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THE HOLLAND & HART PRIVATE INTERNATIONAL LAW AWARD

CRITICAL ESSAY: THEORETICAL FOUNDATIONS IN DEVELOPMENT LAW: A RECONCILIATION OF OPPOSITES?

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INTRODUCTION

This Critical Essay will examine certain philosophic implications of modernization theory and dependency theory, and their impact on development law. The essay will also identify certain similarities and key differences between the two theories and explore past histories and future trends of both theories. Finally, this Essay will propose a means of reconciling the two, thereby ending the decades-long stalemate between the two theoretical perspectives. If accepted, this reconciliation may provide common ground for development law practitioners and specialists to work more harmoniously together into the future. However, before embarking on a discussion of the theoretical foundations of development law, let us take a step back and examine why this inquiry should be made.

Development law, as I have defined it, is a subject that establishes a new legal architecture between developing and advanced nations.[1] Moreover, development law, by its nature, is a multidisciplinary study that incorporates aspects of economics, political theory, philosophy, history, sociology, and even legal anthropology as well as other subjects. While philosophy may not be as important in other subjects of law, it is particularly relevant to an understanding of development law. The theoretical foundation of development law is its cornerstone, and any change in its philosophic underpinnings has profound implications with respect to the subject generally.

Indeed, it may be argued that development itself is essentially a political process. It may be further argued that as a consequence, the political theories, ideologies, and philosophies that motivate and guide the political process are vitally important regardless of whether individual political actors acknowledge it, or are even aware of it. Philosophic orientations and approaches, whether overtly

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* This essay summarizes and expands the remarks made by the author at the Denver University College of Law on March 30, 2005. Dr. Rumu Sarkar is an Adjunct Law Professor at the Georgetown University Law Center, and the General Counsel for the Overseas Basing Commission (OBC). The views expressed herein are the author's personal views and do not necessarily reflect the views or policies of the OBC, or the U.S. Government.

1. RUMU SARKAR, DEVELOPMENT LAW AND INTERNATIONAL FINANCE, CHAPTER 2 (2d ed. 2002, Kluwer Law International); *see also* Rumu Sarkar, *The Developing World in the New Millennium: International Finance, Development, and Beyond*, 34 VAND. J. TRANSNAT'L. L. 469 (2001).

acknowledged or not, tend to describe, define, and differentiate developing nations from their more advanced counterparts. The post-WW II era has seen a clash of ideals that has been the genesis of the political thinking and action on both sides of the "development" equation, between the so-called "haves" and "have nots." Therefore, a clearer understanding of the philosophic dimensions of this divide both deepens and broadens the debate.

The second preliminary question that needs to be addressed is why modernization theory and dependency theory are considered to be rivals. Modernization theory, discussed below, rose into prominence after the end of WW II, primarily as a result of the efforts of U.S. economists, political scientists, and sociologists.[2] In contrast, dependency theory achieved its prominence after the decline of modernization theory in the mid-1970's.[3] It became a discipline that both stemmed from Marxist political theory, and was adopted by Marxist-influenced political regimes. This, in my view, led to the unhappy juxtaposition of the two approaches within the context of the Cold War during the decades that followed.

A potential reconciliation of opposite views and approaches as discussed in this Critical Essay is important not simply from the perspective of intellectual history, but more importantly, in terms of developing a more coherent, consolidated approach to development theory. If this reconciliation occurs in fact, this will have far-reaching consequences, and a potentially beneficial impact, on development law as a whole. In my view, there may be a significant shift underway in that direction for the reasons discussed below.

I. THE THEORETICAL UNDERPINNINGS OF DEVELOPMENT LAW: MODERNIZATION THEORY

Modernization theory is based on the assumption that development is the inevitable, evolutionary result of a gradual progression led by the nation-state that results in the creation (and ascendancy)[4] of Western-styled economic, political, and cultural institutions. These institutions rest on three pillars: a free market capitalist system, liberal democratic institutions, and the Rule of Law.

In this context, modernization theory is anchored by two principal thinkers: first, Adam Smith's elevation of the drive to acquire material wealth to a classical economic ideal, and second, John Locke's demand that the State protect private property and individual liberties, thus setting the stage for liberal political theory.[5] In other words, the pursuit of one's own personal happiness through the material acquisition of personal wealth as well as the state's protection of individual

2. Brian Z. Tamanaha, Book Review, 89 AM. J. INT'L L. 470, 471 (1995) (reviewing LAW AND DEVELOPMENT (Anthony Carty, ed., 1992)).

3. *Id.* at 477.

4. *See e.g.*, FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (Penguin 1992) (purportedly describing man's "universal history" by arguing that liberal democracy is the "end point of man's ideological evolution" and thus, the final form of human government. This, in essence, constitutes the "end of history" beyond which no further evolutionary development should be expected). *See also* SARKAR, *supra* note 1, at 11-12.

5. See generally SARKAR, *supra* note 1, at 21.

liberties has become a Western classical ideal. Indeed, the terrifying force of this ideal may be its universality.

While Western societies developed legal structures over the centuries to protect private property—such as contract enforcement, mortgages, secured loans, liens, and bankruptcy proceedings—and to ensure the protection of individual liberties—for example, passage of a Bill of Rights, due process of law, and jury trials, non-Western societies did not, for the most part, develop similar institutions. What revolutionized our world at the end of the last millennium was not the adoption of a Western classical ideal by the non-Western world, but the adoption of the Western methodology of achieving this ideal through private property, democratic governance, and the Rule of Law.

Under modernization theory, there is a clear and pronounced emphasis on constitutional, legal and regulatory reform.[6] In fact, modernization theorists created the so-called "Law-and-Development" movement in the 1960's,[7] espousing the idea that emulating Western legal principles and institutions lays the foundation for legal development, and therefore, supports the development process in general. A modernist approach creates a solid foundation for creating a positivist, normative style of law-making with which most common law practitioners are familiar.

However, the fundamental character of modernization theory seems to be, for the most part, overlooked. The theory describes an ahistorical, linear *process* based on the experience and cultural values of Western nations. While the value of this process and the end product that it desires to achieve may be debated, the inherent, and somewhat negative, drawback to the modernization approach is, in fact, its ahistorical perspective. The model has been criticized (albeit primarily by dependency thinkers, but also by modernization scholars themselves) as "ethnocentric"[8] by steadfastly failing to recognize and acknowledge that it

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6. Modernization theory supports the view that, "law is essential to economic development because it provides the elements necessary to the functioning of a market system. These elements include a universal rule uniformly applied, which generates predictability and allows planning; a regime of contract law that secures future expectations; and property law to protect the fruits of labor. In theory, law assists political development by serving as the backbone for the liberal-democratic state. Law is the means through which the government achieves its purposes, and it serves to restrain arbitrary or oppressive government action." Tamanaha, *supra* note 2, at 473.

7. *See generally* Francis Botchway, "*Good Governance: The Old, The New, The Principle, and The Elements*," 13 FLA. J. INT'L L. 159, 177-180 (2001).

8. *See e.g.*, Ilana Shapiro, *Strengthening Transitional Democracies Through Conflict Resolution*, 552 ANNALS OF AM. ACAD. POL. & SOC. SCI. 14, 20 (1997):

The traditional critiques about Modernization theory's ethnocentric bias are still relevant. The assumption that Western forms of political, economic, and social organization can provide universal models requiring only minor adaptations to the cultural and historical contexts of CEE [Central and Eastern European] countries reflects Western cultural biases. At the same time, this view dismisses the anthropological conceptions of culture and postmodern understandings of context where systemized ways of organizing the world are embedded within specific cultural and social systems. . . .

Modernization models are derived from Western cultural and historical legacies. The specific conditions from which free markets and liberal democracies in the West emerged are not comparable to those in CEE countries, even those CEE countries that had some prior democratic and free market

engenders and supports Western forms of economic production, democratic governance, and laws. As a result, the approach fails to take into account the differences in cultural values and the legal histories of developing nations.[9] This "one style fits all" approach, in turn, may be perceived as being somewhat autocratic in its overtones.

Modernization theory thus supports, and perhaps even applauds, the demise of the former Soviet Union and the creation of Western-styled democracies in Eastern Europe, the Baltics, the Balkans, and Eurasia along with the profound changes that have most recently taken place in the Ukraine.[10] Further, the modernization of Turkey by sacrificing more traditional Islamic-based values in favor of instituting a modern nation-state, joining NATO, and seeking European Union (EU) membership[11] is also a step-by-step path to which a modernist approach would ascribe. However, the same lack of historicity prevents modernization theorists from predicting a case like Iran or Taliban-controlled Afghanistan where modernist principles are eschewed in favor of pre-modern values, practices, and governance.

Modernization theory also creates a nexus between a free market economy and a liberal democracy. Both are seen as co-equal partners working in tandem to bring the wealth and prosperity of Western nations to the underprivileged classes of the developing world. The conceptual framework of both acting in concert is certainly an ideal to aspire to, but it has been clear for quite some time that the nexus may not be an absolute predeterminate of successful development.

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traditions. Further, Western political and economic systems have undergone massive changes since their inception so that the current forms barely resemble the early stages. Yet countries in the CEE region are expected to catch up to conditions that have taken decades to develop in the West. Many authors have noted that such expectations are a formula for uneven and unpredictable development. In many ways, the Modernization process in CEE is like trying to rebuild a Skoda into a Mercedes while speeding down the road at seventy miles an hour." *Id.* (citation omitted).

9. Even I have tried to mitigate the one-sidedness of this approach by proposing the Janus Law Principle (JLP) after the Roman God Janus, who looks both forwards and backwards simultaneously. By this, I simply mean to suggest that there are implicit time and space dimensions to sequencing and synchronizing legal reforms. The developing country in question should plot out on a time-space axis for the multi-dimensional legal reforms it is considering. For example, on the time axis, the types of legal reforms a developing country wishes to make in terms of globalization of law efforts (future) along with maintaining its own authentic legal traditions worthy of preservation (past) should be plotted out. On the space axis, the country in question should look to its international national needs (home) and its need to integrate more fully into the global economy (the world.) One of my students also suggested that the JLP axis also be used as the legal coordinates for a fuller analysis that could include economic data and socio-economic criteria. *See* SARKAR, *supra* note 1, at 38-43.

10. *See* Steven Lee Mayers, *Ukraine President Sworn In, Promising to Promote Unity*, N.Y. TIMES, Jan. 24, 2005, at A9; Brian Knowlton, *Ukraine President Visits Congress A Hero and Asks for More Help*, N.Y. TIMES, Apr. 7, 2005, at A10.

11. *See e.g.*, Robert Kaplan, *Turkey's Precarious Success*, N.Y. TIMES, Feb. 27, 2001, at A23.

Again, as an example of its lack of historicity, modernization theory was at a loss to explain the relative success of "soft" authoritarian regimes or illiberal democracies that have encouraged capitalist-based economic growth while at the same time repressing true democratization, respect for human rights, and certain social and religious institutions. Examples of such economic success stories include Spain under Franco, Chile under Pinochet, Malaysia, and China.[12]

On the other hand, it is possible to have vibrant democratic institutions without significant economic development as in the case of India until fairly recently, and in the post-Marco era Philippines. While I am not suggesting that free market growth be disaggregated from encouraging the growth of representational democracy and democratic institutions, it is becoming increasingly clear that one can be achieved without the other. Indeed, "the marriage between capitalism and democracy, although prevalent in the West, is not always an easy or happy one."[13]

In the 1970's, modernization fell victim to its own "deep pessimism"[14] in light of the failure of developing countries to develop economically, and by the proliferation of authoritarian and military regimes. These events seemed to negate modernization's own prescriptions for success based on capital market development and democratization. By 1974, less than a decade after it had begun in earnest, the modernization movement was "in crisis" [15] leading to its apparent collapse, despite subsequent attempts to reform it.[16]

Modernization theory has certainly enjoyed a broad-based resurgence after the collapse of the Berlin Wall in 1989, and related historical events. The recent rhetoric of globalization is, in fact, grounded in modernization theory. Indeed, the introduction of democratic reforms in the Middle East is breaking new ground for modernists. While elections in Afghanistan, Palestine, Iraq, and forthcoming elections in Lebanon, Egypt and Saudi Arabia signal significant, and even

12. *See e.g.*, Larry Rohter, *Chile's Retirees Find Shortfall in Private Plan*, N.Y. TIMES, Jan. 27, 2005, at A1; Joseph Kahn, *Democratic Hopes Test China's Political Limits*, N.Y. TIMES, Mar. 2, 2003, at Final 3.

13. Shapiro, *supra* note 8, at 21.

14. Tamanaha, *supra* note 2, at 472.

15. *See* David Trubek and Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1974). These commentators proposed an "eclectic critique" that criticized the law and development model based on modernization theory as "ethnocentric and naïve." *Id.* at 1080. They argued that this modernist view of developing a legal infrastructure did not reflect the realities of developing countries, and was potentially dangerous by attempting to export legal forms and institutions that could too easily be manipulated by and for the purposes of the controlling elites in the countries in question. *Id.* at 1099.

16. "These Modernization revisions included: (1) a greater focus on the role of tradition in processes of social mobilization and change; (2) an expanded methodology of case studies and historical analyses; and (3) a more sophisticated analysis of change that examined the role of multiple institutions, multilinear paths toward development, and the interaction of internal and external factors influencing change." Shipiro, *supra* note 8, at 16 (citation omitted). Most importantly, modernization thinking has been revised to move away from nation-state directed growth (top-down approach) and towards civil society development (bottom-up approach).

impressive, reforms,[17] the question of whether modernization theory will prevail in these societies is an open-ended one. Clearly, these are all works in progress.

Yet, one possible unexpected, and dismaying, result does come to mind. In the end, the transformative power of democratization, a pillar of modernization thought, may be its ability to give voice to and thus, legitimize minority views and political perspectives. This may mean that "terrorists" will *de facto* become legitimate political actors within the democratic fabric. Intimations of this are already apparent in the express political ambitions of Hamas in Palestine, Hezbollah in Lebanon and Syria, and Al Sadr in Iraq,[18] all of whom are seeking to be political representatives in the legitimate governance of their respective countries. However, it may be wise not to draw any hasty conclusions at this point while this story is still unfolding.

II. A CONTRARIAN VOICE: DEPENDENCY THEORY

While modernists were floundering in the 1970's, dependency theorists dominated the conversation about development. In contrast to modernization theory, dependency theory is not a descriptive process of change leading to broad-based economic development, but a historical analysis and critique of the root causes of underdevelopment—on this level, a comparison of the two theories has always seemed inapt.

In any case, dependency theory considers the historical nature, causes, and implications of colonialism and its aftermath. Perhaps the most important work contributed by dependency thinkers was an analysis of neo-colonialism that argued that newly independent developing countries were entering global markets at their own peril. The legacy of colonialism, they argued, left these countries without the necessary infrastructure of commerce, transportation, trade, and communications as well as supporting social, educational, and political institutions.

Apart from its historical analysis, dependency theorists also argued that developing nations were trapped in self-perpetuating "dependency" relations with advanced nations by continually having a net deficit in capital, technology, and educational opportunities necessary to create an educated workforce. Moreover, international laws and practices of commerce, trade, and investment were all created by and thus, skewed in favor of, industrialized nations leaving developing countries in a declining state of impoverishment and "underdevelopment."[19]

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17. *See e.g.*, Mona Al-Naggar, *Egypt: Anti-Mubarak Rallies in 3 Cities*, N.Y. TIMES, Mar. 31, 2005, at A13.

18. Steven Erlanger, *Hamas Will Take Part in Vote for Palestine Legislature*, N.Y. TIMES, Mar. 13, 2005, at Final 1; Michael Young, *Can Hezbollah Go Straight?*, N.Y. TIMES, Mar. 9, 2005, at A25; Hassan Fattah, *Pro-Syria Party in Beirut Holds a Huge Protest*, N.Y. TIMES, Mar. 9, 2005, at A1. See Robert Killebrew, *Al Qaeda: The Next Chapter*, WASH. POST, Aug. 8, 2004, for a theoretical perspective on the assimilation of terrorists into the governance of Middle Eastern countries.

19. While the relative merits of this critique lies outside the scope of this Critical Essay, it is important to note that this theory formed the basis of certain economic models used by developing countries, the most prominent being import substitution. In another contrast with modernization, dependency theorists did not describe a single "process of development" but rather several models of development.

For dependency theorists, law was secondary to economics in accordance with Marx's thinking that law constitutes the superstructure to the underlying structure of economics.[20] Nevertheless, dependency theory was the genesis of the so-called "international law of development" that underscored U.N. initiatives such as the New International Economic Order (NIEO).[21] For example, the NIEO agenda advocated giving preferential trade and investment treatment to developing countries, debt relief and grants-based assistance, access to technology transfers, and the recognition to the right to development.[22]

Ironically, while the various U.N. resolutions and other actions taken may have lacked legal effect, the NIEO-based agenda has, nonetheless, been partially successful in practical terms. For example, the World Bank and other multilateral and, on a limited scale, bilateral institutions are implementing large-scale debt relief,[23] moving away from loans and towards grants, and facilitating certain environmental technology transfers to developing countries.[24] In addition, dependency legal theorists countered the "ethnocentrism" of modernists by espousing the intrinsic worth of preserving the legal values, histories, institutions, and practices of developing nations.

One persistent theme that has emerged from dependency theorists is the legal concept of equity-based relations in international law now referred to as "common but differentiated responsibility (CBDR)." While the term may be fairly new, the concept is not, as it dates as far back as the Treaty of Versailles (1919).[25] Non-uniform, differentiated, non-reciprocal treatment can be found in trade[26] as well as environmental regimes.

However, the CBDR legal standard has imposed non-uniform legal obligations on contracting parties and has been most prevalent and systemic in

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20. Tamanaha, *supra* note 2, at 479.

21. *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201 (S-VI), § 4e, U.N. GAOR, 6th Spec. Sess., Supp. No. 1, at 3, U.N. Doc. A/9559 (1974).

22. *See generally* SARKAR, *supra* note 1, ch. 7.

23. See e.g., the World Bank's Enhanced Heavily Indebted Poor Countries Initiative (HIPC), at http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTDEBTDEPT/0,,contentMDK:20260411~menuPK:528655~pagePK:64166689~piPK:64166646~theSitePK:469043,00.html. Widespread debt relief has not always met with approval even from a developing country perspective as there is an implicit "moral hazard" to debt relief insofar as recipient nations may appear uncreditworthy and unattractive to investors. *See e.g.*, Barbara Crossette, *Ex-Premier of Singapore See Pitfalls in Debt Relief*, N.Y. TIMES, Oct. 15, 2000, at Final 4.

24. *See e.g.*, the UN Environmental Programme's website discussing technology transfers, which is available at http://www.unep.or.jp/Ietc/EST/Index.asp. *See also* 15 U.S.C. § 4728(a) (2004) (stating in relevant part: "it is the policy of the United States to foster the export of United States environmental technologies, goods and services. In exercising their powers and functions, all appropriate departments and agencies of the United States Government shall encourage and support sales of such technologies, goods and services.").

25. *See* Christopher D. Stone, *Common But Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276, 278 (2004).

26. The General Agreement on Tariffs and Trade (GATT) added nonreciprocal trade provisions in favor of developing countries in 1979, by permitting "differential and more favorable" tariff treatment. Stone, *supra* note 25, at 278.

international environmental legal agreements stemming from the three "earth summits." The first of these summits was the landmark Stockholm Declaration of the U.N. Conference on the Human Environment (1972) that took "into account the circumstances and particular requirements of developing countries and any costs which may emanate from their incorporating environmental safeguards into their development planning and the need to make available to them, upon their request, additional international technical and financial assistance for this purpose."[27]

The second summit held in Rio de Janeiro in 1992 also produced detailed international legal agreements such as the Rio Declaration of Principles,[28] the Statement of Forest Principles,[29] the Convention on Biodiversity,[30] and Agenda 21,[31] that all contained the CBDR principle in some form. These principles were reaffirmed at the third earth summit held in Johannesburg, South Africa in 2002.[32]

A successful example of the use of CBDR is the Montreal Protocol (1987) which took effect on January 1, 1989. [33] The Protocol required a 50 percent reduction in the production and use of ozone-depleting substances. The Protocol led to the adoption of the Helsinki Declaration and the London Amendments of 1990, which led to the virtual elimination of ozone-depleting substances by January 2000. Article 2(9)(c) of the Montreal Protocol required a two-thirds majority vote of the participating nations representing at least 50 percent of the total worldwide consumption, giving veto power, in effect, to both developed and developing nations.[34]

The Montreal Protocol's common but differentiated responsibility standard created an equity-based legal regime persuading China, India, and Brazil to join the Protocol. The significant features of the Protocol included: (1) a ten year delay in reducing emissions permitting short-term increases in the production of ozone-depleting substances by developing countries; (2) a multilateral fund to facilitate compliance among developing countries; and (3) facilitated transfers of

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27. *Stockholm Declaration of the United Nations Conference on the Human Environment, Stockholm Declaration*, U.N. Doc. A/CONF.48/14, princ. 12 (1972), *reprinted in* 11 I.L.M. 1416, 1419 (1972).

