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1. Objective: To the extent feasible, insulate the Mexican manufacturing enterprise from the risks of the U.S. market.

(a) Problem: Commercial obligations and general tort liability.

Strategy: The Mexican manufacturing enterprise forms a special-purpose export subsidiary and exports exclusively through it. All commercial obligations relevant to the U.S. market and all operations within the U.S. market are those of the export subsidiary, not the Mexican manufacturing parent.

Comment:

Essential to such structuring are clear and well-considered contracts—both between manufacturing parent and export subsidiary and between the subsidiary and its distributors, dealers, consignees, and customers in the U.S.—for the sale of the exported goods.
Two resources are particularly useful in the preparation of such contracts. One is *Incoterms* (I.C.C. Publication No. 350 (1980)), the International Chamber of Commerce’s rules for the interpretation of basic trade terms (F.O.B., C.I.F., etc.). The second is the Vienna Convention on the International Sale of Goods (U.N. Doc. A/Conf.97/18, Annex I (1980)). The adherence of Mexico to the Convention is not effective until January 1, 1989, and the adherence of the U.S. is subject to the reservation that the Convention will not automatically apply, by rules of private international law, between a U.S. resident and the resident of a non-adhering nation.

Nevertheless, the Convention may be incorporated by reference in Mexico-U.S. contracts or usefully consulted as a check-list for their provisions.

Even the most careful structuring may fail to insulate the Mexican manufacturing parent from all of the liabilities incurred by its export subsidiary. Although by the middle of the Nineteenth Century the United States had generally moved to the principle of limited liability for corporate enterprise, the subsequent emergence of corporate groups, typically a parent corporation or holding company with separately incorporated subsidiaries, led to a reassessment of that principle.

In many fact situations, courts are now willing to “pierce the veil” of corporate insulation that limits the liability of a parent corporation for acts of its subsidiary. This result has been rationalized on the theory that the subsidiary is merely the “alter ego” or “agent” of the parent. The growth of such veil-piercing theories has coincided with the development of product liability law, in which manufacturers of dangerous products are held accountable by strict liability, regardless of the degree of care they exercised and independently of traditional causation rules.

Veil-piercing and product liability are put to their most severe test in cases that seek to impose liability on nonresident foreign parent corporations for acts performed, or products manufactured, locally by their resident subsidiaries.
An excellent survey of this rapidly developing area of law is Blumberg, *Corporate Groups and Enterprise Liability: Procedural and Substantive Issues Pertaining to the Liability of Multinational Corporations for the Activities of Subsidiaries*, in *Private Investors Abroad: Problems and Solutions* 10-1 (1986). For aspiring architects of corporate insulation his conclusions are daunting: "The earlier view that a subsidiary corporation is a separate legal entity distinct from its parent for purposes of jurisdiction is slowly yielding to the view that the parent of a corporate group may be subject to jurisdiction because of its subsidiary's activities within the forum where the subsidiary's operations are economically integrated with the operations of the corporate group and are under some group direction." *Id.* at 10-18. "With jurisdictional disputes involving foreign-based multinational enterprises accelerating the process, the movement of the law in the area of jurisdiction is from an emphasis on legal relationships to an emphasis on economic relationships." *Id.* at 10-24.

(b) **Problem:** Amenity to lawsuit.


**Strategy I:** To the extent feasible, the Mexican manufacturing parent avoids all activity in the U.S. that could subject it to the jurisdiction of U.S. (state or federal) courts.

To the extent feasible, the export subsidiary limits its activities and contractual commitments in the U.S. in such manner that it is subject to litigation only in selected states, ideally only states where the export subsidiary has obtained a Certificate of Authority and consequently has designated a local agent for the service of process.

**Comment:**

Mexican exporters are invariably shocked to learn how litigious the U.S. is, and how jurisdictionally vulnerable defendants are to its courts.

The cited Texas Long-Arm Statute, for instance, deems a
foreign corporation to be "doing business" in Texas, and consequently subject to suit in Texas, if the foreign corporation, (1) "contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state," (2) "commits a tort in whole or in part in this state," or (3) "recruits Texas residents, directly or through an intermediary located in [Texas], for employment inside or outside this state." Id. § 17.041.

