

International Legal Considerations



This chapter covers a wide range of regulations, procedures, and practices that fall into three categories: regulations that exporters must follow to comply with U.S. law; procedures that exporters should follow to ensure a successful export transaction; and programs and certain tax procedures that open new markets or provide financial benefits to exporters.

Export Regulations

General Introduction

The Export Administration Regulations (EAR) regulate the export and reexport of items for national security, nonproliferation, foreign policy, and short supply reasons. The Department of Commerce's Bureau of Export Administration (BXA) has taken important steps to remove unnecessary obstacles to exporting, including completion of U.S. regulatory reform effort and export control liberalizations. Working closely with the exporting community, BXA has simplified the EAR, especially for those companies new to exporting. In addition, export controls have been liberalized on many products sold by U.S. companies around the world, consistent with national security and foreign policy concerns.

A relatively small percentage of exports and reexports requires the submission of a license application to BXA. License requirements are dependent upon an item's technical characteristics, the destination, the end use, and the end user. Determining whether a license is required for export is easier under the newly drafted regulations which consolidate license requirements previously scattered throughout the regulations. Once a classification has been determined, exporters may use a single chart to determine if licenses are needed for a country. The revised regulations include answers to frequently asked questions, detailed step-by-step instructions for finding out if a transaction is subject to the regulations, how to request a commodity classification or advisory opinion, and how to apply for a license.

The EAR groups items (commodities, software, and technology) into ten categories each containing several entries. These entries are the Export Control Classification Numbers (ECCN). These entries are in Supplemental N0. 1 to part 774 of the EAR, which is the Commerce Control List (CCL). The CCL and the Country Chart, Supplement No. 1 to part 738 taken together, define items subject to export controls based solely on the technical parameters of the item and the country of ultimate destination. Items that are listed on the CCL but do not require a license by reason of the Country Chart and items

classified as EAR99 (see 734.3(c) of the EAR entitled "Scope of the EAR") are designated as "NLR," or "no license required."

All countries are not treated in the same way under the EAR because different countries present different national security, nonproliferation, or foreign policy considerations for the United States. A license requirement may be based on the end use or end user in a transaction, primarily for proliferation reasons. Part 744 of the EAR describes such requirements and relevant licensing policies and includes both restrictions on items and restrictions on the activities of U.S. persons.

The EAR covers more than exports. Items subject to the EAR are generally controlled for reexport from one foreign country to another. A relatively small percentage of exports and reexports requires an application to BXA for a license. Many items are not on the CCL or, if on the CCL, require a license only to a limited number of countries. Other transactions may be covered by one or more License Exceptions in the EAR, part 740. However, a license is required for virtually all exports to embargoed destinations such as Cuba. Part 746 of the EAR describes embargoed destinations and refers to certain additional controls imposed by the Office of Foreign Assets Controls of the Treasury Department.

Sometimes the EAR are referred to as "dual use" regulations. The term "dual use" refers to items that can be used for both military and other strategic uses (e.g., nuclear) and commercial applications. It also refers to items with solely civil uses. The term is also used to distinguish the scope of the EAR from items covered by the regulations of other agencies. For example, the U.S. Department of State controls exports of weapons and military related items on the U.S. Munitions List, while the Department of Energy and the Nuclear Regulatory Commission control certain items for nuclear reasons. For more information on the control of agencies other than BXA, see Supplement No. 3 to part 730 of the EAR.

Steps for Using the EAR

You may first look at part 732 of the EAR for the steps you follow to determine your obligations. Part 734 defines the scope of the EAR and excludes certain "publicly available" technology, as well as items properly subject to the jurisdiction of another agency. What is the proper classification for your item? This information is essential to determining any licensing requirements under the EAR. You may either classify your item on your own according to the CCL or you may ask BXA for assistance. The EAR is structured in a way that you should follow the steps in order. To determine whether you need a license, consider, in order, the scope of the EAR (part 734), the ten general prohibitions (part 736), and the license exceptions (part 740).

General Prohibitions

The general prohibitions are found in part 736 of the EAR. The ten general prohibitions describe certain exports, reexports, and other conduct, subject to the scope of the EAR, in which you may not engage unless you have a license from BXA or qualify under part

740 of the EAR for a license exception from each applicable general prohibition paragraph.

License Exceptions

A license exception is an authorization for the export or reexport of some commodities, technology, or software under certain conditions. This gives you authority to ship certain items subject to the EAR that would otherwise require a license. Eligibility for license exceptions may be based on the item to be exported or reexported, the country of ultimate destination, the end use of the item, or the end user. If a license exception is available for a particular transaction, you may proceed with the transaction without a license. A license exception does not require a specific application nor approval from the Department of Commerce. However, you are required to meet all terms, conditions, and provisions for the use of that license exception.

Applying for a License and Application Processing

If an export license is required, you must prepare a Form BXA-748P, "Multipurpose Application Form," and submit it to BXA. The form can be used for requesting an export license, reexports, or commodity classifications. You may request forms by fax at 202-219-9179 or by phone on 202-482-3332. You must be certain to follow the instructions on the form carefully. In some instances, technical brochures and support documentation must also be included.

In reviewing specific license applications, BXA will conduct a complete analysis of the license application along with all documentation submitted in support of the application. In addition to reviewing the item and end use, BXA will consider the reliability of each party to the transaction and review any available intelligence information. To the maximum extent possible, BXA will make licensing decisions without referral of license applications to other agencies; however, BXA may consult with other U.S. departments and agencies regarding any license application. Further information concerning the review policy for various controls is contained in parts 742 and 750.

You may contact BXA for status of your pending certification request, advisory opinion, or license application. For advisory opinion requests, telephone 202-482-4905 or send a fax to 202-219-9179. For license applications and classification requests, telephone BXA's System for Tracking Export License Applications (STELA) at 202-482-2752. STELA is an automated voice response system that, upon request via any standard touch-tone telephone, will provide you with up-to-the-minute status on any license application pending at BXA. Requests for status may be made only by the applicant or the applicant's agent.

Avoiding Delays in Receiving a License

In filling out a license application, reexporters commonly make four errors that account for most delays in processing applications:

1. Failing to sign the application.
2. Handwriting, rather than typing the application.
3. Responding inadequately to section 22(j) of the application, "Description of Commodity or Technical Data," which calls for a description of the item or items to be exported. You must be specific, and you are encouraged to attach additional material to explain the product fully.
4. Responding inadequately to section 21 of the application, where the specific end use of the products or technical data is to be described. Again, you must be specific. Answering vaguely or entering "unknown" is likely to delay the application process.

In an emergency, the Department of Commerce may consider expediting the processing of an export license application, but this procedure cannot be used as a substitute for filing of an application. If you feel you qualify for emergency handling, you should contact the Exporter Counseling Division at 202-482-4811 or by mail to the:

U.S. Department of Commerce
Bureau of Export Administration
Office of Exporter Services
Exporter Counseling Division
14th Street and Constitution Avenue, NW, Room 2706
Washington, D.C. 20230

Export Clearance

If you are issued a BXA license, or you rely on a license exception described in part 740 of the EAR, you are responsible for the proper use of that license or license exception and for the performance of all its terms and conditions.