28. *See Report of the U.N. Conf. on Environment and Development: Rio Declaration on Environmental Development*, U.N. GAOR, Annex I. Vol. I at 8, U.N. Doc. A/Conf. 151/26 (1992).

29. *See Report of the U.N. Conf. on Environment and Development: Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, U.N. GAOR, 47th Sess., Annex 3, Vol. III at 111, U.N. Doc. A/Conf. 151/26 (1992).

30. *See U.N. Environmental Programme: Resolutions of the Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity* (May 22, 1992), *in* 31 I.L.M. 842 (1992).

31. *See Report of the U.N. Conf. on Environmental Development: Agenda 21*, U.N. GAOR, 47th Sess., Annex 2, Vol. 1, at 14, U.N. Doc. A/Conf. 151/26 (1992).

32. *See* Report of the World Summit on Sustainable Development, U.N. Commission on Sustainable Development, U.N. Doc. A/Conf. 199/20 (2002).

33. The Montreal Protocol is available at the U.N. Environmental Programme Ozone Secretariat's website at http://www.unep.org/ozone/Montreal-Protocol/Montreal-Protocol2000.shtml#_Toc483027784 [hereinafter Montreal Protocol].

34. Montreal Protocol, *supra* note 33, art. (2)(9)(c).

environmentally-friendly technologies. The Protocol has led to the virtual elimination of ozone-depleting substances.

Perhaps the most well known legal document containing a CBDR principle is the so-called Kyoto Protocol[35] that specifically states in Article 3(1) that: "the Parties should protect the climate system... on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities."[36]

The Kyoto Protocol [37] requires Annex I countries (i.e., advanced nations belonging to the Organization for Economic Cooperation and Development) to reduce their collective greenhouse emissions by at least 5 percent below 1990 levels by the years 2008 to 2012. However, non-Annex I countries, including India and China, are under no similar obligation—this, in large part, fueled the United States objection to the treaty.[38] Further, Art. 3(5) and 3(6) of the Protocol provide that "economies in transition" listed in Annex I may choose their base year, other than 1990, to make their emissions reduction burdens less onerous.

Although the CBDR standard in the Kyoto Protocol mirrors the approach taken by the Montreal Protocol by imposing different legal standards and timelines for compliance on the signatory nations, it has been widely criticized. From one perspective, the differential treatment implicit in the Protocol seems patronizing in character, implying that developing nations lack the financial, scientific, and administrative capability to address global warming. From another perspective, it seems that onerous burdens are being placed on advanced nations while other nations, who do emit greenhouse gases, are not being asked to change their current practices or assume any financial burdens for achieving a worldwide reduction in greenhouse gas emissions.

Yet, the CBDR standard may hold the key to reconciling the two theories, as discussed below.

III. A RECONCILIATION OF OPPOSITES?

It is clear that modernization theory is undergoing a resurgence, especially in the context of the recent and ongoing Global War on Terror initiated by the

35. *See U.N. Framework Convention on Climate Change*, May 9, 1992, *in* 31 I.L.M. 849 (1992) [hereinafter *Framework Convention*]; *Conference of the Parties to the Framework Convention on Climante Change: Kyoto Protocol*, Dec. 10, 1997, U.N. Doc. No. FCCC/CP/1997/L.7/Add.1, *in* 37 I.L.M. 32 (1998) [hereinafter Kyoto Protocol].

36. Kyoto Protocol, *supra* note 35, art. 3(1).

37. The Kyoto Protocol entered into effect on February 16, 2005 following its ratification by the Russian Parliament on November 5, 2004. Article 25 of the Protocol specifies that ratification by 55 countries representing 55 percent of the total worldwide greenhouse gas emissions is necessary in order for the accord to take legal effect. *See* Kyoto Protocol, *supra* note 35, art. 25. Notably, the United States and Australia have not ratified Kyoto. *See* Gary Thomas, *Global Warming Accord Takes Effect Minus US, Australia*, VOICE OF AMERICA, Feb. 14, 2005, *available at* http://www.voanews.com/english/2005-02-14-voa52.cfm; *see also* the official website of the Australian Government, at http://www.greenhouse.gov.au/international/kyoto/.

38. While the Kyoto Protocol excludes developing nations from making emissions reductions, Art. 12 of the Protocol establishes a Clean Development Mechanism to provide incentives to industrialized countries to finance emissions reduction projects in developing countries (e.g., emissions trading, carbon sinks). *See* Kyoto Protocol, *supra* note 35, art. 12.

unprovoked attacks launched on September 11, 2001 on the United States. Modernization theory has incorporated a fresh new perspective, and now has a re-energized commitment to stem the flow of fundamentalist Islamic-based terrorism by introducing the elements of representational democracy and economic growth, and benefits that flow therefrom, to societies harboring such terrorists.[39]

This is a very significant development since modernization theory now is becoming a backdrop to overarching strategic geopolitical considerations, international diplomacy, and even the prosecution of a global war on terror. This may come as a surprise to the U.S. military, intelligence, and national security communities since development issues have simply not been on their agendas heretofore, at least not in any truly significant way.

The reason this development is so interesting is that it links, however tentatively, the root causes of endemic poverty and political disenfranchisement to the downstream effects that may ultimately lead to terrorist activities, political destabilization, and the emergence of asymmetric threats against the West, particularly the United States. Perhaps over time, this linkage will become clearer and better understood, so that the causes and effects of global poverty will be more fully integrated into geopolitical considerations that go into the formulation of national security, defense, and military strategies.

The relative "symmetry" of the Cold War that held two superpowers in a delicate balance has been replaced with an asymmetric world of unpredictable and diffuse threats posed by failed and collapsed states and non-state actors. Threats include, for example, terrorism, the acquisition and use of weapons of mass destruction as well as biological and chemical agents by rogue states and terrorists, and political destabilization posed by insurgencies, military coups, and genocidal acts. Natural disasters, famine, and HIV/AIDS along with other pandemics are also destabilizing factors affecting global security. In fact, the HIV/AIDS pandemic has been described as "not only an unprecedented humanitarian catastrophe, but a political and security threat to both U.S. and global interests."[40] If the spectrum of geopolitical considerations were widened to include not only HIV/AIDS but also endemic poverty and its causes, that would be impressive indeed.

In contrast, dependency theory is not undergoing a resurgence, but the persistent and recurring theme of the CBDR principle has remained on the international legal scene. In essence:

> The principle of common but differentiated responsibilities requires us to recognize that because of historical circumstances, countries at different stages

39. Neil MacFarquhar, *Unexpected Whiff of Freedom Proves Bracing for the Mideast*, N.Y. TIMES, Mar. 6, 2005, at FINAL 1; Todd Purdum, *For Bush, No Boasts, but a Taste of Vindication*, N.Y. TIMES, Mar. 9, 2005, at A10; Thomas Freidman, *Arabs Lift Their Voices*, N.Y. TIMES, Apr. 7, 2005, at A23.

40. *See* Council on Foreign Relations and Milbank Memorial Fund, *Addressing the HIV/AIDS Pandemic: A U.S. Global AIDS Strategy for the Long-Term* (May 2004), http://www.cfr.org/pdf/HIV-AIDS.pdf.

> of development have different capacities, and consequently, different levels of and kinds of responsibility for dealing with international environmental issues. . .
>
> The principle of common but differentiated responsibilities recognizes the importance of taking responsibility for past actions. As well, differential responsibility is consistent with recognition of the varied needs and capacities of individual and states.[41]

While the name of the underlying concept, Common But Differentiated Responsibility, implies that a *differential* legal norm (i.e., providing a more advantageous set of legal standards to one group over another) is being applied, it may be argued that the legal norm is actually *contextual* in nature (i.e., providing the same legal treatment but permitting different applications that vary based on certain factors.) A contextual norm has been described as:

> A norm which on its face provides identical treatment to all States affected by the norm but the application of which requires (or at least permits) consideration of characteristics that may vary from country to country. The application of a contextual norm thus typically involves balancing multiple interests and characteristics.[42]

Thus, if the CBDR concept could shift from *common but differentiated* to *common and contextual responsibility* (CACR), perhaps some of the divisive rhetoric can be avoided. This shift is permitted under the historical approach and analysis of dependency theory, but not under the ahistorical approach of modernization theory. However, a shift in analysis permits both the introduction of the legal concept of equity as well as the dimension of historicity missing from modernization theory. The element of equity tends to level an unequal playing field by imposing the same legal obligation to comply with international commitments, but differentiating the means by which such compliance is sought.

Recognizing the past inequities among nations, and imposing different legal obligations as a result, is a difficult transition for traditional modernists to make. It requires an acknowledgment of a non-Western history and creates a result based in equity, rather than strictly in law. However, it may be argued that such a shift has already taken place *de facto* (but not *de jure*) with regard to practices related to debt relief, preferential borrowing practices, and other issues discussed above. Perhaps it is time to take a leap of faith.

Law and equity are certainly interrelated concepts, and equity tends to mitigate the harshness of law by taking notions of fundamental fairness into account. By recasting differential norms as contextual norms, the elements of equity and historicity that are notably absent from modernization theory, are

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41. Graham Mayeda, *Where Should Johannesburg Take Us? Ethical and Legal Approaches to Sustainable Development in the Context of International Environmental Law*, 15 COLO. J. INT'L ENVTL. L. & POL'Y 29, 50 (2004).

42. David Magraw, *Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms*, 1 COLO. J. INT'L ENVTL. L. & POL'Y, 73, 74 (1990).

introduced to it. Modernists should not fear that this will weaken or dilute their theoretical approach. Indeed, by incorporating a missing dimension, modernization theory will be greatly strengthened. Just as law is truly balanced by equitable principles, so modernization theory can be balanced by dependency theory.

In the end, modernization theory's "autocratic" edges may be softened by making it more inclusive, more representative, and therefore, more effective in the long run. In addition, it would be well to remember that contextual norms for nations are on a sliding scale insofar as the nations themselves are dynamic and constantly changing. The international scene is constantly in flux and as the circumstances of developing nations change, so too will the legal standards that will be applied to them. Indeed, the entire point of the development process is to actually achieve development.

IV. A SUMMATION

So, we return to the first question posed by this Critical Essay, that is to say, why should we revisit and attempt to reconcile two theoretical perspectives on development law? Modernization theory is already taking on new dimensions of analysis, yet the equity-based differential treatment of developing nations has remained as a constant theme over the past three decades. Rather than continuing a stalemate between the two theoretical approaches, a slight shift in the analysis of modernization theory permits the reconciliation of the two. The merit in doing this is to create a coherent theoretical approach that reconciles the differences between the two while acknowledging the strengths and shortcomings in both.

As a concluding note, it should be clear that this reconciliation is one of two Western-based theories. The truly absent voice in development law is from the developing countries themselves. Perhaps the final frontier is an exploration of the contributions that the historical experience, legal histories, and traditions that developing countries have to make in this regard. The role of consensual decision-making, conflict resolution, and truth and reconciliation of differences seem full of possibilities. As the theoretical dimensions underlying development law evolve in the future, it may lead to seeking new avenues that are more process oriented, that establish contextual relationships and legal norms, and that emphasize more cooperative and collaborative relationships.

ACCOUNTABILITY OF INTERNATIONAL ORGANIZATIONS: SOME OBSERVATIONS

VED P. NANDA*

I. INTRODUCTION

The discussion here will be limited to intergovernmental organizations. The topic is timely, for there remain ambiguities regarding the accountability of such organizations to their members or third parties, or the accountability of the members of these organizations and third parties to the organizations, and the necessary mechanisms and procedures to ensure such accountability.

The issues this topic raises have been subjected to recent scrutiny and debate by international lawyers,[1] but more scholarly analysis is needed to clarify the issues further and provide firm guidelines for action. First, however, we must distinguish between accountability, responsibility, and legal liability. The definitions are not clear. Second, as the mandate and the role of international organizations (IOs), and thus the range and scope of their activities, differ among them, these variables must be considered in determining their accountability. Third, we must answer broadly the question, "accountability to whom?" Those addressed should include IOs and their staff, both member-states and non-members, international and domestic courts, national parliaments, nongovernmental organizations (NGOs) and private parties (including legal persons). Fourth, we need to further explore the existing mechanisms and procedures for holding international organizations accountable and, as required, new mechanisms and procedures should be fashioned. And, finally, we need to consider perhaps the most difficult issue: who can and should determine the question of the validity of the U.N. Security Council's actions? And, assuming the action is deemed to have exceeded the Security Council's mandate and powers, can it be invalidated—by whom and with what outcomes?

Let me illustrate the controversies and ambiguities that abound as we study this subject. Questions have arisen about the accountability, responsibility, and legal liability of the United Nations or its constituent organs, such as the Security Council, the U.N. member states, and individuals for alleged violations of human rights and humanitarian law regarding U.N. peacekeeping, peace enforcement, and peace-building operations, as well as economic sanctions imposed by the Security

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1. Recent studies have been undertaken by the International Law Association and the American Society of International Law, and the International Law Commission has the topic on its agenda for consideration.

Council. Who is responsible and to what extent for tortious acts? Privileges and immunities accorded to the United Nations are implicated. However, normally, prior to the commencement of such operations, the United Nations also negotiates a more comprehensive agreement on privileges and immunities directly with each host state.

Similar questions have been raised concerning alleged ordinary tort and breach of contract claims as well as claims related to alleged human rights violations against other IOs. Also, critics of globalization continue to demonstrate and shout that there is a lack of openness and transparency in World Trade Organization (WTO) decisionmaking, especially its dispute resolution mechanisms, which they find undemocratic and unacceptable. The arbitration process and its outcomes in investor disputes in the North American Free Trade Agreement (NAFTA) setting under its chapter 11, which have been subjects of discussion in several recent international law conferences, have been similarly denounced for the lack of transparency in NAFTA's decisionmaking, especially its dispute resolution processes.

In this address, I will confine my remarks first to addressing briefly the U.N. issues pertaining to peacekeeping, peace-enforcement, peace-building, and economic sanctions; next, to commenting on the accountability of other international organizations; and finally, to reporting on the recently concluded study of the International Law Association on the subject.

II. THE U.N.-RELATED ACTIVITIES

A. U.N. Peacekeeping and Enforcement Operations

In the aftermath of the Cold War, as the U.N. peacekeeping operations expanded in size, scope, and diversity of functions they perform, the application of international humanitarian law to such operations is increasingly recognized as necessary and important. The United Nations acknowledged this necessity by entering into status of forces agreement with the host state Rwanda in 1993, *Agreement on the Status of the United Nations Assistance Mission for Rwanda*, under which the "principles and spirit" of the pertinent international human rights instruments, *inter alia,* the four Geneva Conventions of 1949, the two Additional Protocols of 1977 to these conventions, and the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict of 1954 are to be fully respected by U.N. forces.[2]

2. Agreement on the Status of the United Nations Assistance Mission for Rwanda, Nov. 5, 1993, U.N.-Rwanda, 1748 U.N.T.S. 3. The four conventions are: Convention [I] For the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention [II] For the Amelioration of the Condition of Wounded, Sick or Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention [III] Relative to the Treatment of Prisoners of War, Aug, 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 135; Convention [IV] Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. The two Protocols are: Protocol Additional to the Geneva Conventions of 12 Aug 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3; and Protocol Additional to the Geneva Conventions of 12 Aug 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125

The United Nations entered into similar status of forces agreements in its subsequent peacekeeping and peace-enforcement operations. This broad statement, that of fully respecting the "principles and spirit" of the norms, needed further elaboration since there were no guidelines on how to translate it to address practical issues such as the legal status of combatants and other detainees by U.N. forces, the kind of weapons permissible and prohibited to use, and the legal status of U.N. forces who might be taken as hostages. In 1995, the International Committee of the Red Cross (ICRC) brought together experts to address these challenges and presented to the U.N. Secretariat a draft of basic norms of international humanitarian law to be applied to peacekeeping and enforcement activities.

Based upon the ICRC work, the U.N. Secretary-General issued the *Bulletin on the Observance by United Nations Forces of International Humanitarian Law* on August 6, 1999, which came into force six days later.[3] The Bulletin is "applicable to United Nations forces conducting operations under Untied Nations command and control,"[4] and specifies provisions of international humanitarian law that would be respected by the United Nations. Its principles apply to U.N. forces when they are actively engaged in situations of armed conflicts as combatants "to the extent and for the duration of their engagement," and engaged in "enforcement actions, or in peace-keeping operations when the use of force is permitted in self-defense."[5]

There are still ambiguities in the application of these guidelines. For example, the Bulletin does not differentiate between U.N. operations undertaken in peacekeeping activities and those in enforcement. Also, it does not differentiate between the peacekeepers' status "as civilians" and "as combatants." Even more important, as the Bulletin applies to forces under U.N. command and control, they are not applicable to U.N. "Associated Personnel," or those operations authorized by the United Nations but conducted under national or regional command. In the latter setting, the concerned states or regional organizations responsible for the operations are to ensure that international humanitarian law is applied.

As to the remedies available to the one seeking damages arising out of the U.N. peacekeeping or peace-enforcement operations, or post-conflict U.N. operations aimed at peace-building, it should first be noted, that the United Nations and its officials working in official capacity are granted "functional immunity" from legal process. The Convention on the Privileges and Immunities of the United Nations[6] limits the privileges and immunities of the U.N. officials to those "necessary for the independent exercise of their functions in connection with the Organization." However, under one of the provisions of the Convention, when the

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U.N.T.S. 609.

3. *Secretary-General's Bulletin, Observance by United Nations Forces of International Humanitarian Law*, U.N. Doc. ST/SGB/1999/13 (1999), *reprinted in* 38 I.L.M. 1656 (1999).

4. *Id.* § 1.2.

5. *Id.* § 1.1.

6. U.N. Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16.

United Nations or one of its officials enjoying immunity is a party to a dispute of a private-law character, the United Nations is obliged to provide for appropriate means of settlement in such a dispute.[7]

As the United Nations undertook an expanded role for peacekeeping and enforcement operations, the need to limit U.N. financial obligations arose. The triggering event was a claim by Bosnia and Herzegovina against the United Nations for $70 million, most of it for damage caused by U.N. vehicles for the normal use of roads and bridges, etc. Concerned about the impact of such claims on the financial health of the organization, the General Assembly adopted a resolution calling upon the Secretary-General to explore ways to limit U.N. liability *vis-a-vis* third parties.[8] The limitations established were both financial and temporal.[9] Regarding financial limitation, compensation for personal injury, illness or death must not exceed the amount of fifty-thousand dollars. Compensation for property loss or damage was also set at a reasonable level to be measured by costs of repair or replacement of the property damaged, or fair rental value or repair costs.[10] However, the United Nations is entitled to seek reimbursement from the members of the force or from the state contributing troops.[11] Also, the host country in whose territory a peacekeeping operation is undertaken gives consent for such an operation and is hence assumed to share with the United Nations the burden of financial claims the U.N. peacekeepers' presence may cause. The temporal limit was set at six months.

In case of "operational necessity," which is analogized to "military necessity," the United Nations assumes no tortious liability. Regarding the damage caused by gross negligence or willful misconduct on the part of the United Nations, the Organization assumes liability for full compensation.

B. Post-conflict U.N. Operations

It is generally accepted that the post-conflict U.N. operations in Bosnia and Herzegovina (Bosnia), Rwanda, Somalia, and Mozambique, among others, and territorial administrations from Cambodia to Kosovo and East Timor, have suffered from excesses and serious human rights violations and abuses allegedly committed by peacekeepers. Questions have been raised about the lack of U.N. accountability for such violations. The situations in Bosnia and Kosovo will be briefly mentioned here.

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7. *Id.* art. 29

8. *See* Gen. Ass. Res. 50/235, U.N. GAOR, 50th Sess., Supp. No. 49. Vol. 2, at 33, U.N. Doc. A/50/49 (1996); Gen. Ass. Res. 51/13 (1996).

9. For a detailed analysis, see Daphna Shraga, *CURRENT DEVELOPMENT: UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related damage*, 94 AM. J. INT'L L. 406, 410-12 (2000).

10. *See Report of the Secretary-General, Administrative and Budgetary Aspects of the Financing of the United Nations' Peacekeeping Operations: Financing of the United Nations' Peacekeeping Operations*, U.N. Doc. A/51/903 (1997), paras. 30-36.