Strategy II: The export subsidiary limits its exposure to inconvenient litigation by providing, in its commercial contracts, for the arbitration of disputes.

Comment:

Private contract disputes are one of the rare Mexico-U.S. problem areas in which there is a helpful treaty relationship between the two countries. Both adhere to the U.N. Arbitration Convention of 1958 (Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, T.I.A.S. No. 4739, 33 U.N.T.S. 3), and thus are reciprocally obligated to enforce agreements to arbitrate and to recognize arbitration awards. This permits parties to require, by carefully drawn arbitration clauses, that disputes arising under their commercial contracts be resolved exclusively by arbitration.

(c) Problem: Product liability

Strategy: The export subsidiary obtains, or requires its distributors to obtain, product liability insurance protecting both the export subsidiary and its Mexican manufacturing parent.

Comment:

In *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) the U.S. Supreme Court established the principle that a court has jurisdiction over a non-resident defendant who has sufficient “minimum contacts” with the forum state. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), that principle was applied in dictum to product liability suits against a non-resident manufacturer or distributor “that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.” *Id.* at 298.

In *Asahi Metal Industry Co., Ltd. v. Superior Court of
California, 107 S. Ct. 1026 (1987) (plurality opinion), the Court confronted a more complex situation. There the plaintiff was injured in California while riding a motorcycle whose rear tire was manufactured in Taiwan incorporating a valve assembly manufactured by Asahi in Japan. The plaintiff brought a product liability suit against (among others) the Taiwanese prime manufacturer, who impleaded Asahi by cross-complaint. Pending trial on the merits, the plaintiff settled, dismissing the main suit but leaving the cross-complaint, which the California Supreme Court held separately justiciable in California. The U.S. Supreme Court reversed. A majority of the justices reached that conclusion on the reasoning that in the context of dismissal of the plaintiff’s case it would be "unreasonable" to require non-resident Asahi to defend in California a cross-complaint by the non-resident defendant. Three justices also joined Justice O'Connor's separate conclusion that, regardless of the dismissal of the plaintiff's case, the facts did not support California jurisdiction over Asahi because there was no proof of "any action by Asahi to purposefully avail itself of the California market," as Asahi "did not create, control or employ the distribution system that brought its valves to California" (Id. at 1033).

In the view of those four justices, therefore, there is a penumbra of jurisdictional immunity for foreign sub-manufacturers who have no direct distribution system in the U.S. For them as well as direct exporters, however, insurance is the only reliable precaution against U.S. product liability claims.

2. Objective: Protect the name-identification of the exported product in the United States.

(a) Problem: Pirating in the U.S. of a product’s publicly-accepted Mexican trademark.

Strategy: The Mexican manufacturer anticipates its prospective need for product name-protection in the U.S. market by applying, at the earliest possible date, for registration of a U.S. (state or federal) trademark.

Comment:
The duration of a U.S. (federal) trademark is twenty years but it may be renewed indefinitely. The initial application requires evidence of prior use in U.S. (interstate or foreign) commerce and may be cancelled at the end of six years if the registrant does not show continued use in U.S. commerce or circumstances excusing non-use. Each renewal application requires evidence of current use in U.S. commerce. 15 U.S.C. §§ 1051, 1058, 1059 (1982).


(a) Problem: The absence of a general Mexico-U.S. income tax treaty.

Strategy: The Mexican manufacturing enterprise structures its exports in accordance with the tax-liability criteria of the U.S. Internal Revenue Code and Regulations.

Comment:
Income tax treaties now in force between the U.S. and other countries lessen the U.S. income tax burden on those countries' exports to the U.S. and smooth some rough edges of export structuring.

The tax burden is lessened by reducing tax withholding rates on dividends from U.S.-corporation export structures and by eliminating tax withholding on dividends from foreign-corporation export structures that operate within the U.S. Depending on a treaty's vintage, it may also eliminate some applications of the "dividend equivalent" tax discussed in Section 3(c) below.

