

## I. Initiating the Sale

### A. Market Research

Exporters engage in market research primarily to identify their marketing opportunities and constraints within individual foreign markets as well as to identify and locate prospective buyers and customers. Market research includes all methods that a company uses to determine which foreign markets possess the best potential for its products.

Results of this research inform the firm of:

- The fastest growing markets.
- Market trends and outlook.
- Competitive firms and products.
- The largest markets for their product.
- Market conditions and practices.

A firm will research a market by using either primary or secondary data resources. When conducting primary market research, a business will collect information directly from the foreign marketplace through interviews, surveys, and other direct contact with representatives and potential buyers. Primary market research has the advantage of being tailored to the company's specific needs and provides answers to particular questions that may be situation specific. The major drawbacks to this method of data collection are the amount of time involved and cost.

When conducting secondary market research, a firm collects data from previously compiled sources, such as the information on the U.S. Commercial Service website on [www.export.gov](http://www.export.gov). Working with secondary sources is less expensive and helps the company more clearly focus on its marketing efforts. While secondary data sources are critical to market research, they do have limitations. The most recent data on some countries may be outdated or unavailable. Also, statistics may be distorted by incomplete data-gathering techniques. However, even with the previously mentioned limitations, secondary research is a valuable and relatively simple first step for a firm to take.

Market research is available on [www.export.gov](http://www.export.gov) and through the U.S. Department of Commerce's Customized Market Analysis program.

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### B. Methods of Exporting and Channels of Distribution

The most common methods of exporting are indirect and direct selling. Indirect selling involves an export intermediary, such as an export manager or export trader, who normally

assumes responsibility for finding overseas buyers, shipping products, and arranging methods of payment. In direct selling, the U.S. producer would deal directly with a foreign buyer.

The paramount consideration in determining whether to market indirectly or directly is the level of resources a company is willing to devote to its international marketing effort. The following are some other factors that should be considered when deciding whether to market indirectly or directly:

- The size of the firm.
- The nature of its product.
- Previous export experience and expertise.
- Business conditions in the selected overseas markets.

### 1. Indirect Exporting

The primary advantage of indirect marketing for a smaller U.S. company is that it provides a way to penetrate foreign markets without the complexities and risks of direct exporting. Several kinds of intermediary firms provide a range of export services. Each type of firm offers distinct advantages for the U.S. company. Listed below are descriptions of each.

- Commission agents - commission or buying agents are finders for foreign firms that want to purchase U.S. products. They seek to obtain the desired items at the lowest possible price and are paid a commission by their foreign clients.
- Export Management Companies (EMC) - An EMC acts as the export department for one or several producers of goods or services. The management company looks for business on behalf of the exporting company and takes care of all aspects of the business transaction. Hiring an EMC is often a viable option for smaller companies that lack the time and expertise to break into international markets on their own.
- Export Trading Companies (ETC) - ETC's perform many of the same acts as EMC's, however they tend to be demand driven and transaction oriented, often acting as an agent between the buyer and seller. Most trading companies source U.S. products for their overseas buyers. If the exporting firm offers a product that is competitive and popular with the ETC buyers, it will likely receive repeat business. The majority of ETC's will take title to the goods for export and will pay the exporting company directly. This type of arrangement practically eliminates the risks associated with exporting for the manufacturer.

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2. Direct Exporting

A direct exporting campaign can also be very advantageous for a firm. With direct exporting, the company will have more control over the export process. Other advantages include potentially higher profits, and a greater knowledge of what the buyer and the overseas market really need. However, in order for a company to begin exporting directly to foreign markets, it must impose various internal modifications in order to support such a venture. These, in turn, require a greater investment.

Considerations include:

- Organizing the company for exporting so that international marketing is facilitated.
- Determining distribution channels for export ( agents, sales representatives, distributors, retailers, etc.)
- Contacting and evaluating foreign representatives.
- Negotiating an agreement with a foreign representative.

Various trade publications/ databases include leads business contacts for certain products. One such database is GLOBUS, (202) 482-1986. For previously released trade leads see the National Trade Data Bank.