11. For a Model Contribution Agreement between the U.N. and the state contributing resources to the U.N. peacekeeping operations, see Note by the Secretary-General, *Reform of the Procedures for Determining Reimbursement to Member States for Contingent-Owned Equipment*, U.N.Doc. A/50/995, annex (1996), art. 9.

In Bosnia the U.N. civilian police have been accused of participation in the trafficking of women—buying and selling women, conspiring with criminal groups to recruit and smuggle women into brothels, and patronizing brothels in which trafficked women were abused.[12] There was no accountability for these human rights violations on the part of individual peacekeepers, peacekeeper-contributing states, or the United Nations itself.[13]

Similarly, in Kosovo, the Special Representative of the Secretary-General allegedly abusing his authority was accused of continuing to use Executive Orders to unlawfully detain suspected criminals.[14] Although an ombudspersons' office, aimed at promoting and protecting "the rights and freedoms of individuals and legal entities,"[15] was established, it had limited jurisdiction over the U.N. Kosovo force and institutional checks were inadequate to ensure effective protection of human rights.[16] Accountability was lacking.

C. Economic Sanctions Imposed by the Security Council[17]

Economic sanctions are considered a blunt but nonetheless necessary instrument,[18] aimed at modifying the target state's behavior. However, as is evidenced by the adverse impact of economic sanctions on the vulnerable civilian population in Iraq—malnourishment and increased fatalities among children, women and the elderly—it is often not the regime, but those weakest in societies who suffer the most. This has led to deep concern about the use and impact of economic sanctions expressed by not only NGOs, especially human rights groups

12. *See* Jennifer Murray, *Note: Who Will Policy Peace-Builders? The failure to Establish Accountability for the Participation of U.N. Civilian Police in the Trafficking of Women in Post-Conflict Bosnia and Herzegovina,* 34 COLUM. HUM RTS. L. REV. 475, 477 and nn. 10-12, 503 nn. 150-58 (2003).

13. *See id. at* 505-06 and nn. 159-64.

14. *See* Elizabeth Abraham, *Comment: The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in its Mission in Kosovo,* 52 AM. U. L. REV. 1291, 1296 n. 17 (2003).

15. *See On the Establishment of Ombudsperson Institution in Kosovo,* UN MIK Regulation 2000/38, at 1.1 (June 30, 2000).

16. *See generally* Abraham, *supra* note 14, at 1322-37.

17. For an insightful analysis, see August Reinisch, *Note and Comment: Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Economic Sanctions,* 95 AM. J. INT'L L. 851 (2001)

18. In his *Supplement to an Agenda for Peace,* Secretary-General Boutros Boutros-Ghali acknowledged that an economic sanction is a "blunt instrument," *Supplement to an Agenda for Peace,* U.N. Doc. A/50/60-S/1995/1, para. 66 (1995). Hence he called for providing humanitarian assistance to the potential victims of economic sanctions and, prior to the imposition of such sanctions, to undertake their impact assessment. *Id.* para. 70.

and human rights activists and scholars,[19] but by the United Nations, U.N. organs and U.N.-related agencies as well, arguing that economic sanctions adversely affect human rights of civilians in targeted states.

For example, the General Assembly had started adopting resolutions critical of "unilateral coercive economic measures" in 1989.[20] In 2000, the U.N. Human Rights Commission's Sub-Commission on the Promotion and Protection of Human Rights adopted a resolution suggesting that the Security Council permit the import of food, medical, and pharmaceutical supplies in Iraq.[21] The same year a working paper prepared for the Sub-Commission criticized the U.N. sanctions against Iraq as "unequivocally illegal" under existing international human rights law and humanitarian law.[22] Also, the monitoring body for the International Covenant on Economic, Social and Cultural Rights, its Committee on Economic, Social and Cultural Rights, has expressed concern in its general comments about the impact of economic sanctions on the enjoyment of human rights.[23]

The two pertinent questions for discussion here are: (1) while imposing economic sanctions, what is the accountability of the Security Council to comply with international human rights law and international humanitarian law? and (2) what remedies and what mechanisms for the settlements of disputes are available to the civilian victims of these sanctions?

Regarding the accountability of the Security Council, a literal interpretation of the U.N. Charter does not provide a clear answer to the question raised about the obligation of the Security Council to be bound by general international law while it takes action to maintain or restore international peace and security under its Chapter VII powers. While the Charter specifies no explicit limitations on the Security Council's powers acting under Chapter VII, one could argue that the activities undertaken by the Security Council must be in accord with the purposes and principles of the U.N. Charter as contained in Article I, combined with the human rights provisions in the Charter (Preamble, and Articles 1 and 55).

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19. *See, e.g.*, Felicia Swindlls, *Note: U.N. Sanctions in Haiti: A Contradiction under Articles 41 and 55 of the U.N. Charter*, 20 FORDHAM INT'L L. J. 1878 (1997); Joy K. Fausey, *COMMENT, Does the United Nations' Use of Economic Sanctions to Protect Human Rights Violate its own Human Rights Standards*, 10 CONN. J. INT'L L. 193 (1994); Rene Provost, *Starvation as a Weapon: Legal Implications of the United Nations Food Blockage Against Iraq and Kuwait*, 30 COLUM. J. TRANSNAT'L L. 577 (1992).

20. The first General Assembly resolution criticizing unilateral coercive economic measures was G.A. Res. 44/215, Dec 22, 1989.

21. *U.N. Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Human Rights and Humanitarian Consequences of Sanctions Including Embargoes*, U.N. Doc. E/CN.4/Sub.2/RES/2000/1 (2000).

22. *See U.N. Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, The Adverse Consequences of Economic Sanctions on the Enjoyment of Human Rights*, U.N. Doc. ECN.4/Sub.2/2000/33 para. 6 (2000). [hereinafter Working Paper].

23. *See U.N. Committee on Economic, Social and Economic Rights, The Relationship Between Economic Sanctions and Respect for Economic, Social and Cultural Rights, GENERAL COMMENT* 8, U.N. Doc. E/C.12-1997/8; *U.N. Committee on Economic, Social and Cultural Rights, The Right to the Highest Attainable Standard of Health, GENERAL COMMENT* 14, U.N. Doc. E/C.12/2000/4 (2000).

Also, one could make a sound argument that as the United Nations is a subject of international law, one of its main organs, the Security Council, must itself be subject to international law, including customary international law and general principles. Granted that the United Nations, like other international organizations, is not bound by treaty law to comply with human rights and humanitarian law because none of these organizations is a party to any human rights law treaty or humanitarian law treaty. However, in imposing economic sanctions, the Security Council and its Sanctions Committee cannot derogate from those international law norms that have acquired the status of *jus cogens,* and must as well comply with customary international law and general principles, embodying human rights and humanitarian law norms.

Based upon these arguments, the Security Council must ensure that its imposition of economic sanctions does not adversely affect the enjoyment of human rights of people in the targeted states. For the Security Council and the Sanctions Committee which administers sanctions, specific human rights norms include the right to life, the right to health, and the right to an adequate standard of living, including the basic human needs such as food, clothing, housing, and medical care. These norms are contained in several human rights instruments, primarily among them the International Bill of Human Rights—the Universal Declaration of Human Rights and the two covenants, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

Regarding compliance with international humanitarian law, it should be noted at the onset that the instruments embodying the pertinent international humanitarian norms—the four Geneva Conventions of 1949 and the two Additional Protocols of 1977—apply only in the context of armed conflict and do not explicitly address economic sanctions. However, as the civilian population's protection underlies international humanitarian law, humanitarian law norms could be considered applicable to limit the use of economic sanctions.[24]

Discussion regarding compensation for damages caused by economic sanctions imposed by the Security Council have occurred only in the context of Article 50 of the U.N. Charter, under which any state "confronted with special economic problems arising from the carrying out of [preventive or enforcement measures taken by the Security Council] shall have the right to consult the Security Council with regard to a solution of those problems."[25] However, the working paper on sanctions mentioned above recommended that claims for damages be brought before national courts, U.N. or regional human rights organizations, or even the International Court of Justice.[26] Although there are procedural difficulties

24. For a detailed discussion of both the application of human rights and humanitarian norms, *see* Reinisch, *supra* note 17, at 860-63.

25. See *id.* at 864.

26. *See* Working Paper, *supra* note 22, para. 106

in invoking the jurisdiction of any of these bodies, especially the International Court of Justice, we need to explore all available alternatives including mediation and arbitration.[27] This recommendation applies equally to claims for damages caused by U.N. peacekeepers.

III. OTHER INTERNATIONAL ORGANIZATIONS

Just as the United Nations enjoys immunity from jurisdiction, most other international organizations enjoy similar immunity. I will illustrate this point by referring to arguments before the European Court of Human Rights that a domestic court had violated the European Convention on Human Rights by granting immunity from suit to an international organization, the European Space Agency (ESA).[28]

The applicants had brought the section before the European Court after their petition to the European Commission, based on the argument that the German courts had denied them access to a court to resolve their dispute with the ESA, which was their right under German labor law. They were actually employees of a number of British, Irish, French, and Italian companies who had been working for several years at the European Space Operation Center in Germany at the behest of their actual employers. Before the German courts they had sought recognition that pursuant to the applicable German labor laws, they had acquired the status of employees of the ESA. The German courts had dismissed their actions on the ground that ESA was immune from jurisdiction pursuant to the ESA Convention.

The European Court first interpreted the pertinent provision of the European Convention implicated, Article 6(1), which provides: "In the determination of his civil rights and obligations against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." The Court recognized that this article "embodied the right to a court" and went on to determine whether the German courts' decisions to dismiss their actions were sufficient to secure the applicants' right to a court.

The Court found no violation of Article 6(1) of the Convention, based upon its twin reasonings. Initially, it said that to ensure the proper functioning of international organizations so that they could be free from interference by individual governments, the immunity from suit enjoyed by international organizations was a legitimate purpose in restricting the right of access to court. Second, the Court held that "a material factor in determining whether granting ESA immunity from German jurisdiction is permissible" was whether "the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention." Since the ESA Appeals Board, which has jurisdiction "to hear disputes relating to any explicit or implicit action taken by the

27. *See* Reinisch, *supra* note 17, at 863-69 for a thoughtful discussion on remedies for victims of U.N. sanctions.

28. *See* August Reinisch, *INTERNATIONAL DECISION: Waite and Kennedy v. Germany Application No. 26083/94; Beer and Regan v. Germany, Application No 28934/945. European Court of Human Rights, Feb. 18, 1999*, 93 AM. J. INT'L L. 933 (1999). For a detailed discussion, see *id. at* 933-38.

Agency and arising between it and staff members," provided an adequate alternative forum, the Court found that the test of proportionality, that is, that there be a reasonable relationship between the means employed and the goal sought to be accomplished, was met.

IV. 2004 REPORT OF THE ILA COMMITTEE ON THE ACCOUNTABILITY OF INTERNATIONAL ORGANIZATIONS[29]

In May 1996, the ILA established a committee with the mandate: "to consider what measures (legal, administrative or otherwise) should be adopted to ensure the accountability of public international organizations to their members and to third parties, and of members and third parties to such organizations."[30] After eight years of work the committee presented its final report in 2004 at the ILA's Berlin Conference, in which it discussed IOs at three levels:

> [*First level*] the extent to which international organizations, in the fulfillment of their functions as established in their constituent instruments, are and should be subject to, or should exercise, forms of internal and external scrutiny and monitoring, irrespective of potential and subsequent liability and/or responsibility;
>
> [*Second level*] tortious liability for injurious consequences arising out of acts or omissions not involving a breach of any rule of international and/or institutional law (e.g. environmental damage as a result of lawful nuclear or space activities);
>
> [*Third level*] responsibility arising out of acts or omissions which do constitute a breach of a rule of international and/or institutional law (e.g. violations of human rights, or humanitarian law, breach of contract, gross negligence, or as far as institutional law is concerned acts of organs which are *ultra vires* or violate the law of employment relations).[31]

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29. The report, presented at the 2004 Berlin Conference of the ILA, can be found at http://www.ila-hq.org/html/layout_committee.htm. Members of the Committee were: Chair Sir Franklin Berman (UK), Co-Rapporteur Professor Malcolm Shaw (UK), Co-Rapporteur Professor Karel Wellens (Netherlands), Mr. Dapo Akande (UK), Mr. Tal Becker (Israel), Dr. Niels Blokker (Netherlands), Mr. Daniel B. Bradlow (USA), Judge Carl-August Fleischhauer (Germany), Professor Vera Gowland-Debbas (UK), Dr. Gavan Griffith (Australia), Judge P.H. Kooijmans (Netherlands), Dr. Edward Kwakwa (HQ), Professor Tiya Maluwa (HQ), Professor Ved P. Nanda (USA), Professor Ki-Gab Park (Korea), Dr. Mieczyslaw Paszkowski (Poland), Professor August Reinisch (Austria), Professor David Ruzie (France), Dan Sarooshi (UK), Professor Sabine Schlemmer-Schulte (Germany), Professor Erik Suy (Belgium-Luxembourg), Professor Jerzy Sztucki (Sweden), Professor Toshiya Ueki (Japan), and Dr. Eduardo Valencia-Ospina (HQ). Alternates: Ms. Rae Lindsay, Dr. Wolfgang Munch, and Professor N.D. White.

The Committee had earlier presented its reports in 1998 at the Taipei ILA Conference, in 2000 at its London Conference, and in 2002 at its New Delhi Conference. *See id.* at 4.

30. *Id.*

31. *Id.* at 5-6.

The format the committee used to present its report was to provide a set of "Recommended Rules and Practices" (RRPs) accompanied by commentaries. It noted at the outset that the RRPs "do not necessarily reflect a legal obligation for each IO. They are derived from common principles, objectives and notions related to the accountability of IOs and reflect considerable practice."[32]

On the first level, RRPs common to all IOs include: the principle of good governance (characterized by, *inter alia*, transparency in both the decision-making process and the implementation of institutional and operational decisions, participatory decision-making process, access to information, a well functioning international civil service, sound financial management, and appropriate reporting and evaluation mechanisms), the principle of good faith, the principles of constitutionality and institutional balance, the principle of supervision and control, the principle of stating the reasons for decisions for a particular course of action, the principle of procedural regularity, the principle of objectivity and impartiality, and the principle of due diligence.[33] RRPs on the relationship between IOs and NGOs include establishing appropriate relationships by the IOs with NGOs active within their field of competence, including establishing an NGO liaison service and holding briefings with their representatives.[34]

On the second level of accountability, addressing liability and responsibility issues, the Committee noted first the International Court of Justice's advisory opinion, which stated that: "international organizations are subjects of international law, and as such are bound by any obligations incumbent on them under general rules of international law."[35] The Committee also stated:

> A transfer of powers to an IO cannot remove acts of the IO from the ambit of control mechanisms established by particular treaties nor can it exclude the responsibility of States who transferred power to an IO. States should "make provision that a potential jurisdictional gap concerning the control of the exercise of such transferred powers do not arise."[36]

The Committee stated that where an IO's acts caused personal injury to state officials or damage to state property, international law governs the tortious liability of the IO. As to personal injury to a non-state party or damage to such a party's property, local law is to govern unless the activity constitutes a breach by the organization of an applicable rule of international law.[37] The international organization "should assess the potential damage" which its activities may cause; the IO should also take appropriate precautionary measures to prevent unnecessary damage and should use precautionary principles before undertaking operational activities involving a risk of causing significant harm to the environment.[38] In the

32. *Id.* at 9.

33. *Id.* at 9-18.

34. *Id.* at 20.

35. *Id.* at 21 (quoting Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, at 73, 90).

36. *Id.* at 22 (citations omitted).

37. *Id.* at 25.

38. *Id.* at 25-27.

Committee's RRP stating that IOs "should comply with basic human rights obligations," the commentary adds that IOs should observe basic human rights obligations in their decisions such as "designing structural adjustment programmes and development projects," and that in their decisions "concerning the use of force, temporary administration of territory, imposition of coercive measures, launching of peacekeeping or peace-enforcement operations IOs should observe basic human rights obligations and applicable principles and rules of international humanitarian law."[39]

On the third level of accountability, the Committee noted the current state of international law, which presents dilemmas in establishing a responsibility regime for IOs.[40] However, it does provide guidelines on the international legal responsibility of IOs.[41] It also discusses attribution of wrongful acts to IOs and responsibilities of states for defaults or wrongful acts of an IO and such attribution and responsibility in situations of delegation and authorization.[42]

The Committee provides detailed RRPs on remedies against international organizations. It moves from general features of remedies and the pertinent question, "remedial action against whom?" to the potential outcome of remedial action.[43] It then discusses the procedural aspects of remedial action against IOs—by states, staff members, and private claimants, including contractual liability claims and tort liability claims—and claims against officials and experts.[44] It specifically states that IOs should establish an insurance mechanism to address third-party liability claims.[45] It also addresses the issue of jurisdictional immunity of IOs and states that IOs' duties entail "an obligation to disclose information and documents directly held by it."[46]

The Committee discusses substantive outcomes of remedial actions by IOs and provides guidelines on non-judicial remedial action and judicial remedial action, specifically detailing the role of international administrative tribunals, domestic courts, and arbitration proceedings.[47] The only issue on which the Committee was not unanimous was the role for the International Court of Justice (ICJ).

While some members were strongly in favor of the ICJ having a role to ensure accountability, others did not consider it to be practical or even desirable.[48] Thus, the Committee included the proposals on the ICJ in the appendix.[49]

39. *Id.* at 27-28.
40. *Id.* at 31-33.
41. *Id.* at 33-34.
42. *Id.* at 34-38
43. *Id.* at 40-44.
44. *Id* at 45-49.
45. *Id.* at 48.
46. *Id.* at 51.
47. *Id.* at 53-59.
48. *Id.* at 59-60.
49. *Id.* 61-63.

V. CONCLUSION

The last few years have witnessed an increasing demand and some movement toward ensuring that IOs take concrete steps to ensure their accountability. The work of professional and scholarly organizations such as the International Law Association and the American Society of International Law has provided valuable guidance on the difficult issues implicated in the accountability debate. The next important step will be for the U.N. International Law Commission to provide a detailed study on the subject.

IN PURSUIT OF RECONSTRUCTING IRAQ: DOES SELF-DETERMINATION MATTER?

YOUNGJIN JUNG*

I. INTRODUCTION

Since the U.S.-led "coalition of willing"[1] invaded Iraq and toppled the Saddam Hussein regime, Iraq has effectively been under the control of the Coalition forces.[2] One can argue that the Iraqi territory is under belligerent occupation pursuant to international law.[3] As an occupying power, the United States and its allies are vigorously attempting to reconstruct Iraq and eradicate the sources of threat to international peace and security.[4] Among politicians and academics around the world, the legality of the war in Iraq was perhaps the single most controversial issue in the year 2003.[5] States opposing the attack on Iraq invoked the principles of the U.N. Charter,[6] while those supporting the cause of the war based their arguments on numerous U.N. Security Council[7] resolutions and the

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1. *See* Steve Schifferes, *US Names 'Coalition of the Willing,'* BBC NEWS, *available at* http://news.bbc.co.uk/2/hi/americas/2862343.stm (last visited Jan.7, 2003) The United States' government lists forty eight countries in their "Coalition of the Willing. *Coalition Members, at* http://www.whitehouse.gov/news/releases/2003/03/20030327-10.html. (last visited Feb. 23, 2005).

2. *See* Jordan J. Paust, *ASIL Insights: The U.S. as Occupying Power over Portion of Iraq and Relevant Responsibilities Under the Laws of War, at* http://www.asil.org/insights/insigh102.htm (last visited Jan. 7, 2004).

3. *See Id.* (explaining the primacy of fact as the test of whether or not occupation exists). The regulations concerning the laws and customs of war on land annexed to the Hague Convention of 1899 stipulate that territory is considered occupied when it is actually placed under the authority of the hostile army.

4. Dana Milbank & Robin Wright, *Off the Mark on Cost of War, Reception by Iraqis*, WASH. POST, March 19, 2004, at A1.

5. The debates mainly concern the interpretation of relevant U.N. resolutions and the legality of pre-emptive self-defense. *See generally* Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607 (2003); Michael Kelly, *Time Warp to 1945 - Resurrection of Reprisal and Anticipatory Self-Defense Doctrines in International Law*, 13 J. TRANSNAT'L L. & POL'Y 1 (2003); Ronald C. Santopadre, Note, *Deterioration Of Limits On The Use of Force and Its Perils: A Rejection Of The Kosovo Precedent*, 18 ST. JOHN'S J. LEGAL COMMENT. 369 (2003); Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT'L L. 599 (2003); Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576 (2003); John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563 (2003).

6. *See, e.g.* Franck, *supra* note 5, at 611-12 (rejecting the U.S. arguments that the invasion of Iraq was authorized by Security Council resolutions).

