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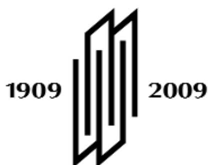
International Business Planning Advisor

Planning Tools for Senior Executives



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International Business Planning Advisor

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4. **Country Localization Checklist -** A checklist of issues to be addressed in the localization process in each foreign country in which the company will be operating. The company will complete this checklist for each foreign country in which it sells products, hires employees or otherwise conducts business.

5. **Overview of U.S. Export Control Laws** - A summary of U.S. export laws that apply to U.S. companies operating abroad.

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Introduction

The International Business Planning Advisor is a set of business planning tools for companies establishing operations in foreign markets. It is designed as a resource for senior management in identifying issues and collecting information for the development of a company's international business strategy. It creates an organized process for evaluating and making decisions for global business expansion.

The first two planning tools are designed for an initial, high level analysis of global expansion issues. These are intended to be used by the senior management team as the first step in planning expansion into foreign markets, addressing questions such as the scope of the proposed international development, optimum business model, country selection, sequence and timing, localization and other critical issues. Once the company's management has completed this review, the information collected can serve as the basis for the company's International Business Plan.

The third planning tool - the Business Model Matrix - is a listing of business models commonly used by companies in international operations. This includes a listing of the advantages and disadvantages of each business model and comments regarding recommended use for each. This is intended to be used for determining the best business model for the company's overseas operations.

The fourth planning tool - the Country Localization Checklist - is designed to assist a company in planning its operations in a specific foreign country. When a company establishes a business in a foreign market, it is usually required to make changes to its product and other aspects of its business model to adapt to the culture, business practices and legal requirements of that country. This may include technical changes to its product, adjustments for local language and currency, compliance with local laws and technical standards, etc. This planning tool is designed to create a process for identifying these areas of adjustment and organizing the company's localization efforts.

The final planning tool - An Overview of the U.S. Export Control Laws - addresses the important issues of legal compliance in international operations. This provides a summary of the major U.S. laws that regulate exports and corporate compliance strategies.

Williams Mullen attorneys are available to assist clients in all aspects of their cross-border business activities, including international business planning, foreign market assessment, formation and structuring of foreign entities, tax planning, addressing the cultural, economic and legal requirements of foreign markets, preparation of international agreements, immigration and US and foreign legal compliance.

INTERNATIONAL BUSINESS DEVELOPMENT -- STRATEGIC PLANNING ISSUES

April 15, 2009

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IS THE COMPANY AT THE RIGHT STAGE OF DEVELOPMENT TO ENTER INTERNATIONAL MARKETS?

- Traditional Test – has the Company saturated the domestic market in its home country?
- New Test – where are the best opportunities for the Company in the world right now? If there are better opportunities in foreign market than home market, should pursue foreign opportunity.
- Are Company's competitors active in foreign markets?
- How will the Company meets its revenue growth projections over next 5 years (especially public companies)?
- Does the Company have the requisite level of resources to enter foreign markets (financial resources, management depth, management expertise)?

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SELECT THE LEVEL OF "OUTBOUND" INTERNATIONAL BUSINESS FOR YOUR COMPANY

- Exports – sale of products from home country to foreign buyers – no Company-owned facilities or employees in foreign locations
- Establishment of Company-owned facilities in foreign jurisdiction – sales office, customer support facility, logistics/distribution, manufacturing facility, "offshoring" facility (eg, company-owned foreign call center)
- Private equity investment, real estate, investment in public foreign company
- Acquisition of operating company
- The farther down the list, the greater the financial investment, risk and requirements for management resources

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SELECT THE BEST BUSINESS MODEL FOR YOUR FOREIGN OPERATIONS

Business Models for International Operations:	
• Sales Through Independent Sales Representatives, Agents, Distributors • Channel Partners • Value Added Resellers ("VARs") • Master Marketing Organizations • Sales Through Independent Local Retails Stores • Consumer – To – Consumer Direct Marketing • Direct Foreign Presence In Foreign Country – Manufacturing Facility • Direct Foreign Presence in Foreign Country – Support Facility • Combination – Company Offices in Regional Centers And Independent Sales Intermediaries in Each Country • Joint Venture	• Licensing • Franchising • Direct Sales From Outside The Country (Internet sales, telephone sales, direct mail, other) • "Piggyback" Sales Through Other Multinational Companies – Walmart, etc. • "Piggyback" Sales Through Electronic Gateways – e-Bay, Amazon, etc. • Sales Through Other Worldwide Electronic Platforms – Internet, Wireless Networks, Digital Satellite Television, For Marketing, Transaction Processing, Content Delivery • Combination – Promotion of Product Through Global Media or Internet Channels But Close Sales Through Local Sales Presence • Acquisition of Operating Business

For a detailed analysis of each business model, see Business Model Matrix attached.

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BUSINESS MODEL SELECTION – PLANNING PRINCIPLES

- The business model you use in your home country may not always work in foreign countries – you may have to make adjustments in the foreign market
- Independent Third Parties (agents, sales representatives, distributors, licensees and joint venture partners) can accelerate a Company's expansion into foreign markets, at reduced cost and risk, but are harder to control than Company-owned operations
- Company-owned facilities: more control, better quality standard, but higher cost and risk
- Companies frequently change their business model in 5 years – set up agreements and relationships to allow for change in this time period without penalty or litigation
- Despite business model selected, maintain Company's core values in every country in which it operates

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BUSINESS PROCESS LOCALIZATION

Adjustments in business operations in each foreign country to comply with local requirements

Examples of localization steps:

- Product modifications (product localization)
- Language
- Currency
- Local technical standards
- Legal compliance
- Product sourcing
- Import duties, quotas
- Product distribution, logistics
- Marketing plan
- Advertising
- Trademarks, branding strategy
- Other IP protection
- Customer support; warranty fulfillment
- Labeling, product documentation

- Website localization
- Tax, profit repatriation
- Government permits, licenses
- Accounting
- Local physical presence – entity selection
- Local physical presence – employees
- Employment law; employee benefits
- Real estate (office lease, warehousing, other facilities)
- Immigration
- IT support
- Insurance
- Political risk
- For a complete listing of steps in the localization process refer to Business Process Localization – Planning Matrix

For a complete checklist of all localization steps in a target market, see Country Localization Checklist attached.

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BUSINESS PROCESS LOCALIZATION - PLANNING PRINCIPLES

- Old Methodology – convert every aspect of business to local business environment – companies end up with 200 separate businesses around the world
- New Methodology
  - *Try to achieve uniformity in as many aspects of the business as possible (eg., product, branding, marketing plan, etc.)*
  - *However, Company will still need to make some adjustments to local requirements in each country*
  - *Must localize/conform to local country's legal, tax and currency requirements in each country or risk legal liability*
  - *Also Company may want to have some elements of local cultural appeal to increase acceptance in the market (eg., use of local sales personnel, local marketing practices, etc.)*
  - *Maintain elements of Company's core culture in each country in which you operate*
- "Local Partner" - Company should use someone who is a native of the foreign country (working as a consultant, employee or partner) in each country to assist in localization process there

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COUNTRY IDENTIFICATION

What are the top 5 countries in the world that are the largest markets for your product?

- Country Groups -
  - *Developed nations – affluent, stable, mature markets, lowest levels of risk*
  - *Top ten emerging markets – unprecedented opportunities but higher levels of risk*
  - *Remaining emerging markets – longer term opportunities but time frame uncertain; higher levels of risk*
- Be strategic, selective
  - *Do not have to establish operations in all 200 countries to have successful globalization strategy*
  - *Often operating in the top 5 - 10 foreign markets alone will achieve most of the benefits, with considerably less cost and risk*
- In emerging markets, consider targeting just affluent centers within the country (Shanghai, Moscow, Dubai, etc.) rather than entire country

For a listing of foreign market research sources, see Appendix A to International Planning Checklist, attached.

COUNTRIES OF GREATEST OPPORTUNITY

Top 20 Export Markets for the United States:[1]		Fastest Growing Economies:[2]		
1.	Canada	1.	Qatar	11.2%
2.	Mexico	2.	China	9.8%
3.	China	3.	Uruguay	8.5%
4.	Japan	4.	Kuwait	8.5%
5.	Germany	5.	Panama	8.3%
6.	United Kingdom	6.	United Arab Emirates	7.7%
7.	Netherlands	7.	Argentina	7.1%
8.	Korea	8.	Oman	6.7%
9.	Brazil	9.	India	6.6%
10.	France	10.	Libya	6.3%
11.	Belgium	11.	Bahrain	6.1%
12.	Singapore	12.	Indonesia	6.1%
13.	Taiwan	13.	Russia	6.0%
14.	Australia	14.	Morocco	5.9%
15.	Switzerland	15.	Bolivia	5.6%
16.	Hong Kong	16.	Brazil	5.2%
17.	India	17.	Malaysia	5.1%
18.	United Arab Emirates	18.	Venezuela	4.9%
19.	Italy	19.	Poland	4.8%
20.	Israel	20.	Philippines	4.6%

[1] For 2008 Source U.S. Dept. of Commerce

[2] Selected countries; for 2008. Sources CIA World Factbook

DEVELOPMENT SEQUENCE

- Old Rule – start first in countries that are adjacent to your home country, then gradually work outward from there
- New Rule – start in countries that present the greatest business opportunities for your Company regardless of location
- Timing – roll-out in phased sequence (eg., one new country per quarter) rather than all at once
- Plan timing based on size, resources and sophistication of the Company. Prioritize countries based on strategy in first point above.

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RISKS AND MITIGATION STRATEGIES

Six Greatest Risks In International Transactions:

Risks	Mitigation Strategies
1. Not getting paid	• Use confirmed letter of credit, documentary collections, payment in advance
2. Piracy of Intellectual Property	• Register all IP in foreign country and use full legal protections • Use security device • Obtain guarantee backed up by letter of credit or bond for infringement • Careful due diligence of parties to whom you will disclose IP • Do not disclose most valuable IP in high-risk countries
3. Currency Fluctuation	• Sell in your home country • Hedge foreign currency risk

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RISKS AND MITIGATION STRATEGIES (continued)

Six Greatest Risks In International Transactions:

Risks	Mitigation Strategies
4. Rule of law – weak enforcement of rights under foreign legal system	• Have agreements provide for choice of law in reliable third country • Set dispute resolution through arbitration by international arbitration organization to be conducted in reliable third country • Letter of credit, performance bond to provide security for breach
5. Political risk – government expropriates your assets or disrupts your business	• Obtain advice of local expert to assess risk of political disruption and/or interference with your business • Political risk insurance (OPIC, MIGA, private)
6. Corruption – risk of FCPA prosecution for acts of agents	• Careful selection of marketing agents, reps • Contract clauses with marketing agents that they will not make prohibited payments • Training company personnel; compliance program

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PROTECTION OF INTELLECTUAL PROPERTY

- Intellectual Property: Trademarks, Patents, Copyrights, Domain Names, Software, Trade Secrets, Proprietary Information, Trade Dress
- Register your IP in each country in which you operate (this should be one of the first steps you take in each country)
- Register trademarks and domain names in both the local language and your home country language
- Develop a strategy for worldwide IP protection at the start of your international development process
- For high risk countries with weak IP enforcement, adopt specialized protection strategy

For a detailed checklist of steps for protection of intellectual property, see Country Localization Checklist, attached.

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TARIFF AND TRADE LAW

- Determine if Company's product will be subject to tariffs, import duties, fees, quotas or other import restrictions in foreign country; calculate as part of cost structure for foreign country
- Consider strategies to reduce or eliminate tariffs and duties:
  - *Attempt to reclassify product to different harmonized tariff number*
  - *Redesign product to change tariff classification*
  - *Use of free trade agreements or compacts (eg NAFTA)*
  - *Assembly of product in third country to import product with lower duty rate*
  - *Use of free trade zones and subzones*
  - *Duty drawback*
  - *Use of preferential duty programs ("GSP")*

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TAX PLANNING; PROFIT REPATRIATION

KEY GOALS & OBJECTIVES – THE "FOUR PILLARS"[1]

- Tax Management
  - *U.S. Federal, State & Local & Foreign Tax Minimization*
  - *Entrepreneur Structures / IP Migration*
  - *Tax-Efficient Internal Debt*
  - *In Country / Jurisdictional Tax Planning*
- Tax Attribute Management
  - *Optimize Foreign Tax Credits (Maximize FTC Limitation / FTC Utilization)*
  - *Optimize E&P and E&P Deficit Utilization*
  - *Optimize NOL utilization/ Valuation*
  - *Facilitate Basis Planning*
- Treasury Management
  - *Efficient Cash Redeployment and Repatriation*
  - *Efficient Offshore Cash Management*
  - *Manage Deferral Positions / APB 23*
  - *Tax Efficient Repatriation of Offshore Cash*
- Structure Management
  - *Tax Efficient Acquisitions*
  - *Tax Efficient Dispositions*

[1] Prepared by Sean King, head of Williams Mullen international tax department

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US INTERNATIONAL BUSINESS LAWS

- Export control laws
- OFAC embargoes and sanctions programs
- Prohibition on dealings with Specially Designated Nationals
- Foreign Corrupt Practices Act
- Antiboycott laws
- Customs and import laws
- Patriot Act; Anti-Money Laundering Laws

For a detailed discussion of U.S. international business laws, see Overview of U.S. Export Laws attached.

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COMPLIANCE WITH FOREIGN LAWS

- Legality and Regulation of the Proposed Business
- Enforceability of Contracts
- Corporate Ownership
- Local Currency Laws
- Employee Relations
- Intellectual Property
- Litigation and Arbitration
- Agreements with Agents, Joint Venture Partners
- Preferred Structure of Local Presence
- Bilateral Investment Treaties
- Taxes
- Customs, Import, Export Requirements
- Other Significant Local Law Issues
- Political Risk

For a detailed checklist of foreign law compliance issues, see Country Localization Checklist attached.

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FOREIGN ENTITY SELECTION

Goals In Entity Selection:

- Limitation of liability of parent company from operations in foreign country
  - *Parent shareholder*
  - *Officer and director indemnification*
- Tax efficiency
- Ease of control
- Perception that company is "native" in the foreign country

For a detailed checklist of foreign entity selection, see Country Localization Checklist attached.

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DEFENSIVE STRATEGIES

Legal remedies available to U.S. companies to stop imports of competing foreign products based on unfair trade practices:

- Antidumping laws – sales at less than fair value
- Countervailing duty laws – foreign government subsidy
- Section 301 Unfair Trade Secrets – manufacturing and/or imports based on violation of U.S. intellectual property rights
- Other import relief laws

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INTERNATIONAL BUSINESS
PLANNING CHECKLIST

For Development of
Overall International Business Plan

Thomas B. McVey[1]

Introduction: The following Checklist is designed to be used by a Company's senior management as the first step in planning its expansion into foreign markets. It sets forth strategic questions to be addressed by the Company in planning its international development, including whether the Company is at the right stage of its corporate development to enter overseas markets, optimum business model, country selection, sequence and timing, localization and other strategic issues. Once the Company's management has completed the Planning Checklist, the information collected can serve as the basis for the Company's International Business Plan and the roadmap for its international development strategy.

1.	Should Company Establish Business in Foreign Markets? – Is the Company at the right stage of its corporate development to enter international markets?		
	a.	Traditional Test – Has the Company saturated the domestic market in its home country? If yes, then this is an appropriate time to begin operations in foreign countries.	
	b.	Modern Test – Where are the best business opportunities for the Company in the world right now? If there are better opportunities in targeted foreign markets than in Company's home market, it is appropriate to skip over portions of the domestic market to pursue foreign opportunities. (However, Company must design the scope and details of its international development to match its capital, personnel and	

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		management expertise.)	
	c.	Competition – Are the Company's competitors active in international markets? If so, should the Company be pursuing such markets to remain competitive?	
	d.	Growth Analysis – How will the Company meet its revenue growth projections over the next 5 years (especially public companies)? Is there sufficient potential for new business in the Company's home market to meet this requirement or will the Company need to look to foreign markets?	
	e.	Resources – Does the Company have sufficient resources to pursue business in international markets at the present time? (Resources include capital, personnel and management expertise.) If not, will the Company be able to acquire these in order to properly execute its international business plan?	
	f.	Have impediments that the Company previously identified in foreign markets been reduced in recent years? Examples include political risk, restrictions on currency repatriation, lack of infrastructure, unreliable legal system, etc. in targeted foreign countries.	
	g.	What type of international activities will be performed? • Sale of products • Performance of services for foreign customers • Establishment of Company-owned facility abroad for	

[2] Note – The focus of this Planning Checklist is on the Company selling its products overseas and setting up foreign operations; importing is beyond the scope of this outline.