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### C. Product Preparation

Preparing a product for export requires extensive product knowledge as well as a thorough knowledge of the unique characteristics of each market being targeted. After the market research and contacts have been made, the firm may find that the particular product may need to be modified in order to satisfy buyer tastes or needs in a specific market. In many cases the product will have to be changed in order to conform to government regulations, geographic and climatic conditions, or to facilitate shipping. In addition to adaptation of the product to suit market conditions, the exporter needs to consider the product's supplementary features, such as packaging, warranties, and service. Another element of product preparation that a company should consider is the ease of installing that product overseas. And of special concern to foreign consumers is the service the U.S. company provides for its product: the more complex the technology, the greater the demand for presale and post sale service.

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### D. Service Exports

Service industries in the United States over the past decade have experienced tremendous growth, the main thrust being a change in how exporting is viewed. The income generated and the jobs created through the sales of services abroad are just as important to the U.S. economy as income and jobs resulting from the production and export of goods.

The service sector presently accounts for a large share of the U.S. economy. While many service businesses cannot easily or effectively export, many innovative and specialized companies are able to with exceptional results. Those industries with the greatest potential include: construction, design, and engineering; banking and financial services; insurance services; legal and accounting services; computer and data sources; and management consulting services.

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### E. Buyer Identification

After a market has been found and a market strategy has been developed, the firm wanting to export must locate a buyer. Typically, if the buyer is the end user of the good or service, then a relatively simple transaction will occur. In many cases, however, the exporter will need a representative or distributor located in the country of destination to reach the eventual buyer. Other common ways of making the necessary contacts are through Internet searches, trade shows, trade missions, direct mail campaigns, and advertising in international journals or trade papers. The Department of Commerce has many effective means to make initial contact. Among these are:

Commercial News USA. This export catalog is a publication distributed only through the Commercial Service, U.S. Department of Commerce, at US consulates and embassies abroad. It is published ten times annually and delivered to over pre-screened business clients in foreign markets who have indicated an interest in buying or representing for sale US products in foreign markets.

Catalog Exhibitions. Catalog exhibitions are staged in a variety of markets and focus on a variety of industry themes each year. The events allow companies to advertise their products or services at low cost by sending literature for display. Leads are collected and forwarded to the company at the end of the event.

Gold Key Service. The Gold Key Service provides exporters with one-on-one appointments with pre-screened potential agents, distributors, sales representatives, association and government contacts, licensing or joint venture partners, and other strategic business partners in a targeted export market. Includes Customized market and industry briefings with CS in-country trade specialists, timely and relevant market research, appointments with prospective trade partners in key industry sectors, post-meeting debriefing with CS trade specialists, assistance in developing appropriate follow-up strategies, and assistance with travel, accommodations, interpreter service, and logistical support.

Trade Shows. In today's international market, trade fairs are "shop windows" where thousands of firms from many countries display their wares, and buyer and seller can meet with mutual convenience. Many of the best of these events are supported by the U.S. Department of Commerce with a variety of services and benefits to participants.

Trade Missions. Missions are carefully planned and scheduled visits by groups of U.S. sellers to potential buyers or clients overseas. Usually organized around an industry or regional theme, they are composed 5 to 12 decision makers who meet with pre-screened appointments (potential business partners) in a controlled environment.

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F. Negotiating an International Sales Agreement.

by David Dubberly, ESQ.

In many countries, if a manufacturer has a choice between appointing an agent or distributor, the manufacturer will appoint a distributor. Where the manufacturer has appropriately limited the authority of the distributor, a distributor is less likely to be protected by labor laws, or to be considered a "permanent establishment" subject to local taxes under the provisions of a bilateral tax treaty.

Licensing Agreements

When transportation costs and local government regulations make it impractical or impossible for a company to sell its products in a foreign market, it may "sell" its knowledge of how to make the

products by licensing its intellectual property rights, such as its patents, copyrights, trademarks, or trade secrets.

One of the greatest concerns for United States licensors is the inadequate protection of patents, trademarks, and copyrights for computer software in many developing countries. Also, many countries have special restrictions on licensing agreements. There may be a requirement that local law govern the agreement or that the agreement be pre-approved or registered with a local agency. Some countries establish caps for royalties and related fees. Other jurisdictions have enacted special “technology transfer” legislation requiring that licensed technology rights become the full property of the licensee after a specified period.

#### Joint Venture Agreements

Once United States businesses reach a certain level of local market penetration, they may acquire a local distributor or enter a joint venture with a local producer. By producing locally, the exporter can enhance its “presence” and avoid or reduce tariffs and transportation costs. For example, MERCOSUR (the Argentina-Brazil-Paraguay-Uruguay trade block) has a 20% maximum common external tariff and 0% internal tariff on most products. An exporter producing within MERCOSUR does not have to pay the external tariff. Also, if a United States business bids for a privatized company or participates in an infrastructure project, it will usually work with a local partner.

