Globalization

A Guide for Growth-Oriented Entrepreneurs

Sample Chapter: Building and Managing a Global Compliance Program

GROWTH-ORIENTED ENTREPRENEURSHIP PROJECT

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Growth-Oriented Entrepreneur's Guide to Globalization

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About the Project

The Growth-Oriented Entrepreneurship Project (www.growthentrepreneurship.org) engages in and promotes research, education and training activities relating to entrepreneurial ventures launched with the intent to achieve significant growth in scale and value creation through the development of innovative products or services which form the basis for a successful international business. In furtherance of its mission the Project is involved in the preparation and distribution of Guides for Growth-Oriented Entrepreneurs covering Entrepreneurship, Leadership, Management, Organizational Design, Organizational Culture, Strategic Planning, Governance, Compliance, Finance, Human Resources, Product Development and Commercialization, Technology Management, Globalization, and Managing Growth and Change.

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Attorneys acting as business counselors to growth-oriented entrepreneurs who are interested in forms, commentaries and other practice tools relating to the subject matter of this chapter should also contact Dr. Gutterman at the e-mail address provided above.

PART III
Global Compliance Programs

Chapter 1
Building and Managing a Global Compliance Program

§1:1 Introduction

This chapter explores the steps that should be taken to build and manage a global compliance program. This chapter provides a basic introduction to US and foreign laws and regulations that may impact cross-border business activities and a discussion of the definition and role of public and private international law in establishing the legal environment for cross-border activities. The chapter also describes how to conduct an initial audit of global compliance, how to organize the global compliance function and the commonly agreed elements of an effective compliance program. Finally, the chapter includes guidelines for designing compliance programs in several key areas of interest to global companies.

§1:2 Compliance for global businesses

Identifying applicable laws and regulations relating to the conduct of a particular business and establishing policies and procedures to ensure compliance with those laws and regulations is an important and challenging objective for any company even when it is operating in just one jurisdiction.[1] However, since commencement of activities in at least one foreign market has now become a natural milestone for almost all growing businesses in the US, regardless of their size in terms of employees, products, or revenues, compliance has become an even more complex activity as companies must learn how to cope with "international law" and the compliance standards and business ethics expectations of many countries. Unfortunately, this is no easy task since there are a number of US laws and regulations that must be taken into account and the variety of laws and customs found around the world often make generalizations very difficult in this area. Any company venturing into cross-border business activities must be prepared to invest the time and resources necessary to establish and maintain an effective global law and compliance program that fits the company's specific cross-border business activities, such as exporting or importing products, licensing of software or technology to or from foreign parties, and/or operating foreign subsidiaries, branches and joint ventures.

§1:3 --Compliance and business ethics in the global marketplace

[1] For general discussion of compliance issues, see "Growth-Oriented Entrepreneur's Guide to Compliance" prepared and distributed by the Growth-Oriented Entrepreneurship Project (www.growthentrepreneurship.org). When establishing a global compliance program companies should first be sure that they have in place an adequate US compliance infrastructure that includes all of the elements described in that Guide.

There is little doubt that corporate governance, compliance and ethics have been some of the hottest topics in the international business scene over the last few years. While regulators had discussed corporate governance reforms from time-to-time and countries had adopted regulatory schemes to deal with specific issues such as bribery of public officials, it was not until the accounting scandals involving Enron and other large global enterprises shook the US that real changes were implemented. In the US, the passage of the Sarbanes-Oxley Act of 2002 was followed by a series of civil and criminal prosecutions against business enterprises and financial institutions, promulgation of new rules by the Securities and Exchange Commission, revised listing and analyst standards for the major securities exchanges (i.e., NYSE and NASDAQ), and increased activism by institutional investors and other stakeholders. In addition, in light of the rapid and continuing globalization of business markets, fueled by advances in technology, industry consolidation and intensified levels of competition, regulators from around the world came to the conclusion that corporate governance and business ethics issues need to be addressed on an international basis. In the financial industry, for example, global standards with respect to management duties and responsibilities were developed and disseminated by the Basel Committee on Banking Supervision, the International Organization of Securities Commissions and the International Association of Insurance Supervisors.

All of this has led to a rapid and dramatic transformation of the way in which compliance is viewed within business enterprises. In the US, public companies now find that their board of directors and board committees, as well as senior management, is now subject to a wide range of new requirements relating to corporate governance, business ethics and compliance. For example, independence is required for the audit, nominating, and compensation committees of the board and public companies must now adopt and publish corporate governance and business ethics guidelines and establish whistleblower protection measures. In Europe the trend among regulators is to push for requirements that would mandate that enterprises establish a global compliance function to support, coordinate, and monitor compliance activities at the business line, geographical, and legal-entity level. While corporate governance is an important reason for this push, Europeans appear to be even more concerned about the need to take affirmative steps to counter international corruption, money laundering and terrorist financing. For example, the Committee of European Securities Regulators has issued standards relating to the harmonization of conduct of business rules in Europe, including a recommendation that enterprises establish an independent compliance function.[2]

Compliance is just one piece of a much larger movement toward demanding and measuring social responsibility and accountability with respect to enterprises that operate in more than one country. For example, consider the Guidelines for Multinational Enterprises developed by the 30 member governments of the Organisation for Economic

[2] For further discussion of the advantages and challenges of compliance programs, see "Growth-Oriented Entrepreneur's Guide to Compliance" prepared and distributed by the Growth-Oriented Entrepreneurship Project (www.growthentrepreneurship.org).

Co-operation and Development ("OECD")[3] as a set of nonbinding recommendations to help multinational enterprises operate in harmony with the policies and societal expectations of the countries in which they conduct business. When originally issued, the Guidelines included voluntary principles and standards for responsible business conduct and cover a wide range of specific issues such as information disclosure, employment, industrial relations, the environment, combating bribery, consumer interests, science and technology, competition and taxation. Substantial changes to the Guidelines were made and announced in a 2011 edition, including a new human rights chapter, which is consistent with the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework; a new and comprehensive approach to due diligence and responsible supply chain management representing significant progress relative to earlier approaches; important changes in many specialized chapters, such as on Employment and Industrial Relations; Combating Bribery, Bribe Solicitation and Extortion, Environment, Consumer Interests, Disclosure and Taxation; clearer and reinforced procedural guidance to strengthen the role of the NCPs, improve their performance and foster functional equivalence; and a pro-active implementation agenda to assist enterprises in meeting their responsibilities as new challenges arise. The Guidelines are not enforceable as a matter of law, nor do they override the national laws of the countries in which multinational enterprises may conduct their business activities. Nonetheless, they do provide a global perspective for U.S. companies seeking to develop a global compliance program that is consistent with international practice and expectations. In general, the Guidelines require enterprises to fully take into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should:

(1) Contribute to economic, environmental and social progress with a view to achieving sustainable development.
(2) Respect the internationally recognized human rights of those affected by their activities.
(3) Encourage local capacity building through close co-operation with the local community, including business interests, as well as developing the enterprise's activities in domestic and foreign markets, consistent with the need for sound commercial practice.
(4) Encourage human capital formation, in particular by creating employment opportunities and facilitating training opportunities for employees.
(5) Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environmental, health, safety, labor, taxation, financial incentives, or other issues.

[3] The Organisation for Economic Co-operation and Development ("OECD") is composed of representatives from the governments of 30 market democracies who work on various issues relating to perceived economic, social, environmental and governance challenges of the global economy. While discussions between OECD members sometimes lead to formal agreements or treaties, more often than not the value of the organization comes from its position as a forum where members can co-ordinate domestic and international policies and develop nonbinding instruments that reflect good practices, such as its Guidelines for Multinational Enterprises. The OECD is also recognized as one of the world's largest and most reliable sources of comparable statistical, economic and social data and OECD information, analysis and data can be publicly accessed at the OECD Internet site (www.oecd.org).

(6) Support and uphold good corporate governance principles and develop and apply good corporate governance practices, including throughout enterprise groups.
(7) Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.
(8) Promote awareness of and compliance by workers employed by multinational enterprises with respect to company policies through appropriate dissemination of these policies, including through training programs.
(9) Refrain from discriminatory or disciplinary action against workers who make *bona fide* reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the *Guidelines* or the enterprise's policies.
(10) Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.
(11) Avoid causing or contributing to adverse impacts on matters covered by the *Guidelines*, through their own activities, and address such impacts when they occur.
(12) Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.
(13) In addition to addressing adverse impacts in relation to matters covered by the *Guidelines*, encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the *Guidelines*.
(14) Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.
(15) Abstain from any improper involvement in local political activities.

§1:4 --Legal and regulatory considerations

While global compliance programs are now widely accepted as examples of corporate "best practices," much of the original incentive for establishing a compliance function came from federal agencies that implemented programs to encourage companies to monitor their compliance with the federal laws for which the agency is responsible and to report violations. The list of agencies includes the Department of Defense, Department of Health and Human Services Office of Inspector General, Department of Justice Antitrust Division, Environmental Protection Agency, Internal Revenue Service and the Securities and Exchange Commission. Many state agencies and prosecutors have adopted similar rules. In addition, there are a number of laws, regulations and guidelines that encourage or require adoption of corporate compliance programs, including the

Foreign Corrupt Practices Act of 1977, the Organizational Sentencing Guidelines and the Sarbanes-Oxley Act of 2002.[4]

§1:5 Sources of international law

International commercial transactions create significant challenges for the parties and their counsel that extend beyond the normal domestic transaction in which both parties are from the same country and performance is to occur within shared borders. Cross-border arrangements involve performance in more than one jurisdiction by parties from two or more nationalities. In the event a dispute arises, it may be necessary for courts from more than one country to exercise jurisdiction or for international arbitration panels to assume responsibility for adjudicating the rights of the parties. It is obvious, therefore, that the parties run the risk that their affairs may be governed by unfamiliar laws and regulations that would not otherwise apply when contracting with a partner in the same country. In order to assist companies in identifying the legal framework that is likely to apply to a particular transaction, as well as the strategies that may be used to establish the most advantageous ground rules, counsel must be aware of the following:

- US domestic laws, typically federal statutes and related regulations, that specifically apply to cross-border transactions and disputes between US and foreign parties;
- Foreign laws and regulations that may apply to a US party doing business in a foreign country or otherwise with a foreign party;
- Public international law, which includes treaties, multilateral agreements struck in the context of the work of recognized international organizations and the customary "law of nations" that has developed through scholarship and practice over decades; and
- Private international law, which governs legal relationships between private parties and includes conventions, uniform laws, guidelines and principles developed by courts and private organizations to interpret, enforce and resolve disputes arising out of private contracts between parties in different countries.

In addition, many types of international commercial agreements will incorporate special rules that have been developed by widely recognized non-governmental international organizations such as the International Chamber of Commerce (e.g., INCOTERMS). These rules are based on careful study and consideration of customary international practice and can be used as a means for clarifying the intent of the parties and establishing a common framework for interpreting and administering cross-border contractual relationships.[5]

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[4] For further discussion of judicial and regulatory guidance regarding effective compliance programs, see "Growth-Oriented Entrepreneur's Guide to Compliance" prepared and distributed by the Growth-Oriented Entrepreneurship Project (www.growthentrepreneurship.org).

[5] INCOTERMS is the International Chamber of Commerce's widely accepted rules for the use and interpretation of domestic and international trade terms. The latest version of INCOTERMS is INCOTERMS 2010, ICC Publication 715 (2010) ("INCOTERMS 2010"), which went into effect on January 1, 2011. INCOTERMS 2010 will usually only apply to a sales contract if the terms are specifically incorporated; therefore, it is always important to refer to desired specific version of INCOTERMS in the contract, particularly where the parties are from different regions of the world. The parties may incorporate a specific rule from a prior version of INCOTERMS, such as INCOTERMS 2000, or all of the terms and

§1:6 --US governmental bodies involved in international trade matters

There are a number of US governmental bodies, including agencies, offices and tribunals, involved in various aspects of US trade law and policy and it is important for counsel to be familiar with the major players in order to understand how laws, regulations and treaties are created and enforced. While it is not practical to list and describe all of the agencies and offices that might have jurisdiction over some aspect of the cross-border business activities of a company, notice should be taken of the following:

- Substantial responsibility for the negotiation of bilateral and multilateral trade agreements on behalf of the US is vested in the Office of the United States Trade Representative ("USTR"), which is part of the Executive Branch. In addition to the work undertaken on free trade agreements, the USTR is charged with advocating US interests at the World Trade Organization ("WTO"), including prosecuting complaints against trading practices of other countries thought to be unlawful and defending against complaints made by other countries against US trade laws and practices.
- The Bureau of Customs and Border Protection, commonly referred to as "Customs" or the "CBP," is part of the Department of Homeland Security and has a broad range of responsibilities in the areas of homeland security, international trade, protecting US ports of entry and intercepting and confiscating illegal drugs and other contraband.[6] In particular, Customs administers, interprets and enforces a wide array of laws and regulations, including customs requirements and creation and monitoring

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rules in a prior version. It is therefore important to include more than just "INCOTERMS" in the contract reference and the parties should explicitly refer to the version of INCOTERMS (e.g., INCOTERMS 2010 or INCOTERMS 2000) they have chosen in order to avoid subsequent disputes regarding what version is applicable. INCOTERMS 2010 is intended to facilitate drafting of clear and concise sales contracts by providing comprehensive rules that the parties can easily integrate into their documentation. Parties are not forbidden to make modifications to a particular INCOTERMS 2010 term or rule; however, modification carries risk of confusion and contract interpretation uncertainty and should not be attempted unless the parties have clearly explained the proposed changes in the contract of sale. INCOTERMS 2010 covers 11 different types of sales transactions, and these are grouped into two categories—those applicable to all modes of transport, which means rules that can be used where there is no maritime transport at all or where maritime transport is used for only part of the carriage, and those only applicable to sea and inland waterway transport, which means rules that should be used in situations where the point of delivery and the place to which the goods are carried to the buyer are both ports. INCOTERMS applicable to any mode of transport include CIP (Carriage and Insurance Paid), CPT (Carriage Paid To), DAP (Delivered At Place), DAT (Delivered At Terminal), DDP (Delivered Duty Paid), EXW (Ex Works) and FCA (Free Carrier). INCOTERMS applicable only to sea and inland waterway transport include CFR (Cost and Freight), CIF (Cost, Insurance and Freight), FAS (Free Alongside Ship) and FOB (Free On Board). Although INCOTERMS is primarily concerned with delivery, for each type of transaction INCOTERMS 2010 stipulates, if appropriate, the respective obligations of the seller and buyer regarding matters such as arranging import or export licenses, carriage, obtaining security-related clearances (e.g., chain of custody information) and, most important to the question of insurance, transfer of risk.

[6] Customs administers, interprets and enforces a wide array of laws and regulations, including customs requirements and creation and monitoring of Free Trade Zones. Current information on the activities of Customs, including links to Customs rulings and related legal resources, can be found at the Customs web site.

of Free Trade Zones. Current information on the activities of Customs, including links to Customs rulings and related legal resources, can be found at the Customs website.

- The US International Trade Commission ("ITC") was created as an independent, quasi-judicial federal agency vested with substantial investigative, adjudicative and research powers and responsibilities.[7] The key functions of the ITC include assisting in the administration of US trade remedy laws[8]; investigation of unfair methods of competition and unfair acts in the course of importation or sale of goods into the US that may infringe US intellectual property rights; compilation and dissemination of trade data and statistics and analysis of major trade-related issues, such as the competitiveness of specific industries and the projected economic effect of new free trade agreements; and maintenance of the Harmonized Tariff Schedules of the US[9].
- The US Department of Commerce ("DOC") is active in a number of areas including the following: the Import Trade Administration ("ITA") promotes US exports of manufactured goods, non-agriculture commodities and services[10]; the ITA, through its offices of Trade Development and Market Access and Compliance, actively work to ensure that rights of foreign market access granted to US companies and industries under negotiated free trade agreement are actually honored by trading partners; the Bureau of Industry and Security ("BIS") within the DOC is responsible for development, implementation and enforcement of US export controls on products and technology that have primarily civilian uses yet also are capable to being deployed in military, proliferation and terrorism-related applications[11]; and the Bureau of Economic Analysis ("BEA"), which is also within the DOC, compiles detailed statistics on the US economy.

§1:7 --International organizations and institutions

[7] Membership of the ITC is composed of six commissioners appointed by the President, no more than three of which can be from the same political party. Commissioners serve for nine-year terms; however, terms are staggered to encourage new ideas while retaining continuity. ITC activities are coordinated by a chairman and vice-chairman appointed by the President from among the six commissioners and these officers each serve two year terms in those capacities. Further information on the activities of the ITC can be found at its web site.

[8] The ITC determines whether it is appropriate to impose additional antidumping or counterveiling duties, which are discussed below, in cases where the ITC determines that a domestic industry has been injured by imports that have been dumped in the US market or imports that have benefited from unfair subsidies. Research and sanctions in this area are done in conjunction with the International Trade Administration of the US Department of Commerce.

[9] The Harmonized Tariff Schedules of the US are used by Customs for a wide range of purposes, notably determination of the applicable rate of duty, eligibility for exemptions under specialized trade programs and quota categories.

[10] The ITA is particularly well-known for the investigations of unfair trade practices undertaken by its Import Administration in conjunction with the ITC. In particular, the Import Administration investigates whether foreign companies violated US and international law by "dumping" products in US markets at below their home-market prices or whether foreign governments have unfairly subsidized foreign companies importing goods into the US.

[11] Further information on the BIS, including a detailed description of its classification and regulatory scheme, can be found at the BIS website.

In addition to the US-based agencies and organizations, there are a large number of international organizations and institutions involved in various aspects of foreign trade and investment. Simply put, an international organization is an organization that has an international scope or character. While the term is broad enough to include private non-governmental organizations ("NGOs") involved in international matters, in this section we refer only to international intergovernmental organizations (i.e., organizations whose members are sovereign states). In order to have legal recognition, an international organization must be established by a treaty which makes the organization a subject of international law that permits the organization and its members to enter into agreements among themselves or with states. There are, of course, international organizations that have not been founded by treaty and instead consist of groupings of states established for a common purpose. Also, while a treaty is necessary for an international organization to be given recognition, existence of a treaty does not necessarily create an international organization (e.g., the North American Free Trade Agreement).

Many of the most important international organizations are based on a treaty or other form of agreement that imposes formal duties and obligations on the parties thereto and creates sanctions for violations of those conditions. While perhaps overly simplistic, international trade organizations and agreements can be broken down into bilateral arrangements (i.e., just two countries), regional arrangements (i.e., a pact among three or more countries all located within a defined geographic territory such as the North American Free Trade Agreement) and multilateral arrangements (i.e., an organization of, or agreement among, three or more countries with membership not constrained by geographical boundaries such as the United Nations[12] and the World Trade Organization ("WTO")[13]). It is also possible to identify international organizations or agreements that base their membership on other criteria, such as the level of economic development or type of economy (i.e., the G8/G20/G77 and OECD for developed market-based economies and the Organization of Petroleum-Exporting Countries ("OPEC")) or cultural and religious background (i.e., Organization of the Islamic Conference).

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[12] The UN is not a governmental body and does not make laws that are binding upon its Member States; however, the UN is active in international dispute resolution and formulation of policies on a wide range of economic, social and political matters. In addition, the UN has cooperative agreements with a number of other specialized agencies, including the International Monetary Fund, the World Bank, the World Health Organization and the International Civil Aviation Organization.

[13] The World Trade Organization ("WTO") is the successor to the General Agreement on Tariffs and Trade ("GATT"), which was a multilateral initiative involving over 100 countries ("Contracting Parties") that conducted regular multilateral trade negotiations ("MTN") aimed at opening international trade. The essential role of the WTO is to facilitate the implementation, administer the operation and further the objectives of the Agreement Establishing the World Trade Organization and its Annexes, which include the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), a series of Multilateral Trade Agreements (the "Covered Agreements") which are binding on Members of the WTO, and a series of Plurilateral Trade Agreements which are not binding on Members of the WTO (GATT 1994 and its Annexes are collectively referred to as the "WTO Agreement"). The Multilateral Trade Agreements cover a number of different areas, including agriculture; textiles; antidumping, subsidies and countervailing measures; safeguards; technical barriers to trade; sanitary and phytosanitary measures; pre-shipment inspection; rules of origin; and import license procedures. There is also a General Agreement on Trade in Services and Agreements on Trade-Related Aspects of Intellectual Property Rights and Trade-Related Investment Measures. Current information on the status of trade negotiations within the WTO, as well as US-related trade complaints being heard within the WTO, can be found at the WTO web site.

A number of international organizations and institutions, such as the WTO, the World Customs Organization and customs unions and free trade areas formed by two or more countries, are concerned with easing the movement of goods across national borders through the reduction or elimination of restrictive trade devices that impede or distort trade. Others focus on specific aspects of cross-border trade and investment, such as intellectual property rights[14], labor conditions[15], standards[16] or arbitration. Still others, such as the World Bank[17] and regional development agencies such as the Inter-American Development Bank, have been established specifically to provide financing and technical support to build developing economies and encourage inbound investment from industrialized countries.[18]

§1:8 --Regional organizations and agreements

[14] The World Intellectual Property Organization ("WIPO") is an international organization dedicated to helping to ensure that the rights of creators and owners of intellectual property are protected worldwide and that inventors and authors are, thus, recognized and rewarded for their ingenuity. WIPO carries out a number of tasks related to the protection of intellectual property rights, such as administering international treaties (e.g., the Paris Convention for the Protection of Intellectual Property (formed in 1883, commonly referred to as the "Paris Convention") and the Berne Convention for the Protection of Literary and Artistic Works (formed in 1886, commonly referred to as the "Berne Convention")), assisting governments, organizations and the private sector, monitoring developments in the field and harmonizing and simplifying relevant rules and practices.

[15] The International Labour Organization ("ILO") is the UN specialized agency which seeks the promotion of social justice and internationally recognized human and labor rights. The primary work of the ILO consists of formulating international labor standards in the form of conventions and recommendations that establish minimum standards of basic labor rights relating to: freedom of association, the right to organize, collective bargaining, abolition of forced labor, equality of opportunity and treatment, and other standards regulating conditions across the entire spectrum of work related issues.

[16] The International Organization for Standardization ("ISO"), a non-governmental organization composed of representatives from the principal national standards bodies of 150 countries, is the world's largest developer of standards. Working together with business and industry sectors, ISO develops and tests standards that can be used by businesses and governments and then creates transparent and consistent procedures that can be followed worldwide to implement those standards. Although ISO standards are voluntary, they are now widely accepted and respected in public and private sectors around the globe given that the organization enlists expert input to develop and test the standards. Areas in which ISO has been active include agriculture and construction, mechanical engineering, manufacturing and distribution, transport, medical devices, information and communications technology, and services.