7. *See id.* at 608.

allegedly imminent threat of the Hussein government that justified the use of force in self-defense.[8] It is even suggested that international law should accept a new paradigm of "collective duty" to prevent unruly regimes from threatening global security with weapons of mass destruction (WMD).[9]

However, there is another important question that one needs to address: how to end the war. There seems to be a long way to go before peace and stability replace the current turmoil in Iraq, and the intermittent violence directed against the occupying powers ceases.[10] Nevertheless, the challenge of restoring public order and safety has come to the forefront, which appropriately leads to question, "How does the Coalition end the war?"

The main motivation for the United States and its allies was to remove the "alleged threat" to international peace and security posed by the former Iraqi leader, Saddam Hussein, in the form of his ostensible WMD programs.[11] No one would deny that the future reconstruction of Iraq should be aimed at enabling the Iraqi people to freely pursue freedom and economic recovery. Moreover, the new Iraq needs to address the issue of the long-standing divisions among diverse internal sectarian groups, the Shi'ites, the Sunnis, and the Kurds, in order to build a stable social and political structure serving the peoples' needs.[12] Therefore, the dual tasks of (1) completely eliminating all sources of threat and (2) reconstructing Iraq to serve the interest of its people are fundamental issues to address. The answer to the question "how to end the war?" may be found by undertaking a thorough analysis of the legal implications of belligerent occupation. This is appropriate since the current occupation is at a critical phase during which a new foundation for the political and social systems will soon be established in the devastated country.

The law of belligerent occupation provides a basic framework to determine how, and to what extent, the rights of the Iraqi people should be protected as the war nears its end. As the occupying power builds a new political and social structure for Iraq, close attention must be directed to the Iraqi people's choices and preferences. This U.N. Security Council adopted Resolution 1511 on October 16,

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8. *See* Wedgwood, *supra* note 5, at 578-82 (supporting the exercise of the right of preemptive self-defense against Iraq); Yoo, *supra* note 5, at 567-74.

9. *See* Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, FOREIGN AFF., Jan./Feb. 2004, at 136 (proposing a collective "duty to prevent nations run by rulers without internal checks on their power from acquiring or using WMD").

10. *See The Tyrant in Chains*, THE ECONOMIST, Dec. 16, 2003, *at* http://www.economist.com/opinion/PrinterFriendly.cfm? Story_ID=2295809 (explaining that, although Saddam Hussein was captured by the United States, the violence shows no sign of abating).

11. *See* BOB WOODWARD, BUSH AT WAR 349-52 (2002).

12. *See* Yitzhak Nakash, *The Shi'ites and the Future of Iraq*, FOREIGN AFF., July/Aug. 2003, at 17 (explaining the history of Iraq, with a focus on the political division between the Shi'ites and the Sunnis); *Middle East: Iraqi Sunnis Feel Marginalized Under New U.S. Order*, IPS-INTER PRESS SERVICE, Dec 23, 2003, *available at* LEXIS, News Library, IPS-Inter Press Service file (explaining the composition of the 25-member interim Iraqi Governing Council (IGC) is already raising a representation issue within Iraq, leaving many members of the Sunni community nervous about their status).

2003.[13] The Resolution reaffirms the "right of the Iraqi people freely to determine their own political future and control their own natural resources."[14] Although the Resolution does not explicitly mention the term 'self-determination,' it strongly implies that self-determination is at issue.[15] In other words, one is faced with the question of how to accommodate the right to self-determination within the context of belligerent occupation.

The concept of self-determination was not salient at the time of conclusion of the Hague[16] and the Geneva Conventions[17] concerning the laws and customs of war, which sought to regulate the status of the occupying powers.[18] In fact, the self-determination theory was once denounced as political rhetoric.[19] Throughout the twentieth century, however, the international community has gradually accepted this theory as one of the most robust principles of international law.[20] It is even believed to constitute a part of *jus cogens*.[21] Therefore, one needs to raise and answer the question of self-determination in every belligerent occupation context.

This article examines the rules of belligerent occupation and the status of the right to self-determination in the contemporary era, focuses on their mutual relationship at a normative level, and proposes that the right to self-determination should be regarded as an important factor when applying the laws of belligerent occupation. The article also argues that the right of the people to self-determination will limit the options of the occupying powers in managing the political process in the occupied territory.

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13. S.C. Res. 1511, U.N. SCOR, 4844th mtg. at 1, U.N. Doc. S/Res/1511 (2003).

14. *Id.*

15. *See* Thomas D. Grant, *The Security Council and Iraq: An Incremental Practice*, 97 AM. J. INT'L L. 823, 841-42 (2003).

16. *See generally* Hague Convention Respecting the Laws and Customs of War on Land, Annex, Oct. 18, 1907, 36 Stat. 2277 [hereinafter "Hague Convention of 1907].

17. *See generally*, Geneva Convention, Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter the "Geneva Convention of 1949"].

18. Halim Moris, *Self-Determination: An Affirmative Right Or Mere Rhetoric?* 4 ILSA J. INT'L & COMP. L. 201, 202-03 (1997) (describing the major emergence of self-determination theory in 1916, after the conventions of 1899 and 1907).

19. *Id.* at 202; Deborah Z. Cass, *Rethinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. & COM. 21, 26 (1992).

20. Mitchell A. Hill, *What The Principle of Self-Determination Means Today*, 1 ILSA J. INT'L & COMP. L. 119, 120-23 (1995).

21. *Report of the International Law Commission*, U.N. GAOR, 56th Sess., Supp. No. 10, at 207-08, U.N. Doc. A/56/10 (2001).

II. STATUS OF BELLIGERENT OCCUPATION IN INTERNATIONAL LAW

1. *Modern rules relevant for belligerent occupation*

The earliest government codification of the laws of the war was the famous Lieber Code, which was issued by the U.S. government in 1863.[22] Modern international law on belligerent occupation can be found in the 1907 Hague Convention IV,[23] "[r]especting the Laws and Customs of War on Land" together with its Regulations, and the 1949 Geneva Convention (IV),[24] along with the 1977 Geneva Protocol I.[25] The Hague Peace Conferences in 1899 and 1907 resulted in the conclusion of the Hague Conventions, which serve as "a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants."[26] The Hague Regulations annexed to the Convention also contain provisions regulating belligerent occupation.[27]

World Wars I and II made it clear that a more comprehensive set of international laws was necessary in order to prevent atrocities aimed at civilians from occurring during hostilities.[28] The Fourth Geneva Convention reflected such an awareness of the international community.[29] Today, the Convention is said to apply universally as part of general international law.[30] Although human rights law was not a main theme of international law at the time the Fourth Geneva Convention was concluded, the Convention is generally known as a "bill of rights" for the people in occupied territories because it focuses on the protection of civilians, rather than on the rights of the states engaged in war.[31]

Article 3 provides for the minimum guarantee for fundamental human rights,[32] and Articles 27 through 34 specifically provide for the rights of individuals.[33] The rules in the Convention that relate to occupied territories also reflect the need to protect civilians in such territories.[34]

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22. Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origin and Limits of the Principle of Military Necessity,* 92 AM. J. INT'L. L. 213, 213 (1998); PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 344 (1997); Ardi Imseis, *On the Fourth Geneva Convention and The Occupied Palestinian Territory,* 44 HARV. INT'L L.J. 65, 87 (2003).

23. Hague Convention of 1907, *supra* note 16, § 1, Ch. 1, art. 1-3, 36 Stat. 2277, *at* 1907 U.S.T. LEXIS 29, at 17-18.

24. Geneva Convention of 1949, *supra* note 17, part 1, art. 2, 6 U.S.T. 3516,, *at* 1949 U.S.T. LEXIS 484, at 2.

25. Imseis, *supra* note 22, at 89-92; Davis P. Goodman, *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573, 1577 (1985).

26. Hague Convention of 1907, *supra* note 16, pmbl., 36 Stat. 2277, *at* 1907 U.S.T. LEXIS 29, at 4.

27. *Id.* § III, arts. 42-56.

28. Imseis, *supra* note 22, at 89.

29. MALANCZUK, *supra* note 22, at 113.

30. *Id.*

31. Suzanne Nossel, *Winning the Postwar*, LEGAL AFF., May/June 2003, at 18, 20. (explaining that the Geneva Conventions of 1949 were intended to empower the local population under occupation).

32. Paust, *supra* note 2.

33. *Id.*

34. Geneva Convention of 1949, *supra* note 17, §111, art. 27-34, 6 U.S.T. 3516, 1949 U.S.T.

What underlies the law of belligerent occupation is the idea that belligerent occupation is a temporary condition, during which the belligerent occupant acts only as the de facto administrative authority.[35] This thought is in line with the Rousseau-Portales doctrine, which asserts that war is about sovereigns and armies, not about subjects and civilians.[36] Article 43 of the Hague Convention reiterates the provisional nature of belligerent occupation because it obligates the occupant to respect the laws that are in force in the occupied country.[37]

Belligerent occupation does not bring about any changes in sovereignty. The ousted sovereign still retains de jure sovereignty.[38] The occupant assumes only de facto control over the occupied territory without acquiring any sovereign rights or entitlement.[39] The Hague Convention envisaged short-term occupations before the conclusion of a peace treaty.[40] The occupying power should respect and maintain the existing laws in force in the occupied territory.[41] According to Article 55, the occupying state is to be "regarded only as administrator and usufructuary of public buildings, real estates, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country."[42]

Since the Fourth Geneva Convention was not intended to replace the Hague Conventions, the Hague rules continue to apply to belligerent occupation.[43] Article 4 of Protocol I to the Geneva Convention reaffirms that the occupation of a territory does not affect the legal status of the territory in question.[44] Modern international law has established rules on the comprehensive prohibition of the use of force, but the law of belligerent occupation is still valid. Furthermore, it is suggested that Hague and Geneva Conventions declare and constitute customary international law.[45] Irrespective of the legality a particular instance of the use of force, the laws of war and belligerent occupation reflected in such Conventions are binding on all parties to armed conflicts.[46]

2. *Belligerent Occupation: An analogy with overthrowing a legitimate government*

In considering the rights of the people under belligerent occupation, two possibilities for comparison come forward. One is the accession of power by a de

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LEXIS 484, at 21-24.

35. Goodman, *supra* note 25, at1581; Imseis, *supra* note 22, at 91.

36. Goodman, *supra* note 25, at 1579.

37. Hague Convention of 1907, *supra* note 16, art. 43, 36 Stat. 2277, T.S. No. 539.

38. Goodman, *supra* note 25, at 1580.

39. *Id.*

40. Nossel, *supra* note 31, at 18 (explaining the temporary nature of the belligerent occupation).

41. Hague Convention of 1907, *supra* note 16, art. 43., 36 Stat. 2277, *at* 1907 U.S.T. LEXIS 29, at 37.

42. *Id.*,art. 45, 36 Stat. 2277, *at* 1907 U.S.T. LEXIS 29, at 37.

43. Imseis, *supra* note 22, at 89-90.

44. Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I, June 8, 1977, art. 4, 1151 U.N.T.S. 423.

45. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 12-13 (4th ed. 1990).

46. *See* MALANCZUK, *supra* note 22, at 342-46.

facto government after dismantling the previous regime.[47] The other is belligerent occupation and accession of power by a de facto government involving the subversion of the existing regime.[48] Another useful comparison treats belligerent occupation similar to colonial rule. This comparison works because colonial rule entails foreign domination, as it was practiced in Asia and Africa during the early twentieth century, in a manner akin to a belligerent occupying force.

These comparisons lead us to focus on the issue of self-determination as such. A de facto government implies the notion of "internal" self-determination,[49] since the government in question often assumes that there has been a change of political power, although on an unconstitutional basis. Constitutionality is not an absolute or a dominant standard by which the will of people is to be measured, but such a change of political power begs the question: what do the people desire? Colonial rule is related to "external" self-determination, a principle by which a people's status in, and relations with, the international society should be determined on its own. The modern principle of self-determination was formulated as a result of the global process of decolonization after World War I.[50] Thus, political conditions similar to those of people under colonial rule should be examined in the context of self-determination.

When the law of belligerent occupation was codified in the international forum during the early twentieth century,[51] the principle of self-determination had yet to be recognized as a legal right. It was only after numerous resolutions by the U.N. General Assembly that the self-determination principle seemed to have gained the minimum level of *opinio juris*.[52] The laws of belligerent occupation and the right of self-determination developed independently of each other in different historical and legal contexts. No matter how temporary belligerent occupation is in nature, it denies the people the right to their own government. Those occupied people have not given their prior consent and, therefore, the consideration of the principle of self-determination in this context is relevant. Before looking into the possible nexus between belligerent occupation and self-determination, it is necessary to examine the modern position of law on the latter.

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47. A de facto government here, as opposed to de jure government, refers to a situation where state power goes through abrupt changes by unconstitutional process such as military coup d'etat or revolutions.

48. Belligerent occupation is regulated by the rules in The Hague Conventions and Regulations and the Geneva Conventions, while de facto government is related to the law of recognition of government and the principle of non-intervention into domestic affairs. BROWNLIE, *supra* note 45, at 90-92.

49. Internal self-determination is about people's choice of their own political system within national boundaries. *See* ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT, 117 (1994).

50. Lung-Chu Chen, *Self-Determination and World Public Order*, 66 NOTRE DAME L. REV. 1287, 1288 (1991).

51. *See* Goodman, *supra* note 25, at 1577-79 (describing how the modern rules of belligerent occupation have evolved in international law).

52. MALANCZUK, *supra* note 22, at 326-27.

3. *Self determination*

The principle of self-determination, with its historical origin in the making of nation-states,[53] is a relatively new concept in international law.[54] Only after the nineteenth century was the principle of self determination recognized as a substantial political right on the global stage.[55] At the end of the World War I, Woodrow Wilson emphasized the importance of self-determination as a fundamental principle for establishing long-lasting peace.[56] The principle of self-determination, however, did not receive widespread recognition at that time.[57] The League of Nations did not mention the principle of self-determination and refused to apply this principle to the territories which were under Allied occupation after World War I.[58] Furthermore, in the *Aaland* controversy, the International Commission of Jurists issued an advisory opinion contending that "the right of national groups... to separate themselves from the state" did not form part of positive international law.[59]

After World War II, the U.N. Charter explicitly referred to the "principle of equal rights and self-determination of peoples."[60] Through Articles 1 and 55 of the Charter, self-determination together with the equal rights of peoples, constitute a common principle but, as Rosalyn Higgins contends, the U.N. Charter does not confer self-determination with an absolute status.[61] The Charter is concerned about the "rights of the peoples of one state to be protected from interference by other states...."[62] However, the articles on non-self-governing territories and international trusteeship do not contain the phrase "self-determination."[63] Self-

53. Chen, *supra* note 50, at 1288 (explaining that the concept of self-determination was born in the 16th century with the emergence of the nation states).

54. In the nineteenth century, John Stuart Mill, in his essay "A Few Words on Non-Intervention," defended the self-determination of a community, probably on the same premises concerning personal autonomy and freedom. *See* Michael J. Glennon, *Self-Determination and Cultural Diversity*, 27 FLETCHER F. WORLD AFF. 75, 75-76 (2003) (stating that the defense of community autonomy may actually undermine the personal autonomy when an oppressive community is protected against outside intervention).

55. Eric Kolodner, *The Future of the Right to Self-Determination*, 10 CONN. J. INT'L L. 153, 154-55 (1994) (explaining that, as the principles of the new international order became more developed after the formation of the United Nations, self-determination attained the status of an international legal right).

56. Hill, *supra* note 20, at 121-22.

57. *Id.* Wilson's effort resulted only in "allowing for the adoption of special treaties for the protection of minorities." J. Oloka-Onyango, *Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium*, 15 AM. U. INT'L L. REV. 151, 159-60 (1999).

58. Hill, *supra* note 20, at 122.

59. Ved P. Nanda, *Revisiting Self-Determination as an International Law Concept: A Major Challenge in the Post-Cold War Era*, 3 ILSA J. INT'L & COMP. L. 443, 447 (1997) (quoting LEAGUE OF NATIONS O.J., Spec. Supp. 1, at 5 (1920)).

60. U.N. CHARTER art.1, para. 2 and art 55.

61. Higgins explains that the concept of self-determination in the U.N. Charter did not include a right of dependent peoples to independence. HIGGINS, *supra* note 49, at 112.

62. *Id.*

63. There is only a reference to 'self government;' it is sometimes said that the U.N. Charter 'implicitly' recognized the right to self-determination of peoples under colonial rules but such an

determination was neither about a legal right nor about dependent peoples. Many jurists and governments seem to view self-determination, though enshrined in the Charter, as a political façade.[64]

The practice of the U.N. bodies made self-determination a part of the law of the United Nations.[65] In the 1950s, the U.N. General Assembly began to accept self-determination as a right of the people.[66] The rise of self-determination to a status of an enforceable legal right of "peoples" materialized as a result of the decolonization process.[67] The "Declaration on Granting Independence to Colonial Countries and Peoples" was adopted by the U.N. General Assembly as a non-binding resolution in 1961.[68] That Declaration provided that all people under colonial rule have the right to "freely determine their political status," which is essentially the right to self-determination.[69] The 1960 Declaration, while acknowledging the right to self-determination, emphasizes the territorial integrity of states.[70] Although the colonial powers resisted the idea of self-determination as a legal right, the right of people to decolonization became widely pervasive.[71] Resolutions adopted by the U.N. General Assembly are not legally binding on member states but can be accepted as constituting or evidencing *opinio juris*. Moreover, in one academic opinion, the Declaration of 1960 serves as "an authoritative interpretation of the Charter."[72]

It should be noted that self-determination became a right of the people and not of a state. This distinction is clearer in the development of human rights law. The two human rights covenants of 1966—the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights—include the right to self-determination in their respective first articles.[73] This inclusion implies that self-determination is a human right existing outside of the specific historical context of decolonization.[74]

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interpretation seems to be based on what Higgins refers to as an incorrect 'popular assumption'. *See id.*

64. BROWNLIE, *supra* note 45, at 554. Brownlie says self-determination referred to in the U.N. Charter was regarded as merely of hortatory effect, while Higgins goes a little further by stating that it was not even about dependent peoples. HIGGINS, *supra* note 49, at 112-14.

65. BROWNLIE, *supra* note 45, at 554.

66. HIGGINS, *supra* note 49, at 113; Cass, *supra* note 19, at 24-26 (stating that the acceptance of self-determination was reflected in the U.N. Charter and a series of resolutions adopted by the General Assembly).

67. Chen, *supra* note 50, at 1289.

68. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961).

69. *Id.*

70. This emphasis on territorial integrity is relied on by many who object to a right to secession of a minority group within a state. See HIGGINS *supra* note 49, at 124; Derege Demissie, *Self-Determination Including Secession vs. The Territorial Integrity of Nation-States: A Prima Facie Case for Secession*, 20 SUFFOLK TRANSNAT'L L. REV. 165, 169 (1996).

71. HIGGINS, *supra* note 49, at 113.

72. *See* Taryn Ranae Tomasa, Comment, *Ho'Olahui: The Rebirth of A Nation*, 5 ASIAN L.J. 247, 263 (1998).

73. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

74. HIGGINS, *supra* note 49, at 114-15.

General Assembly Resolution 2625, the "Declaration of Principles on Friendly Relations," which was adopted in 1970,[75] is another important document emphasizing the right to self-determination. Self-determination was pronounced to take various forms: it may be "independence," "free association," "integration with an independent state," or "emergence into any other political status."[76] The essential idea to note is that people are given a choice.[77] The Declaration of 1970 states that self-determination is not only a right to decolonization, but also a right to be free from foreign domination.[78]

Nothing in the Friendly Relations Declaration is to be construed to undermine "the territorial integrity or political unity of sovereign or independent states [that are] conducting themselves in compliance with the principle of... self-determination and thus possessed of a government representing the whole people belonging to the territory."[79] This language in the Declaration seems to result in a couple of different interpretations. In one view, the wording seems to suggest the principle of democracy, or 'internal' self-determination.[80] A more extreme way of interpreting the Declaration can be drawn from the proposition that supports the supremacy of the right to secession over territorial integrity in instances of government oppression and harassment of minorities within its national boundaries.

Self-determination beyond the context of decolonization has been a source of trouble for some countries and has been a subject of heated debates.[81] The issue has been presented in the form of opposition between respect for territorial integrity of states and the right of self-determination, including the right to secede.[82] States challenged with issues of minority factions within their territorial

75. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 17, at U.N. Doc. A/5217 (1970).

76. *Id.*

77. Hill, *supra* note 20, at 128; Eric Ting-lun Huang, *The Evolution of the Concept of Self-Determination And the Right of the People of Taiwan to Self-Determination*, 14 N.Y. INT'L L. REV. 167, 193 (2001).