The structural smoothing results from substituting the treaty tax-liability criteria of "industrial and commercial profits" and "permanent establishment" for the statutory tax-liability criteria of "effectively connected" income and U.S. "trade or business," discussed in Section 3(b) below.

Treaties also reduce tax withholding rates on interest and royalties paid abroad, and relax the statutory criteria of U.S. personal tax liability applied to the exporter's foreign consultants and trainees. Article 6(7) of the Japan-U.S. Income Tax Treaty (Convention for the Avoidance of Dou-
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ble Taxation and the Prevention of Fiscal Evasion, Mar. 8, 1971 United States-Japan, 23 U.S.T. 981, T.I.A.S. No. 7365), for example, also adds the helpful rule that income from the purchase and sale of personal property is sourced where the property is "sold."

There being no general income tax treaty between Mexico and the U.S., the Mexican exporter faces the undiminished tax rates and unameliorated tax-liability criteria of the Internal Revenue Code and Regulations.

(b) Problem: U.S. statutory tax-liability criteria for export income generally.

Strategy: The Mexican manufacturing/exporting enterprise is structured and operated in such manner that only the special-purpose export subsidiary, and not the Mexican manufacturing parent, has income "effectively connected" with "the conduct of a trade or business" in the U.S.

Comment:
The U.S. Internal Revenue Code contains no separate definition of taxable export income. Instead the exporter must find his tax-identity in the generalized role of a recipient of income "effectively connected" with "the conduct of a trade or business" in the U.S. I.R.C. § 882(a)(1) (West Supp. 1987); Treas. Reg. § 1.864-4(b) (as amended 1984); id. § 1.864-2(e) (1966).

In principle the exporter's income from sources outside the U.S. is not taxed. I.R.C. § 864(c)(4)(A) (West Supp. 1987). But see id. § 864(c)(4)(B)-(C).

There are allocation rules for income from manufacture outside, and sale by the manufacturer within, the U.S. Treas. Reg. § 1.863(b)(2) (1977).

Even if the exporter has an office in the U.S., income is not attributed to that office unless the office is regularly used for business, is a "material factor" in producing the income, and "regularly" conducts activities of the type that produces the income. I.R.C. § 864(c)(5)(B); Treas. Reg. § 1.864-6(b) (as amended 1983); id. § 1.864-7(a)-(b) (1972).
The office of a U.S. agent is not attributed to the exporter unless (1) the agent either (a) has, and regularly exercises, authority to conclude contracts on behalf of the exporter or (b) has a stock of goods from which the agent regularly fills orders on the exporter's behalf, and (2) the agent is not "a general commission agent, broker or other agent of independent status acting in the ordinary course of [the] business." I.R.C. § 864(c)(5)(A) (West Supp. 1987); Treas. Reg. § 1.864-7(d) (1972).

(c) **Problem:** The "dividend equivalent" tax.

**Strategy:** As a general rule, the Mexican manufacturing/exporting enterprise incorporates its special-purpose export subsidiary in the U.S.

**Comment:**

Before 1987 the U.S. was one of the few nations that taxed dividends paid abroad by domestic corporations to foreign shareholders but did not impose a corresponding tax on the remittance abroad of the profits of domestic branches of foreign corporations. That anomalous situation, and the "second tier dividend tax" that attempted to reach beneficiaries of the remittance hiatus, is described in Murphy, *The Legal Dimension of Exporting to the United States*, in Private Investors Abroad 229, 236-37 (1984). For Mexican exporters (whose rate of U.S. dividend tax withholding is not reduced by a general income tax treaty with the U.S.), the result was to favor the use of the U.S. branch of a foreign corporation, rather than a U.S. corporation, as a special-purpose subsidiary for export distribution within the U.S.

The Tax Reform Act of 1986 ended the anomaly. Now the U.S. has a remittance tax, with a vengeance. Instead of being taxed on branch profits as and when remitted, foreign corporations with branches in the U.S. are taxed on the "dividend equivalent amount for the taxable year" (I.R.C. § 884 (West Supp. 1987))—in effect, an annual tax on remittable branch profits.