If you export without either a license issued by BXA or a license exception, you are responsible for determining that the transaction is outside the scope of the EAR or the export is designated as "No License Required."

Both the Foreign Trade Statistics Regulations of the Census Bureau (15 CFR part 30) and the Export Administration Regulations require that the Shippers Export Declaration (SED) be submitted to the U.S. Government. There are exceptions to this rule, but if you are required to submit an SED, you must prepare it in accordance with the rules of the Foreign Trade Statistics Regulations (FTSR) and present the number of copies specified in the FTSR at the port of export. For more information about the FTSR or the SED, visit the Census Bureau online at <http://www.census.gov/foreign-trade/www>.

Records on exports must be retained for five years from date of export, reexport, or any known diversion. For more information on export clearances, see part 758 of the EAR. For additional information on recordkeeping, see part 762.

Where to Get Assistance

The starting point for export licensing requirements and the regulations is the Exporter Counseling Division. BXA's counselors can guide you through the regulations to determine your licensing requirements. They can be reached by phone at 202-48-4811 and fax at 202-482-3617. BXA also maintains a Web site at <http://www.bxa.doc.gov>. The regulations are published in volume 15 of the Code of Federal Regulations starting at part 730. If you wish to purchase a loose-leaf version of the EAR or any electronic version of the EAR with updates, you may contact the National Technical Information Service order desk at 703-487-4630. In addition, the Export Administration Regulations are available through the EAR Electronic Market Place on the World Wide Web at <http://w3.access.gpo.gov/bxa>.

Antidiversion, Antiboycott, and Antitrust Requirements

Antidiversion Clause

To help ensure that U.S. exports go only to legally authorized destinations, the U.S. government requires a destination control statement on shipping documents. Under this requirement, the commercial invoice and bill of lading (or air waybill) for nearly all commercial shipments leaving the United States must display a statement notifying the carrier and all foreign parties (the ultimate and intermediate consignees and purchaser) that the U.S. material has been licensed for export only to certain destinations and may not be diverted contrary to U.S. law. Exceptions to the use of the destination control statement are shipments to Canada and intended for consumption in Canada and shipments being made under certain general licenses. Advice on the appropriate statement to be used can be provided by the Department of Commerce, an attorney, or the freight forwarder.

The minimum antidiversion statement for goods exported under Commerce Department authority is: "These commodities, technology, or software, were exported from the United States in accordance with the Export Administration Regulations. Diversion contrary to U.S. law is prohibited."

Antiboycott Regulations

The United States has an established policy of opposing restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States. This policy is implemented through the antiboycott provisions of the Export Administration Act enforced by the Department of Commerce and through the Tax Reform Act of 1977 enforced by the Department of the Treasury.

In general, these laws prohibit U.S. persons from participating in foreign boycotts or taking actions that further or support such boycotts. The antiboycott regulations carry out this general purpose by:

- Prohibiting U.S. agencies or persons from refusing to do business with blacklisted firms and boycotted friendly countries pursuant to foreign boycott demands;
- Prohibiting U.S. persons from discriminating against, or agreeing to discriminate against other U.S. persons on the basis of race, religion, sex, or national origin in order to comply with a foreign boycott;
- Prohibiting U.S. persons from furnishing information about business relationships with boycotted friendly foreign countries or blacklisted companies in response to boycott requirements;
- Providing for public disclosure of requests to comply with foreign boycotts; and
- Requiring U.S. persons who receive requests to report receipt of the requests to the Commerce Department and disclose publicly whether they have complied with such requests.

The antiboycott provisions of the Export Administration Act apply to all U.S. persons, including intermediaries in the export process, as well as foreign subsidiaries that are "controlled in fact" by U.S. companies and U.S. officials.

The Department of Commerce's Office of Antiboycott Compliance (OAC) administers the program through ongoing investigations of corporate activities. OAC operates an automated boycott-reporting system providing statistical and enforcement data to Congress and to the public, issuing interpretations of the regulations for the affected public, and offering nonbinding informal guidance to the private sector on specific compliance concerns. U.S. firms with questions about complying with antiboycott regulations should call OAC at 202-482-2381 or write to Office of Antiboycott Compliance, Bureau of Export Administration, Room 6098, U.S. Department of Commerce, Washington, DC 20230.

Antitrust Laws

The U.S. antitrust laws reflect this nation's commitment to an economy based on competition. They are intended to foster the efficient allocation of resources by providing consumers with goods and services at the lowest price that efficient business operations can profitably offer. Various foreign countries - including the European Union, Canada, Mexico, Japan, and Australia - also have their own antitrust laws that U.S. firms must comply with when exporting to such nations.

The U.S. antitrust statutes do not provide a checklist of specific requirements. Instead they set forth broad principles that are applied to the specific facts and circumstances of a business transaction. Under the U.S. antitrust laws, some types of trade restraints, known as per se violations, are regarded as conclusively illegal. Per se violations include price-fixing agreements and conspiracies, divisions of markets by competitors, and certain group boycotts and tying arrangements.

Most restraints of trade in the United States are judged under a second legal standard known as the rule of reason. The rule of reason requires a showing that certain acts occurred and such acts had an anti-competitive effect. Under the rule of reason, various factors are considered, including business justification, impact on prices and output in the market, barriers to entry, and market shares of the parties.

In the case of exports by U.S. firms, there are special limitations on the application of the per se and rule of reason tests by U.S. courts. Under Title IV of the Export Trading Company Act (also known as the Foreign Trade Antitrust Improvements Act), there must be a "direct, substantial and reasonably foreseeable" effect on the domestic or import commerce of the United States or on the export commerce of a U.S. person before an activity may be challenged under the Sherman Antitrust Act or the Federal Trade Commission Act (two of the primary federal antitrust statutes). This provision clarifies the particular circumstances under which the overseas activities of U.S. exporters may be challenged under these two antitrust statutes. Under Title III of the Export Trading Company Act (see [Chapter 4](#)) the Department of Commerce, with the concurrence of the U.S. Department of Justice, can issue an export trade certificate of review that provides certain limited immunity from the federal and state antitrust laws.

Although the great majority of international business transactions do not pose antitrust problems, antitrust issues may be raised in various types of transactions, among which are:

- overseas distribution arrangements;
- overseas joint ventures for research, manufacturing, construction, and distribution;
- patent, trademark, copyright, and know-how licenses;

- mergers and acquisitions involving foreign firms; and
- raw material procurement agreements and concessions.

The potential U.S. and foreign antitrust problems posed by such transactions are discussed in greater detail in [Chapter 16](#). Where potential U.S. or foreign antitrust issues are raised, it is advisable to obtain the advice and assistance of qualified antitrust counsel.

For particular transactions that pose difficult antitrust issues, and for which an export trade certificate of review is not desired, the Antitrust Division of the Department of Justice can be asked to state its enforcement views in a business review letter. The business review procedure is initiated by writing a letter to the Antitrust Division describing the particular business transaction that is contemplated and requesting the department's views on the antitrust legality of the transaction.