[17] The primary function of the World Bank Group is providing low-interest loans, interest-free credit, and grants to developing countries. The World Bank Group consists of the two World Bank organizations (i.e., the International Bank for Reconstruction and Development and the International Development Association) and three other organizations: the International Finance Corporation, which promotes private sector investment by supporting high-risk sectors and countries; the Multilateral Investment Guarantee Agency, which provides political risk insurance (guarantees) to investors in and lenders to developing countries; and the International Centre for Settlement of Investment Disputes, which settles investment disputes between foreign investors and their host countries.

[18] It is impossible to include a complete list and description of all of the important international organizations that deal with some aspect of global trade. Researchers interested in locating other international organizations should visit databases available online, such as the International Organizations page of the web site of the Northwestern University Library or the International Agencies and Information page of the web site of the University of Michigan Documents Center.

Even as the WTO was launched as the most ambitious effort toward multilateral trade negotiations, recent years have seen an impressive and important surge in the interest in, and use of, regional trade agreements ("RTAs"). There are now literally hundreds of RTAs that have commanded active participation of almost all of the members of the WTO. This development presents fundamental challenges to foundations of the multilateral trading system since by extending more favorable trading terms to members than to non-members there is a real sense that the principal of nondiscrimination that is so important to multilateralism is being violated.

A RTA is a voluntary, yet formal, association of a group of countries for the purpose of liberalizing their mutual trade by establishing specified market access conditions. There are several different recognized categories of RTA which can be distinguished primarily on the basis of their scope, notably the number of products involved and the number of countries that are parties to the agreement. Examples include the following:

- The most basic form of RTA is a simple "preferential treatment agreement" ("PTA"), which limits it impact by simply providing freer access to the markets of the respective members. The members of the PTA do not engage in organized policies against countries that are not members, nor is there any requirement for tariff reduction.
- The most common, and popular, form of RTA is the "free trade agreement" ("FTA"). While the FTA will typically require that each member state reduce, and eventually eliminate, tariffs, between the member states, there is no expectation that member states will abandon their own independent trade policies in relation to non-member countries.
- Customs unions are based on establishing and maintaining a common external tariff and harmonization of trade policy. The initial goal of a customs union is to liberalize trade among the member states by breaking down internal barriers to trade. At the same time, the members of the customs union establish common tariff barriers against goods coming from non-member states. Since realizing the goals of a custom union requires agreement on commercial policies, customs unions are typically the first step on the road to more complex economic or political unions.
- A common market follows the initial changes necessary for creation of a customs union through multilateral action to reduce and eventually eliminate barriers and restrictions on the free movement of capital, labor and other means of production among the member states. The result, of course, is a "common market" that equalizes the opportunities of firms throughout the region to competitively manufacture and distribute their goods to consumers in all parts of the common market. The European Communities were an example of a common market, as is the Common Market of the South ("MERCOSUR").
- Economic unions are the next step beyond a common market and arise when the member states reach agreement on a unified fiscal and monetary policy within the union and upon a common currency that can be used for trade throughout the union. If economic integration is successful, the final step is the development and support of common foreign and economic policies in the manner being pursued by the EU.

RTAs in one part of the world can actually provide opportunities for prospective trading partners that are not a party to the original RTA by virtue of the fact that it makes it easier to negotiate a new and more comprehensive agreement that involves all of the countries. For example, for several years the South Africa Customs Union (SACU) (Botswana, Lesotho, Namibia, South Africa and Swaziland) and the U.S. attempted to negotiate a Free Trade Agreement. While those negotiations were not successful for various reasons, if an accord had been reached the U.S. would have quickly gained greater access to a regional market, rather than just a single country, since goods exported into one member of the SACU could have then been moved duty-free to other countries within the SACU.

§1:9 ----US trade agreements

In addition to its activities at a global level though the WTO, the US has continuously and vigorously pursued market-opening initiatives on a regional and bilateral basis. The North American Free Trade Agreement (NAFTA) among the US, Canada and Mexico is the most well-known and highly publicized US regional trade arrangement; however, the US has entered into a number of Free Trade Agreements ("FTA"), which include reciprocal trade preferences between two or more countries that cover a large spectrum of the trade in goods between the countries. While most of the FTA are bilateral, involving just the US and one other foreign country, there have been several other regional initiatives that would involve more than just two countries and provide a framework for creation and administration of large regional trading blocs similar to the European Union.

The oldest US FTA is the U.S.-Israel Free Trade Area agreement, which took effect September 1, 1985, and is designed to stimulate trade between the US and Israel. The agreement, which has no expiration date, originally provided for the elimination of duties for merchandise from Israel entering the US; however, subsequent amendments authorized the President to make certain changes which expanded the scope of the FTA to provide duty-free treatment for products of the West Bank, Gaza Strip, or a QIZ, imported directly therefrom, or from Israel, if certain requirements are met. The agreement does allow the two countries to protect sensitive agricultural sub-sectors with non-tariff barriers including import bans, quotas, and fees. An FTA with Jordan went into effect at the end of 2001 and, since then, the USTR has completed agreements with a number of other countries and regions including Australia, Bahrain, Chile, Columbia (signed by President but not implemented) Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Morocco, Nicaragua, Oman, Panama (signed by President but not implemented) Peru, Republic of Korea and Singapore. Further information on bilateral trade agreements is available at the USTR web site.

Of all of the regional trade agreements to which the US is a party, the most well-known is the North American Free Trade Agreement ("NAFTA"), which was implemented on January 1, 1994, by Canada, Mexico and the US. In general, NAFTA eliminated nearly all tariffs between the US and Canada by 1998 and intends to do the same between the US and Mexico by 2008. In addition, NAFTA removes many of the non-tariff barriers, such as import licenses, that have helped to exclude US goods from the other two markets, especially Mexico. NAFTA is divided into several parts, including trade in

goods (e.g., national treatment and market access, rules of origin, customs procedures, energy and basic petrochemicals and agriculture and sanitary measures); technical barriers to trade, specifically standards-related measures; government procurement; investment, services and related matters, including telecommunications, financial services, competition policy and temporary entry of business persons; intellectual property; and review and dispute settlement in antidumping cases. In addition, acting pursuant to guidelines included in NAFTA, the parties have approved several supplemental agreements on environmental and labor cooperation and further guidelines for effective relief to American workers and firms needing time to adjust to injurious imports from Mexico.

Information regarding NAFTA is available at the website maintained by the NAFTA Secretariat, which focuses on the dispute resolution rules and procedures of the NAFTA Agreement. Other information on implementation of the NAFTA Agreement (e.g., customs and rule of origin, imports and exports, investment and services) and articles and academic resources, can be found at the NAFTA Home Page on the US Department of Commerce website and at the NAFTA Customs page on the Customs website. The information on the Customs website is organized in an easy to navigate topical interface and covers such topics as certificate of origin, advance rulings, NAFTA claims, verifications, determinations, and appeals to name just a few. One manual that is essential to any NAFTA importer is *NAFTA: A Guide to Customs Procedures*, which is a trilaterally agreed upon guide that provides general information on various customs topics. The Office of the United States Trade Representative also publishes various NAFTA-related materials, including fact sheets and press releases.

One of the most impressive, yet controversial, regional trade initiatives is the attempt to launch a Free Trade Area of the Americas ("FTAA") that would include all the countries in the Western Hemisphere under a single free trade agreement. When the idea was originally announced the U.S. offered to eliminate tariffs and trade barriers on the majority of industrial and agricultural imports from the Western Hemisphere immediately upon entry into force of the FTAA, and also offered broad access to its services, investment and government procurement sectors. For a variety of reasons the progress of the FTAA has stalled in recent years; however, it is illustrative of the imagination of various policymakers in this area. The US is also a party to, or involved in discussion about, the following regional trade initiatives: the Asia-Pacific Economic Cooperation Forum (APEC), which was in 1989 and has evolved from an informal dialogue group to a strong regional vehicle for promoting open trade and practical economic cooperation; the Enterprise for ASEAN Initiative, which was announced in October 2002 and designed to strengthen ties with the ASEAN countries (i.e., Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam) and facilitate consummation of FTA with ASEAN countries committed to economic reforms and openness; and the Middle East Free Trade Area Initiative, which includes a number of measures such as negotiation of FTA to support the efforts of Middle Eastern nations to increase trade and investment with the US and others in the world economy—notice should be taken of FTA negotiations with the UAE in recent years as well as the long-

standing FTA in place with Israel, Jordan and Morocco and the recent FTA entered into with Bahrain and Oman.

In addition to the various free trade agreements, the US has negotiated and executed over forty bilateral treaties with other countries under its US Bilateral Investment Treaty (BIT) program. The goals of the BIT program are to protect investment abroad in those countries where investors' rights are not already protected through existing agreements (such as modern treaties of friendship, commerce and navigation, or FTAs); encourage the adoption of market-oriented domestic policies that treat private investment in an open, transparent, and non-discriminatory way; and support the development of international law standards consistent with these objectives. Negotiations of an agreement are based on a new model BIT that incorporates the following "core" BIT principles:

- Investors and their "covered investments" (i.e., investments of a national or company of a Party in the territory of the other Party) are entitled to be treated as favorably as the host Party treats its own investors and their investments or investors and investments from any third country for the full life cycle of investment, i.e., from its establishment or acquisition, through its management, operation and expansion, to its disposition.
- Clear limits are established on the expropriation of investments and provision is made for payment of prompt, adequate and effective compensation when expropriation takes place.
- Funds related to a covered investment must be transferable into and out of the host country without delay using a market rate of exchange.
- Limits are placed on the circumstances in which performance requirements (e.g., local content requirements or export quotas) can be imposed.
- Investors from both Parties must have the right to submit an investment dispute with the treaty partner's government to international arbitration, and there is no requirement to use that country's domestic courts.
- Covered investments have the right to engage the top managerial personnel of their choice, regardless of nationality.

Information on the BIT program can be obtained through the US State Department or the USTR, and copies of treaty texts are available at the DOC's Trade Compliance Center website.

§1:10 ----Other regional trade organizations and agreements

Probably the most well-known and ambitious regional trade organization and agreement is what is now referred to as the European Union (EU). Formerly known as the European Community or European Economic Community (formed by the well-known Treaty of Rome in 1957), the EU is a union of independent European states founded and operated to enhance political, economic and social cooperation. The EU was established by that name in 1992 by the Treaty on European Union, often referred to as the "Maastricht Treaty," and, after the latest round of enlargement in 2007, has 27 members. The key goal and objective of the EU has been the establishment and administration of a common

single market that would eventually includes a customs union, a single common currency and common policies with respect to areas such as agriculture and fisheries. In furtherance of this objective, the EU has become involved in virtually all areas of public policy, including health, foreign affairs, economics and defense. The day-to-day activities of the EU actually occur within the various institutions that have been set up by the members, notably the Council of the European Union, the European Council, the European Commission, the European Parliament and the European Court of Justice. Significant changes to the constitutional framework of the EU were implemented through the Treaty of Lisbon (generally known as the Lisbon Treaty), which entered into force on December 1, 2009 and amended both the Maastricht Treaty and Treaty of Rome (which was renamed the Treaty on the Functioning of the European Union).

While not a formal free trade agreement, the Asia-Pacific Economic Cooperation (APEC) has been formed and organized to serve as a forum for facilitating economic growth, cooperation, trade and investment in the Asia-Pacific region. Established in 1989, APEC currently has twenty-one members, including Australia, Canada, Chile, the People's Republic of China, Japan, Republic of Korea, Mexico, the Russian Federation, Singapore and the U.S. APEC members represent 58% of U.S. exports, 55% of world GDP, almost half of global trade and 2.7 billion consumers. Unlike the WTO or other multilateral trade bodies, APEC has no binding treaty obligations on its members and decisions are reached by consensus, and commitments are entered into on a voluntary basis. Among other things, APEC members have collaborated on initiatives to reduce tariffs and other trade barriers across the Asia-Pacific region and have also launched projects to increase economic and technical cooperation.

Other examples of regional organizations and agreements include the Organization of American States (OAS), the Southern Cone Common Market Treaty (MERCOSUR), the Andean Community, the Caribbean Common Market (CARICOM), the African Union (formerly the Organization for African Unity), Association of Southeast Asian Nations (ASEAN), North Atlantic Treaty Organization (NATO), and Commonwealth of Independent States (CIS). Detailed information regarding a particular multilateral or regional trade agreement can usually be obtained from the website maintained by the organization or secretariat responsible for the administration of the agreement.

§1:11 US laws relating to cross-border activities

The US has an extensive set of laws and regulations pertaining to all aspects of international trade and commerce, including exports, imports, immigration, antitrust, inbound foreign investment, anti-corruption, embargoes, and unfair trade practices by foreign countries and firms that injure US industries. In addition, certain US laws, such as the laws pertaining to intellectual property rights, can be used against foreign firms that engage in illegal activities while seeking entry into the US market. Companies will soon find that they are subject to regulation by a number of different agencies, sometimes with overlapping jurisdiction, and the costs associated with compliance can quickly become material and must be factored into the level of investment necessary in order for the company to launch and maintain cross-border operations. For example, US

companies will generally need to obtain certain licenses and permits and will also enter into arrangements with customs brokers and other outside agents to assist in compliance programs. Further complexity is added by the growing number of trade agreements that will impact transactions with partners in countries that are parties to such agreements. Depending on the circumstances, adjudication of issues arising under these laws and regulations may occur in a variety of forums, including administrative, civil, and criminal proceedings.

§1:12 --Export controls

The U.S. has a comprehensive set of statutes, regulations, and executive orders with respect to export controls which are imposed for reasons of national security, for reasons of foreign policy, and in cases of short supply. While the various sets of export controls are administrated by a variety of federal agencies, including the Departments of Commerce, State, Treasury and Energy, the key area of concern for many companies are the controls administered by the Department of Commerce ("DOC") under the Export Administration Act of 1979 ("EAA")[19] for exports of certain "dual-use" products and technologies. Dual-use goods are commodities, software, and technology that, while intended for commercial use, may also have military applications. The DOC's export controls fall under the authority of the DOC's Bureau of Industry and Security ("BIS") (formerly the Bureau of Export Administration or "BXA"), and have typically consisted of restrictions and licensing requirements that distinguish between different types of goods and services, export destinations, and end uses or users.[20] Accordingly, exporters must collect and evaluate information regarding foreign customers, comply with all applicable licensing requirements and obtain certifications from customers regarding their intended use of controlled goods. Products specifically designed for military applications are controlled by the Department of State, Directorate of Defense Trade Controls (DDTC). In addition to Commerce and State controls, exporters should also be aware of limited and comprehensive sanctions programs (embargoes) against various countries that are administered by the Department of Treasury, Office of Foreign Assets Control (OFAC) and further information may be obtained through the agency's website at www.treas.gov/ofac.

§1:13 --Anti-bribery laws

Compliance with the Foreign Corrupt Practices Act ("FCPA")[21] is a matter of concern in any foreign sales representative agreement[22], particularly in situations where local customs may be different from those in the US. The FCPA was enacted in 1977 and, among other things, makes it illegal for a United States exporter to "corruptly" pay or offer to pay a foreign public official for assistance in obtaining or retaining business or from paying a representative if the exporter knows that a portion of the payment will go

[19] 50 U.S.C.A. §§2401 to 2420.
[20] See generally 15 C.F.R. §§730.1 to 730.7.
[21] 15 U.S.C.A. § 78dd-1 et seq. (1995).
[22] For discussion of foreign sales agency agreements, see the chapter on "Export Planning" in this Guide.

to a public official for the same reason.[23] Further information regarding enforcement of the FCPA, which falls within the jurisdiction of the Department of Justice, can be found at www.usdoj.gov/criminal/fraud/fcpa.

§1:14 --Antiboycott laws

US antiboycott legislation prohibits and penalizes cooperation with all unauthorized foreign boycotts and embargoes, requires companies to report most boycott-related requests, and imposes a wide range of sanctions on violators.[24] The concept of "cooperation" is quite broadly defined and includes not only refusing to do business with or in a boycotted country but also providing certain types of information to a boycotting country and engaging in discriminatory activities against a US person for boycott-related reasons. Implementation of an antiboycott law compliance program is particularly important for companies that are engaging in business activities with certain member countries of the Arab League.

§1:15 --Import laws

Like other countries, the US has a comprehensive set of laws and regulations pertaining to the entry and importation of foreign goods. Primary responsibility for administering and interpreting US import laws and regulations is vested in the US Customs and Border Protection ("CBP" or "Customs"), which is part of the Department of Homeland Security. Most of the activities of Customs occur at the various ports of entry into the US, as well as at other land and sea borders of the country. In addition to the functions listed above, Customs is also involved in enforcement of laws and regulations designed to detect and prevent smuggling, fraud, and transmission of illegal materials into the US.[25] Notice should also be taken of a number of treaties have been adopted that also relate to customs laws and regulations, including the North American Free Trade Agreement ("NAFTA")[26], the Agreement Establishing The World Trade Organization[27], the Convention Establishing the Customs Cooperation Council (now called the World Customs Organization)[28], and the International Convention on the Harmonized Commodity Description and Coding System[29].

All goods imported into the US, with the exception of telecommunications transmissions, business records and data, corpses and certain articles returned from space, must be

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[23] 15 U.S.C.A. §§ 78dd-1(a)(1)-(3), 78dd-2(a)(1)-(3) (1995).
[24] See, e.g., 50 U.S.C.A. § 2408; 15 C.F.R. pt. 760; I.R.C. § 999; Treas. Reg. § 7.999-1; 43 Fed. Reg. 3,454 (1978) (Treasury guidelines).
[25] The customs laws can generally be found in Title 19 of the Code of Federal Regulations.
[26] North American Free Trade Agreement, Nov. 13, 1993, State Dept. No. 94-28, 1994 WL 46884, Hein's No. KAV 3417 (entered into force January 1, 1994).
[27] Agreement Establishing The World Trade Organization, April 15, 1994, Hein's No. KAV 4044 (entered into force January 1, 1995).
[28] Convention Establishing the Customs Cooperation Council, December 15, 1950, 22 U.S.T. 320; T.I.A.S. 7063 (entered into force November 5, 1970).
[29] International Convention on the Harmonized Commodity Description and Coding System, June 14, 1983, Hein's No. KAV 2260, State Dep't No. 84–45 (entered into force January 1, 1988).

declared to Customs[30], classified under the Harmonized Tariff Schedule of the United States[31], and valued pursuant to a valuation code[32]. The US also requires that every article of foreign origin or manufacture imported into the US, with certain specified exceptions, "be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article".[33]

While Customs oversees administration and enforcement of US import laws and regulations, the burden of compliance falls upon importers. For example, Section 484 of the Tariff Act, as amended (19 U.S.C. §1484), states that importers are responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirements, if any, have been met. Based on the information provided by the importer, as well as the results of its own investigations, Customs will then fix the final classification and value of the imported merchandise. Failure of the importer of record to exercise the requisite level of reasonable care can result in dire consequences, including delays in the release of the merchandise and possibility civil and criminal penalties. In addition, importers may need to be familiar, and comply with, a wide range of other restrictions and requirements relating to imports of certain types of goods and products, such as the obligation to provide advance notice to the Food and Drug Administration of any shipment of human or animal food imported or offered for import.

§1:16 --Immigration laws

U.S. immigration laws[34] will apply whenever the transaction involves the movement of foreign employees to the U.S., as might occur when a U.S. party forms a domestic joint venture with a foreign firm, or foreign personnel are sent to the U.S. for training in the manufacture of products of the U.S. party that will be sold overseas. U.S. immigration laws are primarily administered and enforced by the U.S. Citizenship and Immigration Services (USCIS), which is part of the Department of Homeland Security. The Department of State and the Department of Labor are also involved in various aspects of the administration and enforcement of the immigration laws. Also, in some cases, U.S. government agencies receive assistance and information from state departments of labor and other state governmental departments.

In general, foreign nationals enter the U.S. under some form of visa. There are two basic types of visas: non-immigrant visas, which permit foreign nationals to enter the U.S. temporarily, and immigrant visas, which permit foreign nationals to live in the U.S. permanently. In most cases relating to the transactions covered in this Guide, a non-

[30] 19 U.S.C.A. §§ 1481 et seq.; 19 C.F.R. pt. 141 to 144. See also General Note 16, HTSUS.
[31] 19 U.S.C.A. § 1202.
[32] See 19 U.S.C.A. § 1401a and 19 C.F.R. §§ 152.100 et seq.
[33] 19 U.S.C.A. § 1304; 19 C.F.R. Part 134.
[34] 8 U.S.C.A. §§ 1 et seq.

immigrant visa is the relevant condition; and, depending on the visa, the foreign national will be allowed to remain in the U.S. for anywhere for three months to a number of years. There are over twenty classes of non-immigrant visas available; however, the most relevant are business visitor visas, intra-company transferee visas, specialty occupation visas, and treaty visas. Because a particular alien worker may quality for two or more types of visas, it is important for counsel and the potential employer to consider which type of visa will be appropriate. The USCIS, in cooperation with the Consular Section of various U.S. embassies, administers the issuance of non-immigrant visas. However, depending on the type of visa requested, approvals must be obtained from other U.S. government departments before application may be made to the U.S. embassy or consulate abroad for the visa. In addition to the visa requirements, U.S. immigration laws impose various legal obligations on employers that employ foreign nationals in the U.S.

Immigration law has become a specialty within the bar in light of the growing need for sophisticated advice regarding the employment of foreign managers and employees. The immigration laws and related regulations are quite complex, and changes in the domestic labor market in the years to come will predictably lead to further modifications. A number of states, including California, have created specialty certifications for lawyers with a documented measure of expertise in immigration law.

§1:17 --Product testing laws and regulations

Commercial use and sale of a "technology-based" product or service may be subject to review and approval by one or more domestic and foreign regulatory bodies. For example, a number of pharmaceutical products in the United States and elsewhere cannot be sold without regulatory approval. In the United States, it is the federal Food and Drug Administration ("FDA"), which exercises the authority to take such measures, as might be necessary in order to prohibit the use of adulterated or misbranded foods, drugs, biologics, medical devices and diagnostics and cosmetics. The statutory basis for much of the FDA's activities is set out in the Federal Food, Drug, and Cosmetic Act of 1938[35], and the Public Health Service Act, Biological Products[36]. The FDA must approve new human and animal drugs, devises, biologics and food and color additives prior to their sale to the public and, in many cases, FDA approval will be conditioned upon the submission of test results which provide proof of the safety and effectiveness of the product.[37]

§1:18 --Trade laws and remedies

The US has a number of laws and regulations that focus on allegedly unfair trading practices of foreign firms and governments. In general, these laws are intended to prevent harm to US firms and industries which might result from the import of foreign goods at below-market price and/or foreign government subsidization of the manufacture of goods which provides importers with an unfair advantage in relation to US firms. As

[35] 21 U.S.C.A. §§ 301-92.
[36] 42 U.S.C.A. § 262.
[37] 21 U.S.C.A. §§ 321(p) and 355.

noted above, the DOC and the ITC have primarily responsibility for conducting investigations relating to what are perceived to be unfair trade practices and have the authority, in appropriate circumstances, for issuing orders to remedy damage to US firms and industries; however, foreign producers often turn to US courts, a NAFTA panel or the WTO to resolve legal issues associated with enforcement of these laws. Several of the most commonly used and publicized US trade laws and remedies are discussed herein, including antidumping and counterveiling duty laws, "Section 201 duties," and "Section 337" proceedings.

