France
- Institut National de la Statistique et des Etudes Economique, Paris
- *Annuaire des Produits Chimiques et de la Droguerie* (Annuaire Rousset), Paris (directory)
- *Chimie et Industrie*, Paris (periodical)
- *Revue des Produits Chimiques*, Paris (periodical)

Germany
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- *Chemische Industrie*, Verlag Handelsblatt GmbH, Dusseldorf (monthly)
- *Kunststoffe*, Carl Hanser Zeitschriftenverlag GmbH, Munich (monthly)

Greece
- National Statistical Service of Greece, Athens
- Industrial Development Corporation, Athens and New York

Italy
- Instituto Centrale di Statistica, Rome
- *Repertorio della Produzione Chimica Italiana*, Tecnindustria Editrice, Rome (directory)

Netherlands
- Centraal Bureau voor de Statistiek, The Hague

Portugal
- National Institute of Statistics, Lisbon

Spain
- *La Industria Quimica en Espagnol*, AGESA, Madrid (directory)
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Sweden
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Switzerland
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General
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- The Organization for Economic Cooperation and Developments, Paris and Washington, D. C. (for publication sales)
- The Statistical Office of the European Communities, Luxembourg and Brussels
- Institute International de Statistique, The Hague
- U. S. Department of Commerce, Bureau of International Commerce, Washington, D. C.
- *Marketing Survey of the European Common Market*, The General Export Assn. of Sweden, 1960 (compares available statistical data of the EEC countries)
- *A Guide to Foreign Business Directories, International Commerce*, World Trade Information Service, Trade Lists, World Trade Directory Reports, Export Series FT-410; all U. S. Department of Commerce

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Legal and Patent Problems in Import–Export Marketing of Chemical Products*

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The expanding American chemical industry, with its potential overcapacity, is being forced to look abroad for markets and for raw materials. Yet, U. S. export trade is only a small fraction of its domestic sales. According to the Bureau of International Commerce[1] only about 20,000 out of the 300,000 U. S. manufacturing firms are exporting any part of their output and only about 125 out of the 500 largest American companies derive as much as 10% of their sales dollar from exports and foreign operations combined. Few of the firms venturing abroad are well informed regarding the legal and patent hazards involved in export–import trade. This report will deal first with the general legal aspects of export–import and then point out the special problems involved in exporting to the European Common Market.

Terminology in Import–Export Agreements.—One of the finest sources of general information on export–import trade is a handbook entitled "An Introduction to Doing Import and Export Business," published by the Foreign Commerce–Foreign Policy Department of the Chamber of Commerce of the United States, Washington, D. C., 6th Ed., 1962, $2.00. It provides sources of trade information, a list of associations and organizations providing assistance to business firms, methods of importing and exporting, form and substance of the import and export order, financing, advertising, and general information on foreign trade restrictions. However, it does not provide an adequate statement of the legal aspects of foreign trade.

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(1) *Fortune*, March 1964, p. 67.

Import–Export Representatives.—Because of the complex rules involved in foreign trade, most American firms prefer to utilize the services of an intermediary, such as an "agent," sales representative, broker, commission house, or trading company, or join an export trade association. Some definitions of these intermediaries are important.

Agent: a person or corporation acting for and in place of the principal. The term "agent" should never be used unless the principal is willing to assume all legal responsibilities for the agent's acts and commitments. When the representative is not in fact and in law an "agent" of the firm but merely its representative, the latter should not be allowed to refer to himself as "agent" either in correspondence or in printed publicity. Even when doing business through a "representative," the contract should expressly state "it is understood and agreed that said Representative is not the 'agent' for Buyer (Seller)."

"*Commission Agent*": in most countries, a representative whose rights and obligations are defined by national law or regulations, which also set forth the precise relation between the principal and the agent. Before appointing a commission agent, the seller (or buyer) should study the laws of the agent's country in order to fulfill all legal requirements of both parties.

"*The Trading Company*" is a tool much used in trade with the Far East. The Trading company is a firm that will take an "FOB" shipment and promotion, collections, credit, and shipping risks. Trading companies in the Orient often handle shipments for a number of producers, even competitors.