Certain aspects of the federal antitrust enforcement policies regarding international transactions are explored in the Department of Justice's Antitrust Enforcement Guidelines for International Operations (1995).

Foreign Corrupt Practices Act

It is unlawful for a U.S. firm (as well as any officer, directors employee, agent, or agent of a firm or any stockholder acting on behalf of the firm) to offer, pay, or promise to pay (or to authorize any such payment or promise) money or anything of value to any foreign official (or foreign political party or candidate for foreign political office) for the purpose of obtaining or retaining business. It is also unlawful to make a payment to any person while knowing that all or a portion of the payment will be offered, given, or promised, directly or indirectly, to any foreign official (or foreign political party or candidate for foreign political office) for the purposes of assisting the firm in obtaining or retaining business. "Knowing" includes the concepts of "conscious disregard" and "willful blindness."

There is an exception to the antibribery provisions for "facilitating payments for routine governmental action." The statute lists a number of examples. Actions similar to those listed are also covered by this exception.

A person charged with a violation of the antibribery provisions of the Federal Corrupt Practices Act (FCPA) may assert as a defense that the payment was lawful under the written laws and regulations of the foreign country or that the payment was associated with demonstrating a product or performing a

contractual obligation.

Firms are subject to a fine of up to \$2 million; officers, directors, employees, agents, and stockholders are subject to a fine of up to \$100,000 and imprisonment for up to five years. The Attorney General can bring a civil action against a domestic concern (and the Securities and Exchange Commission [SEC] against an issuer) for a fine of up to \$10,000 as well as against any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of the firm, who willfully violates the antibribery provisions. Under federal criminal laws other than the FCPA, individuals may be fined up to \$250,000 or up to twice the amount of the gross gain or gross loss if the defendant derives pecuniary gain from the offense or causes a pecuniary loss to another person.

The Attorney General may also bring a civil action to enjoin any act or practice of a domestic concern (and the SEC with respect to an issuer) whenever it appears that the domestic concern or issuer (or an officer, director, employee, agent, or stockholder acting on behalf of the domestic concern or issuer) is in violation (or about to be) of the antibribery provisions.

A person or firm found in violation of the FCPA may be barred from doing business with the federal government. Indictment alone can lead to suspension of the right to do business with the U.S. Government.

The Department of Justice has established an Foreign Corrupt Practices Act Opinion Procedure, the details of which are found at 28 CFR Part 77. Under the Opinion Procedure, any party may request a statement of the Justice Department's present enforcement intentions under the antibribery provisions of the FCPA regarding any proposed business conduct. Conduct for which the Department of Justice has issued an opinion stating that the conduct conforms with current enforcement policy will be entitled to a presumption of conformity with the FCPA.

For further information from the Department of Justice about the FCPA and the Foreign Corrupt Practices Act Opinion Procedure, contact the Deputy Chief, Fraud Section, Criminal Division, U.S. Department of Justice, Room 2424, Bond Building, 1400 New York Avenue, NW, Washington, D.C. 20530, 202-514-0651 (FTS) 202-368-0651.

The Department of Commerce supplies general information to U.S. exporters who have questions about the FCPA and about international developments concerning the FCPA and international bribery. For further information from the Department of Commerce about the FCPA, contact the Chief Counsel for International Commerce or the Senior Counsel for International Finance and Trade, Office of the Chief Counsel for International Commerce, U.S. Department of Commerce, Room 5882, 14th Street and Constitution Avenue, NW, Washington, D.C. 20230, 202-482-0937.

Food and Drug Administration and Environmental Protection Agency Restrictions

In addition to the various export regulations that have been discussed, rules and regulations enforced by the Food and Drug Administration (FDA) and the Environmental Protection Agency (EPA) also affect a limited number of exporters.

Food and Drug Administration

FDA enforces U.S. laws intended to assure the consumer that foods are pure and wholesome, that drugs and devices are safe and effective, and that cosmetics are safe. FDA has promulgated a wide range of regulations to enforce these goals. Exporters of products covered by FDA's regulations are affected as follows:

If the item is intended for export only, meets the specifications of the foreign purchaser, is not in conflict with the laws of the country to which it is to be shipped, and is properly labeled, it is exempt from the adulteration and misbranding provisions of the Federal Food, Drug, and Cosmetic Act (see 801(e)). This exemption does not apply to "new drugs" that have not been approved as safe and effective, or to certain devices and biologics. Additional requirements apply to these products. Banned new animal drugs may not be exported.

If the exporter thinks the export product may be covered by FDA, it is important to contact the nearest FDA field office or the Food and Drug Administration. Companies can make inquiries by writing to the FDA at 5600 Fishers Lane, Rockville, MD 20857, calling 1-800-532-4440, or visiting the FDA Web site at: <http://www.fda.gov>.

Environmental Protection Agency

EPA regulates the export of hazardous waste, pesticides, toxic chemicals, and ozone deplete substances. Although EPA generally does not prohibit the export of these substances (there are some exceptions). There are various statutory notification systems design to inform receiving foreign governments that materials of possible human health or environmental concern will be entering their countries, and in some cases, allows for the foreign governments to object to such shipments.

Under the Resource Conservation and Recovery Act (RCRA), there are two different sets of export regulations - one for exports of hazardous wastes moving for recycling within the Organization for Economic Cooperation and Development (OECD) (40 CFR 262 subpart H), and the other for non-OECD hazardous waste exports, as well as for hazardous wastes exported for treatment and disposal, both within and outside the OECD (40 CFR 262 subpart E). In both cases, exports are prohibited absent the consent of the importing government. Exporters

are required to notify EPA's Office of Compliance (EPA/OC) in writing. EPA/OC then forwards the notification to the importing government (and to transit countries, if applicable). In some cases, the written consent of the importing government is required before the shipment may commence; in other cases, consent is considered "tacit" if there is no response from the importing government after 30 days. Exporters should be aware of the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*. This treaty bans trade in hazardous wastes between parties and nonparties unless there is a Basel-consistent bilateral agreement in place. Approximately 110 countries have ratified the Basel Convention; however, the U.S. has not. Therefore, exporters should be aware of potential trade restrictions. Exporters of hazardous waste should contact either EPA's Office of Compliance, Import/Export Program at 202-564-2290 or the RCRA/Superfund Hotline at 800-424-9346 or 703-412-9810.

As for pesticides and other toxic chemicals, neither the federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) nor the Toxic Substances Control Act (TSCA) requires exporters of banned or severely restricted chemicals to obtain written consent before shipping. However, exporters of unregistered pesticides or other chemicals subject to regulatory control actions must comply with certain notification requirements. Under TSCA importing countries are notified of the export or the intended export of many industrial chemicals or mixtures (40 CFR 707 subpart D). These chemicals or mixtures are subject to certain regulator actions taken under the act. Exporters send to EPA, for each affected chemical or mixture, a notice for each country to which the chemical or mixture is exported. The notice is sent annually or only once, depending on the regulatory action controlling the chemical or mixture. The agency then informs the importing country of the regulatory action taken. These notices are also used to satisfy the information exchange provisions of the Prior Informed Consent (PIC) procedures, which are under the United Nations Environment Programme. For chemicals banned or severely restricted in the U.S. and subject to the PIC procedures, EPA forwards to the designated national authority of the importing country information on the chemical's regulatory controls. In addition, TSCA also prohibits the export of polychlorinated biphenyls (PCBs) and PCB-containing items in concentrations greater than or equal to 50 ppm, unless an exemption was granted. The TSCA hotline, 202-554-1404, can provide general information on these export requirements.