§1:19 ----Antidumping laws

US antidumping laws are set out in the Tariff Act of 1930 (the "Tariff Act")[38] and are applied in the context of the rules governing antidumping proceedings and measures adopted by the WTO.[39] The laws address situations where imports are being sold at prices which are below their "normal value" ("dumping") and, as a result, material injury is or may be caused to a US industry or the establishment of a new US industry is being retarded. Investigations are generally initiated following the filing of a petition by US producers, a trade association of producers, or a union, and are conducted in parallel by the DOC and the ITC. The DOC focuses on the issue of "dumping" itself by investigating the question of "normal value" and comparing it to the importer's prices. Once the DOC makes a determination regarding dumping, the ITC then determines if the material injury condition has been satisfied.

If the DOC and ITC both issue final affirmative determinations, an antidumping order will be automatically issued by the DOC. This order will require the importer to pay cash deposits in an amount equal to the estimated antidumping duties, which are in addition to any normal customs duties on the goods. Orders remain in effect for five years; however, the domestic industry can request extensions by showing the price discrimination and injury can be expected to continue if the order is removed. In addition, the ITC will continue to monitor the situation to determine whether revocation of an order will lead to a resumption or continuance of the injury. In turn, impacted foreign producers can request reviews of orders while they are in place. For example, decisions in antidumping actions may be appealed to the US Court of International Trade, and thereafter to the Courts of Appeals for the Federal Circuit in Washington, D.C. Under NAFTA, however, appeals in cases involving goods imported from Canada or Mexico will be heard by bi-national panels of experts.

§1:20 ----Counterveiling duties

Counterveiling duty laws compliment the antidumping laws by assessing whether or not imports are being subsidized by foreign governments and, if so, whether the subsidized imports are causing the same types of injury referred to above with antidumping laws.

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[38] 19 U.S.C.A. § 1673 et seq.

[39] See Agreement Establishing the World Trade Organization, H.R. Doc. No. 316, 1 Uruguay Round Agreements, Texts of Agreements, Implementing Bill, State of Administrative Action, and Required Supporting Statements, 103d Cong., 2d Sess. (1994). See also 33 I.L.M. 1144.

The counterveiling duty laws are also set out in the Tariff Act[40] and the procedure for review proceeds in the same sequence as an antidumping review, with the DOC investigation the question of subsidization and the ITC assessing the injury. If both agencies should make an affirmative determination, the DOC will issue a counterveiling duty order and the importers will be required to pay cash deposits in an amount equal to the estimated counterveiling duties, which are in addition to any normal customs duties on the goods. The ITC does not make an annual review of the situation, and must revoke a counterveiling duty order after five years unless it determines that revocation would result in resumption or continuance of injury or threat of injury to a United States industry. The same avenues of appeal that apply in the antidumping situation are available with respect to counterveiling duty actions.

§1:21 ----Section 201 of the Trade Act of 1974

Sections 201-204 of the Trade Act of 1974 (the "Trade Act")[41] authorizes the filing of petitions with the ITC for relief in situations where imports of a particular product are increasing and the increase is believed to be a substantial cause of serious injury to United States industry. While the US normally is subject to provisions included in the GATT and the WTO that prohibit quotas and tariff increases beyond certain bounded rates, these agreements also authorize countries to impose "temporary" import restrictions to facilitate continued support for freer trade and the GATT generally. Once a petition has been filed, the ITC will conduct an investigation and if an affirmative determination is made regarding injury and causation, the president is required to take "all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs."[42] Among other things, the president has the power to order tariff increases; impose quotas or tariff rate quotas; and enter into negotiations for orderly marketing agreements. The initial period of relief may extend for up to four years, and may then be extended for up to another four years if the ITC determines that measures are still needed and that domestic industry is adjusting to import competition.

The legislation that implemented the provisions of NAFTA also includes procedures for investigations similar to those conducted under Section 201 of the Trade Act. Specifically, the ITC is authorized to determine whether, as a result of the reduction or elimination of a duty under the NAFTA, increased imports from Canada or Mexico are a substantial cause of serious injury or threat of serious injury to a U.S. industry. If an affirmative determination is made by the ITC, it recommends a remedy to the President, who makes the final remedy decision.[43]

§1:22 ----Section 337 of the Tariff Act

[40] 19 U.S.C.A. §§ 1671 et seq.
[41] 19 U.S.C.A. §§ 2251-2254.
[42] 19 U.S.C.A. § 2253(a)(1).
[43] For further information, see section 301, NAFTA Implementation Act, 19 U.S.C.A. § 3352.

Section 337 of the Tariff Act[44] can be used as a remedy against import practices that amount to unfair trading methods. Specifically, it declares unlawful unfair methods of competition and unfair acts in the importation or sale of articles if the threat or effect of such importation or sale is to destroy or substantially injure an industry in the U.S., prevent the establishment of such an industry, or restrain or monopolize trade and commerce in the U.S. For example, Section 337(a)(1)(B) can be used as a weapon against unlawful "importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that - (i) infringe a valid and enforceable United States patent . . . or (ii) are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent."[45] Section 337 is administered by the ITC and is commonly used when imports are found to violate U.S. intellectual property laws. The ITC is authorized to perform investigations of alleged violations of Section 337 and if the ITC finds a violation it may issue an order excluding imports or a "cease and desist" order, both of which will be enforced at the border by Customs. An order of the ITC is subject to disapproval by the president for "policy reasons." Section 337 determinations can be appealed to the U.S. Court of Appeals for the Federal Circuit.

§1:23 --Antitrust laws

The federal antitrust laws of the US are set out in several different statutes. The Sherman Antitrust Act of 1890 (the "Sherman Act")[46] is the oldest, and main, source of antitrust law in the United States. Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies in restraint of trade. Section 2 of the Sherman Act prohibits monopolization and attempts to monopolize. The Clayton Act of 1914 (the "Clayton Act") prohibits specified restraints of trade that are thought to be particularly objectionable and anti-competitive. Section 2 of the Clayton Act, often referred to as the Robinson-Patman Price Discrimination Act, prohibits specified discriminatory pricing practices which injure competition among purchasers of the products. Section 3 of the Clayton Act regulates so-called "exclusive dealing " requirements by providing that it is unlawful for any person engaged in commerce to lease or sell goods on the condition that the lessee or purchaser will not lease or purchase other goods from the lessor's or seller's competitors, where the effect is to substantially lessen competition or create a monopoly. Finally, Section 7A of the Clayton Act, often referred to as the Hart-Scott-Rodino Antitrust Improvements Act, forbids certain acquisitions of voting securities or assets unless a prior notification has been filed with the government and the specified waiting period has expired.

The Federal Trade Commission Act of 1914 (the "FTC Act") created the Federal Trade Commission ("FTC") and also declared unlawful any "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." For example, the FTC has reached behavior not covered by Sherman Act by

[44] 19 U.S.C. 1337.
[45] 19 U.S.C. ' 1337(a)(1)(B).
[46] 15 U.S.C.A. §§ 1-2.

using the FTC Act to declare that solicitation of price-fixing, also called an "invitation to collude," is indicative of an inclination to engage in illegal behavior.

In addition to the Sherman Act, Clayton Act, and FTC Act, Congress has adopted various other statutes that address specialized aspects of competition and market practices. Thus, for example, the National Cooperative Research and Production Act ("NCRPA") was passed to clarify how antitrust laws might apply to joint ventures and consortia that are involved in research and development activities.

Certain types of contracts and agreements are deemed illegal per se "because of their pernicious effect on competition and lack of any redeeming virtue." As a general rule, the per se doctrine applies only to agreements that are among competitors at the same distribution level, referred to as horizontal agreements, and is used to prohibit price-fixing, allocation of markets, boycotts, and similar agreements among competitors. Most other types of contracts and agreements, including those containing vertical restraints involving persons at different levels in the chain of distribution (e.g., manufacturers and distributors), are judged under the "rule of reason," which balances the business justifications and any procompetitive effects of the arrangement against any perceived anticompetitive effects.

Courts have taken the general position that the Sherman Act applies to all conduct that has any actual or probable effect on US commerce, including conduct in foreign countries that is intended to and does affect United States imports or exports.[47] United States courts should consider issues of "international comity and fairness" in deciding whether or not to extend the US antitrust laws into the international arena, as well as whether the interests, of, and links to, the US, including the magnitude of the effect on American commerce, are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority.[48]

In 1995, the Department of Justice ("DOJ") promulgated a set of international guidelines relating to the policy of the US government on the extraterritorial enforcement of federal antitrust laws. The 1995 International Guidelines address the subject matter jurisdiction of the DOJ and the FTC over conduct and entities outside of the US and the considerations and concerns that will govern decisions to exercise jurisdiction; mutual assistance on international antitrust enforcement matters; and the effects of the involvement of foreign governments on the antitrust liabilities of private parties. The 1995 International Guidelines are largely based upon the general proposition that "[a]nticompetitive conduct that affects US domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved," and point to the Supreme Court statement that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States".[49] The 1995 International Guidelines are available at www.usdoj.gov/atr/public/guidelines/internat.htm. It should be noted that the FTC and

[47] See, e.g., United States v. Aluminum Co. of America, 148 F.2d 416, 443-45 (2nd Cir. 1945).
[48] Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).
[49] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 113 S.Ct. 2891, 2909, 125 L.Ed.2d 612 (1993).

the DOJ have also agreed with other member countries of the OECD to notify a member country whenever an antitrust enforcement action may affect important interests of that country or its nationals. Examples of potentially notifiable actions include requests for documents located outside the US, attempts to obtain information from potential witnesses located outside the US, and cases or investigations with significant foreign conduct or involvement of foreign persons.

The federal antitrust laws are generally enforced by the FTC and the DOJ, although individuals may also have private rights of action for damages suffered as a result of the antitrust violations of another. Injunctive relief is available against actions that violate the antitrust laws, and the court may declare any relevant contract, including any license agreement and the underlying patent rights, to be unenforceable. Damages of up to three times the actual damages sustained may be awarded and criminal penalties may also be assessed.

§1:24 --Foreign investor regulations

Like many other countries, the US has adopted various laws and regulations relating to inbound foreign investment. Regulation appears in a variety of statutes and sometimes takes the form of limits on foreign investment in certain industrial sectors. For example, foreign ownership, operation or control of radio and broadcast television stations in the US is restricted under the Communication Act of 1934.[50] In addition, a foreign person's attempt to acquire a US business may be subject to the Exon-Florio Amendment to the Defense Production Act of 1950 ("Exon-Florio").[51] Exon-Florio calls for the filing of a report regarding a proposed acquisition with the inter-agency Committee on Foreign Investment in the United States ("CFIUS"), which includes representatives from the Departments of State, Treasury, Defense, and Commerce. CFIUS may elect to investigate the proposed transaction if it threatens to impair the national security of the US and the President must ultimately decide whether to block the acquisition.[52] Finally, the International Investment and Trade in Services Survey Act ("International Survey Act")[53], impose reporting requirements regarding cross-border investment activities on US persons that have direct investments abroad and US persons in which foreign persons have made a direct investment[54].

§1:25 --US tax laws and regulations

International tax and the taxation of cross-border transactions is one of the most complex areas of tax law. In general, US tax aspects of international business transactions can be broken down into outbound transactions, which are those involving the application of US taxes to the foreign operations and activities of US taxpayers, and inbound transactions, which are those involving foreign persons who may be investing or otherwise engaging

[50] 47 U.S.C.A. § 310.
[51] 50 App. U.S.C.A. § 2170.
[52] 31 C.F.R. §§ 800.501-800.601.
[53] 22 U.S.C.A. §§ 3101-3108.
[54] 15 C.F.R. § 806.3.

in business activities in the US. In addition, US taxpayers doing business in a foreign country may be subject to taxation in that country; however, various tax treaties may allow the US party to obtain a credit against its US tax obligations for taxes paid in certain foreign countries. Given the difficult issues that can arise in this area, and the impact that taxes can have on the profitability of a given investment, it is essential to obtain expert advice regarding the tax aspects of any proposed international transaction. In the US, such advice is available from tax lawyers who specialize in inbound and/or outbound transactions, and from accountants. In foreign countries, the type of professional that should be consulted will depend on the tradition in the particular country. For example, in Europe, local accountants or special tax experts are usually the best source of information, since tax as a legal specialty is not as developed as it is in the US. On the other hand, tax attorneys are a valuable resource in Central and South America.

§1:26 --Extraterritorial application of US laws

One of the key issues with respect to resolution of disputes that may arise in cross-border transactions is whether or not a US federal statute will apply to conduct which occurs outside of the United States. As a general matter, absent an express provision in the statute that requires that it be applied to overseas conduct, the test will be whether the conduct has sufficiently direct and foreseeable consequences in the US.[55] US courts will apply a so-called "territorial presumption" that holds that no extraterritorial application will be inferred in the absence of an express provision in the statute.[56]

§1:27 Foreign laws and regulations

In addition to all the various US laws and regulations that might come into play with respect to any particular cross-border transaction, the company will obviously need to take into account the impact of laws and regulations in one or more foreign countries where the contract will actually be performed. In most cases, foreign countries will have a wide range of laws and regulations similar in form and content to those in the US. When the foreign party is domiciled in one of the major developed economies, such as Japan or one of the countries in Western Europe, the rules and legal infrastructure are often comparable to those which exist in the US although there are some significant differences depending on whether the country's legal system is based on common or civil law foundations. On the other hand, in situations where the US party is dealing with persons in one of the many developing countries of the world, counsel must be aware of many of the shortcomings in the laws and regulations relating to commercial transactions which may exist in that country. In an effort to modernize their economies, developing countries have launched a variety of law-related initiatives, including the following:

- Development of private property rights, including rights of individuals and artificial legal business enterprises to own and control real and personal property.

[55] Restatement (Third) Foreign Relations Law of the United States § 403 (1986).
[56] See E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 111 S.Ct. 1227 113 L. Ed.2d 274 (1991).

Implementation of a private property rights systems also calls for transfer of control from the state to the private sector (i.e., privatization);

- Land law reforms, including procedures for unfettered transfers of title, land leases, and regulation of land usage (e.g., zoning);
- Development of law-making and law-implementing institutions, such as ministries of justice and local regulatory boards and agencies;
- Development of a judicial system, including a system of courts and prosecutorial officers. Consideration might be given to establishing separate courts which would deal exclusively with economic and commercial contract matters; and
- Training for lawyers, judges, instructors, and others involved in the law-making and enforcement process.

The increasing reliance in developing countries on market-based transactions among independent contracting parties requires a system of commercial laws. The importance of commercial laws for developing countries stems not only from the need to formulate rules for transactions between domestic parties, but also from the need for foreign investors to achieve some level of comfort in their dealings with local firms in the course of licensing, distribution, production, and sales arrangements, as well as joint ventures.

Before proceeding with any cross-border commercial transaction, counsel for the US party needs to identify all of the relevant foreign laws and regulations that might apply. In most cases, this can be done by analogy to a comparable domestic transaction that involves two US parties; however, it is almost certain that the cross-border nature of the arrangement will bring into play foreign investment laws as well as other regulations pertaining to inbound movement of goods, services, people and/or technology. In this part of the chapter we provide an overview of the most common areas that one will find within a foreign legal framework for commercial activities, such as contract laws, product testing laws, debtor-creditor laws, consumer protection laws, regulations on sales agents and representatives, health and safety laws, environmental laws, customs laws, inbound foreign investment laws, competition laws, company laws, financial laws, regulation of technology transfers, employment and labor laws and immigration laws.[57]

While no substitute for competent advice and confirmation from local counsel, it is useful and recommended for US counsel to become personally acquainted with the legal system and primary sources of law in each of the countries where counsel's company or client intends to conduct business. The amount of quality of resources will vary depending on the country and problems are often encountered obtaining English-language materials that are current since translation of laws, regulations and cases is often expensive and time-consuming and publication is often delayed. Many web sites maintained by law school libraries can provide a useful starting point for any country-specific research. For example, the NYU Law School Library web site includes a comprehensive list of other web sites, organized by country, which can be visited in order to obtain local law materials.

[57] For discussion of foreign legal systems as a factor in selecting a new market for investment, see the chapter on "Export Planning" in this Guide.

§1:28 --Contract laws

Contract law among the industrialized countries of the world, particularly in the US and in the European Union, is based on a long pattern of evolution and development that can be traced all the way back of ancient Rome. It was well recognized in 19th century Europe that legally made contracts are laws for the parties thereto and public policy dictated that parties deemed legally competent should be allowed broad freedom of contract. Courts and lawmakers supported this concept by recognizing implied contract terms to "fill in the gaps" and enforcing trade usages of terms commonly found in commercial contracts. As time went by, statutes were adopted to ensure that freedom of contract was not used to provide the stronger party with an unfair advantage and one began to see legislation designed to protect various groups, such as employees, tenants, insured parties and consumers.

In general, contract law in the industrialized countries can be traced to one of two well-recognized families that originally began in Europe: the civil law of the Continent and British common law. Simply put, civil law countries followed general principles of contract law that were set out in the Civil Codes or, in the case of the Nordic countries in statutes. In many cases, the legal terms and classifications included in the Civil Code were based on work of the Romans and were developed and supplemented by the courts as cases came before them; however, it was the primary duty of the courts to resolve the issue before them as opposed to providing extensive commentaries on the content of the statutes. In contrast, the contract laws of Britain have largely been established by the law courts and this pattern naturally was followed in the US given the historical ties to England. In general, legislatures in common law countries rarely draft statutes relating to contract matters and the courts use the general principles developed through cases over the years as precedents for application to similar issues and for creating new laws in areas that have not been previously addressed.

While there are certainly differences among the contract laws of industrialized countries, particularly between civil and common law countries, in general they are all based on the premise of supporting market-based transactions within a framework that restricts contracting parties from bargaining for duties and obligations that violate some recognized public policy. US companies negotiating contracts with parties in the EU may also benefit from ongoing interest in harmonization of national laws and development of a common European civil and commercial law. For example, a long-standing project supported by the European Commission has been the creation of Principles of European Contract Law through the collaborate efforts of experts drawn from all of the Member States of the EU. Multilateral initiatives have also been launched to draft contracting rules that would apply to cross-border transactions. For example, the United Nations Commission on International Trade Law has been actively developing a proposed set of standards rules for International Regulations and Standards, which necessarily transcends national borders.

In developing countries, prior versions of contract law focused primarily on the content of specific types of contracts (e.g., supply and installation contracts, loan contracts) and

set out in detail the contractual terms of transactions involving state-owned enterprises. In many cases, the contract law really reflected the priorities of the state planning process in that contracts were used primarily as a means for setting out the economic targets established by the state and rights of the state in the event that the targets were not met. Early contract laws often made little or no reference to market-based transactions, since they were largely not permitted. To the extent that market-based transactions were permitted, contract laws were generally limited to stating basic principles relating to formation and performance of the contract, consequence of breach, dispute resolution and choice of law. In addition, regulations could be found that prescribed the content of special types of contracts between domestic and foreign parties, notably joint ventures and technology licenses.

However, as developing countries began to move toward market-based economies, they realized that contract laws were necessary in order to allow economic transactions between parties without the need for administrative controls. Accordingly, many developing countries are now working to establish a commercial legal framework for economic contracts, including written agreements relating to production, exchange of goods, provision of services and development and commercialization of technology. The structure of rights and obligations with respect to such contracts are no longer limited to meeting state-established targets or objectives. Instead, parties are allowed to determine the essential elements of economic contract, such as quantity, quality, and price, and can also establish their own terms relating to delivery, guarantees, and duration. Economic contract laws also include rules to ensure performance of the contracts, including dispute resolution, security interests, guarantees and penalties.

Foreign contract laws often refer to international practice for guidance in situations where no provision in the local law covers the particular issue. Typically, this means the parties may look to the rules set out in the United Nations Convention for the International Sale of Goods ("CISG") and provisions in the foreign contract laws of many developing countries will often be borrowed from the CISG.[58] Standard contracts continue to play a large part on contract negotiations between domestic and foreign parties in many developing countries, particularly since local parties still lack the experience and knowledge to assess some of the alternative provisions which might be suggested by foreign parties. However, this situation is changing in various areas, such as licensing agreements and joint venture contracts, as local entrepreneurs and government specialists gradually become more familiar with such transactions through increased contacts with foreign investors.

§1:29 --Foreign product testing laws and regulations

Products that are sold in international markets may be subject to testing and approval before they can be offered for sale in a given country. For example, in contrast to the system in the US, which requires only post-production analysis of performance (i.e., products liability regulations), many countries impose requirements that products meet

[58] For discussion of the United Nations Convention for the International Sale of Goods, see the chapter on "Export Planning" in this Guide.

detailed specifications for their design. The European Union has a detailed set of testing and certification requirements that must be completed in accordance with standards announced by EU regulators; however, since the EU legislation harmonizes mandatory product safety requirements throughout the EU a US manufacturer need only complete the certification process once in order for its goods to travel freely within the unified market. Governmental approval requirements are sometimes supplemented by "voluntary" standards imposed by trade associations, which, while neither legal nor compulsory, are generally required by many wholesale and retail purchasers in the foreign country.

For many years, US exporters faced substantial hurdles when attempting to overcome certification requirements in foreign markets and often had to depend on the ability of importing agents to obtain the necessary approvals. In many cases, foreign countries would not accept test data obtained in the US and would also insist on inspecting each shipment of a particular type of imported good even though the good has previously been inspected and approved. Other difficulties included a lack of coordination among governmental agencies with respect to the formulation and enforcement of standards and the failure of countries to observe transparent procedures during the inspection and testing process.