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		sales, logistics/distribution, manufacturing, research and development, other purposes • Sourcing of raw materials, components, merchandise from foreign suppliers[2] • "Offshoring" i.e., operating a company business process in a foreign location (eg., call center) • Outsourcing, subcontracting to foreign firm • Integrated global business operation	
	h.	Estimate size of the worldwide market for Company's products. How does this compare to the size of the market in Company's home country?	
2.	Business Model – What business model will the Company use in its international development?		
	No Direct Presence In Foreign Country (Export of Products and Services From Company's Home Country)		
	a.	Sales Through Independent Sales Representatives, Agents	
	b.	Sales Through Independent Distributors • Distributors • Channel Partners • Value Added Resellers (VAR's)	
	c.	Consumer to Consumer Direct Marketing (Tupperware, Amway, etc.)	
	d.	Sales Through Local Retail Store Chains	

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	e.	Contractual Joint Venture: • Foreign partner has passive, minority interest • Foreign partner shares management responsibilities with U.S. Company • Foreign partner has primary management role	
	f.	Franchising, Licensing: • Franchising through Master Regional Developers • Franchising – direct to franchisees • Licensing	
	g.	Direct Sales From Outside the Country • Online Internet sales • Telephone sales • Direct mail • Other	
	h.	"Piggyback" sales through multinational companies – Walmart, etc.	
	i.	"Piggyback" sales through electronic gateways – Amazon, e-Bay, etc.	
	<u>Direct Presence In Foreign Country (Establishing Office, Manufacturing or Other Facility In Foreign Country)</u>		
	a.	Marketing facility – Company-owned retail stores, wholesale facility	
	b.	Distribution, logistics, warehouse facility	

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	c.	Offices for the performance of services (technical, financial, professional services)	
	d.	Regional support facility to support independent marketing by agents, distributors, etc.	
	e.	Manufacturing facility	
	f.	Integrated facilities – manufacturing and sales operations	
	g.	"Entity" joint venture (formation of business entity, shares are issued both to the Company and a foreign partner)	
	h.	Real estate ownership and/or development	
	i.	Acquisition of operating company	
	j.	Private equity – investment in majority or minority interest in a private company	
	k.	Public equity – investment in the securities of a publically traded company	
	l.	Planning Note – Many companies change their business model in foreign countries in relatively short periods of time (e.g. within five years). The Company should set up its structure, contracts and business relationships to permit it to make changes to its business model within a medium (e.g. five year) time period without incurring significant legal	

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		liabilities or expense.	
3.	Which Countries – Which foreign countries present the best opportunity for the Company?		
	a.	Identify the top ten foreign markets that present the greatest business opportunities for the Company within the next 5 years (refer to the market research materials, databases and country summaries identified in Appendix A). Consider: • Developed countries (N. America, W. Europe, Japan) • Top 5 emerging markets (China, India, Brazil, Russia, Mexico) • Other emerging markets (Asia, Latin America, Eastern Europe, MENA) • Affluent sub-markets in emerging countries (Shanghai, Dubai, Singapore, Mexico City, etc.)	
	b.	Are there any special restrictions on your product based on regulatory, legal or political factors in the target countries?	
	c.	Are there any special restrictions on your product due to cultural, religious or climate-related factors that will limit your business in the target countries?	
	d.	Do consumers in the target countries have sufficient per capita income to purchase your product? (Consider projected change in per capita income over the next 5 years.)	
	e.	Will there otherwise be sufficient market demand for your	

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		product in the target countries?	
	f.	Conduct risk assessment for targeted foreign markets – see Risk Assessment Planning Matrix. If the Company is considering conducting business in emerging markets, is it prepared to deal with the specialized risks in these markets?	
	g.	It may be advisable to initially limit foreign operations to a small number of high opportunity foreign countries rather than attempt to establish operations in a large number of countries. Similarly, Company should also consider targeting only affluent sub-markets of emerging economies, or limit to just specific regions. These decisions will depend on the size, resources and sophistication of the Company.	
	h.	See Section 6 below regarding the timing and sequence in which the Company will enter each of the target countries.	
4.	Product and Business Process Localization – Each foreign country has its own legal, cultural, technical and business requirements. How will the Company's product and business process need to be changed (localized) in each foreign country to comply with these? The following are examples of issues which will need to be addressed in each foreign country in which the Company operates:		
	a.	Product modifications (product localization)	
	b.	Language	
	c.	Currency	

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	d.	Local technical standards	
	e.	Packaging, labeling	
	f.	Legal compliance	
	g.	Website localization	
	h.	Marketing plan	
	i.	Payment processing (credit cards, check, cash)	
	j.	Customer support	
	k.	Logistics and warehousing	
	l.	Advertising	
	m.	Note - For a detailed checklist of factors to review in localizing the Company's product and business model to individual foreign countries, please see Country Localization Checklist.	
	n.	Local Partner – In localizing the Company's product and business model within a foreign country, it is advisable to have a person who is a native of that country (serving as consultant, employee, partner, director or advisor) advise the Company and participate in the decision-making process in planning the localization for that country.	

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5.	Core Company Standards – Regardless of changes made in the localization process in each country, the Company should maintain core elements of its culture in every country in which it operates. What are the core elements of the Company's business and culture that it wants to maintain in every country?		
	a.	Highest level of quality? Reputation as a "premium" brand?	
	b.	Lowest price?	
	c.	Highest level of customer value?	
	d.	Highest level of profitability?	
	e.	Best company to work for?	
	f.	Other	
6.	Sequence Of Entering Targeted Foreign Markets – Options to consider:		
	a.	Traditional Methodology – Expand first to countries adjacent to Company's home country, and then gradually expand outward from there.	
	b.	New Methodology – Start first in the countries that present the greatest business opportunities for the Company, even if these are in other regions in the world. Continue to other	

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		countries based on priority of business opportunity rather than proximity to home country.	
	c.	Do not start operations in all targeted foreign markets at same time; open in a phased sequence over time. Timing should be determined by the size, resources and sophistication of the Company. Use strategy described in (b) above for identifying country priorities.	
	d.	Identify which foreign countries the Company will operate in each year over the next 5 years, and estimated dated of commencement of operations in each.	
7.	<u>Tax And Entity Planning</u> – Structure the Company's business entities to protect the parent from legal liability, achieve tax efficiency, and streamline treasury function.		
	a.	Tax planning goals: (i) reduce tax liability in individual countries: (ii) avoid double taxation in multiple countries; and (iii) reduce Company's overall worldwide tax rate.	
	b.	Tax planning factors to consider: • Selection of entities in low-tax jurisdictions whenever possible • Maximize use of foreign tax credits • Use of tax treaties and regional holding companies to avoid double taxation • Capture of flow – through losses in start-up stages • Special strategies for IP development and licensing • Tax-efficient internal debt when parent Company is	

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		providing capital to foreign subsidiary • Optimize E&P and E&P deficit utilization • Optimize NOL utilization/valuation • Facilitate basis planning • Transfer pricing strategies • VAT tax planning • Tax efficient acquisitions and dispositions	
	c.	Foreign Entity Selection - type of legal presence in foreign countries: (i) subsidiary; (ii) branch; and (iii) representative office.	
	d.	Commercial law goals in entity planning: (i) limit parent from legal liability in target country; (ii) project a "local company" image in target country; (iii) local entity may be required to comply with local regulatory, legal requirements.	
	e.	It is often desirable to operate through a subsidiary in each foreign country to protect parent Company from legal liability – use of a "branch" will not achieve this and will often expose other assets of parent Company. In selecting type of entity, be sure to select type that has limited liability of shareholders.	
	f.	In certain countries, local law requires that entities formed under local law have at least one shareholder that is a citizen of that country. This may be undesirable for many companies so care must be used in selecting the proper type and jurisdiction of entity.	

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	g.	Local entities can often be characterized as "flow-through" or "blocker" entities for tax purposes. Select the type of entity that presents the optimum tax results for the Company.	
8.	Protection of Intellectual Property.		
	a.	Intellectual property: patents, trademarks, copyrights, trade secrets, trade dress, domain names, technology, proprietary processes.	
	b.	Does the Company have valuable intellectual property? Company should register or otherwise legally protect its intellectual property in every foreign country in which it operates.	
	c.	Trademarks – it is advisable to register trademarks and domain names as the first step in establishing operations in a foreign country – prior to communicating with parties or releasing public information that Company is establishing operations there (in order to avoid pirates registering Company's trademarks in their own name). Company should consider registering trademarks both in the local country language and the Company's home country language.	
	d.	It is recommended to develop strategies to protect the Company's intellectual property on a global basis at the outset of international development process. Specific strategy will depend on the resources of the Company. Major companies often will initially register key intellectual	

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		property in all foreign countries in the world. Companies with limited resources often will register in top ten jurisdictions (US, EU, China, Japan, Brazil, etc.), and then register in remaining countries at a later date. In addition, Companies with limited resources will often only register the most important IP at the commencement of their international development, and then register remaining IP assets when they start actual operations in an individual country.	
	e.	Certain countries pose a particularly high risk of intellectual property infringement due to weak intellectual property laws or lax enforcement mechanisms. Company should adopt specialized protection strategy (beyond simply registering intellectual property) in these high risk countries.	
9.	Tariff And Trade Laws		
	a.	Determine if Company's products will be subject to tariffs, import duties or other import restrictions in targeted foreign countries. Factor these costs into business plan for these markets. Look for: • Tariffs • Import duties, fees • Import quotas or embargoes • Antidumping duties • Countervailing duties • Other import-based charges or restrictions	

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	b.	Consider strategies to reduce or eliminate import duties: • Attempt to reclassify product to different harmonized tariff number with lower duty rate • Re-design product to different harmonized tariff number with lower duty rate • Consider assembly of product in third country to import product with lower duty rate • Use of free trade agreements or regional trade compacts (NAFTA, etc.) • Use of free trade zones and subzones • Duty drawback • Use of preferential duty programs such as Generalized System of Preferences ("GSP")	
	c.	Determine if product will be subject to other "unfair" import restrictions or protectionist measures (local discriminatory technical standards, inspection laws, etc.)	
	d.	Review other import-based laws that will impact on Company's product such as food safety, consumer protection, labeling laws, etc.	
10.	Legal Compliance.		
	a.	U.S. laws – There are certain U.S. laws that regulate international business transactions - Company should use care to comply with these:	

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		• Export control laws • OFAC embargoes and sanctions programs • Prohibition on dealing with Specially Designated Nationals • Foreign Corrupt Practices Act • Anti-boycott laws • Patriot Act, anti-terrorist and anti-money laundering laws • Customs and import laws • Adoption of International Compliance Program	
	b.	Foreign laws – Company should comply with all laws in each foreign country in which it is operating.	
11.	Advanced Globalization Strategies		
	a.	Can the Company develop a "global" product that does not have to be localized in each foreign market?	
	b.	Can the Company develop unified media themes and advertising messaging that do not have to be localized in each foreign country?	
	c.	Can the Company take advantage of technologies such as automated translation tools, automated foreign exchange conversion web applications, website personalization tools to reduce localization efforts?	

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	d.	Can the Company take advantage of worldwide media channels such as satellite television, Internet television/media programming to promote its product and/or for other parts of its business process (payments, electronic delivery of content, etc)?	
	e.	Can the Company take advantage of worldwide business resources such as payment systems (Visa), delivery (Fed Ex) to streamline its international operations?	
	f.	Can the Company design its product around globally accepted technical standards?	
	g.	Sales through other worldwide electronic platforms – Internet, wireless networks, digital satellite television, for marketing, translation processing/sales or content delivery?	

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APPENDIX A

FOREIGN MARKET RESEARCH MATERIALS

World Bank "Doing Business" Reports and Data Base – http://www.doingbusiness.org
Detailed analysis of business climate and business opportunities in each country in the world. Specific "Doing Business" Report for each country.

U.S. Commercial Service Market Research Library – http://www.buyusainfo.net
Detailed market research for U.S. exports for all foreign countries

International Trade Administration (U.S. Dept. of Commerce) Trade Data and Analysis – http://www.export.gov
Trade data and market research broken down by industry, country and other categories

Federation of International Trade Association (FITA) Research Database – http://www.fita.org/countries
Foreign country profiles and research resources for most foreign countries.

Nationmaster Data Base – http://www.nationmaster.com
Detailed business and market research database for most countries

World Bank Development Indicators On-Line – www.worldbank.org
Extensive research on economic indicators in every country.

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BUSINESS MODEL MATRIX

Summary of Business Models
For International Operations

Thomas B. McVey[1]

Contents

1.	Sales Through Independent Sales Representatives, Agents	11.	Joint Venture
2.	Sales Through Independent Distributors	12.	Licensing
3.	Channel Partners	13.	Franchising
4.	Value Added Resellers (“VARs”)	14.	Direct Sales From Outside The Country (Internet Sales, Telephone Sales, Direct, Other)
5.	Master Regional Developers	15.	“Piggyback” Sales Through Other Multinational Companies – Walmart, etc.
6.	Sales Through Independent Local Retail Stores	16.	“Piggyback” Sales Through Electronic Gateways – e-Bay, Amazon
7.	Consumer – To – Consumer Direct Marketing	17.	Sales Through Other Worldwide Electronic Platforms – Internet, Wireless Networks, Digital Satellite Television
8.	Direct Foreign Presence In Foreign Country – Major Facility	18.	Combination – Promotion of Product Through Internet Channels And Close Sales Through Local Sales Presence
9.	Direct Foreign Presence In Foreign Country – Support Facility	19.	Acquisition of Operating Business
10.	Combination – Company Offices In Regional Centers And Independent Sales Intermediaries In Each Country		

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BUSINESS MODEL MATRIX

Thomas B. McVey, Esq.

	Method	Description	Advantages	Disadvantages	Comments
1.	Sales Through Independent Sales Representatives, Agents	Company appoints independent party to market its product in foreign country. Company does not have an office or other facility in the country. Sales representative identifies customers and company makes sales directly to customers from outside the country. Agent is authorized to enter sales contracts on behalf of principal. Both are often paid a sales commission based on completed sales. Both are independent contractors – cover their own overhead and operating expenses. Both can be appointed on an exclusive basis for the country territory or non-exclusive basis.	Company can take advantage of foreign intermediary's knowledge of the foreign market and foreign customer contacts. Does not require significant investment of capital to set up; limited ongoing overhead expense to the Company. Company can control product quality and branding and market its product with a single brand on a worldwide basis. One of the easiest ways to set up marketing network around the world and begin selling on a global basis in short period of time.	Independent intermediaries can be difficult to control (unlike company-owned operations). Foreign intermediaries must be motivated to produce sales or may focus their attention on other opportunities. If foreign intermediaries do not have sufficient resources or expertise to market product Company will not be successful in targeted market. Termination of independent representatives or agents may be costly and/or complicated. Potential for channel conflict – if Company appoints representative as exclusive for a country this could conflict with other Company sales efforts.	One of the easiest and least expensive ways to set up international marketing network and begin selling on a global basis. Caution – If appoint representative or agent on an exclusive basis in a country, be sure to have minimum sales requirements and/or ability to terminate agreement in a short period; otherwise if intermediary does not market product on a satisfactory basis Company will be precluded from making other sales in that country.
2.	Sales Through Independent Distributors	Company appoints independent party to distribute its product in the foreign country. Company	Company can take advantage of foreign distributor's knowledge of the foreign	Independent intermediaries are often difficult to control (unlike company-	One of the easiest and least expensive ways to set up international

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	Method	Description	Advantages	Disadvantages	Comments
		does not have office or other facility in the country. Distributor purchases product from the Company, takes title and possession of product, and resells product to customers. In addition to marketing, distributor often provides related services such as warehousing, delivery and customer support in foreign country. Distributor may also be involved in product localization in foreign country. Distributor is independent contractor – covers its own overhead and operating expenses. Distributor can be appointed on an exclusive or non-exclusive basis.	market and foreign customer contacts. Does not require significant investment of capital to set up; limited ongoing overhead expense to the Company. Company can control product quality and branding and market its product with a single brand on a worldwide basis. One of the easiest methods to set up marketing network around the world and begin selling on a global basis in short period of time.	owned operations). Foreign intermediaries must be motivated to produce sales or may focus their attention on other opportunities. If foreign intermediaries do not have sufficient resources or expertise to market product Company will not be successful in targeted market. Termination of independent distributors may be costly and/or complicated. Potential for channel conflict – if Company appoints distributor as exclusive for a country this could conflict with other sales efforts.	marketing network and begin selling on a global basis in a short period of time. Caution – If appoint distributor on an exclusive basis in a country, be sure to have minimum sales requirements and/or ability to terminate agreement in a short period; otherwise if distributor does not market product on a satisfactory basis you will be precluded from making other sales in that country.
3.	Channel Partners	A channel partner is an independent business in the foreign country that sells products or services that are complimentary to (but different from) the Company's products. The channel partner purchases the Company's product, combines its product/service with the Company's product and sells the combined product to the channel partner's customer in the foreign country. Company	Company can take advantage of foreign partner's knowledge of the foreign market and foreign customer contacts. Does not require significant investment of capital to set up; limited ongoing overhead expense to the Company. Company can control product quality on a worldwide basis. As with other methods of sales through independent intermediaries, is one of the	Independent intermediaries can be difficult to control (unlike company-owned operations). Foreign intermediaries must be motivated to produce sales or may focus their attention on other opportunities. If foreign intermediaries do not have sufficient resources or expertise to market product Company will not be	Is a fast and low cost method of entering a foreign market, and for setting up worldwide distribution. Must address whether Company will be able to utilize its own branding on sales of the "bundled" product.