Good joint venture partners will take care of tasks that are more difficult or impossible for foreigners, such as:

- Dealing with government regulators
- Selling to local government agencies (which are often required by law to “buy local”)
- Obtaining real estate and zoning permits
- Managing employees
- Adapting products and services to local requirements and tastes

Joint ventures may be “housed” in a newly created company separate from the owners. Typically, two parties contribute resources on a 50/50 basis in exchange for ownership. In other cases, the United States partner may buy a large enough block of shares of a local company (at least 20 to 25%) to allow it to have an active role in management. Alternatively, partners may simply sign a contract to work cooperatively. Joint ventures may be formed to complete one project only (like a construction project), for the duration of a patent or concession, for a trial period, or for an indefinite period.

#### Franchise Agreements

Franchising, which has elements of both distribution and licensing, has become a widely used

method for international expansion of fast food restaurants, hotels, theme parks, temporary personnel agencies, and travel agencies. The franchisor licenses the right to sell products or services using the franchisor's trademark and system of operation in return for an initial payment and royalties based on sales. The franchise agreement often provides for standards of quality control and reporting to which the franchisee must adhere.

United States franchisors frequently employ master franchise agreements in which the franchisor grants the right to develop a foreign territory to a sub-franchisor. The sub-franchisor may own some units and franchise others to third parties. In some cases, a United States franchisor may seek local joint venture partners who will share an equity investment in the market.

#### Infrastructure Project Agreements and Other Service Contracts

International infrastructure and construction projects may be completed as turn-key project agreements which set out the responsibilities of the contractor or vendor to finish the project and "turn the key" over to the purchaser for immediate use. Variations on the turn-key arrangement include "BOT" (build-operate-transfer) agreements, "BOO" (build-own-operate), "BOOT" (build-own-operate-transfer) and "BLT" (build-lease-transfer) agreements, all of which provide that the builder operate the facility for a specified time period to obtain a guaranteed return before transfer ownership to another entity.

Other service providers, such as management and technical consulting, architectural design, environmental and civil engineering, and custom computer programming firms often contract to sell their services to foreign clients. Banks are an example of service providers that may establish subsidiaries in other countries to access foreign customers.

#### U.N. Convention on Contracts for the International Sale of Goods (CISG)

The United Nations Convention on the International Sale of Goods (CISG) automatically applies to contracts for the sale of goods between a buyer and a seller located in different countries that have ratified the CISG unless the parties "opt out" by specific written exclusion. Many of the CISG's provisions are comparable to those found in Article 2 of the Uniform Commercial Code (UCC) adopted in the United States. Specific similarities may be found in the provisions of the CISG and the UCC on warranties, course of dealing and usage of trade, excuse, remedies, and adequate assurances of performance.

There are some major differences between the CISG and the UCC. For example, on the issue of contract formation, the CISG contains a strict "mirror image" rule requiring an acceptance to be only of the strict terms of the offer. In contrast, the UCC allows for greater discrepancy in the terms of acceptance which may have different terms than those in the offer provided the differences do not alter the material terms of the offer. Under the CISG rules, a reply that purports to accept an offer, with modifications, is a rejection of the offer and constitutes a counter-offer. Under the UCC, a reply to an offer that contains different terms that do not materially alter the terms of the offer constitutes an acceptance unless the offeror, without undue delay, objects orally or in writing to the discrepancy. If the offeror does not object, the terms of the contract are the terms of the offer including the modifications contained in the acceptance. Therefore, an exporter

should quickly send a letter of objection or clarification to the buyer if there is any discrepancy between the exporter's offer and the buyer's acceptance. Failure to convey such objection could result in an unwarranted contract where the UCC and not the CISG applies in such a negotiation.

#### International Contract Terms (INCOTERMS)

INCOTERMS are a set of internationally recognized trade terms published by the International Chamber of Commerce (ICC) located in Paris, France. These terms include definitions such as parties, terms of sale, point of origin, place of delivery, cost of shipping and insurance, and which party is responsible for obtaining export and import clearances. For example, CIF (Cost-Insurance-Freight) is a pricing term that indicates that cost, insurance, and freight to the port of destination are included in the quoted price. In such case, the buyer is responsible for the transportation of the goods from the port to the buyer's inland location.