For the Mexican manufacturing enterprise the result is to reverse the pre-1987 structural rule-of-thumb. Absent excep-
tional facts, in terms of net current U.S. income taxes it is now usually more advantageous to structure its special-purpose subsidiary for export distribution in the U.S. as a U.S. corporation, not as the U.S. branch of a foreign corporation.

(d) **Problem:** Mexican income tax rates.

**Strategy:** In structuring exports to the U.S., the Mexican manufacturing/exporting enterprise bears in mind that income shifted from the U.S. to Mexico is in principle income taxed at a higher rate.

**Comment:**
A central feature of the Tax Reform Act of 1986 was to convert the U.S. from a moderately high income tax jurisdiction to one of the lowest among developed countries. The comparison with current Mexican rates is striking. Under the Act the ultimate U.S. tax rates on top-bracket 1987 income are 28% for individuals and 34% for corporations. Although Mexican income tax rates are scheduled for reduction, for top-bracket 1987 income they are 60.5% (including surtax) for individuals and 48.65% for corporations. Diamond, *Foreign Tax and Trade Briefs*, Release No. 332.

Notwithstanding enormous differences between the U.S. and Mexican tax systems in the calculation, reporting, and collection of net income, the present disparity in rates makes it obvious that, in structuring Mexican exports to the U.S., tax planning now must accomplish more than merely shifting income from the U.S. to Mexico.

Some structures will seek to defer Mexican taxes by the accumulation and reinvestment of export profits in U.S. export subsidiaries; others will achieve deferral and reinvestment outside the U.S. by interposing a tax haven holding company between the U.S. export subsidiary and the Mexican manufacturing parent. Other structural possibilities are innumerable. But, however the problem is solved, for the Mexican exporter effective overall tax planning no longer ends with merely reducing the amount of income that is subject to U.S. income taxes.
4. **Objective:** Minimize state taxes and registration requirements.

   (a) **Problem:** State "Certificate of Authority" statutes.

   **Example:** Texas Business Corporation Act, art. 8.01A (Vernon 1980).

   **Strategy:** The Mexican manufacturing parent avoids all activity in the U.S., particularly acts that constitute "transacting business" for purposes of the "Certificate of Authority" statute of any state. Only the export subsidiary performs acts that could constitute "transacting business" for such purposes.

   As regards a state in which the export subsidiary does not intend to obtain a Certificate of Authority, the export subsidiary avoids all activity in that state except acts which do not constitute "transacting business" for such purposes. The export subsidiary carefully chooses the states in which it will obtain a Certificate of Authority. To the extent business logistics permit, it selects those states on the basis of their low consequent taxes and registration fees.

   **Comment:**

   Many states (including Texas, whose "Certificate of Authority" statute is cited above) consider as not "transacting business" for Certificate of Authority purposes such local acts as: Maintaining bank accounts; effecting sales through independent contractors; creating, securing, and collecting debts; transacting any business in interstate commerce; and conducting isolated transactions.

   By analogy to interstate sales, Texas precedents offer Mexican exporters considerable leeway to sell into Texas without obtaining a local Certificate of Authority. Thus, it does not constitute "transacting business" in Texas for a seller outside the state to sell goods by interstate shipment into Texas pursuant to purchase orders that were obtained in Texas by the seller's representative and sent to the seller for acceptance outside Texas. *Waggener Paint Co. v. Paint Distrib., Inc.*, 228 F.2d 111 (5th Cir. 1956); *North v. Mergenthaler Linotype Co.*, 77 S.W.2d 580 (Tex. Civ. App. 1935);

As discussed in Section 4(b) below, holding a Certificate of Authority in a state may itself necessitate payment of franchise tax in that state.

(b) Problem: State franchise taxes.

Example: Texas Tax Code Section 171.001; Texas Franchise Tax Rules Section 3.406.

Strategy: The Mexican manufacturing parent avoids all activity in the U.S., particularly acts that constitute “doing business” for purposes of franchise tax in any state. Only the export subsidiary performs acts that could constitute “doing business” for such purposes.

As regards a state in which the export subsidiary does not intend to pay franchise tax, the export subsidiary avoids all activity in that state except acts which do not constitute “doing business” for such purposes.