78. *See* HIGGINS, *supra* note 49, at 116 (referring to foreign domination reflected the situations in Palestine and Afghanistan).

79. G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 17, at U.N. Doc. A/5217 (1970).

80. Nanda, *supra* note 59, at 445-46 (noting that internal self-determination refers to a democratic form of government with wider participation).

81. Steve R. Ratner, *Drawing a Better Line: Uti Possidetis And the Borders of New States*, 90 AM. J. INT'L L. 590 (1996).

82. Self-determination and secession are intertwined with the concept of *uti possidetis*. *Uti possidetis*, which provides that "states emerging from decolonization shall inherit the colonial administrative borders that they held at the time of independence," served as a useful guideline for those seeking liberation from colonial rule, but may at the same time endanger global order by leaving certain minority groups unstable and stimulating secessionist movements. *See id.*

borders fear that the principle of self-determination might motivate minority groups to pursue secession.[83] The United Nations, however, has been resolute and consistent in excluding secession from the right to self-determination.[84]

The jurisprudence of the International Court of Justice (ICJ) is another authoritative source in favor of the right to self-determination. In an advisory opinion on Namibia, the ICJ stated that self-determination was made applicable to all people as a result of "the subsequent development of international law" on non-self-governing territories.[85] In the *Western Sahara* case, the ICJ also endorsed the right of the people to determine their political status by their "freely expressed will."[86]

More recent pronouncements are present in the *East Timor* case.[87] In 1991, Portugal, as the administering power of East Timor, instituted proceedings against Australia concerning the latter's activities with respect to East Timor.[88] Portugal asked the ICJ to declare that Australia had failed to respect the duties of Portugal as the administering power and the right of the people of East Timor to self-determination.[89]

The ICJ dismissed Portugal's claims on the ground that in the absence of the consent of Indonesia, a third state, accepting the application would violate the rights and obligations of Indonesia.[90] In its judgment, however, the ICJ declared that self-determination is "one of the essential principles of contemporary

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83. Self-determination has inspired bitter debates on secession of minorities. For example, secession of Bangladesh is an exceptional case to some. Nanda, *supra* note 59, at 450. Some others, however, regard it as an example of secession by the operation of a right to self-determination. Chen, *supra* note 50, at 1292-93. The dissolution of the former Soviet Union and experiences in Eastern Europe has added to the controversy. The view supporting right to secession based on the interpretation of the Declaration of 1970 seems a little flawed. Apart from the Declaration of 1970, which is legally non-binding in itself, there is not enough state practice supporting a right to secession, and the principle of territorial integrity seems to prevail over such a putative right. A more appropriate approach may be that secession is regarded as one political option to protect certain minority group in extreme circumstances. It is one thing to suggest secession as a legal right, and another to suggest it as a political alternative.

84. This determination probably reflects the weight carried by the principle of territorial integrity in the U.N. Charter. Also, it may be that the threat of rampant secession endangers international peace and security; the very values the United Nations was created to protect. *See* Kolodner, *supra* note 55, at 159-60 (stating that granting the right to secede would produce a highly fragmented and politically unstable international system).

85. Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (June 21).

86. Western Sahara, 1971 I.C.J. Reports 12 (Oct. 16).

87. Concerning East Timor (Port. v. Austl.), 1995 I.C.J. 90 (June 30).

88. Natalie S. Klein, *Multilateral Disputes and the Doctrine of Necessary Parties in the East Timor Case*, 21 YALE J. INT'L L. 305, 305-11 (1996) (explaining that the core of the dispute was Indonesia's military invasion of the former Portuguese colony of Timor in 1975).

89. *Concerning East Timor*, 1995 I.C.J. at 92.

90. This was the result of application of the so-called Monetary Gold principle. Under the principle, the ICJ cannot adjudicate a dispute where the interests of a state not consenting to the court's jurisdiction constitute the very subject matter of the dispute. Klein, *supra* note 88, at 313.

international law."[91] Portugal asserted that the rights of people to self-determination had an *erga omnes* character, meaning that the rights involve the obligations to the international community as a whole.[92] The ICJ was of the opinion that Portugal's argument was "irreproachable."[93]

The ICJ did not give its opinions on the implications of the *erga omnes* character of self-determination. However, many academics regard the principle of self-determination as a *jus cogens* norm in modern international law.[94] The tendency to label self-determination as *jus cogens* reflects the position of modern law on the comprehensive prohibition of colonization by the use or the threat of force. However, labeling is not the end of the problem. As the exact boundaries of self-determination are controversial,[95] so too is the result of giving the principle of self-determination a special status in international law.[96] Another important aspect of self-determination is that it forms one factor that constitutes the theory of democratic governance in international law.[97] According to Thomas Franck, self-determination "has evolved into a more general notion of internationally validated political consultation."[98] This line of argument places more emphasis on internal self-determination than on its external aspect relating to decolonization and

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91. *Concerning East Timor*, 1995 I.C.J. at 102. In his separate opinion, Judge Vereshchetin stressed the importance of the views of the people of East Timor with regard to the whole case. According to his analysis, after the adoption of the Declaration of 1960 on the Granting of Independence, the Administering Power has a duty to consult the people of a non-self-governing territory when "the matter at issue directly concerned that people." Separate Opinion of Judge Vereshchetin, *id.* at 138.

92. Portugal aimed to show that the 'Monetary Gold' principle was not applicable in a case where rights erga omnes were at issue, but the Court did not accept the argument, stating the erga omnes character of a norm and the rule of consent to jurisdiction were "two different things". *Id.* at 102.

93. *Id.*

94. Jus cogens, a peremptory norm, has a firm place in modern international law. According to Article 53 of the Vienna Convention on the Law of Treaties (1969), "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, Nov. 8, 1972, art. 53, 23 U.S.T. 3227, 3237, 8 I.L.M. 679, 698, The International Law Commission (ILC) states that a right to self-determination is one of few accepted peremptory norms of international law. *Report of the International Law Commission*, U.N. GAOR, 56th Sess., Supp. No. 10, *supra* note 21, at 208, at U.N. Doc. A/56/10 (2001). According to the ILC, *jus cogens* and *erga omnes* rules are almost identical, only with different focuses. While peremptory norms of general international law focus on the scope and priority to be given to a certain number of fundamental obligations, the focus of obligations to the international community as a whole is essentially on the legal interest of all States in compliance being entitled to invoke the responsibility of any State in breach. *Id.* at 277-78.

95. Many questions remain unanswered: Is self-determination only about independence, or is it a principle of a continuing application? Do minorities have the right to secession under circumstances?

96. For example, are the rights of minorities to secession also a *jus cogens* norm? If so, what is the status of the principle of territorial integrity of states? It is also related to other fundamental principles such as human rights and international peace. Is the exercise of self-determination that violates human rights acceptable? Or, is the use of force in pursuit of self-determination justifiable?

97. *See* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992) (explaining that the entitlement to democracy in international law has its root in the normative entitlement to self-determination).

98. *Id.* at 55.

nationalism. In other words, self-determination is associated with the victory of liberal democracy all over the world. Self-determination, however, is also said to have contributed to the "undemocratic climate in which ethnic-nationalism... has blossomed into a new, totally credible force" in international politics.[99]

III. SELF-DETERMINATION AND BELLIGERENT OCCUPATION

Applicability of self-determination in the context of belligerent occupation

As demonstrated above self-determination is not an idealistic, rhetorical slogan but a legal right stemming from specific historical experience. The principle, as it stands now, is a legal invention produced to deal with the decolonization process after the establishment of the United Nations.[100] It is not a sacred, God-given right of natural law but a legal conception that resulted from historical struggles and compromises. It is noteworthy that even the U.N. Charter, one of the most important instruments for the protection of human rights, failed to directly associate self-determination with decolonization and national liberation.[101] Therefore, it may be rather demanding to state that everyone is entitled to the right to self-determination under all circumstances. Nevertheless, contemporary belligerent occupation may serve as an appropriate setting for the application of the established doctrine of self-determination.

The right of people to self-determination may be realized in many forms, including independence and association with other groups in a federal or non-federal state.[102] In this regard, a theoretical question arises: "Is self-determination to be regarded as 'consumed' once a choice is made?" In case of association, this turns into a controversy on whether the right to self-determination includes a right to secession.[103] A more general aspect of the question surfaces when people choose to establish an independent state, a decision that most peoples have actually made.[104] Then, is self-determination exhausted once independence is achieved? It may be said that from the moment when independence is achieved, sovereignty and equal rights of a state start to take effect.[105] A state is given sovereign rights and legal guarantees under international law. In the normal conduct of state affairs, then, does self-determination disappear? The answer is no.

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99. Russell A. Miller, *Self-determination in International Law and the Demise of Democracy?*, 41 COLUM. J. TRANSNAT'L L. 601, 608 (2003).

100. Kolodner, *supra* note 55, at 155 (explaining the development of the concept of self-determination after the World War II).

101. HIGGINS, *supra* note 49, at 111-12 (stating that the U.N. Charter focused on the right of the sovereign member states).

102. BROWNLIE, *supra* note 45, at 553.

103. Where a people chose to associate with other groups in an existing state, the right of that people to self-determination should probably be regarded as assimilated to the right of the whole people of that state. The right to secession is not about continuous applicability of self-determination, but about who is entitled to self-determination.

104. HIGGINS, *supra* note 49, at 113-14.

105. *See* U.N. CHARTER, arts.1(2), 55.

International law confers equal sovereignty upon a state—a state is a 'subject,' or a distinct actor of international law.[106] Sovereign rights are given to a state, which is different from 'people' in the eyes of international law.[107] On the contrary, self-determination is a right of the people, not of a state, and the right continues to exist as long as that group of people exists, whether they constitute a state governing entity or whether that group remains under colonial rule.[108] It may be said that the sovereignty of a state and the right of people to self-determination exist in parallel with each other. When the sovereignty of a state is invoked against colonialism, the right of people to self-determination is to be invoked as well. In this type of scenario, the right to self-determination would come to the forefront, although such a situation cannot legally destroy sovereignty of an occupied state. In short, the right to self-determination—a right for people "to choose for themselves a form of political organization and their relation to other groups"[109]—always lies with the people, not with the state.

The U.N. Charter stipulates that friendly relations between states should be based on self-determination, and that states must respect the principle of self-determination in continuing mutual relations.[110] The 1966 Covenants also provide for a right to self-determination as a human right,[111] which is attached to individuals and not consumed as a result of political changes. Therefore, it is only logical to state that people have the ongoing right to self-determination under all circumstances, even in instances of foreign domination.[112] Accordingly, there is no reason to exclude self-determination from consideration of the rights of civilians in a territory under belligerent occupation. In Security Council Resolution 1511,[113] however, there is no direct reference to self-determination, which reflects the fact that self-determination as a legal right beyond the historical process of decolonization has yet to be fully acknowledged.[114]

The nature of belligerent occupation is similar to conditions of colonial rule and has the potential of developing into a new form of colonialism. Belligerent occupation imposes a kind of de facto government in the occupied territory. This de facto component, as opposed to a de jure component relied upon by a sitting authority, indicates that people under belligerent occupation are entitled to the right

106. A state is identifiable as a unit upon which international law confers various rights and duties. *See* BROWNLIE, *supra* note 45, at 58-59.

107. *Id.*

108. As Higgins pointed out, the U.N. Charter provided for self-determination as a right of states, not of peoples, but the subsequent practice of the UN changed the situations. *See* HIGGINS, *supra* note 49, at 111-21.

109. BROWNLIE, *supra* note 46, at 595.

110. *See* U.N. CHARTER art. 1, para. 2 and art. 55.

111. HIGGINS, *supra* note 49, at 114-15.

112. Foreign domination is still a source of disputes. For example, the occupation of Jerusalem by Israel has caused serious controversies about Israeli sovereignty and the self-determination of the community of citizens of Palestine. *See* John Quigley, *Sovereignty in Jerusalem*, 45 CATH. U. L. REV. 765, 774-80 (1996).

113. *See* S.C. Res.1511, U.N. SCOR, 4844th mtg., U.N. Doc. S/PV.4844 (2003).

114. In some cases of alien occupation, as with Afghanistan in 1987, the United Nations did refer to the right to self-determination. *See* HIGGINS, *supra* note 49, at 116.

to self-determination. This assertion does not mean that belligerent occupation has created a de novo right to self-determination for people to be protected under the laws of war. The right of people to choose their political future continues to exist whether or not there is a normal, non-wartime, government in place.

When The Hague Regulations and the Geneva Conventions were concluded in 1907 and 1949 respectively, the international community was not in the position to foresee that the principle of self-determination could have evolved to its current form. It was only after the practice of the United Nations in 1950s and 1960s that the principle of self-determination was accepted as a part of international law.[115] The U.N. Charter was in force at the time of the conclusion of the Geneva Conventions but the Charter was ambiguous about the concept of self-determination.[116] Consequently, there was no place for self-determination in the making of the law of belligerent occupation.

Given the status and the meaning of self-determination that is firmly established in modern international law, re-evaluating the duties of the occupying powers, and the rights of the people in occupied territories, becomes important. There is a prima facie contradiction between a people's right to self-determination and the existence of belligerent occupation. Belligerent occupation, although temporary in nature, has obtained ruling power not based on the people's will. Thus, the law of belligerent occupation needs to be revised or, at least re-interpreted in a way that incorporates the concept of self-determination which developed independently of international wartime law.

2. *Occupation At War in Light of Self-Determination*

The first issue needing clarification is the basic relationship between belligerent occupation and self-determination. Belligerent occupation is not a result of the exercise of a people's right to choose their own political destiny, thus, it follows that belligerent occupations contravene the principle of self-determination. Does it follow, then, that belligerent occupation should be legally prohibited? This is the same question facing the rules of war.[117] Today, war, as a means of state policy, is illegal, and the prohibition of the use of force lies at the core of modern international law.[118] The use of force is only lawful when it is used for the

115. BROWNLIE, *supra* note 45, at 595 (explaining that self-determination had not been a positive principle of law before the United Nations tackled the issue of decolonization).

116. HIGGINS, *supra* note 49, at 111-12.

117. *See* MALANCZUK, *supra* note 22, at 306 (explaining the principle that the rules governing the actual conduct of armed conflict are applicable in cases of armed conflict, whether the conflict is lawful or unlawful under the rules governing the resort to armed conflict).

118. *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 112-122 (1963) [hereinafter "The Use of Force"]; MALANCZUK, *supra* note 22, at 309-11.

purposes of legitimate self-defense or when the U.N. Security Council authorizes such a use, in accordance with Chapter 7 of the U.N. Charter.[119] Once an armed conflict occurs, however, the laws of war begin to impose themselves on every party to the conflict.[120] An aggressor is to be judged in the light of international humanitarian law *and* the laws of war, which present issues separate from responsibility for the breach of peace.

In theory, the principle of self-determination immediately makes any belligerent occupation illegal, because occupation is inevitably against the will of the people in the occupied territory. Considering that the right to self-determination is a peremptory norm of international law, the illegality of the very existence of belligerent occupation seems more plausible. The *jus cogens* character of the principle of self-determination would disallow every situation that is in violation of the principle. It may be said that belligerent occupation, which violates the core value of people's right to self-determination is simply not permitted.[121] This theoretical prohibition, however, does not deprive the Hague and Geneva Conventions of their *raison d'être.*

When actual belligerent occupation occurs in the course of an armed conflict, certain rules of protection and preservation are to be applied. These rules are found in the Hague[122] and Geneva laws.[123] Those who violate the rules of belligerent occupation are responsible for their breaches without regard to the lawfulness of their acts at the initial phase of armed conflicts.[124] Therefore, the question comes down to how to incorporate the principle of self-determination into the context of armed conflicts and the subsequent belligerent occupation. In other

119. There are some other forms of use of force, such as humanitarian intervention, which some suggest international law accepts as legitimate. The debates surrounding the legality of humanitarian intervention are mainly about the interpretation of Article 2(4) of the U.N. Charter, and the formation of customary international law. *See* BROWNLIE, *supra* note 45, at 564-71; Maxine Marcus, *Humanitarian Intervention Without Borders: Belligerent Occupation or Colonialism?*, 25 HOUS. J. INT'L L. 99, 103 (2002).

120. BROWNLIE, *supra* note 45, at 564-71; Marcus, *supra* note 119, at 103.

121. This proposed prohibition of belligerent occupation has yet to be accepted by the actual state practice. The legality of belligerent occupation seems to remain integrated with the legality of the initial use of force that resulted in that occupation. It is also to be reminded that, where states representing the international community impose measures of security on a country for its certain internationally wrongful acts such as aggression, the principle of self-determination, in the form of due consultation of the people, may be precluded. *See* BROWNLIE, *supra* note 45, at 169-71. Movement of populations and frontier changes, which are definitely against the will of the people concerned, may be pursued in the wake of a war of sanction to prevent future threats to the peace. *See* The Use of Force, *supra* note 118, at 409. Similarly, if the U.S-led multinational forces are regarded in their exercise of occupation and reconstruction of Iraq as enforcing the decisions of the international community or of the United Nations, their acts concerning the belligerent occupation can be more easily justified.

122. *See generally* Hague Convention of 1907, *supra* note 16, 36 Stat. 2277, *at* 1907 U.S.T. LEXIS 29.

123. *See generally* Geneva Convention of 1949, 75 U.N.T.S. 287, *at* 1949 U.S.T. Lexis 484.

124. "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation it shall be responsible for all acts committed by persons forming part of its armed forces." Hague Convention of 1907, *supra* note 16, art. 3, 36 Stat. 2277, *at* 1907 U.S.T. LEXIS 29, at 17-18.

words, how is self-determination balanced with belligerent occupation? The purpose of the laws of belligerent occupation is to protect civilians and to restore order and security in the occupied territory.[125] Minimizing or preventing miserable conditions inflicted upon civilians is the underlying rationale behind the modern laws of war, and the relevant rules are based on humanitarian needs and causes.[126]

One practical approach to reflect self-determination in this area of wartime law is to restrict the temporal span of belligerent occupation.[127] It should be understood that belligerent occupation should not exceed a certain minimum period of time. The longer the occupation continues, the more the principle of self-determination is undercut. Fixing a time limit in an inflexible form is probably unrealistic and ineffective because so much depends on the actual conditions of each armed conflict and on specific military needs. As a general principle though, it should be expressly acknowledged that belligerent occupation should continue for the shortest period of time necessary so that the preservation and the exercise of self-determination by the people under occupation is not undermined. Once this general principle is established, more concrete factors that take into consideration individual cases can be considered.[128]

Limiting the duration of belligerent occupation, however, is not a sufficient application of the principle of self-determination to fundamentally illegal situations of foreign domination. Another general principle that needs to be adopted is that belligerent occupation, as long as it exists, should be a temporary process so that self-determination is truly realized. Given that self-determination is a principal factor undermining the legitimacy of belligerent occupation, the final result of occupation should be to lay down the necessary conditions under which the people in the occupied territory can build their own government—one based on a freely expressed will. Helping a country to rebuild itself on its own is not an easy task; it is a much more daunting challenge when the country in question is a hostile enemy under the belligerent occupation, because the occupant has its own needs, such as ensuring security.

The recent experience in the reconstruction of several African nations and the Balkan areas after civil conflicts shows the practically insurmountable obstacles facing a belligerent occupier, even in the absence of widespread armed conflict.[129]

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125. Nossel, *supra* note 31, at 20; Imseis, *supra* note 22, at 91.

126. *See* MALANCZUK, *supra* note 22, at 342-46.

127. Some people believe that rules on belligerent occupation are too idealistic to expect states to observe, and that they need to be revised to accommodate reality of wars. *See* Goodman, *supra* note 25, at 1581. However, what is more important and urgent is to reflect human rights including self-determination in the existing laws of belligerent occupation.

128. *E.g.*, S.C. Res.1511, U.N. SCOR, 4844th mtg., at U.N. Doc. S/PV.4844 (2003) (urging the Coalition Provisional Authority to return governing authorities to the Iraqi people "as soon as practicable").

129. *See* Ruth Wedgewood & Harold K. Jacobson, *State Reconstruction After Civil Conflict: Foreword*, 95 AM. J. INT'L L. 1, 1-2 (2001).

The precise methodology of reconstruction and self-determination cannot be dealt with here, but worthy of note are the two correlated aspects of the proposed general principle that belligerent occupation should be about securing self-determination of the people under occupation.

First, in enabling people to exercise self-determination, the occupying powers may have to be allowed to introduce changes to the existing structures of the occupied society. The law of belligerent occupation is based on the temporary nature of occupation and provides that the occupant should respect the laws in force.[130] Sometimes, however, the existing elements of socio-political organization of the occupied territory may fundamentally preclude any notion of self-determination.[131] In this case, it may not be appropriate to allow the existing conditions to continue. The belligerent occupier may also have to establish proper legal and political systems in order to enable people to represent themselves.[132] This general statement on the necessary changes that need to be introduced leads us to the second aspect of the principle of self-determination that has to be applied to belligerent occupation.

