strict products liability.¹⁴⁸ Furthermore, large verdicts like those found in the United States are generally unheard of abroad. U.S. exporters will probably face less chance of a successful suit abroad, and certainly less liability, than they would if they sold their products in this country. Therefore, a manufacturer may be able to save money on products liability insurance premiums by selling abroad. Of course, a person injured by the manufacturer's goods could bring suit in the U.S.,¹⁴⁹ but this could result in a great expenditure of time and money by the consumer. Different courts have reached different results on whether U.S. or foreign law applies to an accident occurring abroad when the product was manufactured in the United States.¹⁵⁰

A close check of the law of the country to which the exporter sells is necessary in light of the definite trend toward development of a strict products liability law in many countries, especially Western European nations.¹⁵¹ A few countries, like France, impose liability on a manufacturer for all commercial losses resulting from a defective product and do not allow the manufacturer to limit his liability by contract.¹⁵² This could result in losses beyond those that would be encountered in the U.S.

By careful planning and contracting, exporters can relieve themselves from potential liabilities, at least in part, and reduce their costs of producing and marketing goods. Greater profits and a keener competitive edge can result.

IX. CONSUMER PRODUCT SAFETY CONTROLS

The Consumer Product Safety Commission (CPSC) is charged

147. *Id.* Art. 18(9), at 612.

148. Siegmund, *Current Developments in Product Liability Affecting International Commerce* 30 (Aug. 1978) (available from U.S. Department of Commerce, Washington, D.C. 20230).

149. See RESTATEMENT SECOND OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 30(1)(a) (1965).

150. See generally Reese, *Products Liability and Choice of Law: The United States Proposals to the Hague Conference*, 25 VAND. L. REV. 29 (1972). See also Annot., 76 A.L.R.2d 130 (1961).

151. Siegmund, *supra* note 148, at 33. The EEC Commission has proposed a new EEC-wide law imposing strict liability even if the manufacturer could prove it had no way of discovering the defect at the time the product was put on the market. ENVIRONMENTAL NEWS (CCH) No. 560, at 3 (October 10, 1979). The text of the draft law is at COM. MKT. REP. (CCH) ¶ 9891.

152. Siegmund, *supra* note 148, at 32.

with administering several acts regulating or banning the manufacture, sale or distribution of unsafe, toxic and hazardous substances.¹⁵³ The act exempts products "manufactured, sold or held for sale for export from the United States."¹⁵⁴ This clause has been given a limited interpretation.¹⁵⁵ Additionally, it does not clearly cover products intended for the U.S. market but diverted to domestic export markets in the face of an adverse safety standard ruling.

The Fourth Circuit Court of Appeals has held that products banned in a U.S. market, in this case, TRIS - treated children's sleepwear, may not subsequently be exported for sale abroad.¹⁵⁶ Overturning the trial court, they held that the Consumer Product Safety Commission could ban the products' export and/or order their distribution.

At the same time Congress enacted legislation extending the CPSC's authority so as to require notification to foreign governments of U.S. exports of products that are banned for health and safety reasons.¹⁵⁷ In implementing the Act, the Commission adopted regulations designed to require exporters "to furnish information . . . beyond that required by the terms of the authorization act."¹⁵⁸ The President moved to lessen the burden of notification on exporters by introducing draft legislation in April 1979.¹⁵⁹ For the present, notification procedures required by the 1978 act are being followed in general terms

153. The Consumer Product Safety Act, 15 U.S.C. §§ 2051-2081 (Supp. IV 1974). Concerning the act generally, see BNA, ABC'S OF THE CONSUMER PRODUCT SAFETY ACT (1973). Regarding the Act's application to international trade, see Note, *Regulation of Importers Under the Consumer Product Safety Act*, 9 CORNELL INT'L L.J. 317 (1976).

154. 15 U.S.C.A § 2067(a)(1) (West Supp. 1980).

155. Salem Carpet Mills, Inc. v. C.P.S.C., No. C78-142R (D.C. W. Va. Dec. 29, 1978) (order denying preliminary injunction) and companion case Civ. No. C78-154R. Both are noted in ITEX, No. 241, at A-5 (Jan. 23, 1979). See also Comment, *United States Export of Products Banned for Domestic Use*, 20 HARV. INT'L L.J. 331 (1979).