When both parties specify that delivery shall be according to INCOTERMS, there need be no dispute regarding at which point the exporter's responsibility ends and the importer's begins. However, the specification must include the year of publication of the INCOTERMS to be used since this publication has been released several times with varying definitions within the revisions for the same or similar terms.

#### Contract Terms

Terms to be covered in agency, distribution, and licensing agreements include:

- Products to be handled (agency and distribution) or rights granted (licensing). The exporter may later develop a new product and not necessarily want to commit to a relationship with the same local partner regarding this product.
- Term. The term of an agent or distributor should be for a defined period and rarely for a period more than three years. It is not advisable to commit to automatic renewal because of the possibility of incurring termination compensation.
- Marketing, service, and financial reporting duties (agency and distribution) or quality standards (licensing). For example, an agent or distributor should contractually agree to:
  - submit sales forecasts and reports on the activities of competitors;
  - maintain premises in a manner that will reflect well on the exporter;
  - provide inspection, maintenance, and repair service;
  - maintain adequate levels of product on hand; and
  - furnish regular financial reports.

The agreement should specify that breach of these provisions will result in a final warning letter or a breach with a reasonable period of cure before the breach is determined to be a default. Warning letters are important to document the

representative's failure to measure up and counter any claim that the termination was arbitrary.

- Grounds for early termination, including failure to meet minimum purchase (distribution) or sales (agency) quotas, or failure to make royalty payments (licensing). The exporter should research the market to determine realistic goals. In some countries, failure to meet objective standards is the only acceptable reason for termination of agency or distribution agreements. Alternatively, if the representative exceeds performance goals, the exporter may consider increasing the representative's discount or commission.
- Consequences of termination, such as:
  - return of customer lists and documents containing trade secrets
  - cooperation with transfer of accounts to a new representative
  - repurchase of inventory
  - cessation of use of trademarks
  - post-termination confidentiality
- Territory/Exclusivity – The agreement should be precise in specifying the kind of exclusivity granted (for instance, whether it grants a territory in which no other representatives will be named, limits the manufacturer's right to sell, or limits the representative from selling competing products). Further, the local jurisdiction's competition laws should be reviewed to determine whether exclusive arrangements are permitted with representatives. The exporter should be careful about granting a new representative the exclusive right to sell its products in more than a limited geographic area and whether the representative should be limited to a product line or to specific channels of distribution. Broad exclusivity should be withheld until the representative proves himself by meeting performance requirements. It is easier to expand the territory of a distributor who does a good job than to reduce the territory of a distributor whose results are disappointing. In any event, the exporter should reserve to itself the right to sell directly into the territory.
- Payment – Letters of credit make it easier to collect payment from foreign customers because the buyer must pay the purchase price to a bank before obtaining the commercial and shipping documents that allow him to claim the goods. Letters of credit give a higher level of security but are also expensive for buyers and may render the product or service non-competitive.

Joint venture agreements usually cover the following main points:

- Contribution of cash, services, equipment, facilities, or technology.
- If buying part ownership, valuation of the local company.

- Determination of the shares and directors which the United States partner may receive or obtain (assuming that the joint venture will be a corporation).
- Control of managerial decisions. Supermajority approval is usually required for a handful of key decisions, such as selecting top managers, changing the product line, declaring dividends, monetary commitments over 10% of net worth, initiating lawsuits, and selecting accountants and lawyers.
- Compensation of the United States partner. Provided the choices are consistent with local law, parties can choose to distribute all profits as dividends based on percentage of ownership, to pay no dividends for initial period to allow venture to build up capital, or to take as dividends a percentage of profits. The United States partner should also be paid for related licensing, management, or components supply agreements based on a flat fee or a percentage of sales or both.
- Termination events - valuation and buy-out.

#### Contract Formation and Procedural Formalities

While the CISG does not require a written contract, some countries have statutory schemes that impose many formal requirements to form a contract. Notarization, registration with a government agency, and even preliminary approvals may be required for certain contracts in some jurisdictions. Notarization is a more complex and formal process in civil law jurisdictions. Also, letters of intent should clearly state what the parties are committing themselves to do. Failure to specify the allocation of expenses can result in a party being responsible to pay the expenses of the party in a failed negotiation.