Belligerent occupants should resist the temptation to excessively "nation build." The term nation building usually refers to a reconstruction strategy with the goal of bringing about durable peace in a state that has suffered from internal ethnic or religious conflicts.[133] It is often said that the reconstruction of failed societies requires more than foreign economic aid, and the notion of nation building refers to helping dysfunctional states, devastated by civil strife or wars, to build the political institutions that make future development possible.[134]

Recognition that financial aid is fruitless where decent governance is not present, inspired the West to focus on nation-building in the reconstruction of chaotic states.[135] Nation-building implies a deeper involvement in the domestic conduct of political affairs.[136] Planting specific democratic institutions in a certain country, for example, is a more realistic way to help that country to get out of poverty and political chaos, instead of simply distributing donated funds.[137] The use of nation-building is also perceived as an effective means to fight against the

130. Hague Convention of 1907, *supra* note 16,art. 43, 36 Stat. 2277, *at* 1907 U.S.T. LEXIS 29, at 37.

131. *Id.*

132. In Iraq, the Governing Council was composed to represent the Iraqi people. *See* CNN, *Iraqi Official: Saddam No Longer a Threat* (July 30, 2003), *at* http://www.cnn.com/2003/WORLD/meast/07/30/sprj.irq.main/index.html (last visited Jan. 7, 2004).

133. Quynh-Nhu Vuong, *U.S. Peacekeeping and Nation-Building: The Evolution of Self-Interested Multilateralism*, 21 BERKELEY J. INT'L L. 804, 804-06 (2003) (explaining that peacekeeping operations are increasingly intertwined with nation building designed to lay the foundations for a durable peace in regions devastated by civil conflicts).

134. *See* Sebastian Mallaby, *The Reluctant Imperialist: Terrorism, Failed States, and the Case for American Empire*, FOREIGN AFF., Mar./Apr. 2002, at 4.

135. *Id.*

136. *Id.*

137. *Id.*

threats of terrorism.[138] But when applying nation-building to a state under belligerent occupation, the fundamental question to ask is: how compatible is the principle of nation building with the principle of self-determination? The answer to this question cannot rule out the notion of nation building but should consider the inherent risks of such a concept.

Nation building efforts are likely to undermine the right to self-determination in a country under belligerent occupation. Political institutions may be chosen and implemented by the occupying powers with the intention of destroying any elements that look intrinsically hazardous to the belligerent occupants.[139] The building of national institutions has to stop short of the total implementation of specific extraneous political systems, and should focus on the establishment of basic conditions for the exercise of self-determination.[140] Therefore, occupying powers need to strike a reasonable balance between no involvement and too much involvement, when attempting nation-building.

IV. CONCLUSION

Today, the principle of self-determination has the potential to outlaw belligerent occupation altogether. Belligerent occupation, once it occurs, should be subject to limitations imposed by the operation of the principle of self-determination. Since belligerent occupation violates the principle of self-determination, the end of the occupation should foster the right to self-determination. Self-determination may call for an early end to the occupation and may obligate the occupants to secure the necessary conditions to implement the political choice of the occupied peoples. These implications must be legally recognized so that belligerent occupation will not turn into neocolonialism. In terms of the laws of belligerent occupation, occupying powers should be allowed to make minimal changes to the existing political conditions of the occupied society. At the same time, however, too much involvement in the name of nation building may hurt the core elements of self-determination.

The question of how to end the war in Iraq is to be answered by bearing in mind such normative relations between self-determination and belligerent occupation. The United States and its allies established the interim Iraqi Governing Council (IGC), wherein various internal sectors of the Iraqi society were supposedly represented.[141]On January 30, 2005, the historic Iraqi election took place, leading to formation of the new government effectively replacing the IGC. Since most Sunnis did not participate in the January election,[142] it remains to be

138. Vuong, *supra* note 133, at 821-22.

139. *Id.*

140. Post-Cold War experiences led foreign aid donors to seek to build in aided countries political parties, law courts, police forces, central banks and newspapers, etc. *See* Mallaby, *supra* note 134, at 4. It is practically impossible to define a category of institutions that are compatible with self-determination of the population involved, but it may be said that consultation with the people and appropriate international bodies would be useful in finding solutions to these sensitive matters.

141. *See* Patrick E. Tyler & Richard A. Oppel Jr., *After the War: Occupation*, N.Y. TIMES, July 15, 2003, at A11.

142. *The Conflict in Iraq: Election; Shiite Coalition Takes A Big Lead in the Iraq Vote*, N.Y.

seen whether the new government can enjoy political legitimacy, which is essential to political and social integration of a majority Shia, Kurds, and Sunns. The government has a responsibility to write a permanent Constitution of Iraq hopefully by mid-August of 2005, pursuant to which a new general election is to take place soon.[143]

Considering the proposed principle that belligerent occupation should endow people with the right to self-determination, the formation of the new government could possibly serve as a stimulus for a complicated process for rebuilding Iraq by Iraqi's own will. The occupying powers, especially the United States, may be tempted to accomplish a short-term political goal of establishing a pro-U.S. government with which they can easily deal; this is of concern to many.[144] It seems rather dangerous to try to impose certain political systems of U.S. choosing and supporting specific sects more responsive to such systems, because this practice would probably aggravate the existing political division among the religious and ethnic groups within Iraq.[145] The final destiny of the Iraqi people should be left in their own hands. The principle of self-determination must be the primary factor in making every decision concerning Iraq's status. A feasible development strategy may be possible only after the Iraqi people are satisfied with the exercise of their right to self-determination. It should be noted, however, that self-determination is required, not because it warrants success of democracy for the Iraqi people, but because it is to be applied as a legal rule. It is true that self-determination is a theoretical starting point for democratic governance,[146] but the principle of self-determination could arouse ethnic or nationalist awareness, which could end up rejecting the idea of democracy.[147] The distinction between external and internal self-determination shows these opposing perspectives. Given the current situation, it is likely that claims for self-determination lean toward an external aspect of the principle that emphasizes an absence of outside interferences.

The principle of self-determination may hamstring or halt the necessary economic reconstruction and political development toward democracy. Nevertheless, the United States and its allies must accept the reality that the rights of the people under occupation impose fundamental restrictions on the management of that occupation.

TIMES, Feb. 4, 2005, at A1.

143. *Iraq Legislators Set Up Panel to Draft a Consitution*, N.Y. TIMES, May 11, 2005, at A9; *U.S. Presses Iraqi Government To Broaden the Role of Sunnis*, N.Y. TIMES, May 13, 2005, at A11.

144. Tyler & Oppel, *supra* note 141.

145. *Id.*

146. *See* Franck, *supra* note 97, at 52-54.

147. *See* Miller, *supra* note 99, at 608.

PROTECTING THE INNOCENT OR PROTECTING SPECIAL INTERESTS? CHILD LABOR, GLOBALIZATION, AND THE WTO

Dexter Samida[*]

INTRODUCTION

For those in wealthy countries, the idea of children toiling in factories or fields seems like a relic from a bygone age. However, for too many children in the world this is still a sad reality. Many children work in hazardous conditions. There were an estimated 211 million children working worldwide in 2000.[1] Of these 211 million children, approximately 8.4 million were involved in child trafficking, forced and bonded labor, armed conflict, prostitution and pornography, and other illicit activities—the worst of the worst forms of labor.[2]

Poverty, income variability, debt, lack of access to credit, and lack of educational opportunities are cited as causal factors.[3] This article focuses on the oft-suggested link between trade and child labor.

This article considers two strategies that the international community might consider in order to reduce the prevalence of child labor. Part I considers whether countries can combat the scourge of child labor by becoming less open to foreign trade and globalization. Specifically, this part of the article looks for empirical

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1. INT'L PROGRAMME ON THE ELIMINATION OF CHILD LABOUR, ILO, EVERY CHILD COUNTS: NEW GLOBAL ESTIMATES ON CHILD LABOUR 20 (2002), *available at* http://www.ilo.org/public/english/standards/ipec/simpoc/others/globalest.pdf [hereinafter IPEC]. This estimate uses a more expansive definition of child labor (ages 5 to 14) than that considered below. See *infra* the text accompanying note 24 for an explanation of the numbers used in this article.

2. IPEC, *supra* note 1, at 25.

3. *See* ROBERT T. JENSEN, ILO, DEVELOPMENT OF INDICATORS ON CHILD LABOR 8-15 (2000) *available at* http://www.ilo.org/public/english/standards/ipec/simpoc/guides/jensen.pdf (noting that because there is evidence that credit restraints are associated with higher levels of child labor, providing credit to poor households could somewhat alleviate this problem); *See generally* KATHLEEN BEEGLE ET AL., CHILD LABOR, CROP SHOCKS, AND CREDIT CONSTRAINTS (Nat'l Bureau of Econ. Research, Working Paper No. 10088, 2003), *available at* http://www.nber.org/papers/w10088 (considering the relationship between a mother's education and her children's level of educational attainment); *See, e.g.*, ALESSANDRO CIGNO ET AL., CHILD LABOR, NUTRITION AND EDUCATION IN RURAL INDIA: AN ECONOMIC ANALYSIS OF PARENTAL CHOICE AND POLICY OPTIONS 34-35 (2001).

evidence supporting or negating the link between globalization and child labor. Part II considers the potential effectiveness of a unilateral U.S. trade ban and whether such a ban would be legal under World Trade Organization law.

I. GLOBALIZATION AND CHILD LABOR

> The fact is that the [World Trade Organization]'s policies are creating conditions for the accentuation of poverty and the decline in the condition of workers everywhere. Child labor is one manifestation or effect of the demands being placed on the majority of the world's population under a neoliberal economic regime.[4]

If globalization is responsible for vast increases in the prevalence of child labor then more restrictive trade policies should enable developing countries to combat the growth of child labor. This argument relies on the assumption that globalization is in fact causing more child labor. Many commentators are convinced there is a link.

For example, Madeleine Grey Bullard, in her award-winning journal article,[5] argues that "[g]lobalization could offer children an escape from lives of toil and drudgery, but instead, it draws more children into servitude."[6] In nearly identical words, Bullard's source for that assertion claims the same thing.[7] Interestingly, neither article has figures demonstrating that an increase in child labor has in fact occurred, irrespective of the cause.[8]

Other commentators claim that there is evidence that "increasing numbers of children migrate from their natal homes as opportunities for work expand in nearby towns or distant cities."[9] For example, in early American society, families moved to areas where child labor was in demand, even if this tended to reduce wages earned by the adult wage earner.[10] It is in this way that some perceive the export

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4. Saadia Toor, *Child Labor in Pakistan: Coming of Age in the New World Order*, 575 ANNALS AM. ACAD. POL. & SOC. SCI. 194, 203–04 (2001). Claims that capitalism is the cause of child labor are not new. For example, see Edwin Markham, *The Hoe-Man in the Making*, COSMOPOLITAN (Sept. 1906) *reprinted in* MUCKRAKING! THE JOURNALISM THAT CHANGED AMERICA 4, 6 (Judith Serrin & William Serrin eds., New Press 2002) ("The factory, we are told, must make a certain profit, or the owners (absentee proprietors generally, living in larded luxury) will complain. . . . It pays, my masters, to grind little children into dividends!").

5. Madeleine Grey Bullard, *Child Labor Prohibitions Are Universal, Binding, and Obligatory Law: The Evolving State of Customary International Law Concerning The Unempowered Child Laborer*, 24 HOUS. J. INTL L. 139, 139 (2001). The article received the American Civil Liberties Union, Ben G. Levy, Essays in Freedom Award.

6. *Id.* at 156.

7. *See* Robert Senser, *How the Global Economy Promotes Child Labor*, *available at* http://www.senser.com/clali.htm (last visited Apr. 19, 2005) (stating that "[t]he global economy should offer little children an escape from lives of forced labor. Instead, it is drawing more and more of them into various types of servitude.").

8. *See generally* tbl. 1 *infra* page 6.

9. Rachel Baker & Rachel Hinton, *Approaches to Children's Work and Rights in Nepal*, 575 ANNALS AM. ACAD. POL. & SOC. SCI. 176, 178 (2001).

10. Donald O. Parsons & Claudia Goldin, *Parental Altruism and Self-Interest: Child Labor Among Late Nineteenth-Century American Families*, ECON. INQUIRY, Oct. 1989, at 637, 655-57 (estimating that around 90% of the income generated by working children in a family was dissipated

sector to be the most direct link between child labor and globalization.[11] This is a possible connection, and it is one of the critiques of the North American Free Trade Agreement.[12] Furthermore, some argue that opening up the export sector increases the opportunities for unskilled labor which could in turn draw children into the workforce.[13]

However, this argument glosses over the fact that the child who relocates in order to find work in the export sector may have previously worked at a less desirable job. Export jobs are not the only source of employment for child laborers—only the most visible.[14] In reality only a small percentage of child laborers work in the export sector.[15] Given this, even a large increase in the size of the export sector will have only limited effects on the number of child laborers.[16]

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through lower adult male wages); *See* Kaushik Basu & Zafiris Tzannatos, *The Global Child Labor Problem: What Do We Know and What Can We Do?*, 17 WORLD BANK ECON. REV. 147, 150–51 (2003) (arguing that there are multiple equilibriums including a "bad" equilibrium where high levels of child labor push down adult wages. Under this scenario a ban on child labor would be welfare enhancing).

11. Toor, *supra* note 4, at 217 ("When we talk about globalization creating the conditions (through the disembeddedness of the economic from the social) for the increasing exploitation of child labor in countries of the South, it does not mean only in the export sector, although the export sector is perhaps the most direct link.").

12. *See, e.g.*, Joshua Briones, *Student Scholarship: Paying the Price For NAFTA: NAFTA's Effect on Women and Children Laborers in Mexico*, 9 UCLA WOMEN'S L.J. 301, 307 (1999); Joan M. Smith, *North American Free Trade and the Exploitation of Working Children*, 4 TEMP. POL. & CIV. RTS. L. REV. 57, 63 (1994) ("[T]here is serious cause for concern that the industrial growth projected under NAFTA will produce greater exploitation of children.").

13. *See, e.g.*, ERIC V. EDMONDS & NINA PAVCNIK, INTERNATIONAL TRADE AND CHILD LABOR: CROSS-COUNTRY EVIDENCE 18-19 (Nat'l Bureau of Econ. Research, Working Paper No. 10317, 2004), *available at* http://www.nber.org/papers/w10317. The authors consider this argument in their paper and conclude that "the evidence [of their empirical research]. . . does not find any significant support for that claim." *Id.* at 19.

14. *See, e.g.*, Robert J. Liubicic, *Corporate Codes of Conduct and Product Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 LAW & POL'Y. INT'L BUS. 111,140 (describing non-export industries as "invisible" industries).

15. *See* U.S. DEP'T. OF LABOR, BY THE SWEAT AND TOIL OF CHILDREN: THE USE OF CHILD LABOR IN AMERICAN IMPORTS 2 (1994), *available at* http://www.dol.gov/ILAB/media/reports/iclp/sweat/sweat.pdf (estimating that export markets may account for as little as 5% of total employment of child laborers).

16. Even if the number of child laborers did increase due to an expansion of the export sector this might not be all bad. Increased employment demand might (for children and their parents) increase wages, improve working conditions, or both.

Moreover, globalization and foreign trade tend to increase incomes.[17] To the extent that trade increases family incomes it may lessen families' reliance on child labor and may move children from the workplace into the classroom.

a. Recent Trends

Linda Golodner, President of the National Consumers League, asserts that "[t]he problem of child labor has grown along with the expansion of the global marketplace."[18] An article by Timothy A. Glut seems to provide evidence for this assertion. He claims that the number of child laborers has increased by 112 million in only eight years.[19] He states:

> In late 1994, the International Labo[u]r Organization (ILO) estimated that there were 200 million child laborers in the world's work force.... These statistics contrast sharply with earlier studies. In 1986, the ILO estimated that there were only eighty-eight million child workers. *This dangerous increase in the amount of child labor* illustrates the ineffectiveness of current measures to curtail child labor.[20]

Glut, however, neglects to cite any actual ILO studies. Instead the author cites newspaper articles in the Detroit Free Press, L.A. Times, and the Washington Post.[21] His inattention to the actual numbers hides the great improvements that have been made and creates the impression that something drastic needs to be done.

Data from the International Labour Office, compiled in Table 1, tells a much different story.[22] In 1960, twenty five percent of world's children worked.[23] That

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17. *See, e.g.*, Axel Dreher, *Does Globalization Affect Growth?*, *at* 14 (2003), *available at* http://econwpa.wustl.edu/eps/dev/papers/0210/0210004.pdf (last visited Apr. 19, 2005) (concluding that economic integration leads to faster rates of growth); *See* DAVID DOLLAR & AART KRAAY, TRADE, GROWTH, AND POVERTY 2 (World Bank, Working Paper No. 2615, 2001), *available at* http://www.worldbank.org/research/growth/pdfiles/Trade5.pdf (stating that developing countries that have "globalized" have grown faster even as wealthier nations growth rates have slowed). Trade between nations also tends to reduce income gaps between those nations. DAN BEN-DAVID & AYAL KIMHI, TRADE AND THE RATE OF INCOME CONVERGENCE 16 (Nat'l. Bureau of Econ. Res., Working Paper No. 7642, 2000), *available at* http://papers.nber.org/papers/w7642.pdf. Finally, some writers claim that globalization induces better governance. FEDERICO BONAGLIA ET AL., HOW GLOBALISATION IMPROVES GOVERNANCE 28 (OECD Development Centre, Working Paper No.181, 2001) *available at* http://www.oecd.org/dataoecd/41/48/2675871.pdf.

18. Linda F. Golodner, Address at the National Consumers League (Jan. 21, 1998), *available at* http://nclnet.org/advocacy/workersrights/speech_child_labor_01211998.htm.

19. Timothy A. Glut, *Changing the Approach to Ending Child Labor: An International Solution to an International Problem*, 28 VAND. J. TRANSNAT'L L.1203, 1206–07 (1995). *See also id.*, at 1207 n.19 (postulating that, in percentage terms, there has been an "over 100% increase in child labor." Glut also argues that the increase "cannot simply be attributed to a greater number of children in the world.").

20. *Id.* at 1206-07 (emphasis added).

21. *Id.* at 1207; *See also id.*, at 1207 n.15, 1207 n.18.

22. *See* WORLD BANK, WORLD DEVELOPMENT INDICATORS (2002), *available at* http://laborsta.ilo.org/ [hereinafter World Bank Data] This study looks at the amount of economically active children. For the purposes of this study, the term "child" is restricted to children aged 10-14. The next age group, 15-19, contains some people generally not considered children. Data for younger children is not available by country. Researchers generally believe that the term "child labor" should

same year, 39 percent of children in Sub-Saharan Africa worked, as did 38 percent of children in East Asia and the Pacific.[24] By 2000, the percentages of children working in the world and Asia had dropped to 11 percent and 8 percent, respectively, while the percentage of children working in Sub-Saharan Africa had dropped to 29 percent.[25] None of these areas has seen an increase in the prevalence of child labor.[26]

Table 1. Prevalence of Child Labor by Region[27].

Region	1960	1970	1980	1990	1995	2000
East Asia & Pacific	37.82%	32.83%	26.23%	14.27%	11.18%	8.06%
Europe & Central Asia	4.71%	3.55%	3.34%	2.80%	1.97%	1.11%
Latin America & Caribbean	16.59%	14.64%	12.70%	11.27%	9.87%	8.23%
Middle East & North Africa	21.61%	18.58%	14.03%	7.80%	6.06%	4.38%
South Asia	31.76%	27.29%	23.35%	19.39%	17.32%	15.03%
Sub-Saharan Africa	39.06%	36.66%	34.71%	32.21%	30.33%	28.99%
World	24.85%	22.20%	19.86%	14.61%	13.08%	11.33%

Table 2 looks at the prevalence (expressed in percentage terms) of child labor and the total numbers of child laborers in: the world; more developed regions; less developed regions; and the ten countries that in 2000 had the highest prevalence of child labor. It illustrates how child labor has declined overall since 1960. Even in countries that have increased *numbers* of child laborers the *ratio* of child workers to non-workers has fallen, in some places dramatically.

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not encompass all work children do (such as light chores). *See* IPEC, *supra* note 1, at 32–33. However, separate data is not available.

23. *See* World Bank Data, *supra* note 22; *see supra* Part I., at tbl. 1.

24. *See* World Bank Data, *supra* note 22; *see supra* Part I., at tbl. 1.