Recently, however, industrialized countries, such as Japan, have bowed to pressure from the US and elsewhere to liberalize their policies with respect to imported goods, and developing countries have been given assistance to improve staffing and equipment at their testing facilities. Moreover, industries have been moving toward adoption of international standards for larger numbers of products and services, and these standards have begun to replace the somewhat arbitrary rules that previously had to be overcome on a country-by-country basis. Companies can outsource testing and certification activities to accredited, independent certification agencies that can assist in meeting the certification requirements of numerous countries around the world.

While standardization has reduced the risks and uncertainties of the exporting process by providing US manufacturers with clear specifications to follow, it has not necessarily made it easier to sell products in foreign markets. For example, it is common to find that consumer protection laws, including requirements for sampling and testing products for safety purposes, are quite demanding in the European Union and other foreign markets, and US manufacturers now need to consider these requirements at the earliest stages of the design process.

§1:30 --Debtor-creditor laws

As an inducement for firms and investors to enter into commercial transactions, provision must be made to protect the rights of creditors who lend capital or other assets for use in a business enterprise. One of the priorities in this area is the establishment of laws that provide for the registration and enforcement of security interests, including mortgages on movable property and intangible property in a manner similar to mortgages on real property. Secured transactions laws permit banks and other creditors to finance

equipment purchases by businesses by taking out a security interest on the equipment and protecting their legal and financial rights against other claimants (e.g., other creditors) without having to retain physical possession of the equipment. The registration system also includes a method for establishing priorities among various creditors, as well as a way for prospective creditors to determine their priorities in relation to prior lenders.

Centuries ago, lenders would rely on reputation of the borrowers and possession of collateral to provide security for credit extended during the course of commercial trading activities. For example, traders would limit credit to parties who were members of families, villages, and ethnic and clan networks known to the lender, thereby creating some sense of accountability in the creditor and limiting the volume of information that the lender needed to know in order to make a credit decision. This method obviously had its limitations and effectively restricted credit transactions with strangers, regardless of their creditworthiness. To alleviate this problem, there was a shift toward requiring that certain physical assets, such as gold, cash or equipment, be held as collateral by the lender. While this improved the position of the lender, depending on the liquidity of the collateral, it deprived the general economy of the productive use of these "hostage" assets during the term of the loan.

Eventually, it was realized that the "hostage" system limited the progress of the economy and that it was necessary to develop a credit system based on non-possessory security interests that protected the rights of lenders while allowing the property owners to continue to use the collateral to generate wealth that could be used to repay the obligations and make other investments. The foundation for such a system could be found in Roman law, which provided for pignus (pledge), which transferred possession but not ownership of an asset to the lender, and hypotheca, which provided lenders with the right to take possession of the debtor's real property upon the debtor's default. Over the centuries, the development of statutory and common law eventually led to the recognition and use of non-possessory security interests in England and then in the US. Today the law of secured transactions in the US is included in Article 9 of the Uniform Commercial Code and similar changes in the Roman law-based systems of continental Europe have also provided a legal basis for non-possessory pledges. Operation of these systems is facilitated by the establishment of filing and registry systems for recording and policing security interests. In addition, the coverage of the system has been continuously expanding to include new types of collateral, including accounts receivable and other contract rights.

In many developing countries, the laws and regulations relating to secured transactions are unclear and incomplete. For example, some laws either require physical possession of the asset in order for a mortgage thereon to be enforceable, or limit security interests to a narrow scope of assets, such as ships or airplanes. Moreover, even when security interests are available, the procedures may be quite time consuming and expensive. As a result, banks and other lenders have little choice but to charge higher rates of interest or demand other collateral or guarantees that make it impossible for many businesses to acquire credit. Accordingly, economic development in these countries is hampered until there is a centralized register for all types of tangible and intangible assets, hopefully

accompanied by a system which uses modern technology (e.g., computerized registers). Progress can also be fostered through refinement of the legal concepts of guarantees and pledges.

In addition to secured transactions laws, countries need procedures for restructuring or, if necessary, liquidating enterprises which experience financial or business difficulties. While few countries can match the complexity of the US bankruptcy system, which serves as the repository for business failures of all types, regardless of the underlying causes (e.g., natural disasters), most industrialized countries have procedures that allow for orderly collection and distribution of the remaining assets of insolvent enterprise. Restructuring procedures are also available and judges in some countries actively intervene with companies evidencing signs of financial trouble to counsel them on appropriate remedies short of liquidation. Developing countries are now beginning to adopt bankruptcy laws which provide for rectification and reform of enterprises which, with some protection from the immediate claims of creditors, be rehabilitated and continue to operate. In cases where liquidation is required, such laws provide a clear procedure for sale and distribution of the remaining assets of the enterprise, as well as priorities among secured creditors, workers, and unsecured creditors. Provision is often made for the resettlement of workers, and some laws actually set out some economic sanctions and criminal penalties for dereliction of duty that leads to bankruptcy. Bankruptcy laws which clearly set out the protections available to creditors can be invaluable as a means for increasing the willingness of financial institutions and others to provide financing for business activities.

§1:31 --Consumer protection laws

Competition and sales-of-goods laws are not adequate to protect consumers from unfair competitive practices, such as publication of false or misleading information regarding goods and services, or from defects in products that might cause harm to the user or his properties and assets. In order to achieve these safeguards, countries have developed legal standards relating to consumer protection and product quality. Consumer protection laws address the quality and accuracy of information provided to consumers regarding products and services, as well as the quality of the products themselves. For example, laws may require that products not be sold if they present "unreasonable dangers" with respect to their use. Similarly, some products can only be sold if they have been produced, stored and transported in accordance with specified safety and hygiene standards. Laws regarding warranties and product performance guarantees must also be addressed, including the responsibilities of the manufacturer and seller with respect to damages caused by defective goods.

Industrialized countries have followed the lead of the US in adopting sweeping and strict laws and regulations designed to afford protections to consumers. For example, over the years, the EU has established laws on the safety of food and other products, on consumers' rights and on the protection of people's health, and the safety standards in EU countries are now among the highest in the world. Among other things, the EU regulates how farmers produce food (including what chemicals they use when growing plants and

what they feed their animals), how food is processed, what additives can be used in it, what labels must be affixed to food packaging and how it is sold. US exporters must also be mindful of the possible effect of import controls and foreign product certification standards as they might apply to goods sold in international markets. In the EU, for example, a Directive pertaining to product liability requires Member States to implement procedures to insure that appropriate checks are made on the safety properties of products, including sampling and testing of products.[59] The Directive also mandates that producers place "safe products" on the market and that consumers be provided with adequate notice of excessive risks associated with the use of products.

Consumer protection legislation is becoming more and more common in countries outside of North America and the EU. For example, countries in the Asian Pacific region have adopted a diverse range of consumer protection statutes that use a variety of techniques. While in many cases these laws remain relatively rudimentary, particularly with regard to how redress may be obtained, significant progress has been made and compliance has become a real issue for US manufacturers and distributors doing business in those countries. It should be noted that consumer protection has been a global policy issue for decades and the United Nations promulgated a set of Guidelines for Consumer Protection, which were non-binding, in 1985.

Another emerging area of consumer regulation around the world is protection the privacy of personal data and information.[60]

§1:32 --Protection of sales agents and other intermediaries

Foreign investors often attempt to engage local parties to act as their sales agent or representative in a developing country as a first step in selling their goods into that country. Many countries have adopted laws as to agents and distributors that are designed to protect a specified class of these "intermediaries" in a manner which is similar to the way that labor laws protect the rights of employees. Persons who fall with the designated group of intermediaries may themselves be subject to regulation, including requirements as to citizenship and registration. In some cases, the definition of "intermediary" is very broad and includes any person other than a salaried employee charged with one or more duties in relation to the promotion or distribution of a product. Certain countries use the concept of an intermediary in the context of actually prohibiting their use, and accordingly regulate any person who, directly or indirectly, participates in preparing, negotiating, concluding, or executing a sale of goods contract.[61]

§1:33 --Intellectual property laws

[59] See, e.g., Council Directive 92/59/EEC, 1992 O.J. (L 228) 24; Council Directive 2001/95/EC, 2002 O.J. (L 11) 4.
[60] Council Directive 95/46/EC, 1995 O.J. (L 281) 31.
[61] For discussion of regulation of foreign sales agency arrangements in countries outside of the US, see the chapter on "Export Planning" in this Guide.

Export activities raise significant and challenging intellectual property issues for US companies. While companies can achieve some level of protection, and associated competitive advantage, by perfecting its rights under US laws pertaining to patents, copyrights, trademarks and trade secrets, these rights extend only through the US and its territories and possessions. Accordingly, when products are exported outside of the US to a foreign country the intellectual property associated therewith will not be protected against infringement or misappropriation unless and until the exporter fulfills the requirements for protection in the importing country. With respect to patents and trademarks, this generally means registration with the appropriate local government agencies. Copyright protection depends on national laws, but registration is typically not required. Trade secret rights still vary substantially around the world and will depend, in large part, on the content and enforcement of local laws pertaining to unfair competition and business ethics and practices in the importing country.

While substantial progress has been made toward harmonizing intellectual property laws around the world, including implementation of procedures to facilitate preparation and filing of patent and trademark applications in a number of countries without duplication of effort, intellectual property laws remain far from uniform in actual practice and enforcement. This inconsistency reflects the fundamental schism that exists between developed and developing countries regarding the benefits and perceived dangers of property rights in technologies and related items. An inventor in a developed country will seek strong intellectual property protection to prevent those located in developing countries from "free-riding" on his or her work and to establish additional markets through which to recover the costs of development. On the other hand, governments in many poor and developing countries are reluctant to provide any strong degree of protection to foreign inventors and firms, since protection of this sort may work as a disincentive to local innovators to build their own research and marketing capabilities and, perhaps more importantly, allow foreign firms to exercise undue control over the availability and affordability of the protected items.

In spite of their fundamental discomfort with intellectual property rights, developing countries have been forced to begin adopting some rudimentary form of intellectual property law. This movement has been driven by multilateral negotiations on a variety of trade-related issues (e.g., the Uruguay Round of the GATT negotiations), as well as well-publicized concerns of many developed countries regarding various inadequacies in the content and enforcement of intellectual property laws in the developing countries, including no preliminary or final injunctive relief, lack of seizure and impoundment relief, lack of exclusion of infringing imports, inadequate civil remedies (i.e., monetary damages), and inadequate fines or other criminal penalties. However, while progress is being made, US exporters must still carefully evaluate intellectual property risks for every new export destination and determine the best strategy to use for protecting its rights in the applicable foreign country.

§1:34 --Health and safety laws

Health and safety laws cover a variety of matters, including safety conditions in the factories and other workplaces, infectious diseases, health and sanitary conditions in public places, food hygiene, and safety conditions in specific industries (e.g., maritime transport, public utilities, etc.). These laws impose specific obligations on employers and other business operators. The EU has promulgated a wide range of legislative initiatives that impact all aspects of the workplace. For example, employers in the United Kingdom and other countries within the EU are required to carry out risk assessments and implement necessary measure to ensure health and safety within the workplace, including compliance with a wide range of regulations dealing with basic health, safety and welfare issues such as ventilation, heating, lighting, workstations, seating and welfare facilities. Employers must also make sure equipment provided for use at work, including machinery, is safe and are also required to provide appropriate protective clothing for their employees. Other regulations mandate employer procurement of accident and health insurance covering employees and controls over hazardous substances and dangerous conditions in the workplace. Developing countries have also recognized the need for strong and enforceable laws and regulations relating to health and safety, both generally and in the workplace in particular, as well as the need to address the impact of commercial activities on the local environment. The International Labour Organization, among others, is active in promoting dialogue among governments, employers and workers in Member States to promote the improvement of working conditions around the world.

§1:35 --Intellectual property laws

While the industrialized countries have made substantial economic progress since the dawning of the industrial age, there is no denying that there has also been a corresponding degradation to the condition of our environment. During the 1960s, "pollution" became a regular part of the news and political dialogue and governments in all industrialized countries were forced to introduce laws and regulations aimed at protecting the environment. Also, beginning in 1972 with the UN Conference on the Human Environment in Stockholm, international environmental law has developed in response to growing recognition of the ecological and economic interdependence of nations. As a result, the past four decades have seen the development of normative environmental principles and environmental action plans in a number of areas including climate change, sustainable development, biodiversity, trans-frontier pollution, marine pollution, endangered species, hazardous materials and activities, cultural preservation, desertification and uses of the seas. Among other things, global environmental treaties have been negotiated, such as the Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal, the 1985 Vienna Convention for the Protection of the Ozone Layer, the United Nations Framework Convention on Climate Change and the Kyoto Protocol on Global Warming, the Rio Declaration on Environment and Development, the Convention on Biological Diversity, the Convention on International Trade in Endangered Species, the Convention Concerning the Protection of the World Cultural and Natural Heritage and the United Nations Convention on the Law of the Sea. In addition, there are an increasing number of regional treaties have also been

adopted, including the 1992 Maastricht Treaty on European Union, the 1992 Paris Convention on the North East Atlantic, and the Helsinki Convention on the Baltic.

Environmental protection is also a growing area of concern for many developing countries, not only as part of their investment approval process, but also as a means for preserving natural resources that may be necessary for sustainable development. Developing countries are struggling to develop various laws and regulations. For example, countries in Southeast Asia have been working to develop regulations governing and establishing an environmental impact assessment regime. In addition, countries are attempting to address urban environmental problems, such as water quality and noise, industrial discharges and toxic gas and ambient air standards. Environmental protection standards for forests and marine areas are also under consideration. It can be anticipated that governments will issue numerous regulations addressing environmental concerns in specified industrial sectors.

§1:36 --Customs laws

Countries regulate the inward flow of goods through customs regulations. Customs laws serve a variety of purposes, including revenue collection through tariffs and other import fees, and the enforcement of regulations which have been specifically adopted with respect to imported goods, such as quotas, trade restrictions, antidumping laws, and country-of-origin marking requirements. Enforcement of customs laws also facilitate the collection of new statistics regarding international trade, and have become an important part of efforts to control the transfer of intellectual property and related technology. US exporters obviously need to be concerned about the customs laws of each country where the exporter intends to sell its goods and US importers relying on goods and materials produced in foreign countries will need to be sure that those items will be allowed to leave those countries without delay or undue expense. While customs laws and regulations around the world have yet to be standardized, a number of initiatives, such as the Harmonized Commodity Description and Coding System and the International Convention on the Simplification and Harmonization of Customs Procedures, have been completed in an attempt to remove any barriers to trade by simplifying and harmonizing customs procedures around the world.

A related issue to consider is the scope and enforcement of import controls in foreign countries. In general, import controls can be classified as import prohibitions, import restrictions (quotas) and import licensing requirements and may be based on a variety of factors including country of origin, product type, or product characteristics (e.g., products produced by convicts or under conditions deemed to be inappropriate by regulators in the foreign country). The scope of import regulations varies from country-to-country; however, US exporters should consider the need to comply with requirements relating to such things as product specifications, product testing and certification, marking (i.e., country of origin) and labeling, packaging, carriage and documentation. Failure to comply with import requirements in a foreign country may lead to problems when an attempt is made to enter the goods into the country at the border, including refusals to enter, seizure of the goods and/or monetary fines and penalties.

§1:37 --Investment laws

Foreign investment regulation encompasses an important component of any country's industrial policies. Under the classical model of free trade, developing nations would allow and actively cultivate direct investment by foreign firms in order to provide the nation with access to capital, new technologies and new products for the domestic market. In addition, the presence of foreign firms and/or their products would provide domestic firms with the competition necessary to insure the financial and human resources of the host country were funneled into the most productive areas. However, the success of the post-War policies of countries like Japan and, to a lesser extent, Korea, which were often based on restricting the presence of foreign firms in various areas of the local economy to allow local firms to grow through export-based strategies, has provided a new potential model for emerging economies to follow.

Most countries have some sort of "investment law" or an "investment code" which would apply to foreign investment in the country, including direct investment or a joint venture with one or more local partners. Foreign investment laws may regulate any type of foreign investment or may be limited to investments in a specified industry sector, such as tourism, agriculture, services or certain manufacturing areas. Foreign investment laws usually require review of the transaction by at least one, and sometimes more than one, governmental authority. In addition, investments by foreigners may be impacted by other local legislative acts, including laws and statutes regulating foreign exchange, unfair and restrictive business practices and mergers and acquisitions. Perhaps the most popular area of regulation is the formation of joint ventures, a common strategy used by U.S. companies to make an initial investment in a foreign country. For example, some countries adopted absolute rules that prohibit foreign investments unless they are made as part of a joint venture in which local investors—either public or private—own a majority of the equity and hold a controlling position. Others countries impose a joint venture requirement only in particularly important segments of the economy, such as agriculture, mining or natural resource development. As time has gone by, however, many emerging economies have liberalized their foreign investment regulations and reduced or eliminated prior restrictions on joint ventures and formation of wholly owned subsidiaries by foreign companies in an effort to attract needed capital and technology from firms in industrialized countries.

§1:38 --Competition laws

Competition law is designed to promote fair and effective competition among autonomous enterprises and ensure that the interests of consumers are protected without the need for direct state management of the enterprises or competition. Among the specific objectives of competition laws in developing countries are the prevention of unfair competition in enterprise operations, particularly in market behavior; ensuring that enterprise mergers do not create barriers to entry into the market; regulation of monopolies, which, in developing countries, can include not only natural monopolies but

also sectors which remain controlled by the state or its affiliates; and protection of consumers against cartel-like behavior of enterprises.

Antitrust or competition laws in industrialized countries typically deal with a variety of business collaborations involving two or more firms which might have a specified impact on competition in the relevant market. These laws not only cover mergers and joint ventures, but also other types of business collaborations (e.g., licensing or distribution agreements) that might result in some combination of the business assets and resources of actual or potential competitors in a manner that reduces competition. In recent years, competition law regulators in the EU and Japan have aggressively investigated proposed mergers and other business collaborations involving U.S. entities and have effectively blocked transactions based on the projected negative impact of the deal on the marketplace in their jurisdictions. Today competition regulators in many parts of the world--Australia, Canada, the EU, France, Germany Japan, the United Kingdom and the US—make decisions based on published merger guidelines that are continuously reviewed and update to incorporate changes in economic learning, case law and administrative practices that had been incorporated into the guidelines of other countries.

While it is unlikely that a developing country will have sophisticated laws and administrative procedures for conducting an antitrust-type review of foreign investment transactions, it is likely that they will have a set of foreign investment laws that serve many of the same purposes as competition laws to the extent they require local regulators to focus on the role foreign firms and capital will have in the domestic economy of the regulating country. In addition, developing countries also have laws designed to set specific forms of business collaborations (e.g., regulation of technology transfer agreements).

§1:39 --Technology transfer laws and regulations

Many countries have supplemented those portions of their antitrust and competition laws that apply to various competitive effects of technology transfers with the enactment of specific legislation regulating the content of technology transfer agreements. The goal is to foster the development of local technical capabilities and, in many instances, monitor the use of foreign exchange and the level of foreign involvement in the local economy. As a general rule, technology transfer regulations require that, to be enforceable, the cross-border agreement be submitted to, and approved by, a national administrative authority. The scope of regulated agreements varies from country-to-country; however, it is typical to find that review will be required for many agreements relating to the transfer, assignment or licensing of the use or exploitation of patents or trademarks; the provision of technical know-how and information in the form of plans, specifications, diagrams, models, instructions, formulae and personnel training; and provision of technical consultancy services and assistance. Governmental bodies charged with reviewing technology transfer agreements often refer to statutory lists of objectionable business practices which must be excised from any agreement as a condition of approval with the most common areas of concern including royalty rates, limitations on use of the technology, term of the agreement, and governing law and dispute resolution.

§1:40 --Company laws

While the success of any business arrangement generally turns on the compatibility of the persons and resources involved in the particular project, the actual legal structure of the relationship usually involves various business organizations, each of which have distinct characteristics that impact the manner in which the transaction is structured and the business relationship itself is managed. Company law, sometimes referred to as enterprise law, is necessary to define the legal entities (i.e., organizational forms) or enterprises which can be used to conduct commercial activities, as well as the rights and obligations of each enterprise and the governance process for the enterprises. In particular, a legal framework must be established with respect to formation, operation, and termination of enterprises, so that private investors have sufficient confidence regarding the rules which are applicable to local enterprises.

Most of the industrialized countries have recognized organizational forms that are similar to those commonly used in the US, including corporations, partnerships and limited liability companies. However, US investors must be mindful of the impact of different approaches to governance that have been taken in the EU and elsewhere. Among the areas where there is noticeable divergence from US practice are employee representation, social accountability for corporate actions, shareholder rights and procedures for shareholder participation, structure and role of the supervisory body (i.e., board of directors) and disclosures.

For developing countries, some of the key issues in this area include defining and broadening the scope of enterprise autonomy and, in the case of state and collective enterprises, effecting the separation of ownership and management. Some developing countries, particularly those who are attempting the transformation from a state-managed economy to a private market economy, have been grappling with making state enterprises more autonomous and with developing new governance structures which permit such enterprises to be run as "profit-pursuing" businesses by independent managers. As part of this process, the state must also separate its responsibilities as a regulator from the rights of an owner, and attempt to concentrate its regulatory activities on strengthening regulation at the macroeconomic level, developing a market system, and providing social services to enterprises.

At the same time, developing countries must also lay the foundations for private enterprises, since these are generally perceived as the primary vehicles for development of a market-based economy. Developing countries are beginning to develop basic structures for governance of private enterprises. For example, laws and regulations have begun to recognize the separate legal powers and duties of members (i.e., shareholders), either in their individual capacities or acting through the shareholders' meeting, and the directors and managers of the enterprise. An enterprise may also have a board of management and inspectors, elected by the shareholders, and shareholders sometimes have the right to vote on distribution of profits and approval of annual business plans. The board of management is designed to protect the interests of the shareholders in

relation to the company managers, and inspectors serve as auditors and inspect the firm's books and render reports to its shareholders.

Although progress is being made in constructing a legal framework, developing countries continue to regulate and monitor the organization and operation of enterprises by registration requirements and minimum conditions for the recognition of formal legal status. For example, private businesses may be subject to government approval processes when the enterprise is established, and upon dissolution or whenever there is a change in operations. In addition, the government often retains the authority to limit the sectors that would be open to private businesses, and can influence the operations of enterprises through its ability to provide incentives (e.g., favorable consideration of land use, priority in borrowing capital, reduction or exemption of duties, import-export facilitation) for private businesses and companies which invested in certain specified fields. Apart from the fact that the government's role in the review and approval process continues to go beyond that of pure administration, problems are caused by the fact that the grounds for governmental approval or disapproval of an application to start a new business are often not clearly specified in the law.