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	Method	Description	Advantages	Disadvantages	Comments
		does not have an office or other facility in foreign country. Is an independent contractor – covers its own overhead and operating expenses. Can be appointed on an exclusive or non-exclusive basis in the foreign country.	easiest ways to set up marketing network around the world and begin selling on a global basis in short period of time.	successful in targeted market. Termination of channel partners may be costly and/or complicated. Potential for channel conflict – if Company appoints representative as exclusive for a country this could conflict with other Company sales efforts.	
4.	Value Added Resellers ("VARs")	A value-added reseller ("VAR") is an independent business in the foreign country that purchases the company's product, makes enhancements or alterations to the product, and re-sells it to the VAR's customers in the foreign country. Company is not required to have an office or other facility in foreign country. Is an independent contractor – covers its own overhead and operating expenses. Can be appointed on an exclusive or non-exclusive basis in the foreign country.	Company can take advantage of foreign intermediary's knowledge of the foreign market and foreign customer contacts. Does not require significant investment of capital to set up; limited ongoing overhead expense to the Company. Company can control product quality and branding and market its product with a single brand on a worldwide basis. One of the easiest ways to set up marketing network around the world and begin selling on a global basis in short period of time.	Independent resellers can be difficult to control (unlike company-owned operations). Resellers must be motivated to produce sales or may focus their attention on other opportunities. If foreign intermediaries do not have sufficient resources or expertise to market product Company will not be successful in targeted market. Termination of resellers may be costly and/or complicated. Potential for channel conflict – if Company appoints representative as exclusive for a country this could conflict with other Company sales efforts.	This is an excellent strategy for penetrating narrow market niches which require specialized enhancements or customize improvements to Company's product. The Company also obtains the benefits of the relationships that the VAR has with its customers. Care must be used to select the right VAR partner, with good reputation and strong market dominance in its field. If you join forces with VAR's that are too small, especially in an exclusive relationship, this will limit your sales

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	Method	Description	Advantages	Disadvantages	Comments
					to and through other parties in the territory.
5.	Master Regional Developers	With a Master Regional Developer, the Company appoints a master sales representative or master distributor in a geographic region (eg Southeast Asia, Central America) and the master party recruits and appoints sub-representatives or sub-distributors in individual countries throughout the region. The master party is responsible for appointing highly qualified representatives in each country, and for managing such representatives on an ongoing basis. The master party may also be responsible for direct marketing activities in its home country. The master party is usually paid a sales commission for direct sales that it makes, and portions of the sales commission (or "override") of sales by the sub-representatives. The balance of the sales commission is paid to the sub-representatives that conclude the sale. Master representatives may also assist in localizing the product for sales for countries in the region, as well as localizing other aspects of the Company's business	Company can take advantage of foreign intermediaries' knowledge of the foreign market and foreign customer contacts. Does not require significant investment of capital to set up; limited ongoing overhead expense to the Company. Company can control product quality and branding and market its product with a single brand on a worldwide basis. One of the easiest ways to set up marketing network around the world and begin selling on a global basis in short period of time.	Independent intermediaries are often difficult to control (unlike company-owned operations). Foreign intermediaries must be motivated to produce sales or may focus their attention on other opportunities. If foreign intermediaries do not have sufficient resources or expertise to market product Company will not be successful in targeted market. Termination of independent intermediaries may be costly and/or complicated. Potential for channel conflict – if Company appoints an intermediary as exclusive for a country this could conflict with other Company sales efforts.	This is an excellent method of developing a global sales force quickly with limited financial investment. However the risk of dealing with independent marketing representatives which involves limited control is magnified here since there are multiple layers of independent parties. As with all independent intermediaries, care must be used to appoint the proper master and subrepresentatives.

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	Method	Description	Advantages	Disadvantages	Comments
		model for such countries, such as currency issues, customer service, regional logistics and distribution, advertising and product positioning (based on regional cultural or ethnic factors, etc.). [overhead/exclusive]			
6.	Sales Through Independent Local Retail Stores	The Company's customer in the foreign country operates a chain of retail stores in the country. Company sells its product at wholesale prices to the customer and customer resells product at the retail level through its stores. Customer may assist in product localization for the foreign country. Company does not have an office or other facility in foreign country. Is an independent contractor – covers its own overhead and operating expenses. Can be appointed on an exclusive or non-exclusive basis in the foreign country.	Company can take advantage of foreign party's knowledge of the foreign market and foreign customer contacts. Does not require significant investment of capital to set up; limited ongoing overhead expense to the Company. Company can control product quality and branding and market its product with a single brand on a worldwide basis. Is a low-overhead and cost effective way to set up marketing network around the world and begin selling on a global basis.	Independent parties such as a foreign retail chain is often difficult to control (unlike company-owned operations). Foreign party must be motivated to produce sales through prominent shelf-positioning and promotion efforts or may focus its attention on other opportunities. Termination of the business relationship may be costly and/or complicated. Potential for channel conflict – if Company appoints party as exclusive for a country this could conflict with other Company sales efforts.	This is an excellent strategy for penetrating a retail market in a foreign country.
7.	Consumer – To – Consumer Direct Marketing	Company appoints a network of consumers in the foreign country who market the Company's products on a retail basis to other consumers. This can include	This business model requires relatively low overhead and capital investment and hence can support a global marketing expansion at low cost.	Managing single-tier and multi-tier consumer marketing organizations requires highly specialized management expertise and	This model can be an excellent method of developing an international marketing network at a relatively

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	Method	Description	Advantages	Disadvantages	Comments
		one-tier direct sales (such as Avon) or multiple tiers of sales representatives (such as Amway). Company will usually appoint a master marketing representative or company-employed sales executive to organize and supervise marketing operations in each country. The Company may also establish national or regional distribution, logistics and customer support facilities.		significant management time and resources. This will add to the expense of establishing and operating a direct sales network. In addition, the Company's products and other elements of its business model will need to be localized for each country in which marketing is undertaken. Many foreign countries heavily regulate or prohibit multi-level consumer marketing.	low cost. However, consumer-to-consumer direct marketing requires highly specialized management resources to be successful. In addition, the company will need to conduct a legal review and perform localization efforts for each country in which it operates.
8.	Direct Foreign Presence In Foreign Country – Major Facility	Company establishes a company-owned facility in the foreign country. This could be a sales office, distribution center, company-owned retail stores, manufacturing facility, professional or technical services office, or other facility. Company will be required to acquire office or commercial space, hire local employees, acquire equipment, and pay overhead expenses. Company will bear one hundred percent of the cost of establishing and operating the facility on an ongoing basis.	Company has tight control over marketing process – if the Company is good at selling its product or service at home it can extend this into foreign markets. Company has tight control over its employees. It is often easier to control and manage performance of direct employees than independent representatives. If employees are not performing up to Company requirements it is often easier to terminate them than terminating independence representatives. Company has tighter control over its branding, image and advertising message in the marketplace. A local office	This strategy entails significant investment and economic risk. The establishment of a foreign office can be expensive and requires significant up front expense and investment. Operating direct company offices also consumes significant working capital on an ongoing basis. Hiring local employees entails not just salaries but "welfare" costs such as health care, retirement benefits, etc. In many foreign countries it is difficult to terminate employees or employers are required to pay	Establishing a direct presence in a foreign country presents a significantly higher level of investment and risk than selling from outside the jurisdiction through independent intermediaries. The Company must bear the direct costs of the operation. It subjects itself to a higher level of taxation, legal regulation, employment laws, etc. In many countries there is increased risk from political instability, inadequate

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	Method	Description	Advantages	Disadvantages	Comments
			provides the customer with the sense that the Company is a "local" business rather than a "foreign" business. This reinforces a sense that the Company is local, reliable and has a permanence in the community. Company will get direct feedback from its customers. Company can conduct its customer service, warranty call-back, product distribution in this office. This will create a higher quality of customer experience. While this model entails a significant up-front investment and economic risk, if the Company is successful in the foreign market this may ultimately be the most customer friendly and efficient way to operate in the foreign country.	severance payments. Company collateral operating expenses, such as advertising, warehouse space, and other overhead expenses are higher than with independent intermediaries. Company's proven marketing strategy from its home country might not work in the foreign cultures of other countries. What works in the U.S. may not translate well into foreign markets. Managing foreign employees entails additional administrative burdens for the Company such as language translation, ex-patriot packages for compensation and benefits, overseas legal compliance.	infrastructure, undeveloped legal system. However, this method affords tighter operating control than operating in the country through independent intermediaries or joint venture partners. If executed properly, it can generate the greatest level of profitability for the Company. Most mature companies establish or eventually migrate to this business model. See Localization Outline For Individual Countries.
9.	Direct Foreign Presence In Foreign Country – Support Facility	Company establishes a company-owned facility in the foreign country, but for a limited or support function rather than for fully-scoped company operations in the country. This might include a representative office for conducting initial market research and	This model presents the same advantages as in section 9 above, although most likely on a reduced scale.	This model presents the same disadvantages as in Section 9 above, but most likely on a reduced scale.	The establishment of a small physical presence in a foreign country raises the same issues as with a major facility, but on a more limited scale. Notwithstanding, no matter how small the foreign local presence

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	Method	Description	Advantages	Disadvantages	Comments
		investigation, customer service or call center, small office for IT support, etc.			the Company will still be subjecting itself to the direct taxing and legal regulatory authorities of the foreign country in which it is operating and this will impact on effectively every aspect of the Company's operations there – from consumer regulation, employment, repatriation of profits, etc.
10.	Combination – Company Offices In Regional Centers And Independent Sales Intermediaries In Each Country	The Company sets up a company-owned office within a geographic region such as Southeast Asia, Europe, GCC countries, etc. Company employees located in that office recruit and appoint independent marketing representatives or distributors in each country within the region, and manage them on an ongoing basis. The regional office may also be involved in localizing the Company's product and other aspect of its business model for countries in the region, such as currency, logistics and distribution, customer support, advertising, etc. Can use the	This method presents the advantages of low cost and other advantages of utilizing independent intermediaries, yet also presents the advantages of a company-owned office in the region.	Same disadvantages as independent representatives – limited control over most sales intermediaries.	This is an excellent method for a company to develop a firm foothold in a foreign region without incurring the expense and risk of establishing Company-owned offices in each country. The Company may wish to convert its independent marketing representatives to Company-owned offices in the future, however, and it should be conscious of this when entering agreements with its marketing representatives at the

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	Method	Description	Advantages	Disadvantages	Comments
		same process for appointing distributors, agents, VAR's and other independent marketing intermediaries as well.			outset of the relationship.
11.	Joint Venture – Joint Ownership With Local Partner	Company establishes a business entity in a foreign country and another party in the country has an ownership interest in the entity. The foreign partner is often looked to in order to provide expertise, contacts and intelligence in dealing in the foreign country which the Company would not otherwise have. The foreign partner can have a minority, 50/50 or majority interest in the business operation in the country.	The Company can take advantage of the foreign partner's expertise, reputation and business relationships in the foreign market. Removes a significant level of risk for the Company as the local partner knows how business is conducted there.	Foreign partners may be difficult to control. Dealing with foreign partners often requires significant time and expense. May be difficult and expensive to replace if have disagreement.	Joint ventures are often the preferred method used by companies in entering a foreign market if they are not familiar with the country or international markets in general. However, due to the complexity and expense of dealing with joint venture partners, once companies become familiar with the country they often prefer to terminate the joint venture and have 100% company-owned operations.
12.	Licensing	Company licenses its technology or business process to licensee in foreign country. Foreign licensee manufactures product or operates its service business under license and markets its products or services in foreign country. Licensee pays royalty to licensor, usually based on a percentage of gross revenues.	Allows Company to expand globally with considerably less risk and investment, and greater speed, than company-owned facilities. Allows Company to maintain strict control over the operation of the business including branding, consumer offerings, facility operations.	Company faces risk of loss of its proprietary technology in countries which have weak intellectual property law. Enforcement is expensive – requires costly litigation. Independent licensees are more difficult to control than company-owned	Company should take all steps to protect its intellectual property in each foreign country in which it will operate (including protection of patents, copyrights, trademarks, trade secrets and other proprietary processes);

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	Method	Description	Advantages	Disadvantages	Comments
		Common practices: (i) appoint separate licensee in each country; or (ii) appoint regional development partners who appoints licensees in separate countries in their region. Technology license – foreign licensee manufactures products abroad based upon a license from your Company. Business process license – Company licenses its proprietary system for conducting a business, or performing a service to licensee in foreign country.		facilities.	In countries which have weak IP laws or inconsistent legal enforcement, Company should take extra steps to protect proprietary IP including use of confidentiality agreements, careful due diligence review for potential licensees, high levels or security, selective disclosure and obtaining security (e.g. letter of credit) in case of breach.
13.	Franchising	Franchisor grants license to franchisee for a proprietary "system" to operate a business including trademark, operations management support (e.g. site selection, etc.), software, etc. within a defined, exclusive territory. Franchisee pays multiple fees including one-time franchise fee, royalties for life of franchise, advertising and other additional fees. Franchise is a form of licensing where a significant part of the license involves use of registered trademarks and branding. The most well known franchises involve consumer services such as restaurants and hotels.	Allows company to expand globally with considerably less risk and investment, and greater speed, than company-owned facilities. Allows company to maintain strict control over the operation of the business including branding, consumer offerings, facility operations.	Franchisees can be more difficult to control than company-owned facilities. In countries with weak intellectual property laws company runs the risk of losing its rights in its intellectual property, including trademarks, business process, trade secrets (food menu items, etc.).	Franchising is an excellent method to utilize to expand a brand globally with reduced investment and risk. However franchising is a specialized form of business and requires qualified management to execute successfully. Company should take all steps to protect its intellectual property in each foreign country in which it will operate (including protection of patents, copyrights, trademarks, trade secrets and other

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	Method	Description	Advantages	Disadvantages	Comments
		Typically the franchisor grants a license to the licensees for the right to use: (i) a proprietary business process (contained in an operations manual); and (ii) trademarks, related trade dress, on an exclusive basis within a defined territory. Franchisors operate internationally in three common ways: (i) granting rights to individual franchisees; (ii) granting regional development rights to regional developers for a region (such as an entire country) and the regional developer gradually develops and operates multiple franchises through the region; and (iii) granting rights to a sub-franchisor for a region (such as a country) where the sub-franchisee recruits and supervises individual franchisees throughout the master territory.			proprietary processes); In countries which have weak IP laws or inconsistent legal enforcement, Company should take extra steps to protect proprietary IP including use of confidentiality agreements, careful due diligence review for potential licensees, high levels or security, selective disclosure and obtaining security (e.g. letter of credit) in case of breach.
14.	Direct Sales From Outside The Country (Internet Sales, Telephone Sales, Direct, Other)	The Company markets to consumers in the foreign country directly without the use of intermediaries such as through Internet sales, direct mail, tele-marketing, television sales and similar methods. Payment is usually made by debit or credit cards and delivery by commercial delivery services.	Requires significantly less capital than company-owned facilities or sales through intermediaries. Can reach large worldwide market quickly. Can have tight control over product quality, delivery, branding, sales message.	Company may still be required to localize its products for the countries in which it is selling and to comply with legal and tax requirements in such countries.	This is an excellent method of expanding in overseas markets with reduced investment and risk, especially if the company takes advantage of globalization technologies such as website personalization

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	Method	Description	Advantages	Disadvantages	Comments
					and foreign exchange conversion. However companies will still be required to localize their product for sale in the foreign market.
15.	"Piggyback" Sales Through Other Multinational Companies – Walmart, etc.	The company sells to a major multinational company that has marketing resources in foreign countries (such as Walmart) and that company sells your product in its stores in the foreign country. The multinational company may require your company to adopt the product for international sales or localize it for individual countries or geographic regions.	Allows company to "piggyback" on other companies with limited expense and risk.	Company has reduced control of product offering, positioning sales effort, etc. The major multinational can "drop" the company's product at any time.	This is an excellent method for a small company to gain international exposure, or for any company to obtain international product distribution. However, it is not a substitute for a mature company to establish its own international operations.
16.	"Piggyback" Sales Through Electronic Gateways – e-Bay, Amazon	The Company places a product for sale with Internet companies such as Amazon.com or e-Bay which have marketing presence in foreign countries. Foreign consumers with access to these Internet websites purchase the product.	Allows fast, inexpensive exposure to consumers in most foreign countries. The Internet company may be able to assist with payment, currency conversion and delivery.	For high volume sales the Company will most likely need to localize its product for sale in foreign countries.	This is a highly inexpensive, fast, low risk method of gaining exposure in multiple foreign countries. Since this is a new category of international marketing, we are just beginning to learn the potential that this method provides. However, sales through one Internet-based business such as e-Bay may be a narrow market niche. This is not a

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	Method	Description	Advantages	Disadvantages	Comments
					substitute for a mature company to establish its own international market presence.
17.	Sales Through Other Worldwide Electronic Platforms – Internet, Wireless Networks, Digital Satellite Television, For Marketing, Transaction Processing on Content Delivery	Company places its product for sale on other electronic networks that are accessible in foreign countries such as cable television channels, wireless telephone networks, etc. Examples include licensing of downloadable applets on telephone networks, downloadable music and video content, etc.	If the electronic network operates in foreign countries, these will provide the Company immediate access to consumers in such countries. Relatively low cost and low risk. Network may be able to assist with payment, currency conversion and product delivery.	The electronic network may have requirements for access, such as product registration for wireless telephone networks or advertising charges for satellite television. For high volume sales the company will be required to localize its product in each foreign country.	Since this business model is so new we are still learning about it potential for international product distribution.
18.	Combination – Promotion of Product Through Global Media or Internet Channels But Close Sales Through Local Sales Presence	The Company promotes and advertises its products through global media channels such as television advertising, website ads, etc. and sales to consumers are made by Company employees or independent marketing intermediaries in the foreign country.	Obtain the benefits of worldwide media and online promotion, and the benefits of direct interpersonal contact to close sales.	Must bear the expense of online promotion and also build a marketing organization in the foreign country.	Combines the best attributes of two strong business models.
19.	Acquisition of Operating Business	The company acquires an operating business which is located in the foreign country.	Acquirer has control of a fully operating business in the foreign country on the date of closing. Allows company to have full operating presence in the foreign country quickly.	Acquirer must pay purchase price for the business.	An acquisition is often the fastest way for a Company to establish a business in a foreign country. While the acquirer will be required to pay a purchase price to purchase the target

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	Method	Description	Advantages	Disadvantages	Comments
					company, such expense is often less than the total investment required to start-up and grow a business in the foreign country.