The Legal Aspects of the Import–Export Contract or Order.—Nothing gives rise to more disappointments, disputes, and litigation than the failure to spell out the terms and conditions of the import or export contract. In order to bring some uniformity to these contracts, the International Chamber of Commerce (with headquarters in Paris) developed by international agreement some uniform definitions of terms and conditions, the latest handbook being called "Incoterms, 1953".[2] The chief difficulties met with by importers and exporters are: (1) uncertainty as to the law of the country applicable to the contract, (2) disputes arising from inadequate information regarding trade rules and regulations, and (3) disputes arising from diversity in interpretation of the terms. "Incoterms, 1953", defines the duties and obligations of seller and buyer under most of the customary shipping terms, such as: "Ex-factory", "FOB", "CIF", etc. American firms may also utilize the "Revised American Foreign Trade Definitions, 1941".[3] It is also desirable for the American trader to use the "Uniform Customs and Practice for Documentary Credits".[4] Other useful handbooks for the import–export trader are: the "Uniform Commercial Code", prepared jointly by the American Law Institute and the National Commissioners on Uniform State Laws, of 1953, which has now been adopted by 28 states. It covers export sales, commercial paper collections, letters of credit, bills of lading, and documents of title.

(2) "Incoterms, 1953," U. S. Council, International Chamber of Commerce, New York, N. Y., $1.05.
(3) National Foreign Trade Council, Inc., 10 Rockefeller Plaza, New York 20, N. Y., 10c.
(4) International Chamber of Commerce, Paris, 1951 Revision.

Substance of the Import–Export Agreements.—It is advisable to draft such agreements by use of the "Commercial Agency",[5] a guide which is for the "Drawing Up of Contracts Between Parties Residing in Different Countries." In addition, the United Nations Economic Commission for Europe drew up two model contracts for export sales, designated No. 118, March 1953, and No. 574 of December 1955.[6] The use of model contracts for export and import sales is strongly recommended because they may decrease disagreement and litigation. Some items in these agreements need special attention:

The Quotation or Offer.—The quotation by the Seller includes not only price, but also method and terms of payment, kind of currency, quantity and quality of goods; time, place, and method of delivery. The quotation is in effect a possible sales contract and defines the responsibility of each party. A "net" price is a quotation not subject to discount, while a "list" price is a published price subject to many discounts by negotiation. If the currency required for payment is liable to fluctuate, the contract should provide either (a) a guarantee of a fixed price at time of acceptance at the current rate of exchange, or (b) for an increase or decrease according to variation between the currency rate at time of acceptance and at time of passing of title. The contract should spell out the system to be used for weights and measures—whether metric, English system, or other. Quality can be assured either by (a) attaching to the agreement a detailed specification of content, state of matter, size, limits for amount of foreign matter, and impurities, or (b) by having the goods inspected before shipment by the Buyer or his authorized representative, and shipped only after delivery of an inspection certificate. An offer must be accepted without reservation, otherwise there is no contract between the parties. A proper acceptance should state: "Your offer of ... is accepted under the terms and conditions specified therein." If the offer is not acceptable, other terms and conditions must be negotiated and a new offer made and unconditionally accepted to produce a contract. To avoid possible misinterpretation of the contract it is advisable for the Buyer to repeat in his letter of acceptance all the terms and conditions of the offer.

Labeling of the Goods.—Serious legal problems can arise from lack of proper labeling, incomplete labeling, or mislabeling. In particular, on import contracts, the Buyer should require the Seller to agree to comply with all applicable labeling laws and regulations of the United States; for example

(a) Notice of content (net weight)
(b) If the chemical is dangerous or flammable, the proper of the shipping label, as well as the proper container
(c) If the commodity falls in the class of food or drugs, a content label meeting the requirements of the Pure Food and Drug Law
(d) If a textile product, a label meeting the requirements of the Textile Fiber Products Identification Act and the rules of the Federal Trade Commission
(e) If an animal product, a label or stamp certifying approval by the Bureau of Animal Industry.

Care must be taken that the label does not carry any mark, word, or design which will infringe any trademark

(5) Published by the International Chamber of Commerce, Paris, 1961.
(6) Published by United Nations, Economic and Social Council, New York, N. Y.

registered in the United States by other parties. Proper labeling should be an obligation of the Seller, but the Buyer should be alert to the fact that if the product is mislabeled or unsupported by claims on the label, the import transaction may give rise to action by the Federal Trade Commission or other Government regulatory agencies and may result in legal actions against both Seller and Buyer by competitors.