A person may not export class I ozone-depleting substances, including chlorofluorocarbons (CFCs), to any country that is not a signatory to the international treaty entitled the *Montreal Protocol on Substances that Deplete the Ozone Layer* (Montreal Protocol). The United States is a signatory to the Montreal Protocol. Under authority of the Clean Air Act Amendments of 1990, the EPA published regulations prohibiting the export of bulk shipments of CFCs, halons, methyl chloroform, carbon tetrachloride, and hydrobromofluorocarbons (HBFCs) to any country not a party to the protocol (40 CFR Part 82 subpart A). Currently, there are 162 nations that are signatories to the Montreal Protocol. The U.S. Customs Service and EPA coordinate to monitor and enforce import and export restrictions on ozone-depleting substances. To obtain an up-to-date list of signatories to Montreal Protocol to export class I ozone-depleting substances

contact EPA's Stratospheric Protection Division at 202-233-9410.

Import Regulations of Foreign Governments

Import documentation requirements and other regulations imposed by foreign governments vary from country to country. It is vital that exporters be aware of the regulations that apply to their own operations and transactions. Many governments, for instance, require consular invoices, certificates of inspection, health certification, and various other documents. For sources of information about foreign government import regulations, see [Chapter 2](#).

Customs Benefits for Exporters

Drawback of Customs Duties

Historically, the word "drawback" has denoted a situation in which the duty or tax, lawfully collected, is refunded or remitted, wholly, or partially, because of a particular use made of the commodity on which the duty or tax was collected.

Drawback was initially authorized by the first tariff act of the United States in 1789. Since then, it has been part of the law, although from time to time the conditions under which it is payable have changed.

The rationale for drawback has always been to encourage American commerce or manufacturers to compete in foreign markets without the handicap of including costs, and consequently in his sales price, the duty paid on imported merchandise.

Types of Drawback

Several types of drawback are authorized under section 1313, Title 19, United States Code:

1. If articles are exported or destroyed, which were manufactured in the United States with the use of imported merchandise, then the duties paid on the imported merchandise used may be refunded as drawback, (less 1 percent which is retained by the U.S. Customs Service (Customs) to defray costs (section 1313(a) drawback).

2. If both imported merchandise and any other merchandise of the same kind and quality are used to manufacture articles, some of which are exported or destroyed before use, then drawback not exceeding 99 percent of the duty which was paid on the imported merchandise is payable on the exports. It is immaterial whether the actual imported merchandise or the domestic merchandise of the same kind and quality was used in the exported articles. This provision in the code makes it possible for firms to obtain drawback without the expense of maintaining separate inventories for imported and domestic merchandise (section 1313(b) drawback - the substitution provision).
3. If merchandise is exported or destroyed because it does not conform with sample or specifications, or was shipped without the consent of the consignee, then 99 percent of the duties which were paid on the merchandise may be recovered as drawback.
4. When certain products manufactured with the use of domestic alcohol are exported or shipped to various island possessions, a drawback of the internal revenue taxes paid on the domestic alcohol may be refunded (section 1313(e) drawback).
5. If imported salt is used to cure fish, the duties on the salt may be remitted (section 1313(e) drawback).
6. If imported salt is used to cure meat which is exported, a drawback, in amounts not less than \$100, of duties paid on the salt may be obtained (section 1313(f) drawback).
7. If imported materials are used to construct and equip vessels and aircraft built for foreign account and ownership, 99 percent of the duties paid on the materials may be recovered as drawback, even though the vessels and aircraft are not, in the strict meaning of the word, exported (section 1313(g) drawback).
8. If imported merchandise is used in the United States to repair jet aircraft engines originally manufactured abroad, the duties paid on the imported merchandise may be recovered as drawback, in the amounts not less than \$100, when the engines are exported (section 1313(h) drawback).
9. If imported merchandise is exported without being used, or destroyed under Customs supervision, 99 percent of the duties paid on the merchandise may be recovered as drawback (section 1313(j) drawback).

If merchandise that is commercially interchangeable with imported merchandise is exported or destroyed under Customs supervision and at the time of exportation or destruction has not been used, 99 percent of the duties on the merchandise may be recovered as drawback (section 1313(j) drawback).

Packaging material used to package merchandise exported or destroyed under section 1313(a), (b), (c), or (j), may receive 99 percent of the duties paid on the packaging materials as drawback (section 1313(q) drawback).

How to Obtain Drawback

As most manufacturers are interested in sections 1313(a) and (b), only the procedures for obtaining drawback under these provisions are discussed.

The purpose of drawback is to enable a manufacturer to compete in foreign markets. To do so, however, the manufacturer must know, prior to making contractual commitments, that he will be entitled to drawback on his exports. The drawback procedure has been designed to give the manufacturer this assurance and protection.

Drawback Proposal

To obtain drawback, first prepare a drawback proposal (statement) and file it with a Regional Commissioner of Customs for section 1313(a) drawback and with the Entry Rulings Branch, Customs headquarters, for other types of drawback, including combination 1313(a) and (b) drawback.

There are currently several general drawback contracts available (orange juice, steel, sugar, component parts, and greige goods) which eliminate the need for submission of a proposal. These have been published in the *Customs Bulletin and Decisions* with instructions as to the procedure for adhering to them.

A simple drawback proposal to serve as a model may be obtained from regional commissioners for section 1313(a) drawback. For other types of drawback, including combination 1313(a) and (b), write to: U.S. Customs Service, Entry Rulings Branch, 1301 Constitution Ave., NW, Franklin Court, Washington, D.C., 20229, or call 202-482-7040. The U.S. Customs Service also maintains an Internet site at <http://www.customs.ustreas.gov>.

Approval

The approval of section 1313(a) proposal takes the form of a letter from a Regional Commissioner of Customs to the applicant. The approval of a section 1313(b) drawback proposal takes the form of a letter from U.S. Customs Service headquarters to the Regional Commissioner of Customs where the applicant will file claims. The applicant receives a copy of this letter. Synopses of all contracts are published in the *Customs Bulletin and Decisions*. The proposal and approval together are called a drawback contract or drawback rate.

If the manufacturer desires to have his contract (rate) changed in any way, he

should file a new proposal (statement) and the procedure is the same as above.