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COUNTRY LOCALIZATION CHECKLIST

For Planning Operations In A Specific Foreign Country

Thomas B. McVey[1]

Introduction. The following Checklist is designed to assist a company's management in planning business operations in a specific foreign country. When a company is establishing a business in a foreign market, it is often required to make changes to its product and other aspects of its business model to adapt to the culture, business practices and legal requirements of that country. This may include technical changes to its product, adjustments for local language and currency, compliance with local legal and technical standards, etc. Some of these changes may be mandatory (such as compliance with local legal requirements), and others discretionary based on the Company's business strategy. This Planning Matrix is designed to create a rational process for identifying these areas of adjustment and organizing the Company's localization efforts.

Country: ____

	Part I – No Direct Legal Presence In Foreign Country – Company sells its products/services from outside the foreign country with no company-owned facilities or employees in the country – (ie, sales through independent distributors, agents, sales reps, sales to retail store chain, direct marketing, franchising, etc.)		
1.	Market Suitability – Confirm that product/service/business activity is suitable for foreign country market		
	a.	Does the Company's product conflict with any prevailing cultural, social or religious practices in the country?	
	b.	What is the target price for the product? Do consumers in the country have sufficient financial resources to purchase the product at the target price?	
	c.	Are there any geographic limitations or climactic factors?	
	d.	Does the product/business conflict with prevailing business practices, technical standards?	
	e.	Are any other companies currently selling the product in the market?	
	f.	Estimate the size of the market within the country at the target price:	

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		i. Number of consumers ii. Estimated Dollar volume iii. Estimate change in market size over 3 and 5 year periods	
	g.	Optional – conduct test marketing and/or consumer preference testing to collect data regarding business potential in the country	
2.	Product Localization; Technical Standards – Determine if changes in the product/service will need to be made for sales in the country.		
	a.	Will changes need to be made to the Company's product to comply with local technical standards (electrical current, engineering requirements, power outlets, compatibility with local conventions)?	
	b.	Will changes be required to the Company's product due to differences in language?	
	c.	Will changes need to be made to comply with local legal requirements (building codes, safety standards, consumer protection requirements)?	
	d.	Will changes be required to convert to metric system of measurement (size, contents, speed calibration, etc.)?	
	e.	Will changes be required due to local religious or cultural preferences?	
	f.	Will changes need to be made due to other consumer preferences or to assure market acceptance?	
	g.	Will changes in the product require changes in product packaging storage facilities, installation equipment?	
3.	Intellectual Property		
	a.	Does the Company utilize intellectual property as part of its	

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		business process (eg, trademarks, patents, copyrights, trade secrets, domain names/URLs, proprietary designs, business processes, trade dress)?	
	b.	Register primary intellectual property in the country immediately (this should be one of the first steps in entry into the country market – even before the Company begins initial discussions with persons in the country). Primary intellectual property is property which is fundamental to the operation of the business or of high value. This includes registration of trademarks, domain names, patens and in certain countries copyrights. Trademarks and domain names should be registered in the local country language as well as the Company's home language. This is especially necessary if company's marks are well known, or if technology is easily susceptible to theft or reverse engineering.	
	c.	Develop strategy for registration of secondary IP during the course of the Company establishing operations in the country.	
	d.	Develop strategy for other steps for protection of the company's IP in the country besides registration, such as use of Confidentiality Agreements, use of other trade secret protections (marked as proprietary, store in secure location, etc.), dissemination only to limited parties after due diligence review, disclosure of only partial portion of IP or no disclosure at all in the country, use of security devices, encryption, etc. Such strategy should be developed based upon the level of risk of illegal misappropriation of IP in the country.	
	e.	Does the country have a reputation for weak intellectual property laws, weak enforcement of such laws or high rate of IP piracy? If yes, adopted heightened strategy for protection due to high level of risk.	
	f.	For countries with the worst reputation for protection of IP, consider not conducting business in that country or not introducing Company products which utilize most valuable IP.	
	g.	Localization Content – Content and work product generated in localizing the product and/or business model to the country (such	

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		as design modifications, changes in advertising slogans or copy, translations of key documents, business process changes) are valuable intellectual property called “Localization Content.” Company should apply same level of protection of this material as it does to its other intellectual property.	
4.	Business Model – Identify the elements of the business model for the target country; determine if adjustments to the Company’s business model will be required.		
	a.	Marketing Plan – identify how product will be sold (eg, through sales agents, dealers, company sales personnel, direct mail, etc.)	
	b.	Pricing Strategy – price of products/services; identify market segment you will be targeting	
	c.	Product Sourcing – identify how product will be manufactured (manufactured in home country, purchased from local suppliers, manufactured in the target country, etc.)	
	d.	Warehousing, Logistics – how will product be warehoused, distribution, logistics?	
	e.	Point of Sales Transaction – what will be the mechanics of the sales transaction with the customer?	
	f.	Payment System – how will customer pay to purchase the product (credit card, check, debit card, cash)?	
	g.	Fulfillment – how will the product be delivered to the customer?	
	h.	Customer Support – how will follow-up customer service be performed (call center, repairs/returns, warranty fulfillment, repairs, spare parts)?	
	i.	Other - ?	

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5.	Language – Determine if Company will be required to conduct business in a language other than its home country language.		
	a.	What is the predominant language (and dialect) in the country? Are there more than one languages in predominant use? Will the Company be required to conduct business in the country in such language(s)?	
	b.	Legal Requirements - Are there any legal requirements in the country that business be conducted in the local language?	
	c.	Oral Communications – Will oral communications be required to be conducted in a foreign language: i. Sales and Marketing – will sales personnel be required to conduct business in the foreign language? ii. Customer Support – will customer support activities be required to be conducted in a foreign language (call center, customer relations)? iii. Management/Other Functions - Will other Company operations in the country be required to be conducted in the foreign language (sales and operations management, accounting and finance, human relations, other administrative staff, other?)	
	d.	Written Communications – Will Company documents and literature need to be translated into the foreign language: i. Sales and marketing materials ii. Advertising content iii. Trademarks/service marks, branding materials, other media iv. Website v. Product packaging, labeling vi. Product literature – product instructions, warranty literature, other packaging inserts vii. Customer support materials viii. Corporate legal and business materials - contracts, other legal documents - operations manuals, employee training manuals - legal compliance materials - internal and external correspondence, memoranda - financial statement, tax returns?	
	e.	Websites - Will Company set up a website with local domain	

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		name for the country or region? Will domain name(s) and/or website content need to be in local languages (see "Website; Online Communications" below).	
6.	Currency – Determine if Company will be required to conduct business in a currency other than its home country currency.		
	a.	Legal Requirement - What is the predominant currency in use in the country? Will the Company be required to conduct business in the country in such currency?	
	b.	Convertibility – Inbound – If the Company is required to invest capital (either through loans or equity) or make payments in the local currency, will the Company be permitted to convert funds from its home currency into the foreign currency? Are there any legal restrictions or approvals required? How long will it take to obtain such approvals? Are there any fees, charges, taxes or similar costs required?	
	c.	Convertibility – Outbound – If the Company wishes to repatriate funds from the local country back to the home country (such as payment of dividends, repayment of loans, payment of management fees, etc.), will the Company be permitted to convert funds from the foreign currency to its home currency? Are there any legal restrictions or approvals required? How long will it take to obtain such approvals? Are there any fees, charges, taxes or similar costs required?	
	d.	Repatriation – If the Company wishes to transfer dollars or local currency from the host country to the U.S. i. are any approvals required? ii. are any taxes, charges or other levies applied? iii. how long?	
	e.	Currency Exchange Risk - How does the price of the foreign currency compare to the price of the Company's home currency? What is the Company's strategy for mitigating foreign exchange risk?	

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7.	Payments, Financing And Flow of Funds – Plan cash flow and financing issues for sales within the country.		
	a.	Method of Payment By Customer – How will customer pay to purchase product: i. Retail Sales – cash, credit card, check, debit card, electronic transfer; ii. Commercial Sales – bank wire transfer, check, open account, payment against letter of credit; documentary collections – payment against presentation of documents?	
	b.	Payment Terms; Payment Risk – Will Company extend credit to customer? Assess credit and collection risk. Terms of payment: payment in advance, open account; letter of credit, documentary collections. If extending credit to foreign purchaser consider private credit insurance or trade finance from government agency (Eximbank, etc.)	
	c.	Internal Financing – Will Company borrow funds to finance sales in foreign country? Consider government sponsored export credit agencies (Eximbank, etc.). Coordinate with Company's other working capital financing	
	d.	Banking – Will Company be required to establish a bank account in foreign country? Consider foreign branch of Company's principal bank in home country.	
	e.	Treasury Operations – Plan for flow of funds – coordinate with Foreign Currency Conversion (Section 6.c. above), Tax Planning (Section 13 below) and Entity Planning (Section II.6. below).	
8.	Advertising, Branding, Marketing Themes, Media Strategy – Determine if changes will need to be made to Company's advertising and branding activities.		
	a.	Advertising Methods – Will the Company conduct advertising in the foreign country? What methods of advertising will the Company use in the foreign country (television, print ads, brochures/literature)?	

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	b.	Advertising, Themes – Will the Company's advertising themes and messaging be suitable in the foreign country – will they be successful in different cultural and socio-economic environments? (Note – it is preferable to use consistent advertising themes across multiple foreign countries if possible.)	
	c.	Branding, Trademarks, Trade Dress – Will the Company's branding, trademarks, designs, logos and trade dress be suitable in the foreign country? (Note – it is recommended to use consistent branding and marks across multiple foreign countries if possible.)	
	d.	Language Translation – Will text of advertising materials need to be translated to the language of the foreign country – ad copy, brochures, etc.?	
	e.	Other Design Changes – Will other changes need to be made to advertising materials – changes in design, etc. to incorporate the above?	
	f.	Website; Electronic Media – Will design changes need to be made to the company's website or other digital media? See Section 10 below.	
	g.	Localization Content – As referenced in Section 3 above, changes made to the Company's advertising materials are part of its Localization Content and should be treated as proprietary intellectual property of the Company. The Company should maintain the exclusive ownership rights in such materials and not permit local distributors, sales agents, franchisees or other third parties acquire legal interests in such items.	
	h.	Protection of Intellectual Property – See Section 3 above regarding steps to protect trademarks, copyright interests and trade secrets which are developed in changes to advertising materials	

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9.	Product Packaging, Labeling		
	a.	Packaging – Will Company be required to change its product packaging in the new country (eg., due to language translation, branding changes, changes in product design, etc.)?	
	b.	Labeling – Will Company be required to change its product labeling (eg., due to labeling and/or consumer protection laws, language translation, branding changes, etc.)?	
	c.	Product Documentation – Will Company be required to change its product documentation, user instructions, operating manuals?	
	d.	Product Legal Documentation – Will Company be required to change legal documentation associated with the sale of the product such as customer warranties, standard terms of sale, conditions of use, etc.? Address changes required under local law, disclaimers, indemnifications, limitations of liability, etc.	
	e.	Software License – Will software licenses need to be translated and confirmed to be legally enforceable in foreign country?	
10.	Websites; Online Communications And Marketing Channels – Develop strategy for on-line communications with customers in the target country.		
	a.	Online Strategy – What is purpose of Company's website – communications with customers, advertising, product catalogue, online sales engine, delivery of product, service or content?	
	b.	Separate Country Website – Consider setting up a website for the country that is separate from the Company's principal website. This can be localized for all the attributes of the country – i.e. language, cultural theme, local currency and pricing, local messaging and selling propositions, local address and contact points, etc. This can be set up to utilize the local country domain url (e.g. co.uk., etc.) This can also be linked to the Company's principal website.	

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	c.	Regional Website – Same strategy as above except for group of countries in geographic region that share similar cultural attributes.	
	d.	Single Company Website – Alternative Strategy - route users to the Company's principal website. Use devices such as language buttons, drop down pricing menus for foreign currency pricing and sub-pages dedicated to individual foreign country markets or regional markets.	
	e.	Localize Website – Language, cultural themes, messaging/branding, local pricing, local currency, local address and contact points, local URL, local country legal disclaimers and terms of use, optimize for local search engines, links to local referral sources.	
11.	Terms of Sale For Sales to Customers in Country		
	a.	Terms - FOB, CIF, C&F, etc.	
	b.	Incoterms – Consider using Incoterms to specify terms for sale of goods (but will not apply for intangibles, software, services).	
	c.	Issues to consider – i. At what point does title and risk of loss pass to purchaser? ii. Which party is responsible for obtaining insurance? iii. Which party has responsibility for export licenses, import documentation, clearing customs, payment of duties?	
	d.	Delivery – Delivery date or range	
	e.	Inspection – Buyers inspection rights, independent inspection service	
	f.	Penalties – Penalties, liquidated damages for breach, late delivery, non-conforming products	
	g.	Coordinate With Collection Process – Coordination of terms of	

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		sale and delivery of documents with payment under letter of credit or documentary collection payment procedures.	
12.	<u>Customs, Import Duties, Trade Law Issues</u>		
	a.	Determine if Company's product will be subject to tariffs, import duties, fees, quotas or other import restrictions in foreign country; calculate as part of cost structure for doing business in the foreign country	
	b.	Consider strategies to reduce or eliminate tariffs and duties: i. Attempt to re-classify product to different harmonized tariff number ii. Redesign product to change tariff classification iii. Use of free trade agreements or compacts (eg NAFTA) iv. Assembly of product in third country to import product with lower duty rate v. Use of free trade zones and subzones vi. Duty drawback vii. Use of preferential duty programs ("GSP")	
13.	<u>Tax Planning</u>		
	a.	<u>POS Tax</u> – Tax arising at point of sale such as sales tax, VAT, etc.	
	b.	<u>Income Tax – Local Presence</u> – Does Company have a sufficient "presence" in the country to trigger payment of income tax there, filing tax returns?	
	c.	<u>Income Tax – Home Country</u> – When payments are transferred back to home country – income tax in home country?	
	d.	<u>Tax Treaties</u> – If owe tax in multiple jurisdictions, consider tax treaties to avoid double taxation.	
	e.	<u>Holding Companies</u> – Consider use of intermediate "holding	

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		companies" in jurisdictions with low tax or favorable tax treaties to avoid double taxation or otherwise create favorable tax treatment.	
	f.	Entity Planning – consider regional holding companies and other entity planning to reduce tax liability (e.g., holding companies in Asia, Latin America, MENA, etc.)	
14.	Legal Issues – Foreign Country – Assure compliance with local laws in the foreign country and structure operations to protect Company's interests there. (Note – it is assumed here that the Company will not have any offices or other facilities in the country and will not have employees in the foreign country). Even if agreements entered into with parties in the country provide for choice of law which is different from the target country, Company may still be subject to legal regulation in the target country in which it is selling its products or services.		
	a.	Legality of the Proposed Business – Is it permissible to conduct the proposed business in the foreign country under the foreign country's laws? (For example, it is illegal to sell alcoholic beverages in certain Middle Eastern countries.)	
	b.	Regulation of the Proposed Business – Major Regulations – If legal, are there any special regulations or restrictions which apply? (For example, sales of products such as medical devices or financial services such as banking and insurance are heavily regulated in most countries.) Will the Company be required to obtain any major licenses, registrations or authorizations to sell the requisite product or service (such licensing is frequently required in the telecommunications, banking, insurance, transportation, energy and government procurement industries). Will the Company be required to operate under a heavy level of regulation in the country?	
	c.	Foreign Ownership – Prohibition or Registration Requirements - Are there any prohibitions or controls on a foreign company selling products or performing services in the foreign country? (Many countries require that products or services in certain industries such as telecommunications, defense procurement, transportation, banking and broadcast media only be provided by companies headquartered in the foreign country or owned by nationals of such country.)	