The export subsidiary carefully chooses in advance the states in which its operations will be such as to necessitate paying franchise tax. To the extent business logistics permit, it selects those states on the basis of low consequent taxes and registration fees.
If a state's franchise tax statute provides (as does the Texas statute cited above) that having a Certificate of Authority in that state is sufficient to require a foreign corporation to pay local franchise tax, that tax cost is weighed in determining whether to schedule for that state operations of the export subsidiary that would necessitate obtaining a Certificate of Authority.

**Comment:**

Specifying what constitutes "doing business" for franchise tax purposes is frequently left to regulations or administrative implementation as distinguished from statute.

In Texas, for instance, the statute merely provides that franchise tax is imposed on "each corporation that does business in this state or that is ... authorized to do business in this state." No published administrative interpretation has applied that language to foreign "destination sales" into Texas.

Rulings in analogous interstate cases support the proposition that such sales constitute "doing business" for franchise tax purposes if they are based on consignment or regular solicitation by sales representatives within the state, but not if they are made by mail solicitation from outside or no solicitation at all. Op. Tex. Atty. Gen. No. M-642 (1970); Tex. Comp. Adm. Dec. No. 10,561 (1980); and Tex. Comp. Adm. Dec. No. 10,178 (1981).

According to the Texas Franchise Rules, specific activities of foreign corporations that constitute "doing business" in Texas for franchise purposes include: "Performance of a contract in Texas" (Texas Franchise Tax Rules § 3.406(c)(1)); "Having employees, independent contractors, agents, or other representatives in Texas, regardless whether they reside in Texas, to provide or induce sales of the foreign corporation's goods or services" (Id. § 3.406(c)(4)); and consigning goods to Texas (Id. § 3.406(c)(17)). Most sweeping of all is Section 3.406(b): "A corporation is doing business in Texas, for purposes of [franchise tax], when it has constitutional nexus with Texas for the purpose of franchise taxation." The result is to extend asserted franchise tax jurisdiction
over Mexican exporters to the constitutional limits discussed in Section 4(c) below.

(c) **Problem:** State taxes generally.

**Strategy:** Similar to Section 4(b) above.

**Comment:**

The authority of U.S. states to tax exports to the U.S. is a function of article 1, Section 8 of the United States Constitution (authorizing Congress to tax imports and to regulate foreign commerce); article 1, Section 10 (forbidding states, without the consent of Congress, to tax imports “except what may be absolutely necessary for executing its inspection laws”); and the tenth amendment (reserving to the states “or to the people” all powers the Constitution neither delegates to the federal government nor prohibits to the states).

The leading cases are *Brown v. Maryland*, 25 U.S. 419 (1827) (a state may not require importers to obtain a license for the sale of imported goods in the original package); *Low v. Austin*, 80 U.S. 29 (1871) (a state may not tax imported goods held by an importer in the original package); *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) (a state may impose a non-discriminatory tax on all goods, imported or domestic, that are no longer in transit and are warehoused within the state); and *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) (a state may not tax cargo containers that are registered and used exclusively for foreign commerce but are located temporarily in the state in transit or awaiting cargo). They are discussed in Murphy, *The Legal Dimension of Exporting to the United States*, in Private Investors Abroad 229, 241-43 (1984). See also the discussion of unitary taxes in Section 4(d) below.

(d) **Problem:** State “unitary” taxes.

**Strategy:** Both the Mexican manufacturing parent and the export subsidiary avoid all activity in a state that imposes a “unitary” tax, unless the Mexican manufacturing/exporting enterprise is willing, in principle, to subject its overall operations to the global reporting and allocation procedures that the unitary tax requires.
If the enterprise accepts those procedures in principle, before commencing operations in a "unitary" tax state, the enterprise carefully weighs the resulting cost, both in taxes and in additional accounting procedures necessary for compliance. If those costs are acceptable the enterprise proceeds as described in Section 4(b) above.

Comment:

By "unitary" taxation a state, in taxing the income of a corporation or affiliated group that operates partly within and partly without the state, allocates a portion of the worldwide income of that corporation or group as being taxable within the state.