Proof of Origin of Goods.—Many countries require an importer to furnish proof of origin of the goods. It is customary to mark goods in international trade with the name of the country in which manufactured, such as "Made in U. S. A." However, in certain countries, a written declaration of origin or a certificate of origin must be furnished in addition to such marking. For example, the United States requires all products shipped from Hong Kong to be accompanied by a written statement certified before a U. S. consul, that the goods were manufactured in or produced in Hong Kong. The object of this requirement is to prevent the importation of goods from Red China, North Vietnam, and other Communist areas of the Far East. U. S. importers must require such certificates before the goods are shipped.

Passing of Title to Goods.—Many disputes arise in international trade because of ambiguity in the time and place when title is actually passed from Seller to Buyer. Often the question turns on whether the contract is to be construed according to the law of the Seller's country or that of the Buyer's country. To avoid this difficulty, the contract should specify the law which is applicable. From a legal standpoint, title to the goods passes when the parties intend it to pass, whether or not delivery of the goods has taken place. Likewise, the "passing of the risk," that is, accidental loss or damage, is normally at the same time as the passing of the title, unless the contract specifies otherwise.

Exclusive Agreements.—An exclusive sales agreement grants the buyer the monopolistic rights in a specified territory, while the buyer obligates himself to purchase the specified goods only from the Seller. It differs from an exclusive agency agreement, for under the exclusive sales contract, the Buyer pays for the goods, takes title, and uses or resells it for his own account and without liability to the Seller. The Seller does not have to worry about the credit of the third party and is freed of the obligation for collections from the third party. In contrast, in an exclusive sales agency agreement, the agent never takes title, but is merely an "order solicitor" and the Seller is obligated to ascertain the credit rating of the third party Buyer and for shipping and collection of payment.

An exclusive distributorship differs legally from both the exclusive sales or agency relationships. The distributor is normally assigned a specific territory, but he buys the goods, takes title, inventories the goods, resells for his own account, and normally provides technical services for his customers. The distributor is generally obligated to attend to duties, export licenses, credits, and collections.

Export and Trade Restrictive Laws.—When an American firm engages in export trade, it must take into account the extraterritorial extension of the U. S. antitrust laws and the trade restrictive laws of the country of the firm's representative or its Buyer. If exports are made to any country in the European Economic Community (the Common Market), the supernational antitrust regulations of the Treaty of Rome, 1957, must likewise be considered. Articles 85–89 of the Treaty of Rome regulate restrictive trade practices and forbid (a) price fixing; (b) control of production, markets, technical development, or investment; (c) market sharing or sharing of sources of supply; (d) unequal terms for equivalent quantities; and (e) tie-in sales of unrelated products.

From January 1, 1962 for 3 years, enforcement was under respective national authorities, but thereafter, they will be enforced by the Commission and the Court of Justice of the EEC.

Further, if an American firm combines with a European firm within the EEC to form a joint venture for exporting to the United States, or any other country, the firm must not only take care to avoid violation of the EEC laws, but also the extraterritorial extension of the U. S. antitrust laws.

Likewise, the EFTA (European Free Trade Association) or "outer seven" regulates restrictive business practices in Article 15 of the Convention, which outlaws (a) prevention, restriction, or distortion of competition within the EFTA; and (b) actions by one or more enterprises taking unfair advantages of a dominant trade position (regulated by council EFTA and may be tightened by December 31, 1964).

Foreign Extension of the U. S. Antitrust Laws.—It must not be presumed that the U. S. antitrust laws only regulate trade between the several domestic states, because both the Sherman Act and the Clayton Act expressly state that the acts apply to commerce between the "states and foreign nations." Thus, these acts apply to agreements made (a) between two U. S. nationals, (b) between a U. S. national and a foreign national, and (c) between two foreign nationals, if it affects U. S. trade.

In the case of the United States *vs.* Imperial Chemical Industries, the court found that Dupont had conspired with ICI to restrain trade in certain chemical products by dividing the world markets. The court ordered compulsory licensing of all the patents involved as a penalty for misuse of the U. S. patents involved.

However, in the United States *vs.* National Lead Co., the U. S. antitrust laws reached abroad and affected the trade practice between two foreign nationals under an agreement relating only to commerce between nations foreign to the United States. The court found that the agreement fixed sales quotas in certain European countries, which had the effect of giving National Lead Co. (a U. S. company) control over imports of titanium pigments to the United States.

