

The War and Navy Departments and the U.S. Maritime Commission were exempted from the provisions of the Buy-American Act shortly after the declaration of the Second World War. Executive Order 9001, 6 Fed. Reg. 6787 (1941). The President is empowered by law to authorize any department or agency exercising functions connected with the national defense to dispense with other provisions of law (e.g., the Buy-American Act) when he deems that such action would assist the national defense. National Defense Contracts Act, 50 U.S.C.A. § 1431 (Supp. 1963).

For a general review of procurement under the Federal Buy-American Act, see Van Cleve, *The Use of Federal Procurement to Achieve National Goals*, 1961 WIS. L. REV. 566, 577-92; Knapp, *Buy-American Act: A Review and Assessment*, 61 COLUM. L. REV. 430 (1961); Gantt and Speck, *Domestic v. Foreign Trade Problems in Federal Government Contracting: Buy-American Act and Executive Order*, J. PUB. L. 378 (1958). See also Note, *National Power to Control State Discrimination Against Foreign Goods and Persons: A Study in Federalism*, 12 STAN. L. REV. 355 (1960).

A 1959 survey by the Council of State Governments reveals that fifteen states—including California, Indiana, Massachusetts, Maryland, Ohio and Pennsylvania—had restrictions against purchase of foreign-made goods by public agencies. A 1961 survey by the Bureau of Business and Economic Research at the University of Utah showed that nineteen states had established preferences for goods originating in the state.

The Attorney General of California has ruled that California Buy-American laws are inapplicable to the purchase of Swiss turbine generator units by the city of Los Angeles because such exclusion of foreign goods is contrary to the National Treatment Clause of the Trade Agreement with Switzerland read in the light of GATT. The GATT provision making the national treatment clause inapplicable to governmental purchases (GATT, Pt. II, Art. III, Paras. 5, 8(a)) was found to be inapplicable because this purchase was for "use in the production of goods for sale." Calif. Atty. Gen. Op. No. 59/164 (1959); Calif. Atty. Gen. Op. No. 60/141 (1960). The California Superior Court for the City of San Francisco held that the California Buy-American Act cannot be applied in connection with power equipment procurement by the city of San Francisco because of the National Treatment Clause of GATT and because of the National Treatment Provision in the Treaty of Friendship, Commerce and Navigation with Japan. *Baldwin-Lima-Hamilton Corp. v. Superior Court*, 208 Cal. Ap. 2d 803, 25 Cal. Rep. 798 (1962).

The Texas Supreme Court has held an order of the Texas Highway Commission requiring use of U.S. made steel in the construction and maintenance of the Texas highway system to be contrary to the Texas Competitive Bidding Law and without legal justification. *Texas Association of Steel Importers v. Texas Highway Commission*, Docket No. A-9515, Supreme Court of Texas, November 6, 1963, rehearing denied, December 11, 1963.

COUNTRY-OF-ORIGIN MARKING

At the individual level, the right to indulge a whim or prejudice—for or against the import—ought to be protected. But there is an important question as to how far importers or distributors should be required by law to insure that the purchaser cannot overlook the country of origin, thus encouraging whatever prejudices he may harbor. Under the U.S. customs laws, the country of origin of imported goods must be legibly marked, where this is practical. The fact that, for some products and some markets, obtrusive marking is a serious commercial handicap makes the marking requirement a definite trade obstacle. Cases may be cited where an importer has abandoned a line of goods because the prominence demanded by customs for the country-of-origin mark made them unsaleable.

After customs has been satisfied, the importer or distributor can still run afoul of the Federal Trade Commission, which has construed its mandate to pursue deceptive practices as requiring it practically to insure that the purchaser knows the goods are imported. This is based on the unchanging assumption that there is a preference for domestic goods—which, of course, may or may not be true in a given situation—and that, unless otherwise noted, the customer will assume all goods to be of American origin.

That the customer should know the truth appears at first blush unchallengeably right and good; but there is an important distinction to be made between *legible* and *obtrusive*. The distinction is illustrated by the ingredients of candy as stated on the wrapper, which is there for those who look, and the label "poison" which is too prominent to overlook. There is no national policy requiring that the customer know the national origin before he buys; there is simply a public interest that the facts be available if he cares. Questions of public health apart, the basic premise of laws protecting the consumer's right to choose is that he *cares* to choose. Public policy favors unfettered international trade, but there lurk in the background passions and prejudices which often influence actions without rising to the level of considered decisions.

History shows—most recently in the case of the vetoed Canadian lumber-marking bill—that country-of-origin marking can be a potent tool for protectionism. This is not always true, of course. For many products and many consumers, it is helpful. However, the marking problem, by definition, arises only in those few market sectors where the country of origin is regarded in the trade as a bad sign. If the distributor thinks it is good or neutral, he is glad to feature it. In addition to questions of consumer attitudes, the actual marking required is frequently onerous and expensive.