The authority of U.S. states to impose "unitary" taxes is a function of the provisions of the U.S. Constitution mentioned in Section 4(c) above, plus the due process clause of its fourteenth amendment (forbidding states to "deprive any person of . . . property, without due process of law").

The leading cases are Bass, Ratcliff & Gretton, Ltd. v. State Tax Com., 266 U.S. 271 (1924) (a state may tax a single foreign corporation, operating within and without the state, on the basis of a reasonable allocation of its worldwide income), Mobil Oil Corp. v. Commissioner, 455 U.S. 425 (1980) (a state may tax a parent corporation, operating directly and through subsidiaries within and without the state, on the basis of the parent corporation's worldwide income, including dividends from subsidiaries not operating within the taxing state), and Container Corporation of American v. Franchise Tax Board, 463 U.S. 159 (1983) (a state may tax a parent corporation, operating directly and through subsidiaries as in Mobil, on the basis of a reasonable allocation of the worldwide income of the parent and all subsidiaries, in the latter case whether distributed as a dividend to the parent or not).

At the peak of the "unitary" tax movement one estimator counted 24 states that taxed on some allocated basis, including 12 (Alaska, California, Colorado, Florida, Idaho, Indiana, Massachusetts, Montana, New Hampshire, North Dakota, Oregon, and Utah) that imposed worldwide allo-
cation of the type considered in *Container Corporation* (Investment/USA, Nov. 1983, at 3). By October 1986, the ensuing consternation of foreign exporters to, and investors in, the U.S. had reduced that 12 to three: Alaska, Montana and North Dakota. Investment/USA, Oct. 1986, at 14. The remaining nine had scaled back their extraterritorial fiscal assertions to systems that tax a transnational business only from the "water's edge" of its local operations.

Even for the nine states with "water's edge" systems, however, controversy still rages. The "water's edge" system of California has been criticized by officials of the U.S. Treasury as discriminatory against U.S.-owned corporations that operate abroad, and bills have been introduced in the U.S. Congress to correct the disparity. Meanwhile, in *Barclays Bank Int'l TC v. Franchise Tax Board* (No. 325059, Sacramento County Superior Court) a California trial court held California's pre-reform "unitary" tax to be unconstitutional, a ruling that if finally reviewed by the U.S. Supreme Court may rank with *Bass, Mobil and Container Corporation* as a delineator of the limits imposed by the U.S. Constitution on the extraterritorial taxing power of states. See Zak, *California Superior Court Strikes Down Unitary Method for Foreign-Based Multinationals*, Investment/USA, August 1987, at 8.

5. Objective: Organize the pattern of export and distribution in a manner that will maximize the success of the Mexican product in the relevant U.S. market.

(a) Problem: U.S. antitrust laws.

*Strategy:* In structuring its pattern of export to, and distribution within, the U.S. market, the Mexican enterprise carefully anticipates the requirements of U.S. antitrust laws.

*Comment:*

Exports to the United States are covered, directly or indirectly, by each of the three basic U.S. antitrust statutes. Section 1 of the Sherman Act prohibits "[e]very contract, combination ... or conspiracy, in restraint of trade or commerce ... with foreign nations." 15 U.S.C. § 1 (1982). Section 5 of the Federal Trade Commission Act prohibits
"unfair methods of competition" in "commerce," which is defined to include "commerce ... with foreign nations." 15 U.S.C. §§ 44, 45 (1982). Section 7 of the Clayton Act prohibits the corporate acquisition of shares or assets of a corporation where "in any line of commerce in any section of the country the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly," "commerce" again being defined to include "trade or commerce ... with foreign nations." 15 U.S.C. §§ 12, 18 (1982).

The Wilson Tariff Act also prohibits combinations or conspiracies of exporters to restrict competition or to increase the price of imported goods or their end products. 15 U.S.C. § 8 (1982). Section 2(a) of the Robinson-Patman Amendments to the Clayton Act (price discrimination) and Section 3 of the Clayton Act (exclusive dealing and tying arrangements) apply to all transactions, including exports, in which the goods are sold "for use, consumption or resale in the United States." 15 U.S.C. §§ 13(a), 14 (1982).