§1:41 --Financial laws

Financial laws regulate access to capital, equity and debt, provided by financial institutions and public securities markets. While US companies are familiar with the broad array of services, and corresponding regulations, that exist within their domestic financial markets, substantial variation in this area continues to exist around the world. While banks and securities firms from Japan and other parts of Asia, as well as from Europe, have long been leading participants in US and global capital markets, developing countries have only recently realized that financial laws are necessary to provide access to capital through a market-driven system rather than through a centralized planning mechanism. Banking laws and regulations address the need in many developing countries for the availability of credit at reasonable cost, of deposit facilities for surplus cash and temporary investment, and of facilities which permit prompt clearance and settlement of payments. Securities laws are needed to facilitate the development of a market-oriented system for capital formation through the issuance of equity securities and debt instruments.

In the US and in other industrialized countries, banking laws and regulations govern the legal relationship between banks and their customers as well as the operational activities of the banks. Over the years the scope of regulation has been expanded beyond banks to include a wide range of other financial institutions, such as savings and loans, credit unions, mortgage bankers, trust companies and insurance companies. Applicable laws and regulations are promulgated by various governmental bodies, such as the Comptroller of the Currency, the Federal Reserve Board, the Federal Deposit Insurance Corporation and the Office of Thrift Supervision in the US. In addition, countries may establish financial institutions that focus on specific types of loans, customers and related activities, such as the Export-Import Bank and the Farm Credit Administration in the US. While there are similarities among industrialized countries with regard to the scope and

goals of their bank regulations, differences can be found based on the historical roles that banks have played in the operations of their customers.

Developing countries are beginning to plant the foundations for a modern banking system, including a central bank and a system of commercial banks and other financial institutions that can begin to assume their respective functions of a central bank and the financial institutions in market economies. This means that the central bank will move away from the direction of providing credit through state-owned banks to merely supervising state-owned banks and other institutions, allow of which would operate on an equal footing. Laws and regulations are also being developed that would serve as a basis for a transparent process relative to the establishment, operation, and dissolution of financial institutions. In addition, commercial banks would be held to various standards of accountability and performance, and would be required to implement measures to improve the quality of their credit management processes.

In general, securities laws cover the regulatory structure for securities transactions, the registration or approval process for issuance of new securities, transactional rules (e.g., rights and duties of underwriters and brokers), settlement procedures, information requirements, dispute settlement procedures, legal prohibitions (e.g., self-dealing, insider trading, etc.) and investigative procedures and sanctions. For many years, the standard for securities regulation was established in the US, which launched an extensive system of regulation for its public securities markets after the problems in the late 1920's by creating the Securities and Exchange Commission and promulgating the Securities Act of 1933 and the Securities Exchange Act of 1934. Recently, however, a number of truly global securities markets have emerged, particularly in Europe and in Asia, and regulators around the world have substantially overhauled and modernized their securities laws and exchange procedures in an effort to attract traders and capital.

For their part, developing countries understand that securities laws and regulations are necessary to develop a market-driven system for enterprise financing, rather than having capital management defined as part of a state planning system. There are at least three important aspects of financial market regulations which are important in establishing a legal framework for enterprise financing: the definition of the rights associated with securities; the regulation of the securities markets; and the development of rules and procedures under which securities transactions can be conducted. These regulations are necessary in order to provide clear rules for investors, enterprises and financial intermediaries in securities transactions. As developing countries begin to build their own domestic securities markets, it will be imperative that they develop laws and regulations for management of the markets and the parties involved in the financial transactions occurring therein (e.g., financial institutions, underwriters, dealers, appraisers, accountants, and lawyers).

§1:42 --Employment and labor laws

Employment and labor laws are necessary for economic development to create a labor contract system, and a system for providing workers' rights and benefits which are not

permanently linked to a particular employer. Like the US, many industrialized countries have embraced significant levels of regulation in this area. Notably, the EU has adopted a number of Directives focusing on the protection of workers and improvement of working conditions within the Member States. For example, Directives have been adopted with respect to maternity leaves, working hours, and protection of part-time and temporary workers. Also, larger companies in most parts of the EU are obligated to provide information to, and consult with, workers through the establishment of "works councils." Of course, the Directives provide baseline requirements and individual Member States may adopt additional laws and regulations. For example, in countries such as Germany, termination provisions in employment contracts, including notice periods and severance payments, are extensively regulated.

Labor and employment laws in developing countries cover such things as regulation of worker dismissals, recruitment, unemployment insurance; and regulations establishing the respective rights and obligations of the parties to a labor contract. These laws and regulations play an important role in enhancing the level of worker confidence in the labor system, and in promoting the labor mobility which is often required for developing economies to rapidly shift its human resources to sectors which are best suited for the further development and growth. Many developing economies have experienced extended periods of labor unrest, which often adversely impacted the productivity of numerous enterprises, if not entire industries. While the response of the state was sometimes combative, most developing countries have begun to lay the foundation for a comprehensive set of laws and regulations relating to the terms and enforceability of labor contracts (e.g., description of duties, compensation, benefits, term, termination, and liabilities for breach); trade unions; health and safety regulations in the workplace; labor disputes and mediations; and pension and disability benefits. In some cases, special regulations have been promulgated for various industries that are considered to be of strategic importance.

§1:43 --Immigration laws

US citizens assigned to work in foreign countries will have to comply with applicable local immigration law requirements. Foreign countries are adopting immigration laws that, in general, mirror the approach taken by the US in this area; however, since sources on foreign immigration laws are somewhat limited, it is important to seek the advice of local experts whenever it is anticipated that US persons will need to be transferred to foreign locations to staff and manage offshore business activities, like a local joint venture. Development of foreign immigration laws reflects the tension between the often parochial attitudes of protection the domestic labor force and the realization that foreign expertise is necessary in order to attain greater competitiveness in the global trading order. In many cases, residency and employment in foreign countries will be conditioned upon issuance of some form of residence and/or work permit. Since the requirements for these permits are not uniform, contact should be made with the relevant embassy or consulate in the US as soon as it becomes apparent that a permit is necessary. Permits are typically valid for a fixed, and relatively short, period of time; however, extensions may be available. As with any form of approval or license required from a foreign

government, adequate time should be allocated to completing an application and the review process.

§1:44 Public international law

Public international law refers to the body of law that governs relationships between states, international organizations and, sometimes, individuals. At one time states were almost the only bodies that had rights and duties under international law; however, in during the course of the 20th Century rights and duties under international law have been extended to a number of international organizations (e.g., League of Nations and then the United Nations), multinational companies and even individuals afforded rights to pursue remedies against sovereign nations.

The Restatement of the Law (Third), the Foreign Relations of the United States (the "Restatement") is perhaps the best-known attempt to summarize the basic principles of the US view of public international law. Promulgated by the American Law Institute, the Restatement reflects the aforementioned evolution of public international law through the following definition in Section 101 thereof: "International law, as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical." The Restatement, while not authoritative, does state US practice with respect to such things as the jurisdiction of national legislative bodies to promulgate rules pertaining to conduct in foreign countries and the jurisdiction of national courts to adjudicate disputes arising out of conduct in foreign countries.

Public international law has expanded rapidly and now includes a broad and diverse range of areas such as air law, space law, maritime law (both shipping law and the law of the sea), diplomatic relations, human rights law, law of armed conflict, international environmental law, international economic law and international trade law. Section 102(1) of the Restatement includes a descriptive statement of the generally accepted sources of international law by providing: "A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world. Article 38 of the Statute of the International Court of Justice also includes a list of the major sources of international law that includes international conventions, international custom, general principles of law, and judicial decisions and scholarly "teachings."

Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.[62] The corresponding notes for this definition indicate that customary international law is intended to include diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states...." The notes also state that "For a practice of states to become a rule of customary

[62] Restatement Section 102(2).

international law it must appear that the states follow the practice from a sense of legal obligation (opinio juris sive necessitatis); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law." Custom was the primary source of international until the middle of the 20th Century; however, over the past decades there has been a decided trend toward codification of customary international law in international agreements.[63]

International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.[64] The term "international agreement" is defined as "an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law".[65] The most common term used for agreements of this type is a "treaty"; however, other popular designations include Agreement, Charter, Convention, Covenant, and Protocol. In each case, the arrangement is afforded the same legal status.

Creation of treaties and other international agreements follows a process similar to that found in private law.[66] Thus, for example, the parties will engage in negotiations followed by execution of authorized representatives. If necessary, the agreement will then be submitted for consideration and ratification by the appropriate national bodies. Once these steps have been completed, the text of the agreement should be published; however, the incidence of publication is still must less than what is normally expected with domestic statutes and regulations. In the US, many treaties are negotiated and signed by the Executive Branch (acting through one of the Cabinet-level agencies such as the State Department); however, treaties must then be ratified by the President following "advice and consent" of the US Senate. Once a treaty has been ratified, other governmental parties are generally involved. For example, the entire Congress may act to pass legislation required in order to implement the provisions of a particular treaty and

[63] A wide range of sources can be referred to as a means for identifying and substantiating what is customary international law and a good source of current information is the web site maintained by the US Department of State, which includes references to letters and other documents relevant to international law generated by that department over a number of years. For example, there are a number of digests of department documents that have been edited by specialists and which collect works generated during a specified period of time. Further information about the department's activities with respect to international law issues can be obtained by contacting its Office of the Legal Adviser.

[64] Restatement Section 102(3).

[65] Restatement Section 301(1).

[66] The Treaty Affairs Staff of the Office of the Legal Adviser at the Department of State publishes, on an annual basis, Treaties in Force which lists as of January 1st of that year the treaties to which the US is a party, the parties to the treaty and the dates of signing and coming into force. With respect to US treaties, including bilateral and multilateral agreements to which the US is a party, perhaps the best source, although sometimes not up to date, is the Treaties and other International Acts Series published by the US Government Printing Office and including treaties from 1946 to the present in "slip law" form. The Trade Compliance Center maintained online by the US Department of Commerce also includes a comprehensive collection of most of the trade agreements to which the US is a party and researcher can search the materials by agreement or treaty title, by country/signatory, by issue, or by keyword. For international treaties, including multilateral treaties to which the US is a party and treaties between other states that do not involve the US, reference must be made to a number of sources including the comprehensive collection of over 40,000 bilateral and multilateral treaties available through the United Nations Treaty Series.

thereafter it will be left to various administrative agencies within the US government to make and enforce regulations implementing the treaty and the statutes. Finally, the courts will be involved in interpreting treaties and any related statutes, regulations and non-treaty international law.

Treaties are generally classified as bilateral (i.e., involving only two countries) or multilateral (i.e., involving more than two parties). Double taxation and extradition treaties are common examples of bilateral agreements and multilateral treaties are typically used when attempting to address global or regional concerns or create global or regional institutions. The signature and effective dates of treaties are typically not the same and the effective date will be identified in the text of the treaty. For example, effectiveness may be delayed until a date certain, the date of ratification, the date that parties complete adoption of any required follow-on legislation, or, with multilateral treaties, the date when a minimum number of parties have actually completed the ratification process. If a party is joining a multilateral treaty already in effect for other country members, the new party can generally set it own effective date for the accession.

In determining whether a rule has become international law, substantial weight is accorded to (a) judgments and opinions of international judicial and arbitral tribunals; (b) judgments and opinions of national judicial tribunals; (c) the writings of scholars; (d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.[67] For example, case law created by international courts of general and limited jurisdiction, international tribunals, national courts enforcing norms taken from international sources and arbitral decisions is an important indicator of the content and direction of international law counsel may refer to reports of judgments, advisory opinions and orders issued by the International Court of Justice, the International Criminal Court and the European Court of Justice for the European Union. Reports of international arbitration awards can be found in various commercial publications as well as through the major organizations responsible for the conduct of international arbitrations. In addition, enactments by bodies and organizations established by multilateral treaties, such as resolutions of the United Nations General Assembly and directives of the European Union Commission, are also valuable and widely accepted sources of international law and regulation.

§1:45 Private international law

Private international law is the broad and diverse body of conventions, model laws, legal guides, and other documents and instruments that have come into effect as a means for regulating cross-border private relationship. Private international law can be found in such areas as trade and commerce, finance and banking, trusts and estates, family and children matters, and international judicial assistance. The development of private international law is generally a long and complex process of negotiations that requires consideration of international consensus on the one hand and attempting to ensure the individual sovereign nations are willing to recognize and implement the end products of the deliberations. Most of the major initiatives in this area are driven by the following

[67] Restatement Section 103(2).

major intergovernmental organizations concerned with the unification and development of private international law: the Hague Conference on Private International Law[68], the UN Commission on International Trade Law ("UNCITRAL")[69], the International Institute for the Unification of Private International Law ("UNIDROIT")[70] and the Organization of American States ("OAS")[71]. Also, not surprisingly, the work of National Conference of Commissioners on Uniform State Laws ("NCCUSL") and the American Law Institute ("ALI") also impacts the various aspects of the codification of private international law.[72]

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[68] The Hague Conference on Private International Law (http://hcch.e-vision.nl/) has an extensive history that reaches back to a conference convened by the Government of the Netherlands in 1893. Today this group is actively involved in the development of private law conventions in a wide range of traditional and contemporary areas including conflict of laws, judicial assistance, inter-country adoption and child abduction. The Hague Conference Web site contains the full text, status and bibliographic information and explanatory reports, where available, about its work and also maintains lists of Central Authorities designated under a number of conventions.

[69] The United Nations Commission for International Trade Law ("UNCITRAL") (http://www.uncitral.org), which was established by the UN General Assembly in 1966, has developed some of the most significant conventions and projects relating to the harmonization of areas of private international law that are of great interest to counsel and companies engaged in cross-border commercial transactions. UNCITRAL organizes its work through the following six specialized working groups: Procurement (Group I); International Arbitration and Conciliation (Group II); Transport Law (Group III); Electronic Commerce (Group IV); Insolvency (Group V); and Security Interests (Group VI). In addition to its work on conventions and similar instruments, UNCITRAL is involved in the creation of model laws and legal guides that can be consulted by various countries in drafting their domestic laws and regulations, such as the UNCITRAL Model Law on the Procurement of Goods, Construction and Services with Guide to Enactment (1994). Finally, UNCITRAL has conducted projects to assist private contracting parties, such as the promulgation of the UNCITRAL Arbitration Rules and the UNCITRAL Notes on Organizing Arbitral Proceedings. The UNCITRAL website includes extensive information in multiple languages regarding its activities, including drafts and preparatory documents for the work of each of the working groups.

[70] The International Institute for the Unification of Private Law ("UNIDROIT") (http://www.unidroit.org/) was originally established by the League of Nations and has evolved into an autonomous international organization devoted to the harmonization of private international law. One of the best known works of UNIDROIT has been the UNIDROIT Principles of International Commercial Contracts, which are a compilation of commonly recognized general principles of commercial contract law that have been derived from a study of various legal systems. As is the case with the websites for the other organizations involved in private international law activities, the UNIDROIT site includes status information on UNIDROIT Conventions and information on current projects.

[71] Inter-American Specialized Conferences on Private International Law (generally known by the Spanish Acronym as "CIDIPs") (http://www.oas.org/dil/private_international_law.htm) have been established under the auspices of the Organization of American States to serve as a catalyst for development and harmonization of private international law in the Western Hemisphere. The work is generally conducted through conferences held in various locations in the Americas and various conventions and protocols have been adopted in the following general categories of private international law: applicable law, enforcement and procedural law, family law and commercial law.

[72] Primary responsibility for coordination of US efforts to participating in the development of private international law is vested in the Office of the Assistant Legal Adviser for Private International Law ("L/PIL") at the US Department of State. The L/PIL maintains a web site that includes a comprehensive collection of treaties in force for the US, other international instruments, and information on current negotiations and projects concerning multilateral private international law conventions. It also contains drafts, background reports, US Government position papers and proposals, and other working documents. In addition, the web site includes links to the major intergovernmental organizations described herein and bibliographic information on the conventions and related case law.

While the US closely follows the activities of the organizations involved with the development of private international law, it has opted to become a party to only a limited number of private international law conventions such as the UN Convention on Contracts for the International Sale of Goods (UNCITRAL), the Convention on the Limitation Period in the International Sale of Goods (UNCITRAL), the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (UNCITRAL) and the OAS Inter-American Convention on International Commercial Arbitration (OAS). In addition, consideration is being given to US ratification of the UNIDROIT Convention on International Financial Leasing (UNIDROIT), the UNIDROIT Convention on International Factoring (UNIDROIT), the UN Convention on International Bills of Exchange and International Promissory Notes (UNCITRAL) and the UN Convention on Independent Guarantees and Stand-by Letters of Credit (UNCITRAL).

§1:46 Application of international law to cross-border business activities

While it is useful to identify and understand each of the US and foreign laws that may be applicable at any given time, as well as the relevant public and private international law activities, the main challenge for counsel is determining the specific international law considerations that must be addressed in dealing with a specific transaction or event. In this section we provide several short case studies involving common cross-border transactions that illustrate the legal issues, domestic and foreign, that must be considered. These case studies are not intended to be comprehensive and reference should be made to other chapters in this Guide that cover particular transactions or issues in greater detail.

§1:47 --Sales and procurement of goods

International trade, notably the sale and procurement of goods and services across national borders, raises a variety of issues that are not applicable in situations where the parties are located in a single country and performance is expected to occur exclusively within the borders of that country.[73] First of all, the contract governing the sale and procurement of goods must take into account the differences in local laws of direct relevance to the parties and private international law efforts have been made to bridge this gap through the development and use of the UN Convention on Contracts for the International Sale of Goods (UNCITRAL) and the UNIDROIT Principles of International Commercial Contracts has been widespread. In addition, notice should be taken of the UNCITRAL Model Law on Procurement of Goods, Construction and Services.

Parties may also rely on the dispute resolution rules of one of the private organizations referred to above in their contract and specific procedures for activities contemplated under the contract may be documented through various rules promulgated by the ICC, notably INCOTERMS, the Uniform Customs and Practices for Documentary Credits, the Uniform Rules for Contract Guarantees and the Uniform Rules for Collections.

[73] For further discussion of the business and contractual issues that arise during the purchase and sale of goods and services across national borders, see the chapter on "Export Planning" in this Guide.

Beyond the contract, however, international trading partners must be mindful of a wide range of local laws and international agreements such as the following:

- The laws of the exporting and importing countries (as well as any other countries involved in transshipment of the goods) will regulate the entry and exit of goods and services through customs duties and imposition of other types of restrictions and requirements on various items of particular interest to local regulators.
- Trading in goods and services will also be subject to various multilateral conventions (e.g., the WTO), regional arrangements (e.g., NAFTA and the European Union) and bilateral agreements that regulate the ability of the parties to restrict the inbound flow of goods and services from the other party to the agreement.
- Sale or movement of certain types of goods into specified countries may be prohibited or closely restricted under multilateral agreements adopted to create and enforce economic sanctions against those countries. The most notable example in this area is the export controls imposed in the US and many other industrialized countries.
- Depending on the circumstances, the transfer and use of goods or services may also be subject to local laws relating to antitrust and competition, consumer protection, creation and enforcement of security interests, immigration and labor and employment.
- The tax laws of the countries of each of the parties involved in the transaction will also be relevant and it is often necessary to seek and obtain expert advice on structuring the transaction in a way that achieves the most advantageous tax treatment in light of the impact of international treaties and the enforcement policies of local tax regulators.

§1:48 --International investments

Many US firms become involved in cross-border investment transactions including formation of wholly-owned subsidiaries in foreign countries, minority investments in foreign firms, acquisitions of foreign companies and formation of joint ventures with overseas partners. In addition, the introduction to international investment laws may come from accepting equity or debt capital from a foreign investor to finance domestic activities in the US. Outbound or inbound international investment will typically bring a number of different types of laws and regulations into play, many of which are driven by overriding political and economic objectives of the regulating governments. For example, before investing in a foreign country, US firms must be mindful of local restrictions on foreign ownership of equity interests and assets, including limits on percentage ownership and the business sectors in which foreign investments are permitted. Also, since an investment typically leads to involvement in the day-to-day management of a business enterprise in the foreign country, the US investor must educate itself regarding the whole range of local laws applicable to business and commercial activities (e.g., corporate governance, ownership and use of personal and real properties, labor and employment, competition laws). Investments may be subject to bilateral investment treaties that impose restrictions on discriminatory treatment of foreign

nationals and limits on the right of foreign governments to expropriate the assets of foreign nationals.

§1:49 --Technology transfers

US companies can realize significant advantages through arrangements with foreign firms that include transfer of technologies and related intellectual property rights developed in the US. For example, US companies may export technology-based products into new foreign markets in pursuit of opportunities to increase sales and realize higher margins based on the offering of truly innovative goods in those markets. Technology may also be transferred to foreign manufacturers that can produce products at substantially lower costs than US manufacturers. Also, many foreign joint ventures are based, in part, on inbound transfers of technology by the US partner that can then be used for manufacturing by the foreign joint venture followed by sale of the products by the joint venture into the local market where it is domiciled. In each case, US companies must plan for the impact of foreign laws regulating inbound technology transfers and determine if they will be able to effectively protect their intellectual property rights relating to the technology in each of the countries where the technology will be transferred (including countries where goods in which the technology is integrated will be sold after the initial transfer). Moreover, US laws and regulations, notably export controls, may restrict outbound technology transfers.

§1:50 --Dispute resolution

International commercial agreements raise interesting and complex issues relating establishing the proper forum for resolution of disputes, identifying the procedural rules that need to be followed when a dispute arises and, eventually, the ability of the prevailing party to enforce a judgment or award outside of the jurisdiction in which is was rendered. The parties to a cross-border agreement are free to agree upon and insert a choice-of-forum provision in the contract and, in most cases, the selection will be honored by the courts if the case arises in an industrialized country. That said, international traders are often reluctant to voluntarily submit potential contract disputes to the courts of their foreign partners fearing, often correctly, that they will not be able to receive fair treatment. As a result, alternative dispute resolution (i.e. arbitration) is often selected for international contracts and such provisions are readily enforced.