156. *United States v. Articles of Hazardous Substance*, 588 F.2d 39, 44 (4th Cir. 1978). See also Salem Carpet Mills, Inc. v. C.P.S.C., *supra* note 155, in which a U.S. carpet manufacturer whose products failed to meet U.S. flammability standards was denied an injunction to compel C.P.S.C. to permit exportation. Note that the C.P.S.C. Act provides for an export exemption when goods are produced for the purpose of export.

157. 15 U.S.C. § 2067(b) (Supp. II 1978). The Act applies to products regulated under the Consumer Product Safety Act, the Flammable Fabrics Act, and the Federal Hazardous Substances Act. 15 U.S.C. § 2079 (1976). The Act does not address the C.P.S.C.'s basic authority to ban exports of hazardous goods. That power exists under present law and was confirmed in *United States v. Articles of Hazardous Substance*, 588 F.2d 39 (4th Cir. 1978).

158. Report of C.P.S.C.'s staff on draft proposed regulations, quoted in ITEX, No. 253, at A-7 (April 17, 1979).

159. The Uniform Hazardous Substances Export Notification Act of 1979 would have required notification only when a product has actually been banned or is a "severe hazard." The draft bill is reprinted in ITEX, No. 254, at P-1 (April 24, 1979). The C.P.S.C. considered this draft bill and unanimously rejected it, adopting its own staff's more restrictive proposed regulations at the same meeting. *Id.* at A-4. The C.P.S.C. proposed regulations drew unanimous objections in comments filed through September 1979. See ITEX, No. 274, at A-2 (September 18, 1979).

pending CPSC adoption of final regulations or new legislation as suggested by the President.

X. FOREIGN BOYCOTTS

In response to requirements imposed upon U.S. firms wishing to do business with Arab countries that they not transact any business with Israel or with companies dealing with Israel or having Jewish partners or officials, Congress enacted rules governing foreign boycott cooperation in 1977.¹⁶⁰ The act itself is short, but the Secretary of Commerce has issued lengthy regulations to help interpret it.¹⁶¹

The act prohibits anyone from refusing to do business with a boycotted country, or any company or individual of the boycotted country, pursuant to an agreement with or request from the boycotting nation.¹⁶² Discriminating against U.S. citizens on the basis of race, religion, sex, or national origin in response to such an agreement or request is also prohibited.¹⁶³ Furnishing information about: a U.S. citizen's race, religion, sex, or national origin; business relationships of others with a boycotted country or with a company or individual of that country; or the association of any person with charitable or fraternal organizations that support a boycotted nation, is also prohibited.¹⁶⁴ Finally, paying or honoring a letter of credit containing a prohibited term is a violation of the act.¹⁶⁵ U.S. citizens are exempted from honoring letters of credit containing these provisions.

The mere absence of a business relationship with a boycotted country or with an individual or company of a boycotted country does not violate the act, nor does the furnishing of normal business information in a commercial context.¹⁶⁶

Exceptions to the restrictive terms of the act are provided for refusing to use carriers of the boycotted country for shipment of goods to the

160. Export Administration Act, 50 App. U.S.C.A. § 2407 (West Supp. 1980); I.R.C. § 999. On the nature, history and response to the Arab boycott of Israel see LOWENFELD, *supra* note 4, at 100-03.

161. 15 C.F.R. § 369 (1979). The Treasury Department is also involved in discouraging U.S. involvement in the boycott. See *The Operation and Effect of the International Boycott Provisions of the Internal Revenue Code* (first annual report of Treasury Department covering period from Nov. 4, 1976-Dec. 31, 1976). The legislative response is traced in Note, *The Development, Scope and Application of the New Antiboycott Law of the United States*, 10 N.Y.U. J. INT'L L. & POL. 397 (1977). An excellent guide to extensive literature is Mersky and Richmond, *Legal Implications of the Arab Economic Boycott of the State of Israel: A Research Guide*, 71 LAW LIBRARY J. 68 (1978). A bibliography is appended to the article.

162. 50 App. U.S.C.A. § 2407(a)(1)(A) (West Supp. 1980).

163. *Id.* § 2407(a)(1)(B).

164. *Id.* § 2407(a)(1)(C)-(E).

165. *Id.* § 2407(a)(1)(F).

166. *Id.* § 2407(a)(1)(A),(D).

boycotting country. Compliance with requirements about import and shipping documents are allowed as long as the information furnished in response to these requirements is not stated in negative, blacklisting, or other exclusionary terms.¹⁶⁷ For example, an exporter can properly state that the goods shipped are exclusively of U.S. origin, but he could not state that the goods shipped are not of Israeli origin.