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	d.	Protection of Intellectual Property – Registrations – Take all requisite steps to protect Company's intellectual property in the country. For intellectual property that can be protected through registration (e.g. trademarks, patents) file immediately in the foreign country. Register local domain names immediately. (It is recommended that this be done as far in advance as possible). For trademark registrations and domain names, consider registering marks and domain names in both the home country language as well as the local country language.	
	e.	Protection of Intellectual Property – Other Steps – For IP that cannot be protected by registration, such as trade secrets, certain business processes, software, other works or media, take steps to protect Company's exclusive ownership rights in such materials including use of confidentiality, proprietary right, license and other agreements, and use of precautions to protect trade secret protections (store in secure locations, use access security devices, mark as "confidential", etc.). For countries with a reputation of weak enforcement of intellectual property laws, develop a strategy to prevent pirating and knock-offs including contractual covenants (no reverse engineering, etc.), careful due diligence review of marketing partners, loss of marketing rights in the case of pirating, use of liquidated damages clauses and security devices (security deposits, bonds, letters of credit) for infringement. In countries with the most significant problems, consider not transferring Company's valuable intellectual property to parties located in that country.	
	f.	Marketing Laws – Verify that Company's proposed marketing methodology is in compliance with local law. For example, certain countries prohibit multi-level marketing.	
	g.	Franchise Laws – If you are entering franchise or licensing agreements with parties in the country, comply with local franchise registration and selling laws if applicable.	
	h.	Labeling Laws – Comply with local labeling laws for all product labeling.	

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	i.	Consumer Protection, Advertising Laws – Comply with local consumer protection and/or marketing laws such as disclosure, refund, recission, advertising, false claims laws.	
	j.	Inspection, Safety Laws – Comply with applicable safety and inspection laws such as food safety laws, import inspection, laws, etc.	
	k.	Agent Termination Laws – If Company hires independent agents, sales representatives or other sales intermediaries, make sure it understands local termination laws so it has adequate ability to terminate such parties if required.	
	l.	Repatriation of Funds; Currency Laws – Understand local currency laws to permit Company to convert local currency and repatriate funds from the country to its home country.	
	m.	Agreements With Agents, Distributors, Partners – Verify that agreements with local agents, distributors, consultants and other parties (i) comply with, and (ii) are enforceable under, local law. Confirm that choice of law and dispute provisions are acceptable to Company.	
	n.	Product Legal Documentation – Prepare product legal documentation (such as sales agreement, customer warranties, software licenses, terms and conditions of sale) that protect Company's interests including disclaimers and limitations on warranties, waiver of implied warranties, indemnifications, etc.) Verify that contracts are enforceable in the country and in compliance with local law. Note that, depending upon the country, the U.N. Convention on Contracts for the International Sale of Goods may automatically apply to Company's agreements unless specifically waived. Confirm that choice of law and dispute provisions are acceptable to Company.	
	o.	Other Agreements – Verify that other agreements (license agreements, franchise agreements, software agreements, etc.) (i) comply with; and (ii) are enforceable under, local law. Confirm that choice of law and dispute resolution provisions are acceptable to Company.	

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	p.	Routine Government Registrations, Permits – Obtain all requisite routine government registrations, licenses, building permits, zoning, etc.	
	q.	Entity Planning – While the Company will most likely not have a legal entity established in the foreign country, the Company should nonetheless conduct proper entity planning and structuring for sales into the country. For example, the Company will most likely conduct its international marketing through one or more subsidiaries (for limitation of liability, reduction of taxes and other purposes.) The Company will most likely want to incorporate these in jurisdictions with favorable tax rates or tax treaties. Companies often also organize regional holding companies to take advantage of favorable tax treaties and to streamline treasury management. Local entity planning should also be coordinated with tax planning, foreign currency repatriation and flow of funds.	
	r.	Litigation And Arbitration – Will Company be able to avail itself of the courts in the foreign country? If Company is a litigant in the country's courts (either as plaintiff or defendant), will it receive unfair treatment as a foreign party? If Company obtains a judgment (for damages, injunctive relief or other remedies), will it be able to enforce it in the target country? Consider choice of forum clause, including for litigation outside of foreign country. Consider arbitration as exclusive remedy for dispute, with international arbitration rules and location in neutral country. Note – under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, if Company obtains an arbitral award in one country it will be permitted to domesticate it and enforce it in any other foreign countries which are a party to the convention (this is not the case with foreign judgments).	
	s.	Customs, Import And Trade Laws – See Section 12 above.	
	t.	Product Liability And Other Areas of Litigation Risk – Are product liability or other tort liability suits prevalent in the country? If yes, take appropriate steps to limit liability under such suits (e.g., use of product warnings, drafting of disclaimers	

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		and indemnities, purchase of insurance, careful entity planning and asset protection).	
	u.	Immigration – If company personnel will travel to the country obtain proper immigration authorization.	
	v.	Privacy Laws – Comply with local privacy and data security laws – this is especially important if Company is conducting business in the retail, health care or financial services industries.	
	w.	Other Local Laws – Compliance with other local laws including environmental, safety, religious and other legal requirements.	
15.	Legal Issues – Home Country - U.S. laws – There are certain U.S. laws that regulate international business transactions - Company should comply with these:		
	a.	Export control laws	
	b.	OFAC embargoes and sanctions programs	
	c.	Prohibition on dealing with Specially Designated Nationals	
	d.	Foreign Corrupt Practices Act	
	e.	Anti-boycott laws	
	f.	Patriot Act, anti-terrorist and anti-money laundering laws	
	g.	Customs and import laws	
16.	Legal Issues – International Treaties – The following treaties or international conventions may apply to the Company's proposed business in the country:		
	a.	UN Convention on Contracts For the International Sale of Goods – provide principles of contract law for sales of goods	

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	b.	Convention on the Recognition and Enforcement of Foreign Arbitral Awards – authorizes domestication and enforcement of arbitral awards in other countries	
	c.	Incoterms (International Chamber of Commerce) – standardized terms of sale agreed to by the parties	
	d.	Bilateral Investment Treaties – establish valuable rights for dispute resolution, market access, currency repatriation, etc.	
	e.	Trade Agreements such as NAFTA and applicable bilateral trade agreements – reduce import tariffs and duties	
17.	Structure of Relationship With Marketing Intermediaries (Agent, Distributor, or Sales Rep), Local Consultants		
	a.	Selection of Intermediary or Consultant i. Experience in your industry ii. Track record and previous marketing results for other customers iii. Available resources to focus on your products iv. Reputation and due diligence review	
	b.	Key Terms and Conditions In Agency Agreement i. Obligations of agent ii. Territory iii. Exclusive or non-exclusive iv. Minimum performance standards v. Compensation vi. Non-competition vii. Protection of IP, confidentiality viii. Company has exclusive rights in localization content ix. National/international accounts/ channel conflict x. Anti-corruption under Foreign Corrupt Practices Act	
	c.	Exit Strategy – Have pre-existing strategy and established legal rights to: i. Terminate agent if things are not working out; and ii. Change business model in country	

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	d.	For Direct Dealings With Retail Customer In Country –Major issues include: i. Terms of payment; ii. Return policy; iii. Warranty and limitations and disclaimers of Company's liability; and iv. Compliance with local law requirements	
	e.	Intellectual Property – Confidentiality and Company is exclusive owner of all intellectual property	
	f.	Localization Content – Consultant's work product, including advice, strategies, translations, advertising, technical design changes, are exclusive property of Company	
18.	Insurance		
	a.	Shipping, cargo, transportation	
	b.	General liability; Product liability	
	c.	Optional: Currency convertibility and repatriation (OPIC, MIGA)	
19.	Corruption		
	a.	Assess risk of potential corruption in foreign country and exposure of Company to potential liability under Foreign Corrupt Practices Act ("FCPA") and foreign country's anti-corruption statutes	
	b.	Take steps to reduce risk of Company liability under FCPA: i. Provision in agreement with marketing intermediaries prohibiting corrupt payments ii. Due diligence review of marketing intermediaries	

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		iii. Training of Company personnel regarding FCPA compliance iv. Company international legal compliance program, including written policies and procedures v. Proper recordkeeping to maintain adequate financial records as required under FCPA accounting requirements (for public companies)	
20.	Political Risk – Assess risk of political instability in country.		
	a.	Change of government and resulting disruption of business	
	b.	Regulatory changes that are adverse to business	
	c.	If government agency is customer, loss of customer due to change in government or officials in power	
	d.	State entity enters market as competition to the company	
	e.	Adoption of government price controls	
	f.	Adverse foreign exchange controls	
	g.	Expropriation of assets or business	
	h.	Tax increases	
	Part II – Establishment of Direct Legal Presence In Foreign Country – The Company establishes a direct presence in the country such as an office, distribution facility, factory, retail store, or private equity investment, hires employees in the foreign country or acquires an operating business there.		
1.	Description of Physical Presence – Describe the direct legal presence in the country.		
	a.	Nature of presence – Marketing office, warehousing facilities,	

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		manufacturing facility, etc. Number of facilities.	
	b.	Employees - Number and level of employees.	
	c.	Real Estate Facilities – Offices, industrial plant, commercial assembly, warehouse.	
	d.	Nature of Real Estate Interests - Own or rent facilities?	
2.	Economic Conditions In Country To Support Business		
	a.	Market/Customer Affluence – Targeted customers have sufficient financial resources to purchase your product?	
	b.	Employee Base – Adequate work force in country at Company's budgeted cost level with requisite skills to fulfill Company's personnel needs?	
	c.	Raw Materials And Components – Adequate access to manufacturing inputs at targeted price levels?	
	d.	Facilities – Adequate access to real estate (office space, manufacturing facilities, etc.) to meet company's needs?	
	e.	Infrastructure - Does the country have adequate infrastructure to support the proposed business activity? i. Electricity ii. Water iii. Petroleum products or other fuels iv. Telephone v. Intranet, broadband vi. Roads/transportation/ports	
3.	Factors Described In Part I Above – Conduct review of the following factors that are described in detail in Part I above: 1. Market Suitability		

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	2. Product Localization – Technical Standards 3. Intellectual Property 4. Business Model 5. Language 6. Currency 7. Payments, Financing and Flow of Funds 8. Advertising, Branding, Marketing Themes 9. Product Packaging, Labeling 10. Website; Online Communications		
4.	<u>Local Labor Matters</u>		
	a.	Will the Company be hiring employees in the foreign country?	
	b.	Are there local labor unions, collective bargaining or similar requirements?	
	c.	Are there laws regarding minimal wages and/or mandatory compensation?	
	d.	Are there other local labor laws, such as wage and hour laws, minimum age requirements, age, gender and race discrimination?	
	e.	What are the requirements for social benefits and welfare payments, pension contributions, health insurance, mandatory profit sharing, unemployment insurance?	
	f.	Are there any restrictions on terminations, lay-offs, firing employees? Severance payments?	
	g.	Are there requirements regarding conditions of work environment, safety laws, minimum lighting, ventilation, fire precautions, etc.?	
	h.	Are there requirements regarding privacy of employee personal data?	
	i.	If employees will be brought in from outside the foreign country,	

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		obtain requisite immigration authorizations and plan in advance for time requirements for obtaining worker visas.	
	j.	Note: Employees of the U.S. Company who work in foreign offices who are not U.S. citizens are generally not subject to U.S. labor laws. However employees of the U.S. company who work in foreign offices who are U.S. citizens are subject to certain U.S. labor laws including Title VII of the Civil Rights Act (prohibiting discrimination based on race, color, religion, sex or national origin), Americans With Disabilities Act and the Age Discrimination In Employment Act.	
5.	Real Property Issues		
	a.	Will Company have local real estate requirements – identify (eg, office space, industrial/warehouse space, manufacturing facilities, etc.) Any specialized uses or requirements?	
	b.	How will company acquire rights to the space - lease, fee simple ownership other?	
	c.	Are foreign companies permitted to own/lease the real estate interest which is required, including both the land and structures?	
	d.	Are there any special restrictions, zoning requirements, use restrictions?	
	e.	Are there any special requirements regarding workplace conditions, safety, ventilation?	
	f.	Are there any special environmental restrictions on intended use?	
	g.	Will the Company be required to construct a building or make alterations, improvements?	
	h.	Is property commercially available at the price required?	
	i.	If the Company is purchasing land and/or a building or	

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		substantial construction, is adequate financing available at desirable terms?	
6.	<u>Entity Planning</u>		
	a.	Determine the most advantageous entity structure for operation in the local country.	
	b.	<u>Factors to consider:</u> i. Tax planning (including minimization of tax in local country, minimization of tax in home country and third countries, avoidance of double taxation, utilization of applicable tax treaties, etc.) ii. Limitation of liability of parent company iii. Projection of a "local face" to customers in local country iv. Efficiency in repatriating profits and other payments out of country	
	c.	Foreign Entity Selection - type of legal presence in foreign countries: (i) subsidiary; (ii) branch; and (iii) representative office.	
	d.	Commercial law goals in entity planning: (i) limit parent from legal liability in target country; (ii) project a "local company" image in target country; (iii) local entity may be required to comply with local regulatory, legal requirements.	
	e.	It is often desirable to operate through a subsidiary in each foreign country to protect parent Company from legal liability – use of a "branch" will not achieve this and will often expose other assets of parent Company. In selecting type of entity, be sure to select type that has limited liability of shareholders.	
	f.	In certain countries, local law requires that entities formed under local law have at least one shareholder that is a citizen of that country. This may be undesirable for many companies so care must be used in selecting the proper type and jurisdiction of entity.	

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	g.	Local entities can often be characterized as "flow-through" or "blocker" entities for tax purposes. Select the type of entity that presents the optimum tax results for the Company.	
7.	Tax Analysis		
	a.	Types of taxes: i. Income, profits or operating taxes? ii. VAT, sales taxes? iii. Employment taxes? iv. Import, export, harbor, transfer taxes? v. Taxes on repatriation of dividends, capital, repayment of loans, etc.? vi. Withholding requirements? vii. Federal, state/regional, local analysis	
	b.	Tax planning goals: (i) reduce tax liability in individual countries: (ii) avoid double taxation in multiple countries; and (iii) reduce Company's overall worldwide tax rate.	
	c.	Tax planning factors to consider: • Selection of entities in low-tax jurisdictions whenever possible • Maximize use of foreign tax credits • Use of tax treaties and regional holding companies to avoid double taxation • Capture of flow – through losses in start-up stages • Special strategies for IP development and licensing • Tax-efficient internal debt when parent Company is providing capital to foreign subsidiary • Optimize E&P and E&P deficit utilization • Optimize NOL utilization/valuation • Facilitate basis planning • Transfer pricing strategies • VAT tax planning • Tax efficient acquisitions and dispositions	

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8.	Capital, Payments and Flow of Funds		
	a.	Capitalization of Entity – If Company will be providing initial capital to operating entity in foreign country, structure capital injection to be tax advantageous – consider providing a portion of initial funding through debt rather than entirely through equity.	
	b.	Flow of Funds In Operations – How will Company be paid by its customers for the sale of its products or services – check, electronic transfer, debit/credit cards, cash? Establish payment system to accommodate flow of funds in local currency.	
	c.	Working Capital; Capital Expenditures – Will local entity have ongoing requirements for capital to fund operations? Identify sources of capital, including conversion of capital to local currency.	
	d.	Repatriation; Treasury Management – Determine if there will be restrictions on or charges for (i) converting local currency into Company's home currency; and (ii) repatriating payments (including dividends, repayment of loans and payment of management fees to parent).	
9.	Legal Issues – Foreign Country		
	a.	Legality of the Proposed Business - Is it legally permissible to conduct the proposed business in the foreign country under the foreign country's laws? (For example, it is illegal to sell alcoholic beverages in certain Middle Eastern countries.)	
	b.	Regulation of the Proposed Business – Major Regulations – If legal, are there any special regulations or restrictions which apply? (For example, sales of products such as medical devices or financial services such as banking or insurance are heavily regulated in most countries.) Will the Company be required to	

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		obtain any major licenses, registrations or authorizations to sell the requisite product or service (such licensing is frequently required in the telecommunications, banking, insurance, transportation, energy and government procurement industries). Will the Company be required to operate under a heavy level of regulation in the country?	
	c.	<u>Foreign Ownership – Prohibition And Registration Requirements</u> i. Is a company formed outside of the foreign country, such as a U.S. company (a "Foreign Company") permitted to own property in the country (real property, personal property, securities, intangible assets such as software or patents)? ii. Is a Foreign Company permitted to own and control a business entity formed under the laws of the foreign country? Must a resident of the host country own a percentage of the entity' stock or can the Foreign Company own 100%? Can the U.S. shareholders of the Foreign Company appoint and replace the officers and directors and have operating control of the entity? iii. Are there requirements for registration of foreign investments in the country or for foreign ownership of businesses in the country (such as in Indonesia, Thailand, etc.)? iv. Is a Foreign Company restricted from operating or owning an interest in businesses in certain industries in the foreign country? (Many countries require that products or services in certain industries such as telecommunications, defense procurement, transportation, banking, broadcast media, only be provided by companies headquartered in the foreign country or owned by nationals of such foreign country.)	
	d.	<u>Protection of Intellectual Property – Registrations</u> – Take all requisite steps to protect Company's intellectual property in the foreign country. For intellectual property that can be protected through registration (e.g. trademarks, patents) file immediately in the foreign country. Register local domain names immediately. (It is recommended that this be done as far in advance as possible). For trademark registrations and domain names, consider registering marks and domain names in both the home country language as well as the local country language.	
	e.	<u>Protection of Intellectual Property – Other Steps</u> – For IP that cannot be protected by registration, such as trade secrets, certain	

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		business processes, software, other works or media, take steps to protect Company's exclusive ownership rights in such materials including use of confidentiality, proprietary right, license and other agreements, and use of precautions to protect trade secrets (store in secure locations, use access security devices, mark as "confidential", etc.). For countries with a reputation of weak enforcement of intellectual property laws, develop a strategy to prevent pirating and knock-offs including contractual covenants (no reverse engineering, etc.), careful due diligence review of marketing partners, loss of marketing rights in the case of pirating, use of liquidated damages clauses and security devises (security deposits, bonds, letters of credit) for infringement. In countries with the most significant problems, consider not transferring Company's valuable intellectual property to parties located in that country.	
	f.	Corporate Laws – The Company will most likely wish to operate the business in the country through one or more subsidiaries and/or branch offices – See "Entity Planning" above to identify the most advantageous entity and corporate structure. Do the corporate laws of the country provide the Company with adequate legal rights to properly protect its interests, such as rights to manage the business, replace officers and directors, change business models, acquire or dispose of assets, repatriate funds, recapitalize the business? Is there limitation of liability for shareholders and adequate indemnification for officers and directors?	
	g.	Repatriation of Funds; Currency Laws – Understand local currency laws to permit Company to convert local currency and repatriate funds from the country to Company's home country	
	h.	Employment Laws i. What requirements apply to hiring and terminating employees in the foreign country? Are employers restricted from terminating employees at will? ii. Are employers required to pay severance or termination payments for terminating employees? iii. Understand requirements under local welfare, pension and withholding laws.	