There are a number of completed conventions, rules, model laws and legal guides that are relevant to international dispute resolution, including arbitration and mediation. Among the most well-known are the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UNCITRAL Conciliation Rules (1980), UNCITRAL Model Law on International Commercial Arbitration (1985), UNCITRAL Notes on Organizing Arbitral Proceedings (1996) and UNCITRAL Arbitration Rules (1976). At the regional level, arrangements such as the Inter-American Convention on International Commercial Arbitration create enforcement rules similar to those in the NY Convention that are applicable within the Western Hemisphere. In addition, notice must be taken of the activities of private organizations that provide rules and institutional

structures to resolve international commercial disputes including the International Chamber of Commerce ("ICC") (the International Court of Arbitration and the Rules of Arbitration of the ICC), the American Arbitration Association ("AAA") (the International Arbitration Rules of the AAA) and the London Court of International Arbitration

In those cases where a dispute is to be resolved by litigation in the local courts of one of the parties to a cross-border transaction, the parties are generally subject to the procedures adopted by the courts in that jurisdiction as well as their conflicts of laws rules. However, in an effort to even the playing field, several international conventions have been adopted that impact elements of the litigation process. Notable examples include the Hague Conventions on Service of Process, the Taking of Evidence Abroad and Abolishing the Requirement of Legalisation for Foreign Public Documents. On the other hand, little progress has been made with respect to recognition of bilateral and multilateral agreements relating to enforcement of judgments. In general, enforcement of such judgment is a matter of comity and practice continues to vary widely around the world with the most relevant factors being the similarity of the legal systems and reciprocity. Notice should also be taken, however, of the growing impact of regional organizations that have attempted to forge agreements in this area, such as the European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

§1:51 Designing and managing a global compliance program

Designing and managing an effective global compliance program is a demanding process that requires attention to identifying all laws and regulations applicable to the company's activities in both the home country and in each of the countries in which the company engages in business activities and/or its products or services are available and then establishing and coordinating common standards and procedures with respect to compliance throughout the company. The global compliance program should enable sharing of best practices, provide training to all involved managers and employees, permit real-time monitoring and measurement of compliance, and make it easy for everyone in the organization to quickly gain access to guidance on how best to fulfill their legal and ethical obligations. The design process begins with a comprehensive audit of international operations and the resulting program should include clear guidelines with respect to the role of the governing board of the company (e.g., the board of directors of a corporation) and certain key elements such as codes of conduct, education and training programs, oversight processes, and reporting procedures. Design of the program should be accompanied by an organizational structure that fits the activities of the company and provides oversight and management in the compliance area.

§1:52 --International operations audit

While some companies build global compliance procedures into their business operations from the very beginning, the more common situation is that the decision to implement a formal compliance program is not made until the company already has some level of international activities. At that point, the first action that should be taken is to conduct a

comprehensive audit of the company's international operations to identify the business and legal risks that will arise in connection with existing and proposed cross-border activities and transactions (see Table 1.1). The goal is to insure that the company establishes adequate policies and procedures for complying with domestic and foreign laws, including US export control, anti-boycott, and foreign corrupt practices laws. In addition, the audit of international business activities can be used to determine whether the company has adequate resources dedicated to global compliance issues. Once the initial audit has been performed, plans should be made to revisit the questions and issues on a regular basis to determine whether there have been any significant changes in the challenges that may be confronting the company in its international operations.

Table 1.1
Steps for Conducting an International Operations Audit

- Consider the appropriate scope of the investigation, identify the key issues which are to be covered by the review (e.g., changes in internal compliance procedures necessitated by changes in applicable laws and regulations) and, if appropriate, prepare a formal investigation plan
- Identify the person or persons who will participate on the investigation team and review with such persons the investigation procedures and laws and regulations that may be applicable to the review
- Review the general information collection procedures relating to legal review and compliance investigations, including the guidelines that must be followed to protect the confidentiality of the investigation and, if appropriate, prepare confidentiality and non-disclosure agreements and/or board actions authorizing the investigation
- Prepare an appropriate questionnaire regarding the subject matter of the investigation and circulate it to persons known, or likely, to have material information regarding the issues being analyzed
- Arrange for inspection of the company's files, including files in foreign offices, to identify information which may be used in the course of the investigation
- Arrange for interviews with persons familiar with the information which may be used in the course of the investigation, including officers and employees of the company, general counsel, outside counsel, and other parties
- Review contracts and documents relating to international business transactions collected during the course of the investigation and prepare summaries of any material information contained therein
- Analyze the information obtained through the questionnaires, interviews, and document reviews
- If appropriate, prepare a report or summary of findings, appropriately labeled to preserve any applicable privilege, which can be presented to persons within the company charged with compliance responsibility in the specified area
- Establish procedures for implementation of compliance procedures and/or remedial actions identified during the course of the investigation, including a system for monitoring progress of the procedures and/or actions
- Arrange for information collected during the course of the investigation to be appropriately organized and stored

§1:53 ----Organizational review and risk analysis

The international operations audit should begin with a review of the structure that the company has in place for managing its overseas activities (see Table 1.2). This usually will be done through interviews with key personnel in the area about their duties and their perception of the material risks that the company is confronting in foreign markets.

Obviously, risk analysis is particularly important in the international context and there are several unique areas of concern that need to be taken into account from a legal perspective. For example, while there are ongoing attempts at harmonizing laws and regulations that might apply to common cross-border commercial transactions, US companies must still anticipate difficulties and uncertainties relating to enforcement of their contractual rights in foreign markets. In addition, the audit process should incorporate many of the elements of an overall country analysis in order to determine how economic and political conditions in a particular foreign country might impact a proposed investment transaction.[74]

Table 1.2
Questions for Organizational Review and Risk Analysis

- Identify key personnel in international operations (show name, qualifications, years with company), including manufacturing; marketing; taxation; export and import licensing; and technology licensing.
- Describe the principal business risks (contract and legal system), economic risks (foreign exchange, inflation, and interest rate), and political risks (foreign government actions) in company's international operations.
- Describe any tariff and non-tariff barriers which have a particular impact on company (e.g., taxes, quotas, import or export licenses, custom duties).
- Provide copies of any government audit reports in last two (2) years relating to international operations, including but not limited to import and export licensing.
- Are there any pending government audits with respect to international operations?
- Describe the major weaknesses and problems with the company's international operations.
- Describe material changes and developments in international operations in last twelve (12) months, and any anticipated changes and developments in the future.

§1:54 ----Contract collection and review

As part of the audit process, an inventory of the company's international business activities should be developed. This will begin with the collection of key contracts relating to international business transactions (see Table 1.3), and preparation of a summary of the company's international business plans relating to sales and manufacturing. In general, it can be expected that global companies will have contracts relating most of the common transactional forms for entering a new foreign market, including direct sales contracts between the company and the customer or end user in a foreign market, foreign sales agency agreements, manufacturing and distribution agreements, licensing agreements and joint ventures. In addition, if the company has formed foreign subsidiaries or branch offices, the document collection should be expanded to include the organizational instruments for each of these entities. It is not sufficient, however, to merely collect all the contracts and it is important for the audit process to include an attempt to place the relationships in proper context by providing a narrative description of the company's overall foreign distribution and manufacturing

[74] For further discussion of country analysis, see the chapter on "Evaluating Foreign Markets" in this Guide.

strategies. This allows the analyst to anticipate any legal or business hurdles that the company may need to confront as it expands its international operations in the future.

Table 1.3
Questions for International Contract Review

- Provide copies of the following to which the company is a party: international sales and purchase agreements; foreign sales representative agreements; foreign manufacturing and distribution agreements; foreign technology transfer and licensing agreements; international joint venture agreements; financing and construction agreements; and any other material contract or agreement relating to the foreign activities of the company or any of its subsidiaries.
- Describe the company's international manufacturing and marketing programs.
- Describe the company's relations with foreign distributors, representatives, and other agents.
- Describe the company's relations with foreign governments and regulators. Identify any agreements and commitments between the company and foreign governments pertaining to international operations.
- Provide copies of applications for approval of inbound investments submitted to a foreign regulator over the last five (5) years.
- Identify any foreign assets of the company which have otherwise been subjected to or threatened with governmental controls (other than expropriation or nationalization) in last two (2) years.
- Describe cross-border transfers of company personnel to and from the United States. Is the company in compliance with all the requirements of domestic and all applicable foreign immigration laws?
- Describe major foreign transactions under negotiation.
- Describe the company's policies for complying with domestic laws and regulations relating to the activities of foreign agents (e.g., Foreign Corrupt Practices Act).
- Identify foreign counsel engaged to provide services to the company regarding compliance with laws and regulations in local markets.

§1:55 ----Compliance review

An important focus of the audit process is identifying all of the domestic and foreign laws and regulations that might apply to the company's cross-border activities and determining the company current level of compliance. The contract collection and review process described above can serve as the initial basis for determining which laws and regulations are important to the company. Once that process is completed, the audit team should determine what actions are typically required for compliance, such as obtaining licenses, permits or registrations, and then search the company's records to verify that the appropriate steps have been taken to fulfill the identified obligations. The end product of this process should an inventory of records for each major law, regulation or compliance topic that includes items such as communications with governmental officials, licenses and similar approvals (when applicable), and records that serve as evidence of compliance in situations where licenses are not issued (e.g., documentation of the process followed to determine that a license to export specified goods was not required).

The scope of the compliance review will depend, of course, on the specific activities of the company and the foreign markets in which it is active. As such, it is impossible to create a single master list of compliance topics that will adequately cover every US

business involved in cross-border activities. As a starting point, however, the audit team may focus on compliance in the following key areas:

- US immigration laws, which will apply whenever the transaction involves the movement of foreign employees to the US, as might occur when a US party forms a domestic joint venture with a foreign firm or foreign personnel are sent to the US for training in the manufacture of products of the US party which will be sold overseas.
- The Foreign Corrupt Practices Act ("FCPA"), which is described above, is obviously a matter of concern in any foreign sales representative agreement, particularly in situations where local customs may be different from those in the US; however, the potential impact of the FCPA extends into any other situation where employees or agents of the company may have contact with persons deemed to be a "foreign public official" under the FCPA.
- Export controls, which consist of a comprehensive set of statutes, regulations, and executive orders implemented by the US to curb the worldwide proliferation of weapons of mass destruction and prevent certain countries from obtaining goods and technology that may contribute to their military potential.
- US customs laws, which regulate the inward flow of goods into the US through the collection of duties and information on imported goods as well as the imposition of quotas, restrictions and marking, packaging and safety requirements.
- US antiboycott legislation, which prohibits and penalizes cooperation with all unauthorized foreign boycotts and embargoes, requires companies to report most boycott-related requests, and imposes a wide range of sanctions on violators.

Obviously, compliance issues are not limited to US laws. For example, a US company entering into a foreign sales arrangement will need to be concerned about the possible effect of foreign laws adopted primarily to protect local agents. Such laws often impose severe penalties on foreign firms whenever they seek to terminate an agency arrangement with a local party. In addition, goods exported from the US will need to satisfy the requirements of the import laws and regulations in each destination country and companies will need to be aware of any specific obligations with respect to documentation, product markings, tariffs and duties. At a minimum, the audit process should identify the company's largest import and export activities over the last year to highlight those countries and regions where the company has the highest level of international activity. The information can be used to assess whether the company has allocated sufficient resources to understanding the business practices and laws that are most commonly applicable to its international transactions.

Assuming that the company already has a compliance program in place, the international operations audit should also include a review of the policies and procedures that currently are being used to monitor cross-border activities. The review can be done by measuring the company's performance against the standards normally used to determine the effectiveness of a compliance program. The areas that should be covered in an international compliance review (see Table 1.4) include policies and procedures relating to cross-border activities and transactions, due diligence procedures relating to foreign agents and business partners, monitoring of authority delegated to managers in foreign

countries, compliance training activities, procedures for reporting possible violations of law and other wrongdoing, recordkeeping and procedures for regular audits and reviews of global compliance programs.[75]

Table 1.4
Questions for International Compliance Review

1. Import and Export Activities

- List all countries in which company has annual sales of more than $100,000 (estimate sales for each in last twelve (12) months).
- List all exports and imports of products, services, and technical data over $100,000 in last twelve (12) months. Show shipment date; product, service, or data; value; contract number; and export and import license, permit, or approval (type, number and issuing agency).
- List all planned future exports and imports of products, services, and technical data over $100,000. Show shipment date; product, service, or data; value; contract number; and export and import license, permit, or approval (type, number and issuing agency).
- Describe any Eximbank (or equivalent) insurance on exports.

2. Import and Export Licenses

- List any products or services whose export is reviewed, restricted, or prohibited by U.S. Departments of State, Commerce, or equivalent. With respect to such products and services, obtain copies of sales orders and products to determine if legends reflecting export restrictions and prohibitions have been placed thereon.
- Provide copies of outstanding export and import licenses, permits, and approvals, including one-time and continuing licenses and applications therefor.
- Describe any imports or exports in last twelve (12) months as to which the import or export licensing was inadequate or questionable.
- Describe the company's policies for complying with domestic export control laws and regulations.

3. Customs Compliance and Disputes

- Describe all pending disputes over import and export duties and tariffs where the amount at issue is $25,000 or more.
- Describe the company's policies for complying with domestic and foreign customs laws and regulations.

4. Boycott Activities

- Is company in compliance with domestic laws and regulations which prohibit American involvement, whether active or passive, in international boycotts and which requires reporting of requests for boycott information or compliance?

[75] For discussion of the standards normally used to determine the effectiveness of a compliance program, see "Growth-Oriented Entrepreneur's Guide to Compliance" prepared and distributed by the Growth-Oriented Entrepreneurship Project (www.growthentrepreneurship.org). A common thread across many of the compliance areas is the need to understand and observe detailed recordkeeping requirements and companies should expect to be required to retain export control documents, memoranda, notes, correspondence, contracts, invitations to bid, books and accounts, financial records, restrict trade practice or boycott documents and reports; and other records pertaining to the types of transactions covered by applicable export control laws and regulations. The retention period for these records extends for at least five years and may be even longer depending on the type of transaction and the applicable statute of limitations for the subject matter of the transaction apart from regulatory compliance.

- Has the company been blacklisted or boycotted by any countries?

5. Trade Law Disputes

- Describe any anti-dumping proceedings in any country by or against company in last two (2) years.
- Has the company or any of its domestic competitors been involved in any countervailing duty proceedings in the last two (2) years?
- Has the company been involved in any other proceedings brought under domestic laws relating to unfair trading practices of foreign firms or governments?

6. Foreign Exchange Agreements

- Provide copies of any foreign exchange agreements.
- Describe any open sales and purchases as to which there is a material foreign exchange problem, either from a change in exchange rate or foreign currency restrictions.

7. Tax Reporting and Compliance

- Provide copies of all income tax returns relating to foreign operations of the company or its subsidiaries over the last five (5) years.
- Has the company established any foreign subsidiaries or branch operations?
- Provide copies of any agreements, permits, approvals, and certificates pertaining to foreign taxation and exemption therefrom.
- Describe any company policies with respect to compliance with withholding requirements in transactions with foreign parties.
- Identify the person(s) responsible for the company's foreign taxation and accounting functions, as well as the company's outside accountants for international activities in the United States and in any foreign country.

§1:56 --Role of the governing board

While strategy and operational policies, including compliance issues, were traditionally lefts to the officers of the business, there has been a distinct shift in responsibilities over the last years that has resulted in the ascendancy of the governing board of the organization, such as the board of directors of a corporation in the US, as the ultimate gatekeeper with respect to governance issues.[76] The impact of SOXA on the composition and experience of the board of directors in general and audit committees in particular is well documented; however, the US is not the only country that has focused on the duties and responsibilities of the board of directors. For example, the OECD Principles of Corporate Governance, which were originally endorsed by OECD Ministers in 1999 and recently revised in 2004, have since become an international benchmark for policy makers, investors, corporations and other stakeholders worldwide. With respect to the responsibilities of the board of directors, the Principles emphasize that the board must establish a corporate governance framework that ensures the strategic guidance of the company, the effective monitoring of management by the board, and the board's

[76] For further discussion of the role of the board of directors of US companies with respect to compliance activities, see "Growth-Oriented Entrepreneur's Guide to Governance" and "Growth-Oriented Entrepreneur's Guide to Compliance" prepared and distributed by the Growth-Oriented Entrepreneurship Project (www.growthentrepreneurship.org).

accountability to the company and the shareholders. Specific guidelines include the following:

"A. Board members should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders.

B. Where board decisions may affect different shareholder groups differently, the board should treat all shareholders fairly.

C. The board should apply high ethical standards. It should take into account the interests of stakeholders.

D. The board should fulfill certain key functions, including:

1. Reviewing and guiding corporate strategy, major plans of action, risk policy, annual budgets and business plans; setting performance objectives; monitoring implementation and corporate performance; and overseeing major capital expenditures, acquisitions and divestitures.
2. Monitoring the effectiveness of the company's governance practices and making changes as needed.
3. Selecting, compensating, monitoring and, when necessary, replacing key executives and overseeing succession planning.
4. Aligning key executive and board remuneration with the longer term interests of the company and its shareholders.
5. Ensuring a formal and transparent board nomination and election process.
6. Monitoring and managing potential conflicts of interest of management, board members and shareholders, including misuse of corporate assets and abuse in related party transactions.
7. Ensuring the integrity of the corporation's accounting and financial reporting systems, including the independent audit, and that appropriate systems of control are in place, in particular, systems for risk management, financial and operational control, and compliance with the law and relevant standards.
8. Overseeing the process of disclosure and communications.

E. The board should be able to exercise objective independent judgment on corporate affairs.

1. Boards should consider assigning a sufficient number of non-executive board members capable of exercising independent judgment to tasks where there is a potential for conflict of interest. Examples of such key responsibilities are ensuring the integrity of financial and non-financial reporting, the review of related party transactions, nomination of board members and key executives, and board remuneration.
2. When committees of the board are established, their mandate, composition and working procedures should be well defined and disclosed by the board.
3. Board members should be able to commit themselves effectively to their responsibilities.

F. In order to fulfill their responsibilities, board members should have access to accurate, relevant and timely information."

While directors around the world are increasingly involved in corporate governance reforms, there role continues to vary from country to country depending on historical factors and the speed and scope of local regulatory changes. In almost all industrialized countries, directors have a defined role in overseeing ethics programs. In addition, nearly all boards delegate program oversight responsibility to a committee, although at times it may be delegated to more than one committee. For example, an audit committee may review conflict-of-interest issues, while the governance committee may have oversight for general code-of-conduct issues. The advantages of such delegation are the specialization it allows those most directly involved to develop, and the greater time that a committee rather than the entire board can devote to the issues. Interestingly, while in the US the executive most likely to have general responsibility for reporting to the board on ethics or compliance issues is the chief legal officer, the chief executive officer is most likely to have that responsibility outside of the US. Boards around the world are also more engaged in some aspect of "whistle blowing" procedures; however, directors in Japan, United Kingdom and Western Europe are more likely than their counterparts in the US to be involved in discussing individual cases.

§1:57 --Elements of an effective global compliance program

In general, a compliance program can be understood to be an internal management system that educates the officers and employees and employees of an organization about laws and regulations relevant to the activities of the organization and establishes processes and procedures to guide and monitor the behavior of those persons. There are no legally mandated standards for compliance programs; however, numerous attempts have been made to identify and define the essential elements of an effective compliance program.[77] Each global compliance program should be tailored to the unique circumstances of the company including the size of the firm, the foreign countries in which it operates, the level of regulation applicable to the firm's business activities and its past compliance history. In any case, however, the program should be broad in its scope of application and extend beyond all officers and employees of the company and its subsidiaries and branches to include outside consultants, advisors, independent contractors and foreign business partners such as distributors, agents, sales representatives, licensees and joint venture partners. There is no recognized standard template for an effective global compliance program; however, it is generally accepted that the program should include, at a minimum, a code of conduct and supporting policies and procedures, an education and training program, procedures for overseeing and

[77] For further discussion of recognized sources for guidance on the elements of an effective compliance program, see "Growth-Oriented Entrepreneur's Guide to Compliance" prepared and distributed by the Growth-Oriented Entrepreneurship Project (www.growthentrepreneurship.org). Among other things, reference should be made to the federal Sentencing Guidelines, guidelines developed by regulatory agencies responsible for administration and enforcement of specific laws and regulations (e.g., export controls and import laws) and the rapidly growing body of case law, notably the *Caremark* case.

auditing the compliance process, procedures for reporting violations and a demonstrated commitment to enforcing policies against violators.[78]

§1:58 ----Code of conduct

The foundation of the global compliance program is a code of conduct that sets the basic internal standards to be observed by all directors, officers and employees of the company in order to establish, maintain and strengthen the business ethics and compliance systems throughout the company. In addition to legal and regulatory compliance standards, the code of conduct will also state the company's intention to engage in ethical business practices with respect to such areas as respect for human rights, safety of products and services, environmental conservation and information disclosure. In fact, many multinational companies draw upon the contents of the OECD Guidelines for Multinational Enterprises when preparing their internal code of conduct. Substantial changes to the Guidelines, the first since 2000, were made and announced in a 2011 edition, including a new human rights chapter, which is consistent with the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework; a new and comprehensive approach to due diligence and responsible supply chain management representing significant progress relative to earlier approaches; important changes in many specialized chapters, such as on Employment and Industrial Relations; Combating Bribery, Bribe Solicitation and Extortion, Environment, Consumer Interests, Disclosure and Taxation; clearer and reinforced procedural guidance to strengthen the role of the NCPs, improve their performance and foster functional equivalence; and a pro-active implementation agenda to assist enterprises in meeting their responsibilities as new challenges arise.[79]

The code of conduct should be disseminated to all employees of the company, particularly employees working in foreign countries. Assuming that the company has adopted a structure that includes regional compliance offices, those offices will be responsible for translating the code into local languages and making sure that the code is explained and understood. Employees should also have access to the code on the intranet websites of the individual branches and subsidiaries within the company. In addition, the contents of the code should be part of the company's compliance training and education programs.

The OECD Guidelines for Multinational Enterprises encourage enterprises to disclose timely, regular, reliable and relevant information regarding their activities, structure, financial situation and performance. As part of this disclosure process, companies should

[78] For a detailed list of the elements of an effective corporate compliance program, see "Growth-Oriented Entrepreneur's Guide to Compliance" prepared and distributed by the Growth-Oriented Entrepreneurship Project (www.growthentrepreneurship.org). In addition to the elements described in this section, efforts must be made to establish an appropriate control environment on a global basis and institutionalize applicable ethical conduct requirements throughout the all of the domestic and foreign business units within the company.

[79] For a detailed list of conduct codes, see "Growth-Oriented Entrepreneur's Guide to Compliance" prepared and distributed by the Growth-Oriented Entrepreneurship Project (www.growthentrepreneurship.org).

make a copy of its localized code of conduct available to the public in each foreign country where they are doing business and establish procedures that be used by stakeholders to communicate comments on the company's performance in relation to the standards in the code of conduct.