Further, in the United States *vs.* Aluminum Corporation, the case involved only foreign nationals. In a cartel agreement between French, Swiss, and British aluminum producers, an alliance was formed to allocate aluminum to be produced on a quota basis. The agreement provided that imports into the United States should be included in the quotas. The U. S. court held that these agreements constituted a conspiracy under the Sherman Act to restrain commerce between the "states and foreign nations."

Exclusive Distributorships in the Common Market.—On March 13, 1962, the EEC published Regulation 17 requiring notification of all agreements which might affect trade between the members of the Common Market. An exclusive agreement with a distributor inside the Common Market frequently includes limitations, such as

(a) a particular territory
(b) a particular class of customers
(c) to purchase only from the Seller
(d) in a specified quantity during a certain time
(e) not to sell any competing products.

Such limitations fill a need and have persuasive economic justifications. Nevertheless, they may result in violation of applicable trade restrictive laws. Under Article 85, Section 1 of the EEC law, such agreement is illegal only if it: (1) affects trade between member countries, and (2) distorts competition within the Common Market. If the trade is intrastate (limited to one country), the EEC law does not apply, but then the national law must be considered.

However, if the agreement will affect trade and distort competition between member countries, notification must be made under Article 85, Section 3, to the antitrust Commission of the EEC in Brussels, with a request for an exemption. Notification must be given on or before the "effective data" of the agreement, the effective date being the date upon which the agreement has received approval by all applicable Government agencies, such as Bureau of Industry, of Finance and Customs in the country of the distributor.

An Exclusive Agreement may be exempted if it: (1) contributes to improvement of production, or (2) of distribution, or (3) promotes technical or economic progress and does not impose superfluous restrictions to achieve these results. On December 24, 1962, the EEC Commission announced that simple "sales agency" agreements were exempt from notification and outside of the scope of Article 85, Section 1.

Patents in Import-Export Transactions.—If the commodity is covered by patents in the country of the Seller or Buyer, both may desire that a guarantee regarding patents be written into the import-export agreement.

The following is a typical broad indemnity clause: "Seller will indemnify Buyer against all claims and liabilities for actual or alleged infringement of any patent in connection with the materials or articles furnished under this order, except where Seller has been required to comply with Buyer's written specifications."

The following is an indemnity with reservations: "Seller warrants that the use or sale of the material delivered hereunder will not infringe any United States patent covering the material itself, but does not warrant against infringement by reason of the use thereof in combination with other materials or use in any process."

Working Requirements of Foreign Patents.—Most of the industrialized countries of the world are members of the International Convention for the Protection of Industrial Property and such countries, except the United States, require that a patent must be "worked" by the owner or his licensee within 3 years of the date of grant. Importation of the patented thing does not satisfy the working requirement. Failure to work the patent will subject it to revocation or compulsory licensing by a third party, including the Government.

Advantages of Patents in International Trade.—United States patents can be used legally to restrain or prevent imports if the patent covers an article, composition of matter, or a process. If the imported article constitutes an infringement of any of the claims of the U. S. patent, the owner may file a copy of the patent with the Tariff Commission and imports will be stopped at the border.

Patents owned in foreign countries can be used legally to protect exports by the patent owner to that country. The owner can grant his distributor a license limited to use and sale, but not to make, can restrict the license to a particular country, limit the term of the agreement to less than the full life of the patent, and also limit the use. In the absence of a patent, such limitations may raise serious questions, and result in violation of either national or EEC trade restrictive laws.

Improper Use of Patents in Foreign Trade.—A price-fixing arrangement between two or more patent owners goes beyond the legal patent monopoly and violates the Sherman Act, Section 1. United States *vs.* Line Material, 333 U. S. 287,68 ct. 550.

The owner of a U. S. patent may not enter into an agreement with another party, either an American citizen or a foreign national to divide the world into sales territories in which each party would agree not to sell in the territory assigned to the other: United States *vs.* Imperial Chemical Industries, Ltd., 105 F. Supp. 215.

Export Cartels and Associations.—The export trade association is common in many foreign countries, but is not legally possible in the United States unless organized under the Webb-Pomerene Export Trade Act. Such associations comprise competitors who joint their export efforts, establish uniform prices, utilize a common foreign representative, and maintain common credit and collection facilities. The members may exchange information on quality standards and test methods and often engage in common advertising and promotion. In foreign countries, they may establish quotas for their members and export through a common organization, dividing the income according to the quotas. In many foreign countries, such as Japan and Germany, export cartels are permitted as a matter of efficiency and for improving the foreign balance of trade.