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		iv. Understand requirements under labor unions and labor negotiations.	
	i.	Benefits, Pension and Welfare Laws – Comply with all applicable employee benefit, pension and welfare laws, including withholding, trust administration and related requirements	
	j.	Real Estate Laws – If the Company will own or lease real estate comply with local real estate laws, including applicable zoning, land use, landlord-tenant, rent control and related laws.	
	k.	Environmental Laws – Identify and comply with local environmental laws including air and water pollution, carbon emission, permitting, waste disposal, etc.	
	l.	Privacy Laws – Identify and comply with local privacy laws – particularly where the Company will be collecting personally identifiable information from consumers; this is especially important in the retail, health care and financial services industries	
	m.	Securities Laws – If the Company will be issuing securities in the foreign country or to residents of the country, identify and comply with local securities laws.	
	n.	Antitrust Laws – Identify and comply with local antitrust laws, especially as deal with joint marketing activities, entering agreements with competitors regarding prices, cartels and where the Company has dominant market share (monopolization laws).	
	o.	Marketing Laws – Verify that Company's proposed marketing methodology is in compliance with local law. For example, certain countries prohibit multi-level marketing programs.	
	p.	Franchise Laws – If you are entering franchise or licensing agreements with parties in the country, comply with local franchise registration and selling laws if applicable.	
	q.	Labeling Laws –Comply with local labeling laws for all product labeling.	

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	r.	Consumer Protection, Advertising Laws – Comply with local consumer protection and/or marketing laws such as disclosure, refund, recission, advertising, false claims laws.	
	s.	Inspection, Safety Laws – Comply with applicable safety and inspection laws such as food safety laws, import inspection, laws, etc.	
	t.	Agent Termination Laws – If Company hires independent agents, sales representatives or other sales intermediaries, make sure it understands local termination laws so it has adequate ability to terminate such parties if required.	
	u.	Product Legal Documentation – Prepare product legal documentation (such as sales agreement, customer warranties, software licenses, terms and conditions of sale) that protect Company's interests including disclaimers and limitations on warranties, waiver of implied warranties, indemnifications, etc.) Verify that contracts are enforceable in the country and in compliance with local law. Note that, depending upon the country, the U.N. Convention on Contracts for the International Sale of Goods may automatically apply to Company's agreements unless specifically waived. Confirm that choice of law and dispute provisions are acceptable to Company.	
	v.	Other Agreements – Verify that other agreements (license agreements, franchise agreements, software agreements, etc.) (i) comply with; and (ii) are enforceable under, local law. Confirm that choice of law and dispute resolution provisions are acceptable to Company.	
	w.	Routine Government Registrations, Licenses – obtain all requisite routine national and local government registrations, permits, licenses, building permits, approvals, etc.	
	x.	Customs, Import And Trade Laws – See Section 11 below.	
	y.	Agreements With Agents, Distributors, Joint Venture Partners i. Are there any special legal requirements which apply in the	

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		host country to entering agreements with (i) agents, distributors, sales representatives; or (ii) joint venture or similar arrangements? Would any of such requirements limit the ability of the Company to have operating control of a joint venture? ii. Is the Company permitted to terminate agency and joint venture relationships? Would the Company be required to pay compensation to the terminated party for such termination? iii. Is the Company permitted to buy out/acquire their agents and/or joint venture partners?	
	z.	Litigation and Arbitration - Will the Company be able to avail itself of the courts in the foreign country to enforce rights, collect damages, obtain injunctions? If it is a litigant in the country's courts (either as plaintiff or defendant), will it receive unfair treatment as a foreign party? If it obtains a judgment (for damages, injunctive relief or other remedy), will you be able to enforce it in the target country? Is the country a party to the Convention On the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")? Consider choice of forum clause, including for litigation outside of foreign country. Consider arbitration as exclusive remedy for dispute, with international arbitration rules and location in neutral country. (Note – under N.Y. Convention if Company obtains an arbitral award in one country it will be permitted to domesticate and enforce it in any other foreign country which is a party to the convention (this is not the case with foreign judgments)).	
	aa.	Product Liability And Other Areas of Litigation Risk – Are product liability or other consumer suits prevalent in the country. If yes, take appropriate steps to limit liability under such suits (e.g., use of product warnings, drafting of disclaimers and indemnities, purchase of insurance, careful entity planning and asset protection).	
	bb.	Immigration – If Company personnel will travel to the country obtain proper immigration authorization.	
	cc.	Other Local Laws – Compliance with other local laws as required.	

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	dd.	Bilateral Investment Treaties i. Is the country a party to a bilateral investment treaty with the United States? ii. Does this provide benefits to the U.S. party in the areas of: (i) favorable treatment under local laws; (ii) free repatriation of funds; (iii) right to compensation in the event of government seizure of company property; (iv) enforcement of judgments and arbitral laws?	
	ee.	Contract Laws i. Are contracts enforceable in the host country? ii. Are there any special formalities for entering enforceable agreements - (i) in writing? (ii) executed before a notary? (iii) registration requirements? iii. Is the country a party to the UN Convention on the International Sale of Goods ("UNCISG") and will the provision of the UNCISG automatically apply to the contracts involved?	
	ff.	International Law – The following international treaties may apply to the Company's operations in the county: i. UN Convention on Contracts For the International Sale of Goods – provide principles of contract law for sales of goods ii. Convention on the Recognition and Enforcement of Foreign Arbitral Awards – authorizes domestication and enforcement of arbitral awards in other countries iii. Incoterms (International Chamber of Commerce) – standardized terms of sale agreed to by the parties iv. Bilateral Investment Treaties – establish valuable rights for dispute resolution, market access, currency repatriation, etc. v. Trade Agreements such as NAFTA and applicable bilateral trade agreements – reduce import tariffs and duties	
10.	Legal Issues – Home Country (US) - U.S. laws – There are certain U.S. laws that regulate international business transactions - Company should comply with these:		

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	a.	Export control laws	
	b.	OFAC embargoes and sanctions programs	
	c.	Prohibition on dealing with Specially Designated Nationals	
	d.	Foreign Corrupt Practices Act	
	e.	Anti-boycott laws	
	f.	Patriot Act, anti-terrorist and anti-money laundering laws	
	g.	Customs and import laws	
	h.	International regulatory compliance program	
11.	Customs, Tariff And Trade Laws		
	a.	Determine if Company's products will be subject to tariffs, import duties or other import restrictions in targeted foreign markets. Factor these costs into business plan for these markets. Look for: • Tariffs • Import duties, fees • Import quotas or embargoes • Antidumping duties • Countervailing duties Other import-based charges or restrictions	
	b.	Consider strategies to reduce or eliminate import duties: • Attempt to reclassify product to different harmonized tariff number with lower duty rate • Re-design product to obtain different harmonized tariff number with lower duty rate • Consider assembly of product in third country to import product with lower duty rate • Use of free trade agreements or regional trade compacts	

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		(NAFTA, etc.) • Use of free trade zones and subzones • Duty drawback • Use of preferential duty programs such as Generalized System of Preferences ("GSP")	
	c.	Determine if product will be subject to other "unfair" import restrictions or protectionist measures (local discriminatory safety laws, inspection laws, etc.)	
	d.	Consider other import-based laws that will impact on Company's product such as food safety, consumer protection, labeling laws, etc.	
12.	Structure For Local Partner, Joint Venture or Other Shareholders – For joint venture and/or shareholder agreements, attention should be paid to management rights, minority protection provisions, termination rights, exclusivity, non-competition and confidentiality/ownership of intellectual property.		
13.	Immigration		
	a.	Obtain visas and other immigration approvals for U.S. and other foreign workers and management present in foreign country.	
	b.	Obtain visas for foreign nationals to visit and or work in Company's U.S. office.	
14.	Accounting, Financial Statements		
	a.	The Company will be required to prepare financial statements in accordance with accounting standards in the country – this will most likely be International Financial Reporting Standards (IFRS) rather than U.S. G.A.A.P.	

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	b.	In many countries local companies are required to file their financial statements with local corporate law regulators on an annual basis.	
15.	Employee Benefits		
	a.	Determine and comply with requirements for local employee benefits, retirement and social welfare withholding and payments.	
	b.	Note: Employees of the U.S. Company who work in foreign offices who are not U.S. citizens are generally not subject to U.S. labor laws. However employees of the U.S. company who work in foreign offices who are U.S. citizens are subject to certain U.S. labor laws including Title VII of the Civil Rights Act (prohibiting discrimination based on race, color, religion, sex or national origin), Americans With Disabilities Act and the Age Discrimination In Employment Act.	
16.	Insurance		
	a.	Transportation insurance	
	b.	General liability, product liability insurance	
	c.	Officers and directors liability insurance	
	d.	Errors and omissions insurance	
	e.	Currency conversion and repatriation insurance	
	f.	Political risk insurance	
17.	Political Risk		

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	a.	Does the host country have a stable government?	
	b.	Is there a history of restricting currency transfers by the host country government?	
	c.	Is there a history of expropriation or nationalization of assets, property?	
	d.	Is there a stable, transparent legal system in the host country?	
	e.	Is there a reputation for corruption in the host country?	
	f.	Consider OPIC political risk insurance or private insurance.	

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AN OVERVIEW OF THE U.S. EXPORT CONTROL LAWS

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INTRODUCTION

There is a growing trend for U.S. companies to be involved in some form of international business. Companies which are engaged in exports, overseas licensing, foreign investment or other types of international operations are subject to a complex array of federal laws that regulate international business transactions. Due to the severe civil and often criminal liabilities associated with these laws, they create a significant burden and legal risk for the company. All too often, U.S. firms are unaware of the presence of these laws until it is too late.

The purpose of this Memorandum is to help companies understand the risks and legal obligations that arise under the U.S. export control laws. It will provide an overview of the substantive laws involved in this area and practical steps to take to reduce liability in conducting operations under these laws. Since even the smallest of companies are now often involved in some form of international business, these issues will most likely arise in for a significant number of companies. Such issues will be particularly important in industries which are subject to a high level of regulation under the export control laws such as the technology, computer, software, telecommunications, electronics, energy, defense, chemical and government contracts industries.

There are approximately twenty-nine federal statutes and regulations which address exports[2]. (Such laws are hereinafter collectively referred to as the "Export Control Laws.") The purpose of these laws is to control exports and re-exports for purposes of national security, foreign policy, short supply, reduction of nuclear proliferation, limitation of chemical or biological warfare, antiterrorism, crime control, enforcement of economic embargoes, compliance with United Nations resolutions and other purposes. These laws apply to both the export of tangible products as well as the export of technology, technical data, software, trade secrets and similar types of information. These programs are administered on an uncoordinated basis by at least 16 federal agencies. Sanctions for violations include civil and criminal penalties - criminal sanctions are often imposed on both corporate defendants as well as officers, directors and employees of the corporation in their personal capacities.

The principal federal authorities for export controls are: (i) the Export Administration Regulations; (ii) the Arms Export Control Act; and (iii) various embargoes administered under the U.S. Sanctions Programs. In addition, there are numerous other federal statutes which address the export of specific products or are in the context of specialized industries such as transportation, vessels and watercraft, chemicals and hazardous materials, electric power,

[2] A listing of these statutes and regulations is set forth below as Appendix A.

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narcotics and dangerous drugs, agriculture and endangered fish and wildlife. A listing of these statutes and regulations is set forth below as Appendix A.

A. The Export Administration Regulations (15 CFR §§ 730 et seq.)

1. Introduction. The principal program for the federal regulation of exports is under the Export Administration Regulations ("EARs"). See 15 C.F.R. §§ 730 to 744. The EARs control the export and re-export of U.S.-origin products and technologies from the United States. The Regulations were initially adopted pursuant to the Export Administration Act and are administered by the U.S. Department of Commerce ("Commerce"). The EARs prohibit the export of certain goods, software and technologies identified therein to specific foreign countries or require exporters to obtain export licenses for the export of such items.

2. Commerce Control List. The EARs incorporate a list of approximately 3,000 items (the "Commerce Control List" or "CCL") which are subject to export restrictions. Items on the CCL are prohibited from export to certain destinations unless an export license is issued by Commerce. Items on the CCL include products, software required to operate such products and technology related to such products. Examples of products which are subject to export licensing include electronic navigation control systems, computer aided design devices (CAD-CAM), high performance computers, network components (routers, hubs, servers), computerized telecommunications switches and high performance composite materials.

3. Dual Use Items. Items which are "dual use," i.e., which can be used in both military and civilian applications, will often be restricted from export as a result of the potential for their use abroad in a military context. Under this principle, items which are often widely in use in civilian commerce within the U.S. are restricted from export due to their potential military use abroad.

4. End-Use Based Controls. In additional to CCL-based export controls, the EARs prohibit the export of any product, software or technology which will be used in any of the prohibited end-uses set forth in 15 CFR § 744 (the "Prohibited End-Uses"). The EARs also prohibit the performance of any services which are in furtherance of the Prohibited End-Uses. The Prohibited End-Uses include activities related to the following:

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(a) Encryption Devices;

(b) Nuclear Explosive Activities;

(c) Missiles;

(d) Chemical or Biological Weapons;

(e) Foreign Maritime Nuclear Propulsion Projects;

(f) Certain Exports to Foreign Vessels;

(g) Products or Technology to be used in the manufacture or refurbishment of Libyan aircraft.

This section also prohibits U.S. parties from entering into export transactions with parties on the Entities List set forth under Section 744 (the "Prohibited End-Users"). The Prohibited End-Users include:

(a) Certain Russian entities listed at 15 C.F.R. Part 744, Supplement 4;

(b) Certain Indian and Pakistani governmental, military, parastatal and private entities listed at 15 C.F.R. Part 744, Supplement 4;

(c) Certain persons and entities identified at 31 C.F.R. part 595, Appendices A-C.

This category of controls applies not just to items which are specifically identified (such as items listed in the CCL), but to effectively <u>all items</u> which the exporter knew or reasonably should have known would be used in connection with the Prohibited End-Use. This restriction is considerably broader in scope than restrictions for products which are listed on the CCL. Exports of the above items are either flatly prohibited or subject to the licensing or other restrictions set forth at 15 C.F.R. Part 744.

5. <u>Re-exports.</u> In addition to controlling exports from the United States, the EARs control the "re-export"of products manufactured in foreign

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countries which incorporate U.S. components or which are based upon U.S.-origin technology.

6. Software and Technology. The EARs apply to the export of products as well as software, technology and other types of information.

   (a) Exports of software and technology are "deemed" to occur by: (i) transporting information out of the U.S. by mail, courier or similar means; (ii) traveling abroad and releasing information in a foreign location through oral or written means or through personal demonstration; or (iii) releasing information to foreign nationals in the United States.

   (b) Thus electronic sales/licensing of software, electronic posting of technical manuals, electronic transmission of education materials, and even e-mails, fax and telephone calls constitute exports if foreign nationals can have access to such materials.

   (c) Posting such items in chatrooms, "intranets" or the Internet or storing items in computer networks constitute an export if a foreign national can have access to such items.