§1:59 ----Education and training

One of the key roles of a compliance department is education and the elimination of ignorance as an excuse for noncompliance. This can first be accomplished by regular publications on important and current compliance issues. To foster continuity, these publications can be issued as compliance guides so employees begin to recognize a consistent message underscoring its importance. Next, the department can hold compliance training conferences in all areas where the company has significant business operations. Ultimately, the department should have an extensive inventory of training videos and manuals, publications, and access to topic experts. The materials must be regularly updated and expanded.[80]

The most effective training takes place at the operating unit level and is directed to employees directly involved in activities likely to involve risks covered by the compliance program. This means effective training must be job-specific. While such customization will result in increased costs for tailored programs, it also means increased overall effectiveness and reduced the likelihood of penalties. Beyond increasing variety through customizing programs, another important trend has been increasing delivery mechanisms. This includes printed materials, training videos that educate employees regarding substantive laws and the company's own policies and procedures, and recently interactive multimedia training programs, such as CD-ROM and the Web. It is now common for larger companies to establish internal "intranet" sites to post the key compliance program documents and copies of relevant laws and explanatory materials. A side benefit of using Web-based training is that third-party resources can be listed on the corporate compliance department's Intranet Website. This should also mean that global resources could be used, including those in every major country that the company does business. A web site is also relatively easy to update and changes can be communicated quickly via e-mail with links back to the site.

Companies often use a combination of the tools and methods described above to create their compliance education programs. For example, written materials, such as handbooks and manuals, can now be supplemented by video training that also includes automated testing procedures that can be conducted at the company's compliance web site. In fact, companies may require that employees involved in regulatory-specific activities must be regularly tested against established standards of knowledge and that successful completion of the tests and related training be a condition to ongoing employment and/or promotion. However, while these new technology tools have many advantages and should be used when available, they cannot be relied on completely. On-site visits by

[80] For further discussion of compliance policy and procedure manuals and training programs, see "Growth-Oriented Entrepreneur's Guide to Compliance" prepared and distributed by the Growth-Oriented Entrepreneurship Project (www.growthentrepreneurship.org).

members of the corporate compliance department emphasizing the importance of the company's compliance plan are invaluable and cannot be overlooked.

§1:60 ----Oversight process

An appropriate oversight process must be developed as part of the compliance program. Certainly effective oversight requires the active involvement of management, since managers are best placed to evaluate on a day-to-day basis the activities of employees in complying with the code of conduct and other internal controls. In addition, however, the board of directors, principally through its audit committee, must assume responsibility for evaluating management's performance with respect to identification and assessment of risks and establishment of internal controls. The company's internal auditors are also important participants given the need for them to determine whether a breach of internal controls has been commitment and their role in assisting management in identifying and evaluating risks and recommending steps that can be taken to improve compliance. Finally, as recent developments in the US demonstrate, independent auditors must assume an expanded role in advising management and the audit committee about the adequacy of the company's internal controls.

§1:61 ----Reporting procedures and enforcement against violators

The company should establish procedures that can be used by employees and business partners to report concerns about, and potential violations of, the code of conduct and the company's other compliance rules and guidelines. It is now commonplace for companies to set up an internal "hotline" system that employees can use to report possible violations of law and internal policies and these systems should be well publicized in the company's compliance literature and training sessions. Employees should be assured that reports made honestly and in good faith will be treated with respect and that the makers of such reports will not experience retaliation in any form. Provision should be made for allowing employees to make reports anonymously if they so choose. A fairly recently development has been the launch of "information channels" that can be used by business partners of the company, such as suppliers and customers, to report activities of company employees and agents that might violate laws or company policies.

Once a suspected violation has been reported or otherwise discovered, it is essential for the company to follow an established procedure for dealing with these issues. In the event of a suspected violation, the chief compliance officer, usually in conjunction with corporate counsel, should investigate the claim. Depending on the outcome, the company should take appropriate follow-up steps such as ceasing any ongoing activities which may be in violation of the law, sanctioning the employee, consulting outside counsel to conduct an independent investigation or contacting the appropriate governmental agency with responsibility for administering the law. When conducting investigations in foreign countries, care should be taken to understand local customs and rules regarding attorney-client privilege since US counsel may be surprised to learn that disclosures that would normally be protected in the US may not be eligible for the same treatment in other jurisdictions.

§1:62 --Organizational structure

As the company grows, it will typically establish a compliance office to exercise overall control over the compliance activities of the company. Enterprises in the US and Europe have embraced the concept of a stand-alone compliance function based on the recognition that compliance activities are best handled by an independent staff that provides support and information to the board of directors and senior managers who have the ultimately regulatory responsibility for compliance. However, while there are analogies to the way in which companies have established their internal audit function, compliance specialists must balance the need for independence with the practical requirement that the compliance function must work closely with business units on a day-to-day basis to assist managers and employees throughout the company in identifying and resolving potential compliance risks and issues.

§1:63 ----Central compliance office and chief compliance officer

The compliance office will be responsible for establishing compliance policies and procedures throughout the company and may also be involved in other functions such as crisis management. As discussed above, responsibility for operation of the compliance office should be vested in a chief compliance officer ("CCO") who is considered to be a member of the senior management group of the company and who reports to the chief executive officer and, as necessary, to the audit committee of the board of directors. The CCO must have a broad compliance background and specific experience working with organizations that have operated in the same product and geographic markets. In addition, however, it is essential that the compliance function be staffed by persons with the requisite competencies to handle the compliance risks that may arise with respect to each entity, business unit, product, territory and transaction in the organization. Staff must not only be versed in all of the laws and regulations that apply to the company's business activities, it must also be able to effectively and independently enforce and monitor all of the required policies, standards and procedures.

The compliance office itself will be broken down into several groups, including legal and risk management. The legal staff within the compliance office will be primarily responsible for drafting of policies and procedures, issuing opinions and advisories regarding compliance issues, and staying current with applicable laws and regulations. Many companies are creating special departments to deal with emerging issues that promise to have global impact such as corporate social responsibility and management and protection of personal data and information. The central compliance office will work with dedicated teams within the company that may have been formed to deal with specific legal and regulatory compliance issues such as product safety and environmental conservation. In addition, of course, compliance personnel will need to work with colleagues performing similar tasks in other functional areas, particularly in the legal and human resources departments. In fact, it is important for the COO to have a good working relationship with the general counsel and the head of the human resources

function to be sure that conflicts do not arise and resources are being efficiently distributed.

§1:64 ----Foreign compliance offices

When companies are limited to primarily US operations, they often tend to establish a centralized compliance function that in turn interacts with a network of compliance officers resident in each of the key business functions and units. However, as the company grows and enter foreign markets, the structure must be modified to take into account the fact that regulators in foreign countries will focus on dealing with legal entities (i.e., branch offices and local subsidiaries). At that point, global companies often establish one or more regional compliance offices which will be responsible for administering compliance activities in designated geographic territories. For example, one major multinational company has created regional compliance offices for each of the Americas, Europe, Japan (also including Korea and Taiwan), East Asia (including China and Hong Kong) and Pan-Asia (including Southeast Asia, the Middle East, Africa and Oceana). Each regional compliance office has its own chief compliance officer, who reports directly to the company's CCO, and sufficient staff and other resources to issue instructions to branches and subsidiaries in the region relating to compliance issues and activities.

Among other things, the regional compliance offices can translate and localize the company-wide codes and policies adopted by the board of directors and senior management and can also deal directly with specific laws and regulations in various countries. The structure also acts as an "early warning system" to identify potential crisis management topics. If, for example, a product defect problem arises with regulators in one country, the compliance network should be able to formulate a response that can be disseminated throughout the company's global operations. Obviously, this expanding compliance network creates potential difficulties in terms of independence and consistency that will require careful attention and monitoring by senior management.

When setting up compliance offices in foreign countries, companies often rely on local counsel to assist in providing information on the applicable laws, regulations and business customs. Obviously, local counsel can be an invaluable resource in guiding US companies through the legal and regulatory hurdles associated with doing business in a foreign country. In many cases, local counsel can facilitate the approval process for new projects requiring government approvals. But, US companies need to realize that counsel in foreign countries often operate under a different set of professional standards and that many services commonly offered by domestic lawyers, such as legal opinions, are rarely handled by some foreign attorneys.

§1:65 ----Resources and staffing

The company must be prepared to allocate sufficient resources to adequately staff the central compliance function and each of compliance departments established within business units and in regional markets outside of the US. Among the factors that need to

be taken into account are the overall staffing of the company, the types of activities engaged in by the company, the geographic scope of the company's business activities, the number and type of business relationships with outside parties and, of course, the specific network of US and foreign laws that are applicable to the company's business activities. Staffing at specific foreign offices will depend on the local governance and regulatory environment and the manner in which the company is able to utilize technology and communications tools to streamline and centralize the compliance process. In all cases, the compliance function should have its own budget for staffing apart from individual business units and thus avoid potential conflicts with those units with respect to recruitment, compensation, assessment of performance and promotion.

A threshold issue that must be addressed and answered is whether there is sufficient need in a foreign market to justify recruiting and hiring a lawyer or other compliance official to provide services in the foreign market as opposed to trying to have those services offered remotely from the headquarters office. Several questions must be answered including what type of support is really required in the foreign market and is it too difficult for that support to be provided remotely; how much work would the lawyer or other compliance official need to take on; where should the lawyer or other compliance official be located geographically and within the organizational structure established by the company in the foreign market; and, finally, how easy would it be to identify the qualifications for the lawyer or other compliance official and locate appropriate candidates for the position. It is also obviously important for the appropriate manager in the headquarters office to be sure that he or she can effectively oversee the activities of the lawyer or other compliance official and evaluate the performance of any person filling that position.

§1:66 ----Localization and consistency

When the compliance plan is being drafted, it is important to draw on local experiences and input should be obtain from employees from around the world. Otherwise, there is a risk that the plan will be dismissed as an irrelevant top-down imposition with little understanding about how business is conducted locally. It may even be advisable to create an international team to draft the plan. Once the plan is finished, they can be used to sell it to managers and employees in foreign offices. Another possibility is to create local business standard advisors that can be available to answer questions in the future and to give input on changes that may be necessary over time. Localization also means translation – what employees cannot read cannot be understood. This will also counteract the assumption that if it was really important, then it would be available to employees in their native languages.

On the other hand, while the company may be doing business in many jurisdictions and the rules may vary from country to country, most companies recognize that effective compliance plans must have some minimum cross-border consistency. This does not mean, however, that the plan can be drafted from the US standpoint, and be expected to apply to all jurisdictions. The plan must understand a variety of business practices, customs and rules, but from this overall variety draw guiding principles on how the

company wants to conduct its business. This means that the old approach of asking local counsel to draft a corporate compliance plan for operations that they represent will no longer work. Instead, it will be necessary to draft a plan at the head office, while bearing in mind local conditions, and then forward it to local counsel and team members to review for changes and adaptations.

§1:67 --Governmental relations

Global companies regularly work with governments and regulatory agencies in each of the countries in which they are conducting business. The contacts may occur in a variety of different situations—contracts to sell products and services to the government, application for licenses and registrations, and compliance with record keeping requirements. A wide range of officers and employees may be engaged in "government relations" including senior executives, local managers in foreign countries and employees around the world with responsibility for satisfying regulatory requirements. Accordingly, an important part of any overall compliance and corporate governance program is making sure that all contacts with governmental officials occur in a manner that conforms to all applicable laws and regulations as well as the company's own specific code of conduct. In addition, however, the governmental relations function should be defined broadly enough to include maintaining communications with key regulatory bodies to obtain information on new laws, regulations and enforcement policies that will need to be integrated into the company's compliance program.

§1:68 ----Monitoring US governmental and regulatory activities

The compliance team should establish procedures for regularly monitoring the activities and pronouncements of US regulatory agencies that have authority to administer laws and regulations that routinely impact the company's cross-border activities (see Table 1.2). For example, export control specialists will need to be informed about developments at the Departments of Commerce, State and Treasury, each of which have responsibility for enforcing export controls with respect to different types of products, technologies, and transactions. In addition, steps should be taken to monitor developments relating to important treaties and other multilateral initiatives. In the customs area, for example, notice should be taken of activities in connection with NAFTA, the WTO, the World Customs Organization, and the International Convention on the Harmonized Commodity Description and Coding System. Also, continuing notice should be taken of any actions taken by the DOC and the ITC under US antidumping and/or counterveiling duty laws with respect to imports that might be causing a material injury to a US industry in which the company is active. Depending on the situation, the company may elect to become directly involved in a proceeding under these US trade laws.[81]

Table 1.2
Resources Available from Selected US Regulatory Authorities

[81] One of the most comprehensive sources of research materials relating to issues arising out of foreign laws and international trade agreements can be found at the LLRX.com Resource Center for International and Foreign Law at www.llrx.com/resources4.htm, which also includes numerous links to other sites.

- **Antiboycott Laws**. Assistance regarding compliance with United States boycott laws and regulations can be obtained through the Office of Antiboycott Compliance of the Bureau of Industry and Security, which also maintains a comprehensive Web site at www.bxa.doc.gov/AntiboycottCompliance.
- **Export Controls**. Information regarding compliance with the export controls administered by the Department of Commerce (DOC) can be obtained by contacting the DOC's Bureau of Industry and Security Office of Exporter Services, Exporter Counseling Division. In addition, an extensive amount of information regarding compliance with the rules and policies of the Bureau of Industry and Security can be obtained at its Web site at www.bxa.doc.gov, including general information sheets and current news, publications, training and information programs, rules and regulations, compliance advice, and online ordering of licensing forms. Similarly, a number of resources are available to assist exporters regarding compliance with the controls administered through the Department of State's Office of Defense Trade Controls.
- **Antidumping Laws**. Assistance regarding antidumping and counterveiling duty proceedings can be obtained from the United States Trade Commission, The Trade Remedy Assistance Office, and from the Office of Policy, Import Administration, United States Department of Commerce.
- **Customs Laws**. An excellent resource for information regarding compliance with customs laws and regulations is the Customs Web site at www.customs.ustreas.gov. Among the publications that can be downloaded at the Web site are Importing into the United States: A Guide for Commercial Importers, which includes a good deal of information for new importers such as import requirements, quotas, restrictions, and sample forms. Importers should also review United States Import Requirements: Overview of Customs Procedures, which has a good list of references other Customs publications and sources of information. The Customs Bulletin is a publication containing notices from Customs as well as copies of cases and significant rulings by Customs. Finally, importers should recruit an experienced and reputable claims broker to provide assistance with complying with applicable entry requirements.

§1:69 ----Relations with foreign governments

Legal and regulatory compliance necessarily requires that resources be devoted to developing and nurturing relations with government officials and related political actors in each foreign market in which the company is operating. It is essential for the company to create a communications strategy for each foreign market and, as necessary, implement changes in the company's organizational structure in order to make sure that company officials act in an appropriate manner in their communications with government officials and that all impacted parties within the company are kept informed about information gained from such communications.

In order to develop an effective governmental relations strategy, management must carefully identify the relevant actors in each foreign market. This process requires a thorough understanding of the proposed business activities, both from a "macro" perspective and from the eyes of company employees who will be working with individual government officials on a day-to-day basis. The macro-analysis focuses on each of the key governmental policy areas that might have an impact on the company's activities. For example, it is likely that the company will need to deal with the national governmental institution responsible for review and approval of foreign investment. If local credit and financing conditions are relevant, the company needs to understand how the national government develops and implements fiscal policies. The process continues until each major government policy center has been identified. Then management,

working with local consultants and counsel, must identify the specific departments or units that might be involved in specific reviews and decisions.

It is not enough, however, to simply rely on the aforementioned macro-analysis. In many cases, the most difficult and time-consuming governmental and regulatory problems come up in the normal course of daily operations. Accordingly, management should poll managers throughout the local organization to determine which governmental officials they need to deal with in order to carry out their designated functional tasks. This process serves several functions. First, of course, it broadens the list of actors that need to appear on the company's own "political map," thereby assuring that production schedules will not be unknowingly toppled by delays caused by local officials. Second, it reinforces the importance of governmental relations to all of the managers in the company. Third, it allows senior managers to identify connections between the national policymakers and the lower-level officials asked to carry out those mandates.[82]

The company should establish multiple communications channels, both formal and informal, with local political actors. Obviously it is important to satisfy all formal reporting and meeting requirements with ministry officials and bureaucrats and management should take a proactive approach in such communications. In addition, however, relationships should be formed with actors outside of the government. In many cases, they can serve as conduits to and from key officials in the government and such arrangements can serve as an "early warning" system as to unexpected policy changes.

While the main goal of any communications strategy is to collect relevant information from the government and other political actors, the company should also consider these channels a part of its public relations strategy. For example, where appropriate, contacts with government officials should be used to educate them about the company's plans and any anticipated problems that might have a negative impact on local business activities. If the government is interested in making sure that the company maintains and expands it presence in the country, it may well be disposed to tackle the problems before they reach a formal review and application stage. Also, sharing of information by the company can increase the amount of trust between the parties and make it easier for government officials to fight their own internal battles.

As a company grows and enters multiple foreign markets, consideration must be given to the creation of the most efficient organizational structure for handling governmental relations. It is a challenging question since information about, and from, local government conditions will be important for all of the functions within the company. Accordingly, a premium must be placed on collection and distribution of data. Major issues, such as market entry strategies, must be decided at the highest levels of the company organization. Once these have been determined, each manager and department head should be responsible for establishing and maintaining the necessary communications with the appropriate political actors to implement the company's overall strategy. In other words, one of the responsibilities of each manager is taking care of his

[82] For further discussion of business-government relations in the context of evaluating foreign markets, see the chapter on "Evaluating Foreign Markets" in this Guide.

or her piece of the government relation puzzle. While the company might establish a central group for assisting managers in the collection and analysis of relevant data and in developing specific strategies for communicating with local political actors, this department should be limited to a support role. Local managers, involved on a day-to-day basis in running the company's activities, ultimately are the best positioned to handle company-government relations.

There are, of course, several alternatives to what is essentially a diffused "local market" organizational approach to government relations. For example, companies may take a more centralized approach and establish uniform bargaining positions that must be followed by local managers in all countries. This might be appropriate for companies possessing highly valued technological resources since they presumably have sufficient leverage to force government officials to accede to requests to alter their normal regulatory requirements. A variation of this approach is for headquarters to establish general guidelines and principals regarding the positions the company is willing to take with foreign governments but to allow local managers some latitude in their own discussions with relevant officials. Finally, responsibility for government relations may be placed with local officials subject to a requirement that they actively and regularly share the results of their negotiations with counterparts in other countries to develop and maintain a set of coordinated bargaining positions. This strategy can actually be very effective for companies involved in truly global industries since it facilitates sharing of current information from other markets that might impact competitive conditions in another local market.

§1:70 --Foreign counsel

With the possible exception of small one-time transactions that create no ongoing duties or obligations, US companies generally rely on advice from lawyers outside of the US that are not formally affiliated with a US-based law firm. Foreign counsel can serve as an invaluable aid on matters relating to local law and procedures, and can also be the primary contract with local officials and regulatory bodies. Local counsel can be particular helpful in advising on issues of local law and practice; dealing with foreign government officials, courts and regulators; advising on government policies and developments relating to legislation, regulations and case law in the local market; advising on local customs, culture, and business practices; advising on the legality of contracts under local law; assisting in negotiations with other local residents and firms; and resolving any issues arising from language differences between the parties, including simply creating reliable translations of foreign laws and regulations into English. US companies and their counsel must take great care in selecting local counsel in each jurisdiction where the company has significant business activity. It is essential to develop a good working relationship with the foreign lawyer and to establish a clear set of procedures for managing the activities of the foreign lawyer, including instructions on the scope of a particular problem or engagement.

§1:71 Global compliance programs for specific legal areas

Obviously compliance programs are not, and should not be, limited to international business compliance and it is now common for even modest-sized companies in the US to have several topic-specific compliance programs covering legal areas that present significant legal risks to these businesses. For example, US companies may have compliance programs covering employment law matters (e.g., sexual harassment and employee discrimination), insider trading, antitrust, securities laws and government contracting. With respect to international compliance areas, the scope of the programs to be implemented by a specific company will generally be determined by the particular international laws that are most relevant in its industry as well as the specific foreign countries in which the company has material business activities. For most companies this means that formal global compliance should begin with programs covering Export Administration Regulations, including export controls and licenses and antiboycott regulations; the FCPA; sanctions programs approved by Congressional action and resolutions of the United Nations and administered by the Office of Foreign Assets Control; and import laws under Customs statutes and regulations.[83] Beyond that, regional and local compliance units should be established to deal with the local laws of each relevant foreign jurisdiction. As the company's global activities continue to expand the law and compliance function can implement procedures, and allocate specific resources, for other risk areas including employment and labor laws, protection of intellectual property rights and compliance with foreign laws regulating inbound investment.[84]

While companies establish individual compliance programs for specific areas of law and regulation, there will also be situations where it will be necessary to call on experts in more than one of those areas to work collaboratively in the context of a cross-border business transaction. For example, if the company is contemplating an investment, acquisition or joint venture arrangement, the due diligence investigation of the other party involved in the transaction should include a review of the party's compliance activities with respect to exports, imports and relations with foreign public officials. The company will not want to go through all the time, trouble and expense of acquiring another party

[83] Specific areas of emphasis for any particular compliance program will depend on the business activities of the company. For example, in the export area there may be a need to concentrate on compliance with specialized laws related to industries such as maritime and shipping, chemicals, banking, atomic energy, electric power, pharmaceuticals and firearms, and importers may need to be concerned about specialized import regulations related to alcoholic beverages, tobacco, firearms. Firms engaged in the defense industry will need to attend to the requirements of the Arms Export Control Act, the International Trafficking in Arms Regulations and various government contracting statutes, and chemicals and pharmaceuticals firms should have compliance programs for the import/export provisions of the Toxic Substances Control Act and the Food, Drug and Cosmetic Act, respectively. Companies will generally have some level of immigration law compliance program in place for inbound employees even before they launch foreign operations and this program should be expanded to cover outbound transfers of employees as they are placed in foreign business units.

[84] Compliance with employment and labor laws is largely a local issue that requires resources dedicated to each foreign jurisdiction in which the company is active; however, companies should adopt and enforce certain core principles regarding the employment relationship that apply across all business units. Protection of intellectual property rights involves the development and implementation of global strategies for obtaining appropriate protection for proprietary technology in each major jurisdiction. Compliance with foreign laws regulating inbound investment includes collection and presentation of information to local governmental authorities at the time of the initial investment and ongoing recordkeeping and reporting once the investment has been approved.

only to discover that employees or agents of the target have violated the FCPA and thus opened the door to significant fines and other sanctions that will materially impact the value of the acquisition.

§1:72 --Import/export compliance policies and procedures

The most common cross-border activities of global companies generally involve imports of finished goods and raw materials from foreign countries as well as export of similar items to customers and other business partners outside of the US. Accordingly, the initial step in establishing a global compliance program should be creating policies and procedures to ensure that the company's activities do not violate US laws and regulations pertaining to imports and exports. The laws and regulations involved cover entry of goods into the US, export of certain controlled items outside of the US and administration of trade-related sanctions against certain countries and persons. Companies often coordinate import and export compliance activities through an international trade group or department that includes specialists in common transactions and resources to collect current information regarding changes in applicable laws and regulations.