The Webb-Pomerene Export Trade Act exempts from the Sherman Act "an association entered into for the sole purpose of engaging in export trade, or an agreement made or act done in the course of export trade by such association . . . ." The compliance with this Act is under the jurisdiction of the Federal Trade Commission and U. S. competitors who form such a Webb association must file with the Commission a copy of the agreement as well as annual reports on January 1 of each year. However, the Department of Justice has the right to prosecute the association or individual members of illegal conduct under the Webb Act. Four Webb associations have already been prosecuted under the Act.

It is not necessary to obtain government approval for the formation of an export association under the Act. There are some limitations: (a) the association must engage only in export trade not in export manufacture or imports; (b) only American citizens or American based firms can be members of the association; (c) goods produced outside the United States and imported for re-export cannot be handled by such associations: (d) membership of competitors must be voluntary and withdrawal should be permitted under reasonable terms; (e) members must be permitted to engage in export trade independently of the association, if desired.

In the famous case of the United States *vs.* Minnesota Mining and Manufacturing Company, 92 F. Supp. 947, the court found conspiracy in violation of the Sherman Act by an association in which four-fifths of the coated-abrasive producers formed jointly owned factories in foreign countries and then agreed not to export to the countries served by such factories. An agreement to pool members' patents to operate such factories was also held invalid. However, the court did not strike down as illegal, (a) limiting membership in the association; (b) fixing of prices for export and assigning quotas to members; (c) fixing of resale prices for foreign distributors; and (d) forbidding foreign distributors from handling non-members' competitive products.

Although over 200 Webb-Pomerene associations have been organized, only a small number remain in active export trade and these account for only about 10% of current U. S. export trade. It appears that the limitations imposed upon the Webb export associations does not encourage extensive use of the Act.

A good treatment of this subject is contained in G. P. Lamb and S. S. Kittelle's "Trade Association Law and Practice," Little, Brown and Co., Boston, Mass., 1956.

The Company International Division as a Communication Channel*

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It is quite obvious that the knowledge of a new process or a new chemical on the market in Germany, or Japan, or Italy could be of the greatest interest and importance to you and your business here in the United States. I am sure you can think of many cases where the introduction of a new and improved product has caused a significant change in thinking about product lines in the U. S. Certainly, in the chemical industry we are becoming more and more "one world." There are fewer and fewer isolated technical and marketing "islands."

The flow of marketing and technical information to and from major industrial countries of the world is great. Periodicals by the dozens, newspapers, frequent international visits, telephone conversations, company reports—one would imagine that American business is fully cognizant of what is going on everywhere! Yet we know that this is not true and that even the biggest and best organized companies make mistakes in marketing and research simply because they lack a vital piece of information which may have been freely available.

It is most important to have a well-organized and well-thought-out channel of information flow to and from the U. S. company and all of its foreign affiliates. U. S. companies in particular must pay increasing attention to this matter because during, and immediately after World War II, we were the leaders in many fields and the need for information was not so critical. I think all of us are conscious that the U. S. no longer has the commanding technical and commercial lead it enjoyed even ten years ago. We *must* know what is going on in the rest of the world.

This paper discusses the flow of information from two different aspects: the inflow of information from abroad to the U. S. company and the outflow of information to foreign affiliates, agents, and licensees.

Inflow of Information.—One of the most important sources of incoming information is from company personnel traveling or stationed abroad. Even many smaller companies have found that having technical and commerical representatives in foreign countries is almost a necessity. In this respect Europe has received the lion's share of attention. The man in the field from the home office knows what is needed at home and usually has a pretty good idea of how to get the information. Incidentally, one of the most prolific of our recent exports is the body of market research techniques which has been so well developed in the U. S. in the last fifteen years.

Larger companies have felt the continued necessity of having representatives abroad working in or with their affiliated companies. Of course, there has been increasing governmental pressure to have all companies managed by nationals, particularly in Latin America. We believe that it is not only politically astute to do this, but it also has very practical benefits. Local management has worked out well for most American companies. However, there is still a feeling that one or more Americans working with the companies, even in advisory positions, can better transmit American ideas which will be most useful to the foreign affiliate and can also make clear to the Head

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