The boycotting nation may by itself specifically select carriers, insurers, suppliers of services to be performed within the boycotting country, or specific goods identified by origin in the normal course of business when imported into the boycotting country.¹⁶⁸ The U.S. exporter should be careful not to assist the boycotting country in its unilateral selection of carriers, insurers, or suppliers.

Immigration or passport requirements and export requirements of the boycotting country concerning shipments to the boycotted country can also be observed.¹⁶⁹ Finally, compliance with the laws of a country concerning activities performed exclusively within that nation are also permitted.¹⁷⁰ However none of these exemptions allows discrimination against U.S. citizens on the basis of race, religion, sex, or national origin or the furnishing of this information.¹⁷¹

Requests by foreign governments or officials relating to any of these prohibited acts must be reported to the Secretary of Commerce by the U.S. exporter. Violation of the act results in severe penalties including jail terms, fines, or both.¹⁷² Generally, the U.S. exporter will only be concerned with this act when dealing with Arab nations since most boycotts prohibited by the act are those of Arab nations against Israel.

The U.S. exporter must be careful not only to refuse any agreements, requests, or requirements to boycott a certain country or the nationals of that country or to discriminate against U.S. citizens, but he must also report such requests to the government and be cautious in furnishing information to foreign governments about himself, his company, or any other persons or companies.

XI. QUESTIONABLE PAYMENTS

The knowledgeable exporter should also be generally acquainted with his obligations under the Foreign Corrupt Practices Act.¹⁷³ This

167. *Id.* § 2407(a)(2)(B).

168. *Id.* § 2407(a)(2)(C).

169. *Id.* § 2407(a)(2)(D)-(E).

170. *Id.* § 2407(a)(2)(F).

171. *Id.* § 2407(a)(3).

172. *Id.* §§ 2410, 2411.

173. The Foreign Corrupt Practices Act of 1977, 15 U.S.C.A. §§ 78dd-1, 78dd-2 (West

act applies to citizens, nationals, and residents whether in the United States or abroad and will even apply to Americans working for foreign corporations abroad.¹⁷⁴

The Act prohibits bribing, attempting to bribe, or authorizing someone else to bribe any foreign official, foreign political party or official of the party, or foreign candidate for office, either directly or indirectly.¹⁷⁵ To be illegal, however, the act must be done for the purpose of influencing acts, omissions, or decisions of this person in order to obtain or retain business or direct it to someone else.¹⁷⁶ The Act does not prohibit payments to a clerical official in order merely to expedite matters or payments made to avoid increased taxes, obtain approval of higher price ceilings, or political contributions made to maintain a favorable regulatory climate since presumably these would not be made in order to "obtain or retain business."¹⁷⁷ This is the so-called "grease" payments exemption. Payments made because of extortion (a threat to harm life or property) may be excused from the criminal provisions of the Act.¹⁷⁸

Two precautions are in order. First, many of these payments may be outlawed by the laws of the affected country and the U.S. citizen making these payments could be extradited to stand trial. Second, care should be taken because even under the Act, the phrase "obtain or retain business" may be interpreted broadly so as to cover as many types of conduct as possible.¹⁷⁹

This Act is very broad and can be applied in the proper circumstances to the treating of a foreign official to dinner or the giving of a Christmas present. It provides severe penalties for its violation, includ-

Supp. 1980). See generally Atkeson, *The Foreign Corrupt Practices Act of 1977: An International Application of SEC's Corporate Governance Reforms*, 12 INT'L LAW. 703 (1978). See also *The Foreign Corrupt Practices Act: Implications for Directors* (Joseph E. Conner, Chrm. Price Waterhouse & Co., as presented by Henry Gunders, Vice Chrm. Price Waterhouse & Co., 1979).

174. 15 U.S.C. § 78dd-2(d)(1) (Supp. I 1977).

175. *Id.* § 78dd-2(a).

176. A general discussion of the use of bribes in obtaining business may be found in N. JACOBY, P. NEHEMKIS & R. EELLS, *BRIBERY AND EXTORTION IN WORLD BUSINESS* (1977). This book and the general bribery problems are reviewed in Carley, *Payments for Foreign Contracts . . . and the Dilemmas of Forming a Policy*, Wall St. J., Jan. 27, 1978, at 8, col. 3. The Act and problems of interpretation under it have caused serious problems. See *Misinterpreting the Antibribery Law*, Business Week, Sept. 3, 1979. Interestingly enough there is some evidence that the U.S. government may be aware of illegal practices and possibly has encouraged them. See *Government Complicity in Payments?*, Wall St. J., Oct. 26, 1978, at 18, col. 4.