Completion of Drawback Claims

Claims must be filed within three years after the exportation of the articles. To prevent tolling by the statute of limitations, a claim may be filed before a drawback contract (rate) is effective, although no payments will be made until the contract is approved. For completion of same condition

Export Procedure

It is necessary for a drawback claimant to establish that the articles on which drawback is being claimed were exported within five years after importation of the imported merchandise which is the basis for the drawback. In the case of same condition drawback, the time period for exportation is three years after importation. There are three methods which can be used to do so, and these are described in sections 191.51 through 191.56 of the Customs Regulations. Before exporting, a future claimant should make certain that he is taking the necessary steps to comply with one of these procedures.

Export of qualified U.S.-made petroleum products may be shown by matching production at a specific refinery with exports of qualified petroleum of the same kind and quality that occur within 180 days after the refinery produced the designated petroleum product.

Export of qualified imported petroleum products may be shown by matching the amount imported with exports of qualified petroleum products of the same kind and quality that occur within 180 days after the import (section 1313(p) drawback).

Payment of Claims

When a claim has been completed by the filing of all required documents, the entry will be liquidated by the Regional Commissioner of Customs to determine the amount of drawback due. Drawback is payable to the exporter unless the manufacturer reserves to himself the right to claim the drawback.

Accelerated Payment

Accelerated payment of drawback under certain conditions is authorized by section 192.72 of the Customs Regulations. Accelerated payment generally will ensure that a claimant will receive his drawback no later than two months after he files a claim. Accelerated drawback currently applies to same condition drawback.

Effect of the North American Free Trade Agreement

The North American Free Trade Agreement (NAFTA) provisions on drawback will apply to goods imported into the United States and subsequently exported to Canada on or after January 1, 1996. The NAFTA provisions on drawback will apply to goods imported into the United States and subsequently exported to Mexico on or after January 1, 2001.

Drawback

Under the NAFTA, the amount of Customs duties that will be refunded, reduced, or waived is the lesser of the total amount of Customs duties paid or owed on the finished good in the NAFTA country to which it is exported, for purposes of sections 1313(a), (b), (f), (h), and (g).

No NAFTA country, on condition of export, will refund, reduce, or waive the following: antidumping or countervailing duties, premiums offered or collected pursuant to any tendering system with respect to the administration of quantitative import restrictions, tariff rate quotas or trade preference levels, or a fee pursuant to section 22 of the U.S. Agricultural Adjustment Act. Moreover, same condition substitution drawback was eliminated as of January 1, 1994.

U.S. Foreign-Trade Zones

Exporters should also consider the customs privileges of U.S. foreign-trade zones. These zones are domestic U.S. sites that are considered outside U.S. customs territory and are available for activities that might otherwise be carried on overseas for customs reasons. For export operations, the zones provide accelerated export status for purposes of excise tax rebates and customs drawback. For import and reexport activities, no customs duties, federal excise taxes, or state or local ad valorem taxes are charged on foreign goods moved into zones unless and until the goods, or products made from them, are moved into customs territory. This means that the use of zones can be profitable for operations involving foreign dutiable materials and components being assembled or produced here for reexport. Also, no quota restrictions ordinarily apply to export activity.

There are now 217 approved foreign-trade zones in port communities throughout the United States. Associated with these projects are some 356 subzones. These facilities are available for operations involving storage, repacking, inspection, exhibition, assembly, manufacturing, and other processing.

More than 2,800 business firms used foreign-trade zones in fiscal year 1995. The value of merchandise moved to and from the zones during that year exceeded \$143 billion. Export shipments from zones and subzones amounted to nearly \$17 billion.

Information about the zones is available from the zone manager, from local Commerce Export Assistance Centers, or from the Executive Secretary, Foreign-Trade Zones Board, International Trade Administration, U.S. Department of Commerce, Washington, D.C. 20230.

Foreign Free Port and Free Trade Zones

To encourage and facilitate international trade, more than 300 free ports, free trade zones, and similar customs-privileged facilities are now in operation in some 75 foreign countries, usually in or near seaports or airports. Many U.S. manufacturers and their distributors use free ports or free trade zones for receiving shipments of goods that are reshipped in smaller lots to customers throughout the surrounding areas. For further information, contact your local Department of Commerce Export Assistance Center or the Trade Information Center (1-800-872-8723).

U.S. Customs Bonded Warehouse

A Customs bonded warehouse is a building or other secured area in which dutiable goods may be stored, manipulated, or undergo manufacturing operations without payment of duty. Authority for establishing bonded storage warehouses is set forth in Title 19, United States Code (U.S.C.) section 1555. Bonded manufacturing and smelting and refining warehouses are established under Title 19, U.S.C., sections 1311 and 1312.

Upon entry of good into the warehouse, the importer and warehouse proprietor incur liability under a bond. The liability is canceled when the goods are:

- Exported;
- Withdrawn for supplies to a vessel or aircraft in international traffic;
- Destroyed under Customs supervision; or
- Withdrawn for consumption within the United States after payment of duty.

Types of Customs Bonded Warehouses

Nine different types or classes of Customs bonded warehouses are authorized

under section 19.1, Customs Regulations (19 CFR 19.1):

1. Premises owned or leased by the government and used for the storage of merchandise that is undergoing Customs examination, is under seizure, or is pending final release from Customs custody. Unclaimed merchandise stored in such premises shall be held under "general order." When such premises are not sufficient or available for the storage of seized or unclaimed goods, such goods may be stored in a warehouse of class 3,4,or 5;
2. Importers' private bonded warehouses used exclusively for the storage of merchandise belonging or consigned to the proprietor thereof. A class 4 or 5 warehouse may be bonded exclusively for the storage of goods imported by the proprietor thereof, in which case it should be known as a private bonded warehouse;
3. Public bonded warehouse used exclusively for the storage of imported merchandise;
4. Bonded yards or sheds for the storage of heavy and bulky imported merchandise; stables, feeding pens, or corrals, or other similar buildings or limited enclosures for the storage of imported animals; and tanks for storage of imported liquid merchandise in bulk;
5. Bonded bins or parts of buildings or elevators to be used for the storage of grain;
6. Warehouses for the manufacture in bond, solely for exportation, of articles made in whole or in part of imported materials or of materials subject to internal revenue tax; and for the manufacture for home consumption or exportation of cigars made in whole of tobacco imported from one country;
7. Warehouses bonded for smelting and refining imported metal-bearing materials for exportation or domestic consumption;
8. Bonded warehouses established for the cleaning, sorting, repacking, or otherwise changing the condition of, but not the manufacturing of, imported merchandise, under Customs supervision, and at the expense of the proprietor;
9. Bonded warehouses, known as duty-free stores, used for selling conditionally duty-free merchandise for use outside the Customs territory. Merchandise in this class must be owned or sold by the proprietor and delivered from the warehouse to an airport or other exit point for exportation by, or on behalf of, individuals departing from the Customs territory for foreign destinations.

Advantages of Using a Bonded Warehouse

There are several advantages of using a bonded warehouse. No duty is collected until merchandise is withdrawn for consumption. An importer, therefore, has control over use of money until the duty is paid upon withdrawal of merchandise from the bonded warehouse. If no domestic buyer is found for the imported articles, the importer can sell merchandise for exportation, thereby canceling his obligation to pay duty.