25. *See* World Bank Data, *supra* note 22; *see supra* Part I., at tbl. 1.

26. *See* World Bank Data, *supra* note 22; *see supra* Part I., at tbl. 1. This statement can be made even stronger. Only five of the 171 countries measured have seen any increase in the prevalence of child labor during the time period evaluated. In 1960 the Dominican Republic had 25.7% of the children aged 10-14 working. In 1970 the rate went up to 31.6% and subsequently down to 24.8% in 1980. In Kenya the rate went from 44.96% in 1970 to 45.06% in 1980. In 1990 the rate dropped to 43.4%. Nicaragua saw a 0.82 percentage point increase between 1960 and 1970, followed by a subsequent decline. Similarly, the United Arab Emirates and the United States had temporary increases of 0.45 and 0.10 percentage points respectively in the same time period, also followed by declines.

27. *See* World Bank Data, *supra* note 22.

Table 2. Selected Regions and Child Labor[28]

	Rates		Thousands	
	1960	2000	1960	2000
World	24.7%	11.2%	76420	67444
More developed regions	3.0%	0.0%	2434	17
Less developed regions	32.4%	13.0%	73985	67427
Bhutan	69.1%	51.1%	65	136
Burkina Faso	79.4%	43.5%	426	686
Ethiopia	50.8%	41.1%	1386	3277
Kenya	46.3%	39.2%	435	1699
Mali	63.7%	51.1%	329	726
Nepal	70.7%	42.1%	797	1154
Niger	49.9%	43.6%	182	609
Rwanda	44.2%	41.4%	152	413
Uganda	51.9%	43.8%	438	1343

Furthermore, as illustrated in Table 3, the countries that had the biggest expansion in their export sectors also had the biggest reductions in the prevalence of child labor.[29]

Table 3. Exports and Child Labor

Change in Exports (1995–2000)	-21.3%	2.7%	22.1%	61.4%
Change in Child Labor (1995–2000)	-18.2%	-25.0%	-22.8%	-31.2%

Some commentators rightly suggest that child labor is difficult to define, find, and measure.[30] Nevertheless, these commentators are content in claiming that child labor is a serious and increasing problem.[31] The ILO itself cautions that it is difficult to make comparisons over different years.[32] While one should be cautious in using this data in empirical models, it would be wrong to exempt the claims of anti-globalization writers from empirical scrutiny simply because the data is difficult to collect.

28. Table 2 was complied from World Bank Data, *supra* note 22.

29. Table 3 was compiled from World Bank Data, *supra* note 22. It only includes countries that had some positive level of child labor in 1995. The data was broken into quartiles and then analyzed. The percentage change in child labor was calculated by the deducting the prevalence of child labor in 1995 from the 2000 value and then dividing by the 1995 level. Growth of the export sector was calculated in a similar fashion.

30. Joan M. Smith, *supra* note 12, at 63.

31. *Id.*

32. IPEC, *supra* note 1, at 18–19.

b. Previous Empirical Studies

Trade liberalization has had a positive effect on the prevalence of child labor in Vietnam. One examination of the country indicated that trade liberalization in the rice market moved one million children out of child labor by increasing family incomes.[33] The declines were greatest for secondary school-aged girls, who were consequently more likely to attend school.[34]

As for a cross-section of countries, a recent study found no evidence that greater openness to trade led to higher levels of child labor.[35] The authors concluded that while greater openness is correlated with a lower prevalence of child labor, this effect was statistically insignificant once the study was controlled for income differences across countries.[36] They also concluded that there was no evidence that increased trade leads to product demand changes which in turn leads to increases in child labor.[37] They found no evidence that child labor is related to the heterogeneity of skill endowments, capital scarcity, or the signing of anti-child labor agreements.[38] Additionally, they concluded that child labor is not driven by increases in exports of products made by unskilled labor.[39]

Other authors agree with this evaluation. One critique concludes that high levels of child labor might be attributable to an absence of globalization, rather than to too much of it.[40] The article uses the Sachs-Warner index of openness, along with a number of control variables.[41]

A cross-sectional study of countries by Robert Shelburne came to similar conclusions.[42] Shelburne's article used imports and exports as a percent of GNP as a measure of openness, along with a number of control variables.[43] He found that countries that are small, poor, and less open to international trade have a greater prevalence of child labor.[44]

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33. *See* ERIC EDMONDS & NINA PAVCNIK, DOES GLOBALIZATION INCREASE CHILD LABOR? EVIDENCE FROM VIETNAM 31 (Nat'l Bureau of Econ. Research, Working Paper No. 8760, 2000), *available at* http://papers.nber.org/papers/w8760.pdf.

34. *Id.* at 28-29.

35. *See* EDMONDS & PAVCNIK, *supra* note 13.

36. *Id.* at 22–23.

37. *Id.* at 23.

38. *Id.*

39. *Id.* at 18–19, tbl 5.

40. ALESSANDRO CIGNO ET AL., *Does Globalization Increase Child Labor?*, 30 WORLD DEVELOPMENT 1579, 1587 (2002); Stanley Fischer, *Globalisation and Its Challenges*, 93 AM. ECON. REV. 1, 33 (2003), *available at* http://www.iie.com/fischer/pdf/fischer011903.pdf (echoing this sentiment and concluding, "the pro-market pro-globalization approach is the worst economic policy, except for all the others that have been tried.").

41. ALESSANDRO CIGNO ET AL., *supra* note 40, at 1585–86.

42. Robert C. Shelburne, *An Explanation of the International Variation in the Prevalence of Child Labour*, 24 WORLD ECON. 359, 374-75 (2001).

43. *Id.* at 372.

44. *Id.*

c. New Regressions

This Article builds upon the work of Shelburne. His model of child labor is represented by the following equation:

$$CHILAB = \alpha(PCI)^{\beta_1}(OPEN)^{\beta_2}(GNP)^{\beta_3}\varepsilon$$

CHILAB is the percentage of children *not* in the workforce; PCI is per capita income; OPEN is imports and exports as a percentage of GNP; and GNP is gross national product.[45] An exponential function was utilized for this Article because that was the functional form chosen by Shelburne.[46]

Some believe poverty increases child labor.[47] If true, child labor should decrease as per capita income (PCI) increases.[48] Shelburne uses OPEN to test the influence of openness on the amount of child labor.[49] Shelburne hypothesizes that in a closed economy the introduction of child labor will, on net, benefit the non-child-labor factors of production (although with varying distributional effects).[50] In an open economy the benefits of child labor accrue to the children (or their parents), which suggests that open economies will tend to have less child labor.[51] Shelburne uses GNP as a measure of economic size.[52] Shelburne argues that for

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45. *Id.* at 372-73. Shelburne used 1996 values for each variable Shelburne also used a dummy variable for countries with a history of communist rule. Since the dummy variable had little influence on the results it is dropped here.

46. *Id.* at 376. Shelburne utilized a Box-Cox procedure to pick the functional form which would minimize the residual sum of errors. Representative linear equations were estimated for this article (but not reported). The results were similar to the regressions reported in this article.

47. *See* Sudharshan Canagarajah & Helena Skyt Nielsen, *Child Labor In Africa: A Comparative Study*, 575 ANNALS AM. ACAD. POL. & SOC. SCI. 71 (2001).

48. Shelburne, *supra* note 42, at 369.

49. *Id.* at 370.

50. *Id.* at 365 (suggesting that in a three factor world capital and skilled laborers will benefit from the introduction of child labor,unskilled laborers without children will be harmed, and unskilled laborers with children would most likely benefit).

51. *Id.* at 364. Shelburne concludes "[t]hus in a closed economy the non-child-labour factors gain from child labour, while they do not in an open economy. Therefore, *ceteris paribus*, one would expect on a cross-section that where an economy is open to international trade, there is less likely to be child labour." *Id* at 366. To illustrate, assume Country X is a closed economy where production equals consumption. When child labor is introduced the non-child-labor factors of production can still produce the same combinations of labor-intensive and non-labor-intensive goods. However, the price of the labor-intensive goods falls allowing them to expand their utility. They can produce at one point and trade with the child-labor factor of production until they maximize utility. Although the net effect of the allowance of child labor is positive for the non-child-labor factors as a whole, distributional effects may make some groups worse off such as wage earners in the labor-intensive market. Next, assume Country Y is an open economy that cannot influence the world price. When Country Y allows child labor prices do not change. All non-child-labor factors of production receive the same benefits. Child-labor is paid its marginal productivity, and thus gains. If the decision to allow child labor is set by consensus (through norm creation or legislation) Country X (the closed economy) is more likely to allow child labor as more factors of production benefit from its introduction.

52. *Id.* at 371.

large, open economies the introduction of child labor changes the terms of trade, making the non-child-labor factors of production worse off.[53] Smaller countries cannot affect the terms of trade and therefore the non-child-labor factors are not made worse off on the whole when child labor is introduced (although there are distributional effects—some factors are made worse off and some better off).[54] This suggests smaller countries would be more likely to utilize child labor.[55]

Shelburne's article suggests that smaller, poorer, and less open countries have a greater prevalence of child labor.[56] This result, while interesting, does not fully address the present issue. His article suggests that at a given point in time, lower levels of child labor are correlated with higher levels of trade.[57] However, his results do not indicate whether an increase in the level of global trade over time leads to an increase in the level of child labor.

It is also not clear that the selected measure for openness (imports and exports as a ratio of GNP) is the best available measure. As previously mentioned, the link between globalization and child labor is supposedly between the export sector and child labor.[58] A better measure might therefore focus on exports.

In the following section the Shelburne-model of child labor is extended by estimating the model for a larger number of time periods. This article will then consider an alternative measure of trade openness and present some models of dynamic change.

d. Discussion of Results

The first empirical model tested is based on the Shelburne-model of child labor discussed above.[59] However, slightly different variables were used. Gross National Income per person is used in place of the per capita income variable.[60]

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53. *Id.* at 376.

54. *Id.* at 375. The factors that compete with child labor are made worse off, while the other factors are better off.

55. *Id.* at 369. To illustrate, assume Country X is a large open economy. Before the introduction of child labor, manufacturers produce a certain level of goods and trade with the world to a point that maximizes their utility. Since Country X is able to affect the prices of labor-intensive goods, it is assumed that the products it trades in the world market are labor-intensive goods. When child labor is introduced, the non-child-labor factors of production can still produce the same combinations of labor-intensive and non-labor-intensive goods. However, the country's terms of trade have deteriorated. After the introduction of child labor, Country X receives less skill-intensive goods for each unit of labor-intensive goods it trades. This implies that the non-child-labor factors are unable to consume as much as previously and are made worse off. The net effect for each factor depends on the distributional consequences of the change. Country Y, a small open economy, does not affect the world price and therefore the non-child-labor factors of production are not made worse off. Country Y is, therefore, more likely to allow child labor.

56. *Id.*

57. *Id.* at 362.

58. *See supra* text accompanying note 11.

59. The analysis that follows builds on previous models, but I have added, expanded, or altered those models.

60. *See National Accounts: Output and Expenditure*, *at* http://www.worldbank.org/data/working/def7.html. Gross National Income is what the World Bank now calls what was formerly Gross National Product (GNP).

The openness variable uses gross domestic product (GDP) instead of GNP as its denominator.[61] These changes are minor.

More importantly, instead of using only a single year, regressions were run for 1960, 1970, 1980, 1990, 1995, and 2000. The results are presented in Table 5 of the Appendix.[62] The results replicate what was found previously: child labor is more prevalent in poorer, smaller, and less open countries. Two measures of openness were used. The first measure was similar to the measure used by Shelburne—imports and exports as a percent of GDP.[63] The second measure was exports as a percent of GDP.

Since the dependant variable is the percentage of children *not* in the workforce,[64] positive coefficients mean that when the variable increases, more children are not working, and therefore the prevalence of child labor is lower.[65] For each time period the OPEN variable is of the correct (positive) sign and is highly statistically significant, indicating greater openness is associated with less child labor.[66]

The second model looks at the relationship between changes in the prevalence of child labor and changes in the other variables.[67] If, as the opponents of globalization believe, increased levels of trade increase child labor, the coefficients for the OPEN variable should be negative.[68] If increased openness is unrelated to child labor the coefficient will be zero. If increased openness was related to decreases in the prevalence of child labor the coefficient will be positive.

The estimated changes represent the differences in each particular time period, up to the year 2000. For example, the 1960 estimates look at changes in each of the variables from 1960 to 2000. The results of this model are presented in Table 6 of the Appendix.

Openness is essentially no different statistically than zero for each of the estimates.[69] This suggests changes in the level of openness are unrelated to the prevalence of child labor. Per capita income, however, is strongly statistically significant (and the correct sign) for most of the time periods.[70] In other words, increasing income leads to less child labor.

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61. *See* World Development Indicators, *supra* note 22.

62. The Appendix begins on page 433.

63. *See Shelburne, supra* note 42.

64. This measure was used in order to allow the use of natural logarithms. It is not possible to take the natural log of 0 (representing the percent of children in the workforce). However, it is possible to take the natural log of 100 (representing the percent of children *not* in the workforce).

65. *See infra* app., at tbl. 5.

66. *See infra* app., at tbl. 5.

67. Since using changes creates negative variables a linear model was estimated. Data points where the initial level of child labor was zero were eliminated.

68. The interpretation of coefficients is again slightly counterintuitive because the model looks at the change in children not working. A negative coefficient means that if the variable increases there are fewer children *not* working, in other words, more child labor.

69. *See infra* app., at tbl. 6. One estimate approaches statistical significance at a low level.

70. *See infra* app., at tbl. 7.

One final model was used. This model looked at changes over separate ten-year periods (1960 to 1970, 1970 to 1980, 1980 to 1990, and 1990 to 2000).[71] The data was also pooled and considered as a whole.[72]

The results are slightly different than before. As gross national income expands, child labor decreases.[73] Gross national income per capita is not statistically significant in either the ten-year interval estimate or the pooled data estimate.[74] The coefficients for openness were almost statistically (and the correct sign) significant at a low level.[75]

These results suggest that increased globalization has not led to an increase in the prevalence of child labor. Refusing to embrace further globalization will not free developing nations from the existence of child labor. If trade increases income, trade may indirectly lower the prevalence of child labor.[76]

The next section focuses on the whether a unilateral trade ban would benefit child laborers. It considers whether, even given the above analysis, a unilateral trade ban targeted at goods produced with child labor is a good idea and whether it would be legal under WTO law.

II. UNILATERAL TRADE BAN

a. Discussion

Some advocate for the United States' enactment of a unilateral trade ban on goods produced using child labor.[77] However, as previously noted, only a small percentage of child laborers are employed in the export sector—perhaps as low as 5 percent.[78] A trade ban would do little to protect child laborers if they found work elsewhere. Presumably, for at least some children, the export sector is the best option in terms of wages, working conditions, or both.[79] Even if a large portion of child labor was involved in the export sector, a trade ban would simply mean child labor would move elsewhere as the existence of an export sector itself does not spawn child labor.[80]

Moving child laborers out of the export sector would tend to increase the labor supply in other sectors, which could depress wages, lead to worse working

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71. *See infra* app., at tbl. 7.

72. Instead of using differences this model used ratios (New Value/Old Value). This allowed the use of the original mathematical form of the model.

73. *See infra* app., at tbl. 7.

74. *See infra* app., at tbl. 7.

75. The first definition of openness (imports and exports) was statistically significant at 16.4%. The second definition (exports only) was significant at 15.48%.

76. *See* Dreher, *supra* note 17 and accompanying text.

77. *See, e.g.*, Benjamin James Stevenson, *Pursuing an End to Foreign Child Labor Through U.S. Trade Law: WTO Challenges and Doctrinal Solutions*, 7 UCLA J. INT'L L. & FOREIGN AFF. 129, 166 (2002); Matthew T. Mitro, *Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions*, 51 AM. U. L. REV. 1223, 1271 (2002).

78. U.S. DEP'T OF LABOR, *supra* note 15, at 2.

79. *Id.*

80. *See infra* app., at tbl. 5.

conditions, or both.[81] Wages from foreign-owned entities[82] tend to be higher than domestic companies, and insomuch as the export sector is proportionately made up of a greater number of foreign firms than domestic firms,[83] moving labor from this sector to others could tend to reduce wages for those laborers even if the movement did not depress wages in other sectors.

If, as is likely in at least some cases, necessity pushes children into working, a unilateral trade ban could have the perverse effect of increasing the number of hours children work. This would occur for children that moved to industries paying lower wages.[84]

These are not just idle concerns. The threat of the enactment of a law banning imports of products produced with child labor led to the firing of fifty-five thousand Bangladeshi children.[85] A follow-up of a subset of these children found that none had enrolled in school, half had found jobs paying less money (such as prostitution, brick-laying, and selling flowers), and the other half were still looking for work.[86] Nutrition and health care were better for those children who kept their jobs. Former workers circulated a petition to return to the factories at least part-time.[87]

One commentator speculates that early British laws banning child labor may have increased (at least temporarily) its prevalence:

> The effect of the laws was to impose a cost on firms that were found to be employing children. It is arguable that the added cost, by making children less attractive to hire, tended to lower their wages. But because children worked

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81. This is not a shocking or controversial result. It is a proposition commonly taught in introductory labor economics classes. *See* Notes for Chapter 2, *available at* http://www.oswego.edu/~economic/eco350/chap2.htm. (last visited Apr. 20, 2005). In other words, an increase in labor supply results in a lower equilibrium wage, but a higher equilibrium level of employment. Presumably non-child workers will tend to shift into the export sector if wages adjust. The magnitude of the wage decline depends on how many of workers are able to shift.

82. *See* ROBERT E. LIPSEY & FREDERIK SJOHOLM, FOREIGN FIRMS AND INDONESIAN MANUFACTURING WAGES: AN ANALYSIS WITH PANEL DATA (Nat'l Bureau of Econ. Research, Working Paper No. 9417, 2002), *available at* http://www.nber.org/papers/w9417 (finding that when a foreign-firm takes over a domestic-firm in Indonesia wages rise); ROBERT E. LIPSEY, HOME AND HOST COUNTRY EFFECTS OF FDI (Nat'l Bureau of Econ. Research, Working Paper No. 9293, 2002), *available at* http://www.nber.org/papers/w9293 (summarizing the evidence regarding foreign-firms paying higher wages); ZADIA FELICIANO & ROBERT E. LIPSEY, FOREIGN OWNERSHIP AND WAGES IN THE UNITED STATES, 1987-1992 (Nat'l Bureau of Econ. Research, Working Paper No. 6923, 1999), *available at* http://www.nber.org/papers/w6923 (discussing Venezuela, Mexico, and the United States).

83. *See* FELICIANIO & LIPSEY, *supra* note 82, at 3.

84. *See* Sonia Bhalotra, *Is Child Work Necessary?*, *available at* http://fmwww.bc.edu/RePEc/es2000/0500.pdf (last visited Apr. 19, 2005) (finding evidence that Pakistani children work due to conditions of necessity and suggesting trade bans could actually increase the number of hours children work).

85. Ben White, *In the Best Interests of the Child?*, *at* http://www.cwa.tnet.co.th/vol12-4/interest.htm (last visited Apr. 19, 2005).

86. *Id.*

87. *See* White, *supra* note 85; *See also* CAROL BELLAMY, UNITED NATIONS CHILDREN'S FUND, THE STATE OF THE WORLD'S CHILDREN 23 (1997), *available at* http://www.unicef.org/sowc97/download/sow1of2.pdf.

> primarily to reach a minimal acceptable level of income for their households, a lower hourly wage induced them to work longer hours. Hence, paradoxically, the laws may have contributed to a worsening of child labor. The same risk is there with modern laws, such as India's Child Labor Act of 1986, that impose fines on firms that hire children.[88]

This debate is reminiscent of the one over minimum wage laws—the imposition of which often has unintended consequences. In Indonesia, for example, labor legislation, such as minimum wage laws, have had a statistically significant negative effect on employment in the formal sector of the economy.[89] Those suffering the greatest harm were women, the young, and the less educated.[90] Mandating higher wages or better working conditions is also likely to have significant negative effects for industries under pressure to locate in low-cost jurisdictions.[91] This would be true even if working conditions were enforced by a worldwide policy, as employers would move to locations where the wage and working conditions were justified by levels of productivity.[92] Chasing away potential employers can only make things worse, as that would tend to also restrict the opportunities available to the parents of the child laborers.

It is, therefore, not surprising that one of the most prominent child rights groups—the United Nations Children's Fund—has labeled as a myth the idea that boycotts and trade bans are the only way to lessen child labor.[93] In fact, a UNICEF report seriously questions the efficacy of trade bans and their likely long-term consequences.[94]

In this light, it is hard to see how a trade ban would protect child laborers. A ban would more likely help domestic special interests. Allowing trade bans based on labor standards unfortunately "opens the door to possible abusive use of trade barriers for protectionist reasons."[95] It is not surprising that some of the biggest

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88. Kaushik Basu, *The Economics of Child Labor*, 289 SCI. AM. 84 (2003).