7. Regulatory Requirements For All Exports. In addition, U.S. companies are required to follow certain procedures for all export transactions, even if the transaction does not require an export license:

   (a) Recordkeeping requirements – U.S. parties are required to maintain records of exports for five years including documents set forth at 15 C.F.R. § 762.

   (b) Denied Persons List – U.S. persons are prohibited from exporting to parties which have been convicted of export violations (See 15 C.F.R. § 764.); U.S. exporters must review the Denied Persons List prior to all exports.

   (c) Filing Shippers Export Declarations and Other Export Control Documents – parties are required to file certain export clearance documents upon export such as Shipper's Export Declarations. See 15 C.F.R. § 758.

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8. Penalties. Violations of the EARs can result in severe sanctions including up to 20 years imprisonment and civil penalties of $250,000 per violation or twice the value of the transaction that is the basis of the violation.

9. Enforcement Priorities. The highest priority of enforcement is in the areas of computers and technology products, telecommunications, aerospace and navigation, high performance materials, chemicals, biological products and nuclear materials.

B. U.S. Sanctions Programs (31 C.F.R. Chapter V)

1. Introduction. The United States maintains economic embargoes against a number of foreign countries under the International Emergency Economic Powers Act ("IEEPA"),[3] the Trading With the Enemy Act ("TWEA"),[4] the International Security and Development Cooperation Act of 1985 and related statutes,[5] the United Nations Participation Act,[6] the Iraqi Sanctions Act,[7] the Cuban Democracy Act,[8] the Cuban Liberty and Democratic Solidarity Act of 1996,[9] the Antiterrorism and Effective Death Penalty Act of 1996,[10] as well as a number of Executive Orders. The purpose of these embargoes is to further the foreign policy interests of the United States and to fulfill our obligations under various United Nations Security Council resolutions. These prohibit, with certain exceptions, a broad array of commercial dealings between U.S. persons and parties in the embargoed countries. These embargoes, referred to herein as the "U.S. Sanctions Programs," are administered primarily by the Office of Foreign Assets Control ("OFAC") within the Department of the Treasury ("Treasury"), in conjunction with Commerce and State.

2. Countries Covered. A few years ago sanctions were applied to only a few "black listed" countries such as Iran, North Korea and Cuba. Within

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3 50 U.S.C. A. §§ 1701-1706 (1998).
4 50 U.S.C. A. §§ 1-44 (1998).
5 22 U.S.C. A. § 234999-9 (1998).
6 22 U.S.C. A. § 287c (1998).
7 Pub. L. No. 101-513, 104 Stat. 2047-55.
8 22 U.S.C. A. § 6001-6010 (1998).
9 Pub. L. No. 104-114.
10 Pub. L. No. 104-132.

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recent years, however, sanctions have been expanded by OFAC to cover a larger number of countries and sanctions programs.

3. Comprehensive Sanctions. The exact terms of the U.S. Sanctions Programs vary for each of the OFAC programs. Generally speaking, there are two types of sanctions programs currently in effect: comprehensive programs and limited programs. Under the comprehensive U.S. Sanctions Programs, U.S. persons are prohibited from engaging in a broad array of commercial dealings (with certain exceptions) with persons in the embargoed countries often including exporting or importing products, performing services, making investments, payments, or other financial transactions with persons in a sanctioned country, or engaging in any other commercial activity with persons in that country. In some cases, U.S. persons are prohibited from even providing advice on methods to circumvent the embargo. Examples of comprehensive sanctions programs are the major embargo programs related to Iran, Cuba, North Korea and Sudan.

4. Limited Sanctions. Under limited sanctions programs, U.S. persons are prohibited from engaging in specifically identified types of commercial activities designated under the sanctions program for particular countries, but are free to conduct other types of commercial activities with nationals of such countries.

5. Extraterritorial Application. In many cases, the U.S. Sanctions Programs apply to "U.S. Persons" and foreign subsidiaries and other affiliates of such persons if they are "owned or controlled" by a U.S. person. In determining whether a foreign affiliate of a U.S. company constitutes an "owned or controlled" foreign firm for purposes of the U.S. Sanctions, OFAC may look at such factors as stock ownership, voting control arrangements or parent company participation on the board of directors. In general, practical working control is considered to be "control" for purposes of the Sanctions Programs. Many of the U.S. embargoes are applied on an "extraterritorial" basis. This means that the U.S. Government will attempt to regulate the transfer of products or technologies from one foreign location to another if they are under the control of a foreign corporation if such corporation is under the direct or indirect control of a U.S. party. This is even if such product or technology did not originate in the United States, or was not developed based upon U.S.-origin goods or technology.

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6. Entity Based Sanctions. OFAC also maintains a system of sanctions called "List Based Sanctions" which create a significant additional compliance obligation for U.S. companies. Under this system, in addition to imposing sanctions on a particular country (e.g., Iran), OFAC has developed lists of persons and business entities (such as corporations and partnerships) which are connected with embargoed countries or otherwise targeted by the US Government. Under OFAC regulations U.S. persons are prohibited from conducting business with parties identified on these entities lists anywhere in the world. Thus if a company based in London is partially owned by Iranian nationals and the company is placed on an "entity-based" sanctions list, U.S. persons are prohibited from conducting business with this entity anywhere in the world. OFAC has developed a number of such lists (hereinafter referred to collectively as the "List of Specially Designated Nationals" or "SDN Lists") which include approximately 3,000 parties. See 31 C.F.R. § Chapter V. U.S. US persons are strictly prohibited from entering transactions with parties set forth on the SDN Lists. Many companies have adopted compliance programs which conduct reviews of their business transactions on either a computerized or a manual basis that verify that they are not conducting transactions with parties listed on the SDN Lists.

7. Penalties. Penalties for violations of provisions of the U.S. Sanctions Programs include imprisonment for up to 20 years and civil penalties of up to $250,000 per violation or twice the value of the transaction that is the basis of the violation.

C. The Arms Export Control Act (International Traffic In Arms Regulations)

1. Introduction. A third major export control program is pursuant to the Arms Export Control Act[11] and the International Traffic in Arms Regulations ("ITAR's")[12] promulgated thereunder. This program regulates the export of goods, services, technology and technical data which have the potential for use in a military context. The ITAR's are administered by the Directorate of Defense Trade Controls ("DTC"), an agency within the U.S. Department of State ("State").

[11] 22 U.S.C.A. §§ 2778-2799.
[12] 22 C.F.R. §§ 120-130.

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2. Regulation of Defense Articles. An item or service is regulated under the ITAR's if it is considered a "Defense Article."[13] Generally, an item or service is a Defense Article if it was originally developed for a military use or has a significant military application. It is important to note that even if a product has widespread civilian uses, it may still be considered a Defense Article if it was originally developed for military use or can also be used in military applications. If an item is controlled as a Defense Article or a related technology or service, it is restricted from export unless an export license is issued by the State Department. Exporters of Defense Articles are also subject to additional restrictions such as obtaining delivery verification documentation, maintaining records of exports and filing reports with the State Department.

3. U.S. Munitions List. The ITAR's contain a detailed list of items which are deemed to be Defense Articles. This is referred to as the U.S. Munitions List.[14] The Munitions List sets forth 19 categories of items and approximately 2000 specific items subject to export controls. Some of these categories are specific, such as Category VI - Vessels of War and Special Naval Equipment. However, some of the categories are very open-ended such as Category XI - Military Electronics (which covers areas of electronics and computer equipment), and Category XII - Auxiliary Equipment (which covers encryption/cryptography equipment). The broadest category is Category XXI - Miscellaneous Articles, which includes any article not "specifically enumerated in the other categories of the U.S. Munitions List which has substantial military applicability and which has been specifically designed or modified for military purposes."[15] The decision on whether any article may be included in this category is made by the Director of the Office of Defense Trade Controls. These open-ended categories reserve great discretion to the State Department to add other items to the Munitions List as it sees fit on an ongoing basis.

4. Software and Technology. The Munitions List covers both "hard goods" as well as technical data "directly related to Defense Articles. "[16] Technical data include software, designs, know-how, drawings, training

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[13] The term "defense article" is defined in 22 C.F.R. § 120.3.
[14] The Munitions List is set out at 22 C.F.R. § 121.
[15] Id.
[16] 22 C.F.R. § 121.1 Category VI (d).

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information and other types of information which are related to the specified Defense Articles.

5. Defense Services. In addition, the ITAR applies to "Defense Services," i.e. the furnishing of assistance, including training, to foreign persons related to the design, development, maintenance or use of Defense Articles. Parties are prohibited from performing Defense Services for foreign parties to the same extent that they are prohibited from selling the Defense Articles which relate to such services.

6. Overlap With Export Administration Regulations. The EARs and the ITAR's are complementary and often-times overlapping regulations, and should be read in conjunction with each other. In some cases an export license may not be required under the EARs, but because the product will be used for a military end-use or has a predominant military application, an export license is required under the ITAR's. As with the EARs, the term "export" is broadly construed to include access of data in the U.S. by foreign individuals, plant visits and technical presentations.[17]

7. Registration As A Munitions Manufacturer. In addition to the requirements described above, the ITAR requires manufacturers of Defense Articles to register as munitions manufacturers ("Munitions Manufacturers") regardless of whether or not they contemplate an export. (See 22 C.F.R. Part 122.) Other requirements such as disclosure of certain political contributions and commissions paid to secure the sale of Defense Articles apply to registered Munitions Manufacturers.

8. Registration As Munitions Broker. Parties that serve as sales agents in selling Defense Articles or related technologies or services are required to register with DTC as munitions brokers.

9. License Certifications. Applicants for export licenses issued by DTC are required to certify that none of the parties to the transactions, including third party agents, have violated various U.S. export statutes and other national security priorities. This restriction also requires that the license applicant certify that none of the parties to the transaction have violated relevant export control statutes.

[17] 22 C.F.R. § 120. 17.

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10. Sanctions. Sanctions for violations under the ITARs include imprisonment for up to 10 years and fines of up to $50,000 per transaction.

D. Other Export Statutes

1. Additional Export Regulatory Requirements. In addition to the three export regulatory programs described above, there are additional U.S. export statutes which regulate specific individual classes of products. These specialized classes of products include:

   (a) Pharmaceuticals

   (b) Nuclear products

   (c) Ships and maritime products

   (d) Toxic substances

   (e) Chemicals

   (f) Electric Power

   (g) Endangered species

   A listing of U.S. export statutes and regulations is set forth below as Exhibit A.

E. U.S. Antiboycott Laws

1. Summary of the Law - The restrictive trade practices provisions of the Export Administration Regulations ("EAR Antiboycott Law") prohibit United States persons from honoring the boycott requests of foreign boycotting nations. Included in the prohibited activities are the refusal (or agreement to refuse) to do business with a boycotted nation, its business organizations and its nationals or residents ("boycott targets"), the taking of discriminatory actions against the boycott targets, and the furnishing of information to boycotting nations pertaining to certain business relationships, race, religion, sex or national origin related to boycott

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targets. In addition to setting forth these prohibitions, persons who violate the EAR Antiboycott Law are subject to the sanctions set forth in the Export Administration Regulations.

2. Prohibited Activities - The EAR Antiboycott Law prohibits United States persons from engaging in the following activities:

- Refusing to do business with or in a boycotted country, with any business concern organized under the laws of a boycotted country, with any national or resident of a boycotted country, or with any other person, pursuant to an agreement with, a requirement of, or a request from or on behalf of a boycotting country;

- Refusing to employ, or otherwise discriminating against, any United States person on the basis of race, religion, sex or national origin of that person or of any owner, officer, director, or employee of such person when undertaken with the intent to comply with, further or support an unsanctioned foreign boycott;

- Furnishing information with respect to the race, religion, sex or national origin of any United States person or of any employee of such person when undertaken with the intent to comply with, further or support an unsanctioned foreign boycott;

- Furnishing information about whether any person has, has had, or proposes to have any business relationship with or in a boycotted country, with any business concern organized under the laws of a boycotted country, with any national or resident of a boycotted country, or with any other person which is known or believed to be restricted from having any business relationship with or in a boycotting country when undertaken with the intent to comply with, further or support an unsanctioned foreign boycott;

- Furnishing information about whether any person is a member of, to, or is otherwise associated with or involved in the activities of any charitable or fraternal organization which supports a boycotted country when undertaken with the intent to comply with, further or support an unsanctioned foreign boycott;

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- Paying, honoring, confirming or otherwise implementing a letter of credit which contains any condition or requirement compliance with which is prohibited by the EAR antiboycott law.

3. Exceptions to Prohibitions - There are a number of major exceptions which exist under which U.S. persons may legally comply with foreign boycott requests or restrictions. These are summarized below. The applicability of these exceptions are quite complex, however and parties should consult with legal counsel and the provisions of the EAR's to confirm the applicability of any of the following exceptions to the specific transaction in question.

- *Import Requirements of a Boycotting Country*. A party which is providing goods or services to a boycotting country is permitted to comply with that country's requirements which prohibit the import of goods or services from a boycotted country. That party may not, however, refuse "on an across the board basis" to do business with the boycotted country or a national or resident thereof. Under this exception, a United States person is limited in the types of boycott related information which he can supply. In addition, a party which is shipping goods to a boycotting country is permitted to comply with that country's requirements which prohibits shipments on a carrier of the boycotted country or by a route other than that prescribed by the boycotting country or the recipient of the shipment.

- *Shipment of Goods To A Foreign Country*. A U.S. person, in shipping goods to a boycotting country, may under certain conditions comply or agree to comply with requirements of that country which prohibit the shipment of goods (i) on a carrier of the boycotted country; or (ii) by a route other than that prescribed by the boycotting country or the recipient of the shipment.

- *Import and Shipping Document Requirements*. A party which is shipping goods to a boycotting country may comply with that country's import and shipping document requirements in providing the following information: the country of origin of the goods, the name of the carrier, the route of shipment, the name of the supplier and the name of the provider of other services. Information conveyed pursuant to this exception, however, must be stated in

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"positive, non-blacklisting, non-exclusionary" terms; negative terms such as "subject cargo did not originate in Israel" are strictly prohibited. Information with respect to the names of carriers or routes of shipment, however, may be stated in negative terms in conjunction with shipments to a boycotting country in order to comply with precautionary requirements protecting against war risks or confiscation.

- *Compliance with Unilateral Selection*. Another exception provides that a party is permitted to comply in the normal course of business with a unilateral and specific selection by a boycotting country or a national or resident thereof of carriers, insurers, suppliers of services to be performed within the country or specific goods which in the normal course of business are identifiable as to their origin at the time of entry into the boycotting country. Under this exception, the selection must be specific and unilateral. The terms "specific" and "unilateral" are defined precisely in the EAR's. This exception does not apply, however, to any unilateral selection if the United States person knows or has reason to know that the purpose of the selection is to effect discrimination against any United States person on the basis of race, religion, sex, or national origin.

- *Shipment and transshipment of Exports pursuant to a Boycotting Country's Requirements*. A party is permitted to comply with the export requirements of a boycotting country pertaining to shipments or transshipments of exports to a boycotted country, any business concern of a boycotted country or any national or resident of the boycotted country. A U.S. person may not, however, refuse on an across-the-board basis to do business with a boycotted country or a national or resident of a boycotted country.

- *Immigration, Passport, Visa or Employment Requirements of Boycotting Country*. A U.S. individual is permitted to comply with the immigration, passport, visa or employment requirements of a boycotting country provided that such individual furnishes information only about himself or a member of his family. A U.S. company is not permitted to furnish information about its employees or executives, but may allow these individuals to respond on their own to such requests. Finally, no employees may

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be selected for work on a project in a boycotting country in advance in a manner designed to comply with a boycott.

- *Compliance with Local Law* - Under certain circumstances United States persons in foreign countries are allowed to engage in activities which may otherwise be prohibited by the EAR Antiboycott Law if such actions are required under certain local laws of the host country.

- *Activities Exclusively Within a Foreign Country*. A U.S. person who is a bona fide resident of a foreign country, including a boycotting country, may under certain conditions comply or agree to comply with the laws of that country with respect to his activities exclusively within that country.

- *Compliance With Local Import Law* - A U.S. person who is a bona fide resident of a foreign country, including a boycotting country, may, in importing goods, materials or components into that country, in certain instances comply or agree to comply with the import laws of that country.

4. Reporting Requirements - The law requires that any United States person which receives a request for the furnishing of information, the entering into or implementing of agreements or the taking of any other action prohibited under the EAR Antiboycott Law shall be required to report such a request to the Department of Commerce. Parties are required to make these reports on specific forms published by the Department. Forms are to be forwarded to the Department of Commerce in accordance with the instructions set forth in the EAR's.

   A request received by a United States person is reportable if that person knows "or has reason to know" that the purpose of the request is to enforce, implement, or otherwise further, support or secure compliance with an unsanctioned foreign boycott or restrictive trade practice. Such a request is required to be reported regardless of whether the action requested is prohibited or permissible under the EAR Antiboycott provisions. Certain narrow exceptions to this reporting requirement are set forth in the law. This reporting requirement applies to all United States persons, but only pertains to transactions or activities which are in the interstate or foreign commerce of the United States.