Many items subject to quota or other restrictions may be stored in a bonded warehouse. Check with the nearest Customs office before assuming that such merchandise may be placed in a bonded warehouse.

Duties owed on articles that have been manipulated are determined at the time of withdrawal from the Customs bonded warehouse.

Merchandise: Entry, Storage, Treatment

All merchandise subject to duty may be entered for warehousing except perishables and explosive substances other than firecrackers.

Full accountability for all merchandise entered into a Customs bonded warehouse must be maintained; that merchandise will be inventoried and the proprietor's records will be audited on a regular basis. Bonded merchandise may not be commingled with domestic merchandise and must be kept separate from unbonded merchandise.

Merchandise in a Customs bonded warehouse may, with certain exceptions, be transferred from one bonded warehouse to another in accordance with the provisions of Customs Regulations. Basically, merchandise placed in a Customs bonded warehouse, other than class 6 or 7, may be stored, cleaned, sorted, repacked, or otherwise changed in condition, but not manufactured (Title 19, U.S.C., section 1562).

Articles manufactured in a class 6 warehouse must be exported in accordance with Customs Regulations. Waste or byproduct from a class 6 warehouse may be withdrawn for consumption upon payment of applicable duties. Imported merchandise may be stored in a Customs bonded warehouse for a period of five years (Title 19, U.S.C., section 1557(a)).

How to Establish a Customs Bonded Warehouses

Application

An owner or lessee seeking to establish a bonded warehouse must make written application to his or her local Customs port director describing the premises, giving the location, and stating the class of warehouse to be established.

Except in the case of a class 2 or 7 warehouse, the application must state whether the warehouse is to be operated only for the storage or treatment of merchandise belonging to the applicant, or whether it is to be operated as a public bonded warehouse.

If the warehouse is to be operated as a private bonded warehouse, the application must also state the general character of the merchandise to be stored therein, with an estimate of the maximum duties and taxes that will be due on the merchandise at any one time.

Other Requirements

The application must be accompanied by the following:

A certificate signed by the president or a secretary of a board of fire underwriters that the building is a suitable warehouse and acceptable for fire insurance purposes. At ports where there is no board of fire underwriters, certificates should be obtained and signed by officers of agents of two or more insurance companies.

A blueprint showing measurements to be bonded.

If the warehouse to be bonded is a tank, the blueprint shall show all outlets, inlets, and pipelines and shall be certified as correct by the proprietor of the tank. A gauge table showing the capacity of the tank in U.S. gallons per inch or fraction of an inch of height, shall be included and certified by the proprietor as correct.

When a part or parts of the building are to be used as a warehouse, a detailed description of the materials and construction of all partitions shall be included.

Bonds Required

Bonds for each class of warehouse shall be executed on Customs Form 301.

Duty-free shops (class 9) have specific requirements governing their establishment. These requirements include location, exit ports, record-keeping systems, and the approval of local governments.

Where are Customs Offices Located?

The U.S. Customs Service has more than 300 ports of entry in the United States, Puerto Rico, and the U.S. Virgin Islands. Please consult your local telephone directory under "U.S. Treasury Department, Customs Service."

Foreign Sales Corporations

One of the most important steps a U.S. exporter can take to reduce federal income tax on export-related income is to set up a foreign sales corporation (FSC). This tax incentive for U.S. exporters replaced the domestic international sales corporation (DISC), except the interest charge DISC. While the interest charge DISC allows exporters to defer paying taxes on export sales, the tax incentive provided by the FSC legislation is in the form of a permanent exemption from federal income tax for a portion of the export income attributable to the offshore activities of FSCs (26 U.S.C., sections 921-927). The tax exemption can be as great as 15 to 30 percent on gross income from exporting, and the expenses can be kept low through the use of intermediaries who are familiar with and able to carry out the formal requirements. A firm that is exporting or thinking of exporting can optimize available tax benefits with proper planning, evaluation, and assistance from an accountant or lawyer.

An FSC is a corporation set up in certain foreign countries or in U.S. possessions (other than Puerto Rico) to obtain a corporate tax exemption on a portion of its earnings generated by the sale or lease of export property and the performance of some services. A corporation initially qualifies as an FSC by meeting certain basic formation tests. An FSC (unless it is a small FSC) must also meet several foreign management tests throughout the year. If it complies with those requirements, the FSC is entitled to an exemption on qualified export transactions in which it performs the required foreign economic processes.

FSCs can be formed by manufacturers, nonmanufacturers, or groups of exporters, such as export trading companies. An FSC can function as a principal, buying and selling for its own account, or as a commission agent. It can be related to a manufacturing parent or it can be an independent merchant or broker.

An FSC must be incorporated and have its main office (a shared office is acceptable) in the U.S. Virgin Islands, American Samoa, Guam, the Northern Mariana Islands, or a qualified foreign country. In general, a firm must file for incorporation by following the normal procedures of the host nation or U.S. possession. Some nations, offer tax incentives to attract FSCs. To qualify, a company must identify itself as an FSC to the host government. Consult the government tax authorities in the country or U.S. possession of interest for specific information.

A country qualifies as an FSC host if it has an exchange of information agreement with the United States approved by the U.S. Department of the Treasury. As of September 17, 1996, the qualified countries were Australia, Austria, Barbados, Belgium, Bermuda, Canada, Costa Rica, Cyprus, Denmark, Dominica, the Dominican Republic, Egypt, Finland, France, Germany, Grenada, Guyana, Honduras, Iceland, Ireland, Jamaica, Korea, the Marshall Islands, Malta, Mexico, Morocco, Netherlands, New Zealand, Norway, Pakistan, Peru, the Philippines, St. Lucia, Sweden, and Trinidad and Tobago. Since the Internal Revenue Service (IRS) does not allow foreign tax credits for foreign taxes imposed on the FSC's qualified income, it is generally advantageous to locate an FSC only in a country where local income taxes and withholding taxes are minimized. Most FSCs are incorporated in the U.S. Virgin Islands or Guam.

The FSC (unless it is a small FSC) must have at least one director who is not a U.S. resident, must keep one set of its books of account (including copies or summaries of invoices) at its main offshore office, cannot have more than 25 shareholders, cannot have any preferred stock, and must file an election to become an FSC with the IRS. Also, a group may not own both an FSC and an interest charge DISC.

The portion of the FSC gross income from exporting that is exempt from U.S. corporate taxation is 30 percent for a corporate-held FSC if it buys from independent suppliers or contracts with related suppliers at an "arm's-length" price - a price equivalent to that which would have been paid by an unrelated purchaser to an unrelated seller. An FSC supplied by a related entity may also qualify to use the special administrative pricing rules to compute its tax exemption. Although an FSC does not have to use the two special administrative pricing rules, these rules may provide additional tax savings for certain FSCs.

Small FSCs and interest charge DISCs are designed to give export incentives to smaller businesses. The tax benefits of a small FSC or an interest charge DISC are limited by ceilings on the amount of gross income that is eligible for the benefits.