177. 15 U.S.C.A. § 78dd-2(d)(2) (West Supp. 1980); *Foreign Corrupt Practices Act of 1977 and the Regulation of Questionable Payments*, 34 BUS. LAW. 623, 645 (1979) [hereinafter cited as *Foreign Corrupt Practices*].

178. *Foreign Corrupt Practices*, *supra* note 177, at 645-46.

179. See generally *New Law on Bribes Raises Questions for Firms Auditors*, Wall St. J., Jan. 9, 1978, at 16, col. 6; and 48 LAW WEEK (BNA) 2161 (Aug. 28, 1979).

ing fines, jail terms, or both.¹⁸⁰ The American exporter should be wary of these practices.

XII. ENVIRONMENTAL CONTROLS

The National Environmental Policy Act of 1969 (NEPA)¹⁸¹ was Congress' first comprehensive policy statement on environmental problems. The goals of NEPA were to "encourage . . . harmony between man and his environment; . . . and eliminate damage to the environment and biosphere."¹⁸² The major tool for implementing these goals is the environmental impact statement (EIS) required for all federal agencies in their recommendations on legislation and other major federal actions "significantly affecting the quality of the human environment."¹⁸³

Federal agencies have differed on the issue of whether NEPA applies to their activities which impact only in foreign nations.¹⁸⁴ In litigation on the issue, the Defense Department¹⁸⁵ and Export-Import Bank¹⁸⁶ contended that NEPA and its EIS requirement had no overseas application. The resulting statutory language and legislative history are inconclusive. However, pressure built for some extraterritorial application of U.S. environmental policy so that overseas activities, including U.S. government financed or guaranteed export sales, did not create hazards to the world's environment.

180. 15 U.S.C. § 78ff (Supp. I 1977). The potential for prosecution and enforcement under the Act may be found in Jensen, *Antibribery Law Has Some Teeth*, N.Y. Times, Dec. 25, 1977, § 4, p. 2, col. 3. Even if not prosecuted under the antibribery law other grounds for prosecutions exist. A business may be prosecuted under either the "wire fraud statute", 18 U.S.C. § 1343 (1976), which makes it a crime to use interstate or foreign communications to further a scheme to defraud, or under various U.S. currency control laws prohibiting the removal of specified amounts of currency from the U.S. without notice. Although the potential for prosecution is greater, some businesses continue their bribery practices, see *Some U.S. Firms Are Still Paying Bribes Overseas, Despite Law, Investigators Say*, Wall St. J., July 21, 1978, at 4, col. 2.

181. 42 U.S.C. §§ 4321-4347 (1976).

182. 42 U.S.C. § 4321 (1976).

183. 42 U.S.C. § 4332(2)(C) (1976).

184. *Gemeinschaft zum Schutz des Berliner Baumestandes v. Marienthal*, No. 78-1836 *dismissed with prejudice* (D.D.C. April 27, 1979) [U.S. Dept. of Defense view that Act does not apply overseas]; *Export-Import Bank Opposition to Plaintiff's Cross-Motion for Summary Judgment*, at 3-11 in *Sierra Club v. A.E.C.*, 6 E.R.C. 1980 (D.D.C. Aug. 3, 1974); *Sierra Club v. Coleman*, 421 F. Supp. 63 (D.D.C. 1976) [Dept. of Transportation's refusal to consider environmental impacts of Pan-American Highway construction]; *In the Matter of Babcock S. Wilcox*, 5 NRC 1332 (NRC June 27, 1977) [Nuclear Regulatory Comm. held itself not bound to prepare E.I.S.]; DEPARTMENT OF STATE, DRAFT E.I.S., NEW PANAMA CANAL TREATY, CEQ No. 71057 (1972) in which state assumed an obligation to apply the act as did the Commerce Dept. in relation to EIS on IMPORTATION OF SOUTH AFRICAN SEAL SKINS, MORATORIUM, CEQ No. 60209 (1976); *Environmental Defense Fund v. AID*, 6 ELR 20121 (D.D.C. Dec. 5, 1975) (AID reversed itself and complied with NEPA's EIS requirement).

185. *Gemeinschaft zum Schutz des Berliner Baumestandes v. Marienthal*, *supra* note 184.

186. *Sierra Club v. A.E.C.*, *supra* note 184.