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5. Evasion - The Export Administration Regulations prohibit United States persons from engaging in any transaction or taking any action with the intent to evade the antiboycott laws. In addition, the use of "dummy corporations" or other "devices" to mask prohibited activity will also be regarded as evasion. The evasion provision states, however, that alteration of "a person's structure or method of doing business" will not constitute evasion as long as the alteration is based on "legitimate business considerations" and "is not undertaken solely to avoid the application of the (antiboycott) prohibitions". Finally, it is provided that the facts and circumstances of questionable transactions will be carefully scrutinized to determine "whether appearances conform to reality."

6. Antiboycott Tax Laws. The U.S. Internal Revenue Code also imposes antiboycott prohibitions. ("IRC Antiboycott Law"). These are separate from but similar in nature to the EAR antiboycott provisions. Failure to comply with the IRC antiboycott provisions could result in tax-related penalties as well as other sanctions. The IRC Antiboycott Law also imposes certain reporting requirements which are separate from the EAR Antiboycott Law. Questions regarding these provisions should be addressed to the Company's tax advisors or the ECA.

7. Sanctions - Sanctions for violations of the EAR Antiboycott Law include the criminal and civil penalties applicable under the EAR's described in Section II. A. above.

F. Export Compliance Programs

1. Compliance Systems. Executive and judicial branch authorities have held that adoption of formalized company-wide compliance programs are strongly encouraged to assist in compliance with the export control laws. Such programs help assure that the company's management and employees are aware of applicable laws and are organized to take steps to comply with them. Equally as important, such programs can serve as evidence of the good-faith attempts of management to educate employees and comply with the law. Such evidence can be valuable in defending against claims in enforcement actions that a company did not use reasonable care in complying with the law, or that actions did not reach

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the level of intentional wrongdoing required to be proven for certain criminal convictions.

2. Substantive Laws Covered – A company's international compliance program is usually centered around the particular international business laws which are most prevalent in its industry. For most companies this would be the Export Administration Regulations and the Foreign Corrupt Practices Act. In the defense industry this would also include the Arms Export Control Act, the International Trafficking in Arms Regulations and various government contracting statutes. In the chemical industry this would include the import/export provisions under the Toxic Substances Control Act, and in the pharmaceutical industry the import/export provisions of the Food, Drug and Cosmetic Act. Most companies also require that their operations in foreign countries be in compliance with the local laws of the foreign jurisdiction. Our recommendation in almost all cases is that in developing an international compliance program, a company address all relevant substantive laws that impact on its international business activities. This will assure a comprehensive level of control and reinforce the organization's company-wide culture toward legal compliance. A checklist of substantive laws to be included in an international business compliance program is as follows:

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<u>Substantive Laws To Be Covered In
International Business Compliance Program</u>

<u>General International Business Laws</u>

— Export Administration Regulations (including export licensing and antiboycott regulations).

— Foreign Corrupt Practices Act.

— Various U.S. sanctions programs administered by the Office of Foreign Assets Control, pursuant to separate Congressional action and United Nations resolution. A list of the 33 full or partial U.S. sanctions provisions is attached hereto as Exhibit A.

— Arms Export Control Act and the ITAR.

— Antiboycott laws set forth in the Internal Revenue Code, 50 App. USC § § 2407.

<u>Specialized Export Laws (If applicable to company operations)</u>

— Specialized laws related to industries such as maritime and shipping, chemicals, banking, atomic energy, electric power, pharmaceuticals, firearms. A listing of 16 U.S. export control laws is attached as Exhibit A.

<u>Import Laws (If applicable to company operations)</u>

— Import laws under the Customs statutes and regulations.

— Specialized import provisions under ITAR and Treasury regulations related to alcoholic beverages, tobacco, firearms.

<u>Foreign Laws</u>

— Laws of the foreign country in which company is operating

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3. Parties Covered Under The Program – The international business compliance program should cover all employees of the company involved in international activities, as well as all senior executives of the company. In addition, companies often require the following parties to comply with the company's compliance program as a condition of the company conducting business with them.

   — Outside consultants, advisors, independent contractors.

   — Foreign distributors, agents, sales representatives and other business intermediaries.

   — Joint venture partners and similar parties, especially if such parties will have access to restricted commodities, software or technology of the company.

4. Relevant Legal Standard - Companies should incorporate legal principles from three general areas of law in their international compliance programs:

   (a) The substantive laws covered under the program (e.g., the Export Administration Regulations, the Foreign Corrupt Practices Act, etc.);

   (b) The emerging legal principles regarding corporate legal compliance programs such as set forth in the Caremark case; and

   (c) The principles set forth in the Federal Criminal Sentencing Guidelines. (The Federal Criminal Sentencing Guidelines do not apply to convictions under certain of the U.S. export laws but courts often apply these principles even if not technically required to do so.)

   In the area of the export control laws, U.S. companies are held to a high legal standard for compliance. Sanctions for violations include criminal and civil penalties including up to ten years imprisonment and fines of up to $1 million per violation.

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Civil penalties can be imposed on a strict liability basis, i.e., without any intentional wrongdoing.[18] Criminal sanctions can be imposed for "knowing" violations, although criminal sanctions have also been imposed on a strict liability basis.[19] See 15 C.F.R. § 764.2. Under the Export Administration Regulations, 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. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person's willful avoidance of the facts. See 15 C.F.R. § 772. Parties are deemed to have knowledge of the requirements under the export control laws. Ignorance of the law or avoidance of the facts of a particular situation is not a defense.

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. Sanctions are imposed both for direct participation in violations, as well as failure to properly supervise subordinates.[20]

In addition, violations of these laws encompass not just making prohibited exports but also aiding and abetting, conspiring with or "supporting" other parties who make prohibited exports. Consequently, parties who provide services related to international business transactions, such as transportation, financing, freight forwarding, customs brokering and other facilitation activities, fall within the scope of these laws. This would also include parties who provide information-related products and services such as software or data processing services. If these parties have knowledge of, or reasonably should know, of export violations in transactions in which they are involved, they will also be in violation of the laws set out above.

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[18] See Iran Air v. Kugelman, 966 F.2d 1253, 1993.

[19] See United States v. Shetterly, 971 F.2d 67, 73 (7th Cir. 1992) (holding that 50 U.S.C. App. § 2410(a) requires only that the criminal defendant “knowingly exported . . . a controlled commodity, without obtaining the appropriate export license” and does not require that “the exporter know that a license is required”); cf. Morisette v. United States, 342 U.S. 246, (1952) (“approv[ing],” as constitutional, imposition of strict criminal liability for “public welfare offenses”).

[20] For example, in SEC v. Triton Energy Corporation, et al. Civ. Action No. 1:97, C000401 (D.D.C. Feb. 27, 1997), enforcement actions were initiated against the President and the chief financial officer of the defendant corporation in their personal capacities on the grounds that they received information that subordinates were involved in activities which were potentially unlawful but took no action to investigate or stop it.

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Sanctions for violations by exporters, carriers and transportation facilitators also include seizure of cargoes and vessels used in such exports under "forfeiture" procedures. These procedures are civil in rem proceedings and hence are subject to a lower burden of proof than criminal enforcement proceedings. See 19 C.F.R. § 162.21.

An example of a typical export control enforcement case is *United States v. Ronald J. Hoffman,* 10 F.3d 808 (1993 9th 1993). In this case, a scientist had developed a software program to measure the effects of rocket plumes emitted from rocket nozzles. The program had applications in both the military and private commercial aerospace markets. The U.S. government learned that Hoffman was attempting to export the program to Germany and South Africa without an export license and began an undercover investigation. Hoffman was arrested and charged with violation of export control laws. He was convicted of criminal violations on all counts following a trial and sentenced to prison. The Court of Appeals affirmed the conviction and sentence.

5. Elements of The Compliance Program. The components of an international business compliance program will vary based upon factors such as the size of the company, the foreign countries in which it operates, the level of regulation in its industry and its past compliance history. However, all compliance plans should incorporate a number of elements which are vital to the compliance effort. There are:

(a) Adoption At Senior Company Level: The program must be adopted at the highest levels of the company, preferably by the board of directors or an executive officer. Such adoption should be evidenced by a resolution or similar directive to demonstrate a formalized action by the company.

(b) Compliance Official: A person must be identified in the company to be responsible for the program and in charge of overseeing its operations on an ongoing basis. Such person should direct the operations of the program, answer inquiries from company personnel and take appropriate steps in the event of suspected violations.

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(c) Written Materials: The elements of the program should be set forth in a written document. Usually this consists of an internal management procedure specifying rules and procedures to be followed by company personnel. In addition, these also include educational materials to be distributed to employees which explain the relevant laws and the company's procedures for complying with them.

(d) Education: An important part of the program is an organized, ongoing program of education for company employees. This consists of more than just the distribution of written materials and often includes training classes, training videos, discussion groups, testing, and other forms of training interaction. Employees should be trained in (i) the relevant laws covered under the program; and (ii) company policies to comply with such laws.

(e) Update Function: The company must monitor changes in the law and update the program as changes in the law or company operations dictate.

(f) Periodic Audit: The program should require program administrators to periodically audit or review company operations to verify that personnel are complying with the program.

(g) Enforcement: If an employee is found to have violated the program he should be sanctioned in accordance with company policy. A program without "teeth" is not considered to be effective.

(h) Mechanism For Dealing With Suspected Violations: There should be an established procedure for dealing with suspected violations of the program or the law. To begin, employees should be encouraged to report any suspected violations to the compliance officer. In the event of a suspected violation, the administrator, usually in conjunction with corporate counsel, should investigate the claim. Depending on the outcome, the company should take appropriate follow-up steps including ceasing any ongoing activities which may be in violation of the law, sanctioning the employee, consulting outside counsel to conduct an independent investigation, etc.

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(i) Recordkeeping: One of the most widely overlooked areas of international business compliance is recordkeeping. The U.S. international business laws present a significant array of complex recordkeeping requirements for U.S. firms. For example, under 15 C.F.R. § 762 U.S. exporters are required to maintain copies of all documents utilized in their export transaction for five years. Other requirements exist under the U.S. sanctions programs and the U.S. Customs laws. Compliance programs should address the collection and retention of records as an important part of the compliance effort.

G. Steps To Take If An Export Violation Is Discovered.

If a company discovers a violation of the Export Control Laws, it has a number of options available to it based upon whether the violation had occurred in the past and is concluded or if it is an ongoing violation. Actions to be taken in these instances include the following.

1. Ongoing Violations. The following steps should be taken if an ongoing violation of an Export Control Law is discovered.

(a) Cessation of Illegal Activity. The activity giving rise to the illegal activity should be stopped immediately.

(b) Internal Investigation. It is common in the discovery of export violations for the company to conduct an internal investigation to assess the facts of the violation, the potential legal exposure to the company and steps to take for the company's legal defense. It is imperative that such investigations be structured so that the results become covered under the attorney/client privilege.

(c) Reporting of Past Violations. Most Export Control Laws do not set forth any obligations to report past violations provided that they are no longer occurring.

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(d) Voluntary Disclosure. The company should consider the merits of voluntary disclosure to the Commerce Department or other applicable agencies to mitigate compliance penalties.

(e) Compliance Program. The company should immediately put in place a formalized Export Compliance Program so that the violations do not occur again.

2. Past Violations. If a violation is not ongoing and occurred in the past, the company should take the following steps:

(a) Conduct Internal Investigation. It is common in the discovery of export violations for the company to conduct an internal investigation to assess the facts of the violation, the potential legal exposure to the company and steps to take for the company's legal defense. It is imperative that such investigations be structured so that the results become covered under the attorney/client privilege.

(b) Reporting of Past Violations. Most Export Control Laws do not set forth any obligations to report past violations provided that they are no longer occurring.

(c) Voluntary Disclosure. The company should consider the merits of voluntary disclosure to the Commerce Department or other applicable agencies to mitigate compliance penalties.

(d) Compliance Program. The company should immediately put in place a formalized Export Compliance Program so that the violations do not occur again.

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WILLIAMS MULLEN

APPENDIX A

U.S. EXPORT CONTROL LAWS

1. The Export Administration Regulations, 15 C.F.R. §§ 730.1 to 730.10, administered pursuant to the authority under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 to 1706 (1998), extending the Export Administration Act, 50 App. U.S.C. §§ 2401 to 2420 (1998).

2. Arms Export Control Act, 22 U.S.C. §§ 2771 to 2781 (1998) and the International Traffic in Arms Regulations promulgated thereunder, 22 C.F.R. §§ 120.1 to 120.29.

3. Embargoes and sanctions programs administered by the Department of The Treasury are authorized pursuant to a number of statutes including:

a. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 to 1706;

b. Trading with the Enemy Act, 50 App. U.S.C. §§ 1 to 44 (1998);

c. International Security and Development Cooperation Act of 1985, Public Law 99-83, 99 Stat. 190;

d. National Emergencies Act Pub. L. 105-123, 90 Stat. 1255;

e. United Nations Participation Act, 22 U.S.C. §§ 287 to 287l;

f. Foreign Operations, Export Financing, and Related Programs Appropriations Act, Public Law 101-513, 104 Stat. 2047-55; and

g. Antiterrorism and Effective Death Penalty Act of 1996, Public Law 104-132, 110 Stat. 1214-1319.

Treasury Regulations for the above embargoes are set forth in Chapter 31 of the C.F.R. The Burmese and Sudan embargoes are set out in Executive Orders at 1997 WL 271517 (Burma Restrictions) and 1997 WL 687995 (Sudan Restrictions).

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4. Controls Affecting Maritime Carriers and Related Activities, 46 U.S.C. §§ 222.1 to 221.111 (1998).

5. Shipping Restrictions; North Korea and the Communist-Controlled Area of Vietnam, 44 C.F.R. §§ 403.1 to 403.7.9

6. Toxic Substances Control Act, 15 U.S.C. §§ 2601 to 2629 (1998), 40 C.F.R. § 707 to 707.75.

7. Antiboycott Regulations, 50 App. U.S.C. § 2407 (1998), 15 C.F.R. §§ 760.1 to 760.5; and Internal Revenue Code §§ 999a to 999f (1997).

8. Secrecy of Certain Inventions and Filing Applications in Foreign Countries, 35 U.S.C. §§ 181 188 (1998).

9. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 and 78dd-2 (1998).

10. Nuclear Technology, 10 C.F.R. §§ 110.1 to 110.135.

11. Electric Power, 10 C.F.R. §§ 205.300 to 205.309.

12. Food, Drug and Cosmetic Act, 21 U.S.C. §§ 381 to 383 (1998).

13. Controlled Substances Import and Export Act, 21 U.S.C. §§ 951 to 971 (1998).

14. Endangered Species Act of 1973, 16 U.S.C. §§ 1531 to 1544 (1998).

15. The Migratory Bird Treaty Act, 16 U.S.C. §§ 703 to 712 (1998).

16. The Act for the Protection of Bald and Golden Eagles, 16 U.S.C. §§ 668 to 668d (1998), 50 C.F.R. §§ 17.1 to 17.7.

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APPENDIX B

STEPS IN IMPLEMENTING

AN EXPORT COMPLIANCE PROGRAM

A. Export Administration Regulations

1. Identify items which require export licenses under EAR (See attached Questionnaire).

    a. Items on Commerce Control List (15 C.F.R. Part 742)
    b. Items subject to End Use-based controls (15 C.F.R. Part 744)
    c. Items subject to chemical weapons controls (15 C.F.R. Part 745)

    Classify items and determine export restrictions based upon country chart. (Optional: Obtain DOC classification opinion for EAR 99 items.) Establish license application procedure for above products.

2. Review and classify software, technology and other intellectual property for export licensing requirements.

3. Establish due diligence review procedures under Know Your Customer Guidelines, 15 C.F.R. Part 732.

4. Establish Denied Party List review procedures under 15 C.F.R. Part 764.

5. Establish export clearance procedures under 15 C.F.R. Part 758.

6. Establish export record-keeping procedures under 15 C.F.R. Part 762.

B. International Traffic In Arms Regulations

1. Identify items which require export or import licenses under U.S. Munitions List. Establish license application procedure for above products.

2. Review and classify software, technology and other intellectual property for export licensing requirements.

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3. Register as Munitions manufacturer under 22 C.F.R. Part 122.

4. Establish export due diligence procedure.

5. Establish procedures for reporting payments of sales commissions to agents and political contributions under 22 C.F.R. § 130.9.

6. Establish procedure for complying with record-keeping requirements set forth at 22 C.F.R. § 122.5.

7. Register defense brokers if applicable.

C. U.S. Sanctions And Embargoes

1. Identify company transactions which pose risk of involvement in countries subject to sanctions programs administered by:

   a. Office of Foreign Assets Control (31 C.F.R. Part V)
   b. Department of Commerce (15 C.F.R. § 746)
   c. State Department (22 C.F.R. Part 126)

2. Establish procedure for conducting Specially Designated Nationals List reviews for all international transactions (31 C.F.R. Part V, Appendices A, B & C).

D. Adoption of Compliance Program

1. Communication from senior company officers regarding adoption of program.

2. Appointment of compliance administrator.

3. Preparation of compliance program policy documents.

4. Establishment of training and outreach activities.

5. Establishment of compliance telephone "hotline."

6. Establishment of audit function

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