The small FSC is generally the same as an FSC, except that a small FSC must file an election with the IRS designating itself as a small FSC - which means it does not have to meet foreign management or foreign economic process requirements. A small FSC tax exemption is limited to the income generated by \$5 million or less in gross export revenues.

An exporter can still set up a DISC in the form of an interest charge DISC to defer the imposition of taxes for up to \$10 million in export sales. A corporate shareholder of an interest charge DISC may defer the imposition of taxes on approximately 94 percent of its income up to the \$10 million ceiling if the income is reinvested by the DISC in qualified export assets. An individual who is the sole shareholder of an interest charge DISC can defer 100 percent of the DISC income up to the \$10 million ceiling. An interest charge DISC must meet the following requirements: the taxpayer must make a new election; the tax year of the new DISC must match the tax year of its majority stockholder; and the DISC

shareholders must pay interest annually at U.S. Treasury bill rates on their proportionate share of the accumulated taxes deferred.

A shared FSC is an FSC that is shared by 25 or fewer unrelated exporter-shareholders to reduce the costs while obtaining the full tax benefit of an FSC. Each exporter-shareholder owns a separate class of stock and each runs its own business as usual. Typically, exporters pay a commission on export sales to the FSC, which distributes the commission back to the exporter.

States, regional authorities, trade associations, or private businesses can sponsor a shared FSC for their state's companies, their association's members, or their business clients or customers, or for U.S. companies in general. A shared FSC is a means of sharing the cost of the FSC. However, the benefits and proprietary information are not shared. The sponsor and the other exporter-shareholders do not participate in the exporter's profits, do not participate in the exporter's tax benefits, and are not a risk for another exporter's debts.

For more information about FSCs, U.S. companies may contact the the Office of the Associate Chief Counsel for International Commerce, U.S. Internal Revenue Service 202-622-3810; the Office of the Chief Counsel for International Commerce, U.S. Department of Commerce 202-482-0937; or a local office of the IRS.

Intellectual Property Considerations

Intellectual property refers to a broad collection of rights relating to such matters as works of authorship, which are protected under copyright law; inventions, which are protected under patent law; marks, which are protected by trademark law; as well as designs and trade secrets. No international treaty completely defines these types of intellectual property, and the laws of the various countries differ from each other in significant respects. National intellectual property laws create, confirm, or regulate a property right without which others could use or copy a trade secret, an expression, a design, or a product or its mark and packaging.

The rights granted by a U.S. patent, trademark registration, copyright, or mask work (semiconductor chip) registration extend only through the United States and its territories and possessions. They confer no protection in a foreign country. There is no such thing as an international patent, trademark, or copyright. To secure rights in any country, you must apply for a patent or register a mask work or trademark in that country. Copyright protection depends on national laws, but registration is typically not required. There is no real "short cut" to worldwide protection of intellectual property. However, some advantages and minimum standards for the protection and enforcement of intellectual property exist under

treaties or other international agreements.

International Agreements: The oldest treaty relating to patents, trademarks, and unfair competition is the Paris Convention for the Protection of Industrial Property. The United States and over 130 other countries are parties of this treaty. The Paris Convention sets minimum standards of protection and provides two important benefits: the right of national treatment and the right of priority.

Overgeneralizing, "national treatment" means that a Paris Convention country will not discriminate against foreigners in granting patent or trademark protection. Rights may be greater or less than those provided under U.S. law but the rights given will be the same as that country provides to its own citizens.

An invention may become public and therefore unpatentable in many countries, when a patent is issued or an application is laid open to inspection in any country. In addition, a delay in filing a patent or trademark application leaves open the possibility that those rights will be lost because of intervening acts such as sale of the invention or registration of the trademark by another. The Paris Convention's "right of priority" provides a solution to this problem by giving an inventor an alternative to filing applications in many countries simultaneously. It allows the applicant one year from the date of the first application filed in a Paris Convention country (six months for a design or trademark) in which to file in other countries. Publication or sale of an invention after first filing will therefore not jeopardize patentability in countries which grant a right of priority to U.S. applicants. Not all countries adhere to the Paris Convention but these benefits may be available under another treaty or bilateral agreement. These substantive obligations have been incorporated into the World Trade Organization (WTO) Agreement on Trade Related Aspects of Intellectual Property (TRIPs), by reference for adherence by WTO members.

The United States is also a party to the Patent Cooperation Treaty (PCT), which provides procedures for filing patent applications in its member countries. The PCT allows an applicant to file one "international application" designating member countries in which a patent is sought, with the same effect as filing national applications in each of those countries. The applicant may then later proceed with the filing of separate "national" applications in those countries.

The United States' international copyright regulations are governed principally by the Berne Convention for the Protection of Literary and Artistic Works ("Berne"), to which more than 120 other nations adhere. The United States is also a member of the Universal Copyright Convention (UCC) and has special bilateral relations with a number of foreign countries. Under the Berne Convention, works created by a national of a Berne Union country, or works first or simultaneously published in a Berne country are automatically eligible for protection in every other country of the Berne Union, without registration or compliance with any other formality of law. This is true of works first published in the United States on or after March 1, 1989 the date on which the United States acceded to the Berne Convention. Works first published before March 1989 were protected in many countries by virtue of the United States' membership in the UCC, if published with

the formalities specified in that convention. Older works may also be protected as a consequence of simultaneous publication in a Berne country, or by virtue of bilateral obligations. In any event, the requirements and protection available vary from country to country, and should be investigated before first publication anywhere.

North American Free Trade Agreement and Agreement on Trade-related Aspects of Intellectual Property: Both the North American Free Trade Agreement (NAFTA) and the Agreement on Trade-related Aspects of Intellectual Property (TRIPs) (which is under the auspices of the World Trade Organization) establish minimum standards for the protection and enforcement of intellectual property. Neither of these agreements bestow rights upon U.S. intellectual property owners. Rather, both agreements ensure that a member state that is party to one or both of these agreements provides a certain level of protection to those individuals or companies protected under that member state's laws.

Patents: U.S. patent law differs from the laws of most other countries in several important aspects. The U.S. patent law grants a patent to the first inventor even if another person independently makes the invention and files an application first. Most other countries award the patent to the inventor who first files a patent application. The United States also provides a one-year "grace period" that does not preclude an inventor from obtaining protection after an act such as publishing, offering for sale, or using the invention which would make the invention public. Many countries, including most European countries, lack such a grace period to allow an inventor to so disclose the invention prior to filing a patent application. In countries with an "absolute novelty" rule, a patent application must be filed before making the invention public anywhere. Hence, even the publication of an invention in a U.S. patent grant is a disclosure that can defeat the right to obtain foreign patents, unless the applicant is entitled to claim the "right of priority" under the Paris Convention, as described.

Unlike the United States, many countries require that an invention be "worked" locally to retain the benefit of the patent. "Working" may require commercial-scale manufacture within the country, or may be met by importation of goods covered by the patent, depending on a particular country's law. The Paris Convention permits penalties for nonworking, which may include a compulsory license at a reasonable royalty followed by possible forfeiture of the patent for continuing to fail to work an invention.