The Council for Environmental Quality issued a memorandum in January 1978 stating that NEPA applied extraterritorially and proposed regulations to that effect.¹⁸⁷ This culminated the issue by proposing a new "foreign environmental statement" (FES). The regulations were not adopted. Instead President Carter issued an Executive Order¹⁸⁸ directing all federal agencies involved in foreign activities to draft regulations establishing an environmental analysis procedure.¹⁸⁹ Major federal actions covered are those affecting the environment of (1) the global commons outside any nation's jurisdiction, (2) nations not involved in the activity, (3) foreign nations where a product or project is being sold that is strictly regulated by U.S. law because of its toxic effects, or radioactivity, or (4) natural resources of global importance as designated by the President.¹⁹⁰ The responsibility of preparing an environmental analysis is on the agency.¹⁹¹

The granting of an export license is not "major federal action" under the Act.¹⁹² However, direct loans to finance exports are not excluded. Eximbank loans, guarantees, and FCIA insurance may be subject to the Order,¹⁹³ but the Eximbank rules implementing the President's order interpret the order so as not to apply to credit insurance and guarantees.¹⁹⁴ Eximbank's engineer will determine whether a proposed project may have significant environmental effects. Applicants for the bank's financial commitments should provide the bank with the project's purpose, its description, and a description of the project site.

The law and regulations in the area of environmental controls on exports is still developing. Most agencies have yet to issue their regulations. Thereafter a period of adjustment can be expected as U.S. businesses press further for cutbacks in regulation which they feel interfere with the export competitiveness and environmentalists press for clarifications and more frequent use of EIS's.

187. Memorandum on Application of NEPA to Federal Activities Abroad. *Reprinted in* ITEX, No. 191, at N-1 (Jan. 31, 1978). *See also* Kirschten, *Should Environmental Statements Have an Impact Abroad*, NAT'L J. 1471 (1978).

188. 3 C.F.R. § 356 (1980).

189. The first agency's regulations issued under President Carter's order were those of the Department of Defense, 32 C.F.R. § 197 (1979). *Reprinted in* ITEX, No. 253, at N-1 (April 17, 1979).

190. 3 C.F.R. §§ 2, 3(a)-(d) (1980).

191. *Id.* §§ 2-3.

192. *Id.* §§ 2-5(a)(v).

193. Eximbank published its draft proposed rules on NEPA in May 1979. *Reprinted in* ITEX, No. 258, at R-1 (May 22, 1979).

194. Export-Import Bank, Procedures for Compliance with Executive Order 12114, as amendments to 12 C.F.R. Part 409. *Reprinted in* ITEX, No. 271, at O-1 (Aug. 28, 1979).

XIII. AGRICULTURAL PRODUCTS

It is the declared policy of the United States to expand markets abroad for American agricultural products and encourage exports of agricultural commodities.¹⁹⁵ To this end, financing and credit are available from the Commodity Credit Corporation to foreign purchasers of selected countries in order to open new markets or expand old ones for U.S. agricultural products.¹⁹⁶ The U.S. Department of Agriculture maintains trade offices in several foreign countries to gather and disseminate information on foreign markets for U.S. goods and to help U.S. producers export their agricultural goods.¹⁹⁷ Presently no restrictions exist on export of agricultural goods, but if short supply controls should be established, provision is made for foreign buyers to register their purchases of U.S. agricultural goods for export as an exemption from the controls.¹⁹⁸ Farm products and livestock must be inspected and certified for quality before they can be shipped out of the country.¹⁹⁹

XIV. CONCLUSION

This article is not designed to frighten the American exporter with the difficulties which he faces, but to familiarize him with the legal problems in international transactions. Most of these same difficulties are faced every day in transactions within the United States, and are no more difficult than in domestic transactions, sometimes even less forbidding. For example, most countries do not have a well-established products liability law that will subject the manufacturer to substantial damages if the product malfunctions. Because of the need to increase American exports, the government has granted several benefits to exporters that should be realized and used. Webb-Pomerene associations and corporations, DISCs, and Eximbank financing and insurance are but a few. It is hoped that by knowing the pitfalls and the benefits to be derived from export trade, and realizing that each transaction can be structured to give adequate protection, more U.S. companies will check the prospects for exporting, and therefore, help reduce the U.S. balance of payments deficit.

195. 7 U.S.C. § 1691 (1976).

196. 7 U.S.C. § 1707a (1976).

197. 7 U.S.C. § 1761 (1976).

198. 15 C.F.R. § 377.4 (1979).

199. 7 U.S.C. §§ 76, 78 (1976).