In a 1977 statement of policy, the Antitrust Division of the
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U.S. Department of Justice stated that, to be actionable under the U.S. antitrust laws, conduct outside the U.S. must have a "substantial and foreseeable effect" on U.S. commerce. United States Dep't. of Justice, Antitrust Guide for International Operations 6 (1977). Once inside the U.S. market, the exported goods are subject to the same antitrust constraints as goods of domestic origin. Typically those constraints involve issues of exclusive distributorship, tying, resale price maintenance, and territorial and customer restrictions. The current enforcement policy of the Antitrust Division on those subjects is stated in the United States Dep't. of Justice, Vertical Restraints Guidelines (1985).


Strategy: In determining whether to enter the U.S. market, the Mexican enterprise carefully compares, in terms of the U.S. antidumping law, the intended U.S. market price and the actual Mexican (or other relevant) market value of the product it proposes to export.

Comment:

The U.S. antidumping law imposes offsetting duties on an imported product if (1) the U.S. price of the imported product is lower than its foreign market value and (2) as a result of such imports a U.S. industry sustains, or is threatened with, material injury, or the establishment of a U.S. industry is materially retarded.

The U.S. antidumping law is of particular concern to Mexican exporters because, after many decades of high protective tariffs, the Mexican market price of many capital-intensive manufactured products is higher than the going price of similar products in the United States.

A helpful summary of U.S. antidumping law, countervailing duties law, and other import penalties is contained in Sandler, Primer on United States Trade Remedies, 19 Int'l Law. 761 (1985).

**Strategy:** In determining whether to enter the U.S. market the Mexican enterprise carefully considers the extent to which the product it proposes to export would be considered to have benefited from Mexican government subsidies that are dutiable under the U.S. countervailing duties law.

**Comment:**

The U.S. countervailing duties law imposes offsetting duties on imports. To impose such duties it must be established, in all cases, that the import benefited from a dutiable foreign government subsidy. In the case of imports from a country that belongs, or is assimilated, to the subsidies code of the General Agreement on Tariffs and Trade (GATT) it must also be shown that as a result of such import a U.S. industry sustains, or is threatened with, material injury, or that the establishment of a U.S. industry is materially retarded.

There are, in fact, two statutory impositions of U.S. countervailing duties. 19 U.S.C. § 1671 (1982), which applies to imports from "a country under the Agreement" (i.e., a country that belongs, or is assimilated, to the GATT subsidies code), requires proof of a "material injury" as well as a dutiable subsidy. 19 U.S.C. § 1303 (1982), which applies to imports from all other countries, only requires proof of a dutiable subsidy.

On April 23, 1985, Mexico and the United States signed an agreement whereby for a three-year period Mexico will be accorded the status of a "country under the Agreement" for purposes of 19 U.S.C. § 1671. For its part Mexico agreed to discontinue specified forms of subsidies and, in general, committed itself to obligations similar to the GATT subsidies code. 2 Int'l Trade Rep. (BNA) No. 17, at 565, 590-92 (1985).

On August 24, 1986, Mexico became the 92nd Contracting Party to GATT, undertaking to "initiate negotiations" toward adherence to the GATT subsidies code and to phase into other GATT codes over a period of years. 9 Business America (October 13, 1986).

The high degree of government intervention in the Mexican
The economy tends to make Mexican products vulnerable to claims for countervailing duties. Of more than twenty Mexican government programs that were involved in U.S. countervailing duty investigations between 1982 and 1984, eleven (typically loans, credits, tax rebates and supplier discounts favoring exports) were held to be dutiable.

(d) **Problem:** Section 337 exclusion. 19 U.S.C. § 1337 (Supp. II 1984); 19 C.F.R. §§ 210.1-.71 (1987) (adjudicative procedures); Id. §§ 211.01-.59 (1987) (enforcement procedures).

**Strategy:** In determining whether to introduce a particular product into the U.S. market, the Mexican enterprise carefully considers the vulnerability of the product to exclusion under Section 337.