For an invention made in the United States, U.S. law prohibits filing abroad without a foreign filing license from the Patent and Trademark Office unless six months have elapsed since filing a U.S. application. This prohibition protects against transfer of information which might damage the national security. The penalties for filing abroad without following these requirements range from loss of U.S. patent rights to possible imprisonment if classified information is released. In addition, other export control laws require that a license be obtained prior to the export of certain technologies, even if no patent application is filed, or bar their export altogether.

Trademarks: A trademark is a word, symbol, or device which identifies and distinguishes the source of sponsorship of goods and may serve as an index of quality. Service marks perform the same function for businesses dealing in services rather than goods. For example, an airplane manufacturer might register its service mark. In the United States, rights to trademarks, service marks, and other marks such as collective marks are acquired through use or prior foreign registration. However, in most countries, trademark rights are acquired only through registration, and many countries require local use of the registered mark to maintain the registration. Whether a given mark can be registered in a particular country will depend on the law of that country. For example, some countries do not protect service marks. The United States is not a member of any agreement under which a single filing will provide international protection, although the right of priority under the Paris Convention confers a substantial benefit.

Expanding businesses sometimes face a period of time in which their mark may be known and perhaps registered in the United States, but they are not quite ready to do business abroad. It is prudent to decide early where trademark protection will be needed and to protect rights by filing in those countries. Where to file is a business decision, balancing the expense of registration against its benefit. At a minimum, you will want to file in countries in which you will do business. You may also find it desirable to file in countries which are known sources of counterfeit goods, although some require local use to maintain a registration. Although trademark laws impose no deadlines for registering a mark, as a practical matter, a business should register promptly in order to avoid having its mark registered by someone else.

Although not a legal requirement, it may help to investigate the connotation of a trademark, trade name, number, or trade dress before making a major investment in another country. A different language or culture may have unfavorable, silly, or even rude meanings for words or symbols with neutral or favorable connotations in the United States. Even packaging colors may connote different meanings. For example, white may imply purity in the United States, but it is the color of mourning in most of the Far East.

Trade names are also protected on a country-by-country basis. Although the Paris Convention requires protection of trade names, they are not necessarily registered as is the case in the United States. Each country protects them in accordance with its own business practices.

Copyrights: A copyright protects original works of authorship. In the United States, this protection gives the owner the exclusive right to reproduce the work, prepare derivative works, distribute copies, or perform or display the work publicly.

In the United States, "original works of authorship" include literary, dramatic, musical, artistic, and certain other intellectual works. A computer program, for example is considered a literary work protected by copyright in the United States and in a large and increasing number of foreign countries.

In most countries, the place of first publication determines whether copyright protection is available. Some countries require certain formalities to maintain copyright protection. Many other countries, particularly member countries of the Berne Union, offer copyright protection without these formalities. Still others offer little or no protection for the works of foreign nationals. Before publishing a work anywhere, it is advisable to investigate the scope of protection available, as well as the specific legal requirements for copyright protection in countries in which copyright protection is desired.

Semiconductor Chips and Mask Works: The Semiconductor Chip Protection Act of 1984 provides a special system of legal protection for original mask works used in the production of semiconductor chips. It confers the exclusive right to produce and distribute mask works for a term of ten years, subject to registration by the Copyright Office.

The act also created an incentive for other countries to provide such protection since its benefits are available to any foreign national whose home country's laws extend similar protection to U.S. nationals. Protection on an interim basis is available to foreign nationals whose country undertakes good faith efforts to provide protection for mask works of U.S. nationals. The Secretary of Commerce, through the Patent and Trademark Office, determines which countries are entitled to protection under this act.

Unfair Competition and Related Rights: In the United States, federal law protects exclusive rights in patents, copyrights, and mask works. Other intangible property such as trademarks, trade names, business goodwill, trade secrets, and know-how are protected against unfair competition by federal and state law.

Most developed countries have unfair competition laws similar to the United States, although details vary. The European Union, for example, bans "restrictive business practices" that would restrict trade among the countries of the Union.

Not all countries have unfair competition laws, and even in some countries that do have them, their coverage may not be as extensive as in the United States. For example, protection for trade secrets of valuable unpatented technology may be inadequate. Before divulging any information which could be helpful to a potential competitor, it would be wise to investigate the protection available in the recipient's country and in any country which may be a potential market. Written agreements also should be used to protect all trade secrets that are divulged (e.g. licensing agreements and employment agreements).

Social and economic policies may also affect the value of intellectual property. Some countries restrict the right to do business unless the foreign concern assists in meeting certain goals. Typical examples include requirements for generic labels of comparable size with the trademark, requirements for local working of patented inventions, better treatment for businesses with local ownership, and restrictions on intellectual property regulations may still require

submission of proprietary information to the authorities, without restricting access to it by local competitors. The best rule is to investigate before you invest.

Enforcement: After securing valuable intellectual property, the owner must enforce it vigorously to derive the maximum benefit. The ease of enforcement depends on local law, the resources of the intellectual property owner, the attitude of local officials, and many other factors. In general, the United States views intellectual property as a private right to be enforced by its owner.

Enforcement must be accomplished through local law. In the United States and many countries, intellectual property rights are enforced by a civil suit for infringement. The intellectual property owner may be awarded damages or an injunction against infringement. Preliminary injunctions may also be available to prevent ongoing violations of intellectual property rights before a final decision on the merits by a court.

In the United States, the owner may protect against importation of infringing goods by recording a trademark or copyright with the U.S. Customs Service. An intellectual property owner also may bring a proceeding before the International Trade Commission under Section 337 of the Tariff Act of 1930 for an exclusion order to prevent infringing goods from entering the country or a cease and desist order to prevent an infringing use once the goods have entered the country.

In more serious matters, criminal penalties may apply. The Trademark Counterfeiting Act of 1984 imposes heavy criminal penalties for trafficking in goods or services which bear a counterfeit mark. These penalties can amount to a fine of as much as \$1 million and 15 years imprisonment of individuals. Civil penalties can include the recovery of the trademark owner of treble damages and attorney's fees. **Ex parte** seizure orders are also authorized in certain cases.

Piracy of copyrighted materials is also subject to criminal penalties. In the United States, a person who willfully infringes a copyright for financial gain is subject to a \$25,000 fine, one-year imprisonment, or both. If the offense involves a substantial number of infringing copies of phonorecords or motion pictures, or trafficking in counterfeit labels for phonorecords, motion pictures, or other audiovisual works, the penalties may be as much as \$250,000 and five-year imprisonment. In addition, a court may order seizure and destruction or other disposition of infringing copies and equipment used in their manufacture.

Some foreign countries provide criminal penalties for infringement, either as the exclusive remedy or in addition to private suits. The remedies available against an infringer will vary from country to country.

Ease of enforcement will depend on a number of factors. If a government action is required, as with criminal penalties, are the local authorities cooperative? If private remedies are available, may the intellectual property owner get an injunction as well as damages? How long will it take to get enforcement? What methods are available to obtain proof? These and other questions are part of a

detailed study that should be done for each country before investing.

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