#### Intellectual Property Protection

Before expanding overseas, an exporter should register its trademarks in its name in each target market. It is important not to permit the local partner to register the exporter's trademarks in the name of the local agent or partner. Also, the exporter should place appropriate copyright and confidentiality notices on information about processes, products or services, customers, and personnel. Finally, the agreement establishing the relationship with the local partner should provide that:

- The exporter owns all intellectual property in its products or services, including any translations, adaptations, enhancements, and new versions;
- No ownerships will be transferred to the local partner;
- The local partner and its employees will sign confidentiality and non-compete agreements; and
- The local partner will notify the exporter immediately upon learning that a third

party is infringing or threatening infringement of the exporter's intellectual property.

### Exchange Controls

The exchange control regime of the foreign country should be understood to identify risks to be managed through contractual provisions, insurance, or other mechanisms. Contracts should address such issues as: (i) payment currency, (ii) currency of denomination specifying amount payable, (iii) availability of foreign exchange and (iv) restrictions on repatriation of capital.

### Dispute Resolution

The risk of disputes can be minimized by choosing local partners carefully and by negotiating clear, written contracts. However, despite the most thoughtful planning disputes may arise. As long as the courts of the local partner's country enforce arbitration clauses and awards, binding arbitration will be the preferred method of resolving most disputes. The main advantage of arbitration is that the parties can decide beforehand who the arbitrators will be and where they will hear the case. The alternative may be competing court proceedings in the United States and the local partner's country. Contracts should usually require non-binding but formal negotiation or mediation prior to arbitration. If such efforts fail, binding arbitration follows.

### Compliance with United States Foreign Corrupt Practices Act (FCPA)

Companies having dealings with foreign government agencies or state-owned enterprises should take steps to ensure compliance with the FCPA. This law prohibits offering or giving "anything of value" to any foreign official or public sector employee "corruptly" to obtain or retain business. Large gifts and lavish entertainment are presumed illegal. The law also prohibits such payments through local partners. Minor "facilitating payments" to expedite the performance of routine actions, such as speeding up licenses and customs clearances, are allowed. Also, as a general rule, the law does not prohibit giving promotional samples of products, or reimbursing foreign officials to travel to the United States to meeting with company personnel and visit facilities. The Act imposes civil and criminal penalties for violations. Recently General Electric Company paid \$69 million and Lockheed Corporation paid \$24.8 million in fines and penalties for alleged violations of the law. In addition to adopting and enforcing FCPA policies and procedures, exporters should provide formal training regarding the FCPA to employees and local partners involved in marketing to public entities. "Red flags" include requests that commission payments be made to bank accounts in third countries or to third parties, and requests for cash or unusually large commission payments.

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### G. Business Travel

To be a successful exporter, one must be able to think globally. In this sense, thinking globally means that the exporter should be aware of and sensitive to the subtleties of conducting business in an international arena. If the exporter is not prepared for the cultural differences, even the most well planned, well-prepared business strategy can go awry.

## Be Familiar With The Culture

Familiarity with a foreign culture will help the exporter to avoid embarrassing situations and aid business negotiations. Obviously, every culture has different standards for conducting business. One culture may consider a specific action as a sign of respect, while another culture may view the same sign as being impolite.

It is crucial to understand exactly how a culture views power and authority. American entrepreneurs tend to be highly motivated, time conscious, take-charge people. This sort of behavior is often frowned upon by foreign businesspeople and may possibly cost the exporter a sale. Other important factors to remember include:

- Know a few words in the language. Trade specialists recommend that exporters employ a professional interpreter to help them draft written correspondence and aid in the interpretation of the letters received from abroad. Also, a quick, intensive study of the language just before the trip will prove to be helpful.
- Study the country's characteristics. Preparation and planning will eliminate many potential problems. Be aware of the weather, currency exchange rates, politics, history, and national holidays.
- Carry business cards. In some countries, exchanging business cards at any first meeting is considered a basic part of good business manners.

## Communicating With International Business Executives

Written correspondence is the communication of choice. Foreign cultures place a great deal of importance on form. Initial contact with a client over the phone is considered taboo because it is generally considered to be informal. While the telephone is an effective and powerful communications tool, it should be used with caution. In international business dealings, the telephone is best used to clarify matters that have previously been communicated in writing. Recent advancements in telecommunications have made the world seem to be a much smaller place. This technology has allowed greater ease in corresponding with international business executives, however prudence should be exhibited when conducting business in this fashion.

For a list of the interpreters/ translators located in your area, contact the Carolina Association of Translators and Interpreters.

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