§1:73 ----Import activities

Companies engaged in import activities should establish policies and procedures to ensure compliance with all laws and regulations governing the entry of goods into the US.[85] In general, primary authority for administration and enforcement of these laws is vested in Customs which, among other thing, has the following duties: responsibility for inspection and clearance of carriers, persons and merchandise; classification and valuation of imported goods; assessment and collection of duties on imported goods; responsibility for enforcement of Country of Origin Marking Requirements; and detection and prevention of smuggling.

Importers are responsible for "entry" of goods into the US, which is the administrative process by which Customs releases imported goods to the importer for use or sale domestically. In order to obtain entry of imported goods, it is necessary to file a number of documents with Customs at the port where the goods are to be released. Accordingly, it is essential that importers establish procedures for making sure that all entry documents are accurate and complete and available for presentation to Customs at the time when the importer wishes to use the imported goods. Upon entry, importers are also required to pay all duties or tariffs that are legitimately owed on the goods that are being imported and this means that import compliance group must correctly calculate the duty owed using the appropriate category from the Harmonized Tariff Schedule and information regarding the value or amount of the articles imported. Since duties depend on several different factors, including the country of origin, and imported articles may fall under one or more of the categories in the Harmonized Tariff Schedule, expert guidance is often required. Finally, importers must comply with various regulations requiring that certain records regarding imports be kept for the purposes of verifying entry documents and

[85] For discussion of compliance programs for import activities, see the chapter on "Import and Customs Compliance" in this Guide.

detecting fraud. The record-keeping requirements apply to any party that imports merchandise or who knowingly causes merchandise to be imported. Among other things, importers must retain and preserve all records relating to the importation of goods or to the accuracy of the entry and entry summary documents, including correspondence and accounts. Recordkeeping is a long-term responsibility as records must be kept for a period of five years from the date of entry.

§1:74 ----Export controls

Just as imports of goods into the US are heavily regulated, global companies will generally need to understand and comply with various sets of laws and regulations pertaining to export of certain types of goods and technology. For most companies, the export control provisions in the EAR are the ones that are usually applicable. The EAR are enforced by the BIS and are designed to restrict access to "dual use" items, including goods, software, technology, services and technical data, by countries or persons that might apply such items to uses contrary to US interests. These controls can apply to both exports and re-exports and some items may not be exported or re-exported without a license from BIS. Accordingly, an important part of the compliance function is determining the license requirements for each export transaction, a decision that will depend on an item's technical characteristics, destination, end-use and end-user, and other activities of the end-user. A license for a particular product may be required only for shipments to particular destinations but not to others, and there are some license exceptions that may also apply. In addition to the BIS export controls, the State Department's Office of Defense Trade Controls regulates a number of products and technologies that may have the potential for direct military uses.

§1:75 ----Sanctions

In general, US companies may not import products from, or export products to, embargoed countries, directly or indirectly. In addition, financial transactions with embargoed countries and all dealings with nationals thereof are generally forbidden. The list of covered countries changes periodically, as do the details of the embargo for each country. A current schedule of the list of embargo programs is included at the BIS web site and the web site of the Office of Foreign Assets Control within the Department of Treasury. In addition, the US has extended the embargo to prohibit dealings with narcotic traffickers and terrorists and with "specially designated nationals," "specially designated terrorists," and "specially designated narcotics traffickers." The sanctions extend beyond direct dealings with embargoed countries to include knowledge that the US company and its employees may have that a customer may be re-shipping goods to an embargoed country.

§1:76 ----Guidelines for establishing an import/export compliance program

Compliance is an essential activity for U.S. importers and exporters given the high legal standards that are imposed under applicable laws and regulations. With respect to export controls, for example, both civil and criminal penalties can be imposed on a strict liability

basis (i.e., without any intentional wrongdoing by the violator) and other criminal sanctions can be imposed for "knowing" violations. Criminal sanctions for corporate violations are often imposed on officers, directors and employees of the corporation in their personal capacities as well as against corporate defendants and penalties can include up to 20 years imprisonment and fines of up to $1 million per violation. Sanctions are imposed both for direct participation in violations, as well as failure to properly supervise subordinates. In addition, violations of export controls may also lead to seizure of cargoes and vessels used in such exports under "forfeiture" procedures.

Under the EAR, the term "knowledge" includes not only positive knowledge that a circumstance exists, but also an awareness of a high probability of its existence or future occurrence. Parties are deemed to have knowledge of the requirements under the export control laws and ignorance of the law or avoidance of the facts of a particular situation is not a defense. In addition, if a party has knowledge of, or reasonably should know, of export violations in transactions in which they are involved, they will also be in violation of the export control laws. This means that exporters that sell controlled items to customers with knowledge that the purchaser will be making a prohibited re-export of the items can also be liable for violation of the export control laws on an "aiding and abetting" theory.

In light of all of this, exporters must implement policies and procedures to comply with applicable export controls. The first step is ensuring that the company and its employees have the requisite level of knowledge regarding the requirements of export control laws, since ignorance is not a defense. Beyond that, however, the company must have a system of controls and procedures in place to evaluate each proposed export transaction to determine whether the products, software, technology or other items involved are subject to export restrictions and whether the other parties to the transactions are listed on the Denied Parties Lists published by the Department of Commerce or the Entities-Based Sanctions Lists published by the Department of the Treasury (or whether any customers, partners, employees or affiliates thereof are so listed). In fact, these due diligence reviews are strongly recommended under the EAR, which includes "Know Your Customer Guidelines" that can be followed for collecting and evaluating information about foreign customers, end-users and end-uses.[86] The compliance group should also be involved in the due diligence investigation in connection with any proposed acquisition of another company to determine whether the target has committed past export control, customs or similar violations or has potential liability thereunder for which the company would become responsible through the acquisition, including failure to fulfill export and/or import recordkeeping requirements or to perform adequate due diligence in advance of export transactions.

§1:77 --FCPA compliance policies and procedures

Many countries, including the US, have specific laws on conducting business with foreign government officials that may come into play in any given export sales

[86] See 15 C.F.R. § 732 Supplement No. 1.

transaction. Under the US Foreign Corrupt Practices Act ("FCPA")[87], for example, a company (including its shareholders, directors, agents, officers and employees) is prohibited from directly or indirectly offering, promising to pay, or authorizing the payment of money or anything of value to a foreign official, a foreign political party, a party official or a candidate for political office in order to influence official acts or decisions of that person or entity, to obtain or retain business, or to secure any improper advantage. A "foreign official" is defined to include an officer or employee of a government or any department, or agency of a government, or of certain international agencies, such as the World Bank or the United Nations or any person acting in an official capacity on behalf of one of those entities. In addition, officials of government-owned corporations are considered to be foreign officials.

The FCPA prohibits giving or offering to give "anything of value", which means that payments need not be in cash in order to be considered illegal under the FCPA. For example, companies have been prosecuted under the FCPA for paying travel expenses, funding golf outings, providing automobiles and making loans with favorable interest rates or repayment terms. Indirect payments made through agents, contractors or other third parties are also prohibited and companies cannot avoid liability under the FCPA by simply ignoring or "turning a blind eye" to circumstances that might constitute a potential violation of the FCPA. There are limited exceptions recognized under the FCPA that permit "facilitating" payments to foreign officials provided that such payments are of small value to effect routine government actions such as obtaining permits, licenses, visas, mail, utility hook-ups and the like. However, determining whether a particular payment falls within this exception involves difficult legal judgments and a sometimes unacceptable level of risk in relation to the value to be obtained from the action being "facilitated." Accordingly, companies should proceed with great care before making any payment or gift thought to be exempt from the FCPA.

Recent enforcement actions, as well as growing multilateral concern about bribes to foreign public officials in cross-border business transactions, provide a real exclamation point for the long-standing advice to companies with operations or sales overseas to implement and maintain FCPA compliance policies and procedures.[88] Moreover, the Sentencing Guidelines require federal courts handing down criminal sanctions to take into account the existence or absence of effective corporate compliance programs. More and more, the status of the defendant's FCPA compliance program is an important factor in establishing the sentence for the alleged violations. Among the steps companies can and should take to bolster their FCPA compliance profile are the following:

- Companies should begin by retaining an independent consultant to review their FCPA compliance policies and procedures and to prepare reports to the board of directors documenting its findings and recommendations. In fact, such an independent review and evaluation, which must include full access to all of the company's relevant books

[87] 15 USC § 78dd et seq.
[88] For discussion of FCPA compliance programs, see the chapter on "Antibribery Compliance" in this Guide.

and records, has been required as a condition of settlement by enforcement agencies in recent cases.[89]

- The company should prepare and adopt a written corporate policy on FCPA compliance applicable to all employees, agents and consultants of the company and distribution of the policy to all covered parties, particularly persons working in foreign countries. While policies adopted by other companies are available over the Internet and should be consulted for guidance, care should be taken to customize the policy to the specific business operations of the particular company. Among other things, for example, illustrations of payments and activities that might run afoul of the FCPA should be taken from scenarios that typically occur in the course of the company's business activities. When necessary, policies (and related procedures) should be translated into other foreign languages so that they can be understood by covered parties in foreign countries.
- Formal acknowledgement of the company's responsibilities in this area should be obtained through presentations to the board of directors and other senior managers. The policy referred to above should be approved by the board of directors or an appropriate committee of the board and dissemination of the policy to employees should be accompanied by a letter from the company's chief executive officer that admonishes employees to take the policy seriously and adhere to its requirements.
- One member of the company's in-house legal department should be given the responsibility of regularly monitoring developments in this area, including US enforcement actions, progress with adoption of multilateral codes of conduct such as the OECD Convention and changes in anti-bribery laws in foreign countries. If the company lacks the in-house resources to do this job, outside counsel with appropriate expertise should be selected and tasked with keeping the company updated.
- The policy itself is generally short and sets out broad guiding principles as well as a summary of relevant laws and regulations. Accordingly, the policy must be supported by comprehensive rules and procedures that facilitate monitoring of activities that might be impacted by the FCPA and compliance with reporting requirements.
- The board of directors or the chief executive officer should establish a formal institutional solution for handling FCPA issues. In many cases, an FCPA review or compliance committee will be assembled to deal with FCPA matters and will include an FCPA Compliance Officer with responsibility for overseeing the activities of the committee and representatives from other departments as well as the authority to engage outside counsel and consultants to conduct audits and investigations. It is also probably a good idea to designate an ombudsman who can serve as the contact for employees wishing to report potential violations of the FCPA on a confidential basis.
- Various departments should be enlisted to standardize certain business tools and practices that can be disseminated throughout the company in order to ensure that FCPA compliance is smoothly and efficiently integrated into the company's normal

[89] Litigation Release No. 19107 \ March 1, 2005 and Accounting and Auditing Enforcement Release No. 2204 \ March 1, 2005 – Securities and Exchange Commission v. The Titan Corporation, Civil Action No. 05-0411 (D.D.C.) (JR) (filed March 1, 2005); see also Securities Exchange Act of 1934 Release No. 50978 / January 6, 2005 and Accounting and Auditing Enforcement Release No. 2160 / January 6, 2005 - Admin. Proc. File No. 3-11789 In re Matter of Monsanto.

business operations. For example, screening methods, questionnaires and checklists can be created so that properly trained employees can isolate FCPA issues early on in relationships with third parties. Particular attention should be paid to due diligence on foreign agents retained for business development purposes in their jurisdictions. Once an agent has been engaged, its activities should be closely monitored since companies have been prosecuted for potential violations of the FCPA when it appears that they failed to do anything when their employees were aware of a high probability that the company's foreign agents or distributors had made improper payments to local officials in connection with sales of the company's products.[90]

- Counsel should draft contract language that addresses FCPA concerns for inclusion as a standard practice in all relevant company agreements. For example, agents and contractors in foreign countries engaged in local business development efforts on behalf of the company should be required to warrant that they will no payments of money or anything else of value will be made or offered to any local government official to induce the official to use his influence with the government to obtain for the company an improper business advantage. Such agents and contractors should also be prohibited from retaining sub-agents without the consent of the company, thereby allowing the company to perform its own due diligence on the proposed sub-agent.
- All employees likely to come into contact with FCPA compliance issues should be provided with adequate training regarding the policies and procedures developed by the company. This is particularly true for employees stationed in foreign countries and for US-based employees involved in sale of products to foreign customers, especially foreign governments. While outside trainers can be used, it is importance for the company's compliance officer and/or counsel to be involved to be sure that the training touches on situations most likely to occur during the company's specific activities. Attendance records should be maintained and refresher courses should be given on a regular basis. An executive summary of FCPA compliance issues should also be prepared and distributed to employees and posted on the company's Intranet.
- The designated compliance officer should make regular reports on the compliance program to the board of directors, including policy violations and disciplinary actions taken against employees. Based on the requirements imposed by regulators in recent enforcement actions, it also appears that companies should seriously consider engaging independent consultants to audit the effectiveness of the FCPA policy and procedures.

Even when the company has taken all of the steps necessary to establish policies and procedures for complying with the FCPA, the effectiveness of the plan in the eyes of regulators will be based in large part on whether or not the company continuously audits its domestic and foreign business operations to be sure that the procedures are being properly used. In light of the accounting requirements included as part of the FCPA, auditing for compliance requires cooperation between the internal audit and legal

[90] Litigation Release No. 19078 / February 14, 2005 and Accounting and Auditing Enforcement Release No. 2187 / February 14, 2005 - Securities and Exchange Commission v. GE InVision, Inc. (formerly known as InVision Technologies, Inc.), United States District Court for the Northern District of California, Civil Action No. C-05-0660 MEJ.

functions within the company. Of particular interest to the legal team is compliance by the managers and employees of foreign subsidiaries and counsel should develop a questionnaire that seeks information on payments to foreign government officials and agents, conflicts of interest, special payments or accommodations, political contributions and any other payments made to (or at the request of) foreign business partners (e.g., customers or suppliers). The internal audit team will have its own set of questions relating to local accounting policies and procedures at each foreign subsidiary and should focus on problems that enforcement agencies have identified in prior cases, such as when payments are made from funds that have been earmarked for other purposes and the size of payments to a particular payee is abnormally high in relation to other similar payments.[91]

Sometimes, even when reasonable precautions have been taken, companies find that provisions of their FCPA policies may have been violated. When this occurs, it is paramount for the officials that have responsibility for FCPA compliance to move quickly to launch an investigation, discipline those employees and others who may have been involved and determine whether changes in the FCPA policies and related procedures are necessary in order to strengthen the compliance program. Moreover, in the event that the investigation uncovers an actual violation of the FCPA itself, consideration should be given to making a voluntary disclosure to the federal government in order to avoid prosecution or at least mitigate the civil and criminal penalties that might be imposed. Voluntary disclosure should not be taken lightly since regulators will typically require that companies waive the attorney-client and work product privileges and disclose all documents and communications relating to the matter. Further complicating the decision is the need to move quickly since disclosures must be "timely" in order to have the desired benefits to the company. If the company delays and regulators become aware of the situation through other means, such as through press reports or an internal whistleblower, it is unlikely that regulators will consider the company's offer of cooperation to be timely.

§1:78 --Antiboycott law compliance policies and procedures

The Export Administration Act of 1979 ("EAA"), and the Export Administration Regulations ("EAR")[92], which are administered and enforced by the Office of Antiboycott Compliance of the BIS, prohibits companies and individuals from refusing or agreeing to refuse to do business for boycott-related reasons[93]; furnishing information for boycott-related reasons[94]; taking discriminatory acts for boycott-related reasons[95]; and implementing letters of credit that contain boycott-related conditions[96]. The regulations provide several exceptions to the general restrictions discussed above, most of which permit compliance with a boycotting country's laws that relate to activities within its own

[91] Securities Exchange Act of 1934 Release No. 48461 / September 9, 2003 Administrative Proceeding File No. 3-11249 – In the Matter of Schering-Plough Corporation.
[92] See 50 U.S.C.A. § 2408 and "Antiboycott Regulations" at 15 C.F.R. Part 760 (1994).
[93] 15 C.F.R. § 760.2(a).
[94] 15 C.F.R. § 760.2(c) and (d).
[95] 15 C.F.R. § 760.2(b).
[96] 15 C.F.R. § 760.2(f).

borders. For example, a US person is allowed to comply with import restrictions that prohibit importation of goods or services from the boycotted country[97] or that prohibit the shipment of goods into the country on a boycotted country's carrier or by a certain route[98].

The Antiboycott Regulations require each US person to report (on a quarterly basis) to the BIS anytime that such person receives a request for information or action if the person knows (or should know) that the request is designed to further an unauthorized boycott.[99] Persons who violate the EAA's antiboycott provisions may be subject to both criminal and civil penalties. In addition to the reporting requirements imposed under the Antiboycott Regulations, the Internal Revenue Code requires that taxpayers must report annually on all of their operations with a boycotting country and the Treasury Department maintains a list, which is not exclusive, of boycotting countries as to which reports must be filed.[100] The Internal Revenue Code also imposes adverse tax consequences on United States taxpayers who participate or cooperate in such a boycott in the course of their operations with a boycotting country.[101]

The primary goals and objectives of any antiboycott policy should be to prevent the company and its employees, agents or representatives from knowingly or inadvertently participating in international boycotts that are not sanctioned by the US and to make sure that the company complies with its obligations to report any requests to engage in prohibited conduct to the DOC.[102] A "boycott request" is defined as a request to supply any information, take any action, or refrain from any action if the requested conduct could be considered to further or support a prohibited boycott, particularly the Arab boycott of Israel. A request also includes any proposed bid invitation, contract, purchase order, letter of credit or other agreement, provision, requirement or condition calling for such information or action or non-action.

One important boycott which is not supported by the US government is a boycott of Israel enforced by certain member countries of the Arab League. The primary boycott bars the importation of Israeli goods and services into the boycotting countries and bars the export of goods and services from those countries to Israel. Arab countries that enforce this boycott may attempt to impose certain requirements on persons who are directly or indirectly supplying goods or services to these countries. A secondary aspect of the Arab boycott also precludes dealings with firms and persons in third countries which have been "blacklisted" by the boycotting countries because those firms or persons do business in or with Israel. In this case, Arab countries my impose requirements designed to ensure that blacklisted firms, including suppliers, ships and freight insurers, do not participate in any transactions involving the supply of goods or services to these Arab countries.

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[97] 15 C.F.R. § 760.3(a).
[98] 15 C.F.R. § 760.3(b).
[99] 15 C.F.R. § 760.5.
[100] I.R.C. § 999(a)(1).
[101] See, e.g., I.R.C. § 908(a) (reduction of credits); I.R.C. § 999(c)(1) (international boycott factor).
[102] For discussion of antiboycott law compliance programs, see the chapter on "Antiboycott Compliance" in this Guide.

An antiboycott law compliance program presents special challenges in that it requires awareness and cooperation from a number of different functions and business units. Obviously managers and employees continuously involved in business transactions with boycotting countries need to be knowledgeable about what is and is not permitted under the antiboycott laws and regulations. However, since requests for information regarding the company's business activities may be diverted to other departments, such as accounting and human resources, the company must establish procedures for making sure that responses do not violate the regulations. Moreover, personnel must be trained to respond quickly and correctly to the reporting obligations. Since the antiboycott regulations are administered and enforced by the BIS, it is common for responsibility for compliance to be handled by the same group or department that coordinates export control matters.

As with the other areas, the cornerstone of the compliance with respect to antiboycott regulations is a clear and concise statement of policy that affirms the intent of the company to comply with applicable laws and regulations in the US and in other countries where the company conducts business activities. The policy should specifically prohibit officers and employees from (i) refusing to do business with any country, entity or person for boycott-related reasons or (ii) providing information, statements, certificates or any other communications, whether written or oral, which would violate the regulations. The policy should make it clear that any information regarding activities that might violation the regulations must be reported immediately to the compliance department and that failure to comply with the policy will result in disciplinary action, up to and including dismissal. The compliance policy should be supplemented by guidelines and procedures that cover the most common situations that may arise that bring these laws and regulations into play. Issues to consider include the following:

- The fundamental premise of the regulations is that companies cannot refuse to do business with a company in a boycotted country or with a boycotted country because a customer in a boycotting country has indicated that it would not purchase goods containing materials that originated in the boycotted country. Officers and employees must be admonished to immediately report any demand by a boycotted country that would place the company in violation of the regulations. Moreover, any decision not to do business with a company in a boycotted country or with a boycotted country should be carefully documented to ensure that it was not made for reasons prohibited by the regulations.
- Officers and employees should not provide any information with regard to the company's relationship with a boycotted country or any national thereof, whether in positive or negative terms, or provide any other information, if requested for boycott-related purposes. For example, it is not appropriate for the company to respond to a "boycott questionnaire" from a central boycott office that seeks information as to whether or not the company does business with a boycotted country or anticipates doing business with that country.
- It is not a violation of the regulations to comply with laws of the boycotting country which relate exclusively to activities that take place entirely within the boycotting

country, such as complying with a local prohibition on the import of goods or service from the boycotted country. However, in order to be sure that this exception will apply, companies must carefully collect information regarding the local laws of any boycotting country in which they opt to do business.

- It is a violation of the regulations, as well as broader employment law principles, to discriminate against any person on the basis of race, religion or national origin (e.g., discouraging individuals from a boycotted country from applying for a job with the company's subsidiary in a boycotting country even when it is known that the individual would not be granted a work permit by the local government). Accordingly, the company's human resources personnel need to be involved in employment decisions relating to activities in boycotted and boycotting countries. It is, however, not a violation of the regulations to replace persons to whom the boycotting country government refuses to give a work permit.
- Officers and employees must be told not to furnish any information about whether or not any person has any business relationship with or in the boycotted country, such as signing a statement that the company does not do business with Israel. Companies can sign a statement that the company has not been "blacklisted" by the boycotting countries because those firms or persons do business in or with a boycotted country.
- When doing business with a boycotting country, the company must avoid choosing among a list of carriers, insurers or suppliers of goods acceptable to the boycotting country or agreeing to do business only persons on such a list. It is acceptable, however, to use a specifically named carrier, insurer or supplier of goods.
- Companies must take care in handling requests from boycotting countries with respect to markings on goods and packaging. For example, it is unlawful to agree not to include a Jewish star on packaging of goods to be sent into a boycotting country, since this is a statement that the company will not ship goods made or handled by persons of the Jewish religion. On the other hand, companies may disclose or certify the name of the supplier or manufacturer of the goods shipped.