**Comment:**

Section 337 of the Tariff Act of 1930 (codified at 19 U.S.C. § 1337 (1982)) mandates the exclusion of articles that are "concerned" with "[u]nfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale . . . the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States."

Enforcement cases have construed Section 337 as covering antitrust violations; the infringement of patents, trademarks and copyrights; false advertising; and "palming off."

(e) **Problem:** U.S. (federal and state) franchise and business opportunity laws.

**Strategy:** In appointing U.S. distributors and dealers, the export subsidiary carefully anticipates the disclosure requirements and supra-contractual obligations that apply to the offering of a "franchise" or "business opportunity" in particular jurisdictions.

**Comment:**

The U.S. government and nearly forty states regulate product distribution arrangements. Some laws apply only to the distribution of specific products (for example, automobiles
or gasoline). Other laws focus on the nature of the relationship, typically regulating only those that meet statutory definitions of "franchise" or "business opportunity."

The principal regulatory mechanisms are (1) requiring the offeror to disclose information concerning the offeror and the relationship offered and (2) granting the offeree special supra-contractual rights, such as protection against termination on short notice or without "good cause."

The general federal regulation is the Franchise Rule (Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 16 C.F.R. §§ 436.1-.3 (1987)) administered by the Federal Trade Commission. It does not regulate the parties' business relationship, but requires a franchiser to disclose to the franchisee detailed information concerning the franchiser and the franchise.

For the Mexican exporter, the key to compliance with such regulations is determining, in each instance, whether the planned distribution relationship falls within a regulated category. In the case of regulation by product line, the form of distribution may be irrelevant. In the case of regulation by relationship, the form of distribution as entailing more than a mere agreement to purchase for resale is usually the key.

6. **Objective:** Clear U.S. Customs.

   (a) **Problem:** Normal import duties.

   **Strategy:** The export subsidiary carefully ascertains, in advance, the optimum duty classification available for the product it proposes to export.

   **Comment:**

   The best technique is to prepare, with the help of an experienced customs broker, mock-ups of the commercial documents and U.S. Customs forms that will be required to see the product into the U.S. Doubtful cases can be resolved by consultation with, and advisory opinions from, U.S. Customs. What is indispensable is for the exporter to reckon import duty as a significant cost of doing business in the U.S., and to determine the acceptable classification that achieves the lowest available duty rate.
The U.S. is approaching a sea change in its method of classifying goods for customs purposes. On August 2, 1986, the U.S. Treasury Department gave notice that the U.S. intended to replace the venerable U.S. Tariff Schedules by acceding to the International Convention on the Harmonized System, subject to ratification by the U.S. Congress, effective January 1, 1988. 51 Federal Register 30933.

The Harmonized System was developed by the Customs Cooperation Council over a twelve-year period and is based in large part on the Brussels Tariff Nomenclature. The major countries that did not adhere to the Brussels Tariff Nomenclature were the U.S., Canada, North Korea, East Germany, and the U.S.S.R. The International Convention on the Harmonized System was opened for signature on 1 July 1983 and was scheduled to enter into force on 1 January 1988. It has now been signed (in most cases subject to ratification) by more than fifty countries and customs unions, including most European nations, Canada, and Japan.


(b) Problem: Exclusionary laws enforced by U.S. Customs.

Strategy: The export subsidiary makes certain, in advance, that the product and packaging it intends to export are not subject to exclusion for non-duty reasons.

Comment:

In addition to collecting import duty, U.S. Customs has a myriad of exclusionary chores. A proposed export may be excluded because it is not marked to show country origin (19 U.S.C. § 1304 (Supp. II 1984); 19 C.F.R. §§ 134.0-.55 (1987)) or because the marking is false as to origin or description (15 U.S.C. §§ 294, 1125 (1982); 19 C.F.R. § 11.13 (1987)). Goods bearing counterfeit U.S. trademarks may be seized and forfeited (15 U.S.C. § 1124 (1982); 19 C.F.R. §§ 133.1-.24 (1987)), as may pirated copies of U.S.- copyrighted works (17 U.S.C. § 602(a) (Supp. III 1985); 19

See also Section 5(d) above (Section 337 exclusion).