89. *See generally* ASEP SURYAHADI ET AL., *Minimum Wage Policy and Its Impact on Employment in the Urban Formal Sector*, 39 BULL.OF INDONESIAN ECON. STUD. 29 (2003).

90. *Id.*

91. *See* DRUSILLA K. BROWN ET AL., THE EFFECTS OF MULTINATIONAL PRODUCTION ON WAGES AND WORKING CONDITIONS IN DEVELOPING COUNTRIES 10-11 (Nat'l Bureau of Econ. Research, Working Paper No. 9669, 2003).

92. *See id.* at 11. An unfortunate example is South Africa where the unemployment rate is 40 percent. Labor standards, enacted at the behest of labor unions, have meant many jobs have been exported to other developing countries. *See* Sharon LaFraniere, *Low Labor Standard Leads South Africans to Export Jobs*, N.Y. TIMES, Mar. 13, 2004, at A3.

93. BELLAMY, *supra* note 87, at 21, 23–24.

94. *Id.* at 23–24.

95. Virginia A. Leary, *Workers' Rights and International Trade: The Social Clause (GATT, ILO, NAFTA, U.S. Laws)*, *in* 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 177, 204 (Jagdish Bhagwati & Robert E. Hudec eds.,1996); Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1, 3 (1999) (arguing that a unilateral trade ban on child labor could be seen as a type of "regulatory protectionism." That is, a regulation that imposes costs on foreign-producers "in a manner that is unnecessary to the attainment of some genuine, nonprotectionist regulatory objective."). Child labor bans come within this definition as trade bans affect costs of protection but are unlikely to reduce child labor.

advocates of trade bans are unions, who couch their demands for special treatment in more palatable terms.[96]

Some have argued that in the past the United States has too readily imposed unilateral trade sanctions and that these sanctions have been ineffective.[97] Worse than being ineffective, unilateral trade bans targeting some of the world's poorest countries could have quite pernicious effects on the living standards of the most vulnerable in those countries.

b. Big Enough Stick?

A U.S. unilateral trade ban might prove ineffectual for another reason—the United States is often not a large trading partner with poorer nations. If the United States stops trading with a particular country or industry within that country, the goods could be sold to other trading partners. For the fifteen countries with the greatest levels of child labor, trade with the United States collectively accounts for approximately 9.8 percent of their trade.[98]

96. *See, e.g.*, Jenny Bates, *International Trade and Labor Standards*, PROGRESSIVE POL'Y INST., Apr. 1, 2000, *available at* http:// http://www.ppionline.org/ppi_ci.cfm?contentid=1152&knlgAreaID=108&subsecid=206.

97. Claude Barfield & Mark Groombridge, *U.S. Unilateral Sanctions are Overused and Undereffective*, 8 AM. ENTERPRISE 76 (1997) (noting that "42 percent of the world's population live in sanctioned countries" and that "sanctions are rarely effective").

98. *See* World Bank Data, *supra* note 22; *see infra* Part II, at tbl. 4. The 9.8 percent figure is an unweighted average of the U.S. trade figures. A weighted average might yield a different result. This list only includes countries that had bilateral trade data. This data is available at ttp://data.econ.ucdavis.edu/international/wixd/index.html.

Table 4. Child Labor and Trade Flows[99]

Country	Child Labor (% of children)	Exports (% of GDP)	Imports (% of GDP)	US Trade (% of total trade)
Mali	51.1%	25.0%	40.4%	1.0%
Bhutan	51.1%	29.6%	59.9%	2.4%
Burundi	48.5%	9.0%	23.6%	7.8%
Uganda	43.8%	10.1%	25.7%	8.5%
Niger	43.6%	15.5%	23.1%	15.9%
Burkina Faso	43.5%	10.7%	29.6%	0.6%
Nepal	42.1%	23.7%	32.0%	33.4%
Rwanda	41.4%	8.3%	24.1%	21.7%
Ethiopia	41.1%	15.4%	30.7%	11.1%
Kenya	39.2%	26.5%	35.6%	2.6%
Comoros	38.4%	15.7%	86.1%	18.4%
Tanzania	37.6%	25.6%	31.9%	3.9%
Guinea-Bissau	36.9%	14.7%	23.2%	1.4%
Chad	36.7%	31.8%	58.2%	1.3%
Madagascar	36.6%	16.6%	32.0%	17.0%

Table 4 shows that the countries with the highest levels of child labor tend not to trade in significant amounts with the United States. Further, the trade sector in many of these countries is small. This suggests that disruptions to trade flows would have limited impacts on the economy. A unilateral trade ban targeting these countries might have little effect if other countries continue to trade with them.

Even if a significant number of countries join together in a multilateral trade ban, there is no guarantee this would result in net benefits. If a country that utilizes child labor is unable to find new trading partners a broader trade ban could have significant effects. Unfortunately, as illustrated above, it is very possible that these significant effects would be deleterious.[100] Countries wishing to erect a trade ban are in a precarious situation—in many cases the ban will not affect enough trade to make much of a difference, and if the ban does make a difference there is little to suggest the difference would be positive.

The next section focuses on the applicable WTO law. Despite spirited efforts at trying to demonstrate that such a unilateral trade ban would be WTO legal, as discussed below, these attempted justifications fail.

99. *See* World Bank Data *supra* note 22. Child labor, export, and import data is from 2000. The prevalence of child labor represents the percent of those aged 10 to 14 that work.. The US trade data is from 1990. US trade is calculated by dividing the dollar amount of US trade by the particular country's total export trade flows.

100. *See supra* notes 29-43, 59- 76.

c. WTO/GATT Law

"With GATT, Asian and other slave-wage countries can send products to the United States without any taxes. They will be able to use child labor, as it is not prohibited by GATT."[101]

"The idea, however, that the WTO as it is, and with the name it carries, can or will influence the destiny of most or even many child laborers, is completely fanciful."[102]

The General Agreement on Tariffs and Trade (GATT) was created with the goal of lowering tariffs through a multilateral approach.[103] The present day World Trade Organization (WTO) is the successor to the GATT.[104] The WTO Charter contains the 1994 revised GATT, as well as a number of other agreements.[105]

GATT Article XI contains a general prohibition of quantitative restrictions including quotas.[106] A unilateral trade ban on goods produced using child labor would contravene this article. It would not be permitted under WTO law unless it fit within one of the exceptions contained in the agreement.[107]

GATT Article XX provides a list of general exceptions, of which XX(b) is the most applicable.[108] Exception XX(b) allows a departure from GATT rules if the measure is "necessary to protect human, animal or plant life or health."[109]

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101. Philip M. Nichols, *Trade Without Values*, 90 NW. U. L. REV. 658, 680 n.133 (1996) (quoting William Pipher, *NAFTA, GATT Will Ruin U.S. Economy*, INDIANAPOLIS NEWS, Nov. 7, 1994, at A13 (letter to the editor)).

102. Sara Ann Dillon, *A Deep Structure Connection: Child Labor and the World Trade Organization*, 9 ILSA J. INT'L & COMP. L. 443, 443 (2003).

103. JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS 211 (4th ed. 2002).

104. *Id.* at 218–19.

105. *Id.* at 219–20.

106. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, art. XI *reprinted in* JOHN H. JACKSON ET AL., 2002 DOCUMENTS SUPPLEMENT TO LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASE, MATERIALS AND TEXT 28-29 (West 4th ed. 2002) [hereinafter GATT 1994]. Article I could be implicated if the ban was targeted at particular countries, but not others. GATT 1994 art. I, at 17–18.

107. *See* Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CAL. L. REV. 885, 890 (2003) (discussing how labor issues might be incorporated into WTO law).

108. GATT 1994 art. XX, *supra* note106, at 45–46. Some have argued that the XX(a) and XX(e) exceptions could also apply in the context of unilateral child labor bans. *See, e.g.*, Janelle M. Diller and David A. Levy, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 AM. J. INT'L L. 663, 681–85 (1997) (noting that XX(a) applies to measures necessary to protect public morals.). For the purposes of this Article, this argument is ignored given the improbability of its success in front of a WTO panel. *See* Diego J. Linan Nogueras and Luis M. Hinojosa Martinez, *Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems*, 7 COLUM. J. EUR. L. 307328 (2001) (concluding "it is practically impossible to think that Article XX(a) would permit a Member State to apply its concept of public morals extraterritorially"); *but see* Guzman, *supra* note 107, at 890-91 (discussing a potential XX(a) argument.). XX(e) applies to measures "related to products of prison labor." For simplicity, this Article excludes from consideration "forced" child labor, which is at least arguably similar to prison labor. According to ILO figures less than 4% of child laborers are "forced or bonded laborers." *See* IPEC, *supra* note 1, at 25. This suggests

In trying to fit a unilateral trade ban within this provision, commentators start by arguing that child labor is hazardous to the health of the child laborers.[110] In the abstract, this is not seriously in question.[111] The problem is that it is highly unlikely that the elimination of child labor through labor bans actually promotes human health. The decision whether to enter the labor force is likely made based partially (if not totally in some cases) on necessity.[112] This necessity means laborers frozen out of the export market are likely to move to other industries—industries which may pay less, have worse working conditions, or both. The irony is that a ban on child labor might actually increase the number of hours children work.[113]

Without being able to link the ban with human health, the commentators stumble. One author argues:

> Child labor is a 'vital' health risk and, under a balancing approach, domestic policymakers should be given wide deference to combat it. No reasonably available alternatives to unilateral sanctions appear to be 'sufficiently effective.' . . . The drafting history of Article XX(b) plays a supplementary role and does not exclude the use of unilateral and extraterritorial sanctions. Furthermore, the WTO Preamble objective of raising standards of living permits the pursuit of properly delimited social objectives.[114]

Ignoring the legality of sanctions for extraterritorial conduct,[115] this argument relies on an unproven assertion: unilateral sanctions are effective in protecting the

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significant difficulty in targeting industries that rely on this form of child labor making such bans difficult to administer.

109. GATT 1994 art. XX(b), *supra* note 106, at 45. Timothy A.Glut has suggested that unilateral trade bans might not be considered necessary given the availability of other measures to combat child labor such as labeling. *See* Glut, *supra* note 19, at 1233–34. He notes that the word "necessary" in Article XX(b) is problematic because GATT Dispute Panels have interpreted the term to mean "the least-GATT-inconsistent alternative that a country could reasonably be expected to employ" in order to achieve its overriding public policy goals. *Id.* Glut further argues that because inconsistencies with GATT must be unavoidable, "it is likely that a GATT Panel would find that alternatives such as a product labeling requirement foreclose the availability of other trade sanctions." *Id.* at 1234. This Article does not consider that argument.

110. Glut, *supra* note 19, at 1233; Benjamin James Stevenson, *supra* note 77, at 162; Matthew Mitro, *supra* note 77, at 1243.

111. *See* ANACLAUDIA GASTAL FASSA, HEALTH BENEFITS OF ELIMINATING CHILD LABOUR 46 (ILO Working Paper , 2003), *available at* http://www.ilo.org/public/english/standards/ipec/publ/download/pol_healthcostben_2003_en.pdf.

112. Bhalotra, *supra* note 84, at 24 (finding support for the contention that Pakistani children enter the work force mainly due to conditions of necessity).

113. *See supra* text accompanying notes 84–8888.

114. Mitro, *supra* note 77, at 1260-61 (citations omitted).

115. See United States—Import Prohibition of Certain Shrimp and Shrimp Products, Oct. 12, 1998, WT/DS58/AB/R, for a discussion of when sanctions for extraterritorial conduct might be allowed in a case litigated under Article XX(g). The Appellate Body noted:

Of course, it is not claimed that all populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. ***Neither the appellant nor any of the appellees claims any rights of exclusive ownership*** over the sea turtles, at least not while they are swimming freely in their natural habitat -- the oceans. We do not pass upon the question of whether there is an

health of child laborers by reducing the prevalence of child labor. As discussed above,[116] such an assertion is unlikely to prove true in practice, therefore, any claims that the measure protects child laborers must fail. [117]

Further, the ban may also have to comply with the standards enunciated in the Agreement on Technical Barriers to Trade.[118] A ban on child labor might be considered a technical regulation as it would "lay[] down product characteristics or their related processes and production methods... with which compliance is mandatory."[119] Technical regulations should be created without "creating unnecessary obstacles to international trade" and "shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create."[120]

Proponents of such bans will again have a difficult time proving a ban on child labor is necessary to prevent harm to human health, as discussed above. One writer has also noted that the technical barriers agreement gives additional time to developing nations to comply with proposed barriers.[121] In particular, the agreement states that "[m]embers shall, in the preparation and application of

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implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. *We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g).*" (emphasis added).

United States—Import Prohibitions of Certain Shrimp and Shrimp Products, Oct. 12, 1998, WT/DS58/AB/R, at para. 133. This differs from the case of child labor in two respects. First, the population of one nation is the exclusive concern of that nation's government. Second, there is little nexus between the United States and foreign child laborers.

116. *See supra* text accompanying notes 18-32.

117. Robert Howse & Michael J. Treblicock, *The Free Trade-Fair Trade Debate: Trade, Labor, and the Environment, in* ECONOMIC DIMENSIONS IN INTERNATIONAL LAW: COMPARATIVE AND EMPIRICAL PERSPECTIVES 186, 215 (Jagdeep S. Bhandair & Alan O. Sykes, eds., 1997) (arguing that the fact that the action is unilateral might be enough to condemn it. Unilateral action has previously been condemned by a GATT panel as violating the requirement of necessity. The panel used a least restrictive means approach and concluded that "since the United States had not exhausted the avenues for a negotiated cooperative solution that would have avoided trade disruption" the measures could not be considered "necessary.").

118. Agreement on Technical Barriers to Trade, Apr. 15, 1994, *reprinted in* JOHN H. JACKSON ET AL., 2002 DOCUMENTS SUPPLEMENT TO LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASE, MATERIALS AND TEXT 149-73.

119. *Id.* at 164; *See also* Glut, *supra* note 19, at 1234. It is not entirely clear that a ban on child labor would be considered a technical barrier under WTO case law. See *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, Sept. 18, 2000, WT/DS135/AB/R, for a discussion of this issue. In that case, the WTO Appellate Body limited the definition of "technical barrier" to those regulations that deal with identifiable groups of products. *Id.* at para. 70. However, they noted that a ban on asbestos did deal with an identifiable group of products—that is, all products. *Id.* paras. 72, 74. According to the Appellate Body "product characteristics" include things like "composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity." *Id.* at 67. This would seemingly exclude bans on child labor. There is no discussion, however, on what constitutes a "related processes or production method." The use of child labor might fit within this category.

120. GATT 1994 art. 2.2, *supra* note 106, at 150 .

121. Glut, *supra* note 19, at 1234-35. *See also* GATT 1994 arts. 2.12, 12, *supra* note 106, at 151, 161–62 .

technical regulations... take account of the special development, financial and trade needs of developing country Members."[122] This suggests that developing countries would get additional leeway when defending themselves in front of a WTO panel.

Given these obstacles it would be a mistake to use unilateral trade bans in the name of protecting children. The danger of making things worse is too great and the likely benefits are too small. A World Bank paper notes, "there is virtually no economic case favoring the use of bilateral or multilateral trade penalties against labor standards.... On the other hand, the economic case against such penalties is strong."[123]

d. Countervailing Duties and GATT

Some commentators suggest that child labor might be condemned under international law as either a subsidy or as dumping.[124] Under GATT both subsidized and dumped goods can have countervailing duties applied to them.[125] However, child labor does not fit comfortably within either of these molds.

1. Subsidy

Under WTO law a subsidy is defined as a "financial contribution by a government" where a "benefit is thereby conferred."[126] A financial contribution includes, *inter alia*, a situation where "government revenue that is otherwise due is foregone."[127] These requirements are likely to doom any claim that the allowance of child labor is a subsidy.

Some argue that by failing to enforce laws regarding child laborers, developing nations confer a benefit on producers who violate those laws with impunity.[128] However, even if we assume that a subsidy exists,[129] the mere

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122. GATT 1994 art. 12.3, *supra* note106, at 161. *See also* GATT 1994, art. 12.4, *supra* note 106 ("Members therefore recognize that developing country Members should not be expected to use international standards as a basis for their technical regulations . . . which are not appropriate to their development, financial and trade needs.").

123. KEITH E. MASKUS, SHOULD CORE LABOR STANDARDS BE IMPOSED THROUGH INTERNATIONAL TRADE POLICY? 67 (World Bank Working Paper No. 1817, 1997); *see also* Basu and Tzannatos, *supra* note 10, at 151 (noting that "[i]n a very poor economy it is entirely possible that the demand for labor is so low that . . . a ban on child labor can backfire, leaving the children and their parents impoverished and risking starvation.").

124. Stevenson, *supra* note 77, at 164-66.

125. *See* GATT 1994 art. VI, *supra* note 106, at 23-24; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, *reprinted in* JOHN H. JACKSON ET AL., 2002 DOCUMENTS SUPPLEMENT TO LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASE, MATERIALS AND TEXT 174-97 [hereinafter Anti-dumping Agreement]; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, *reprinted in* JOHN H. JACKSON ET AL., 2002 DOCUMENTS SUPPLEMENT TO LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASE, MATERIALS AND TEXT 253-94 [hereinafter SCM].

126. SCM arts. 1.1(a)(1),1.1(b), *supra* note 125, at 253.

127. SCM art. 1.1(a)(1)(ii), *supra* note 125, at 253.

128. Stevenson, *supra* note 77, at 165. Though a weak argument, presumably the revenue forgone could be the fines that could have been imposed. Daniel S. Ehrenberg argues that "'actionable' subsidies should be expanded to include gross and persistent violations of the prohibition against forced

existence of a subsidy is not condemned by the WTO. Subsidies are only condemned if they are considered "specific" under Article 2 of the Subsidies Agreement.[130]

Specific subsidies are either export contingent,[131] aimed at inducing import substitution,[132] or targeted at a specific "enterprise or industry or group of enterprises or industries."[133] Since this so-called "child labor subsidy" would be available to any industry in the country, it would be considered a general subsidy (allowable) rather than a specific subsidy (impermissible).[134] Therefore, under WTO law the United States could not take action against this so-called 'subsidy.'

2. Social Dumping

The final argument[135] considered in this Article is whether allowing child labor is a type of "social dumping."[136] Dumped goods are those sold at less than their "normal value."[137] If dumping is found, the complaining nation may impose a duty on the dumped goods so long as the duty is not greater than the margin of dumping.[138]

While some argue that dumping should be found when a country lacks appropriate levels of social legislation,[139] this is not supported by the text of GATT. To find dumping a product's selling price in the importing nation must be "less than the comparable price, in the ordinary course of trade, for the like product

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or child labor." Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 361, 393 n. 263 (1995). However, as the agreement is currently written, there is no textual support for this expansion.

129. *See generally*, SCM *supra* note125. A developing country that found itself in front of a WTO panel would have a strong argument that there is no subsidy under the definition in the SCM agreement.

130. *See* SCM art. 2, *supra* note 125, at 254.

131. *See* SCM arts. 2.3, 3.1(a), *supra* note 125, at 254-55. Some might argue that the allowance of child labor is actually export contingent. *See* Ehrenberg, *supra* note 128, at 393 n.265 (arguing that it is difficult to classify subsidies, and that if the subsidy is given to all industries but export industries primarily benefit, the subsidy "may be better classified as an export subsidy"); *See* U.S. DEPT. OF LABOR, *supra* note 15, at 2. Given that the export sector employs only a small portion of all child laborers such re-characterization is not appropriate here as the export industry does not receive a majority of the benefits of child labor.

132. SCM arts. 2.3, 3.1(b), *supra* note 125, at 254-55.

133. SCM art. 2.1, *supra* note 125, at 254.

134. *But see* Ehrenberg, *supra* note 128, at 393 n. 265 (indicating that the subsidy must be "specific" but arguing that a child labor subsidy should still be actionable).

135. *See, e.g.*, Diller & Levy, *supra* note 108, at 685-686. Some have also argued that Article XXIII of GATT 1994 might provide an avenue for attacking child labor. Since those arguing this agree that the "use of Article XXIII in the context of child labor appears problematic under the new WTO rules," this article will not consider the issue. See also GATT 1994 art. XXIII, *supra* note 106, at 47, which states that the provisions of Article XXIII apply when "any benefit accruing to [a country] directly or indirectly under [the] Agreement is being nullified or impaired . . . as the result of . . . the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement."

136. Stevenson, *supra* note 77, at 164-66.

137. *See* GATT 1994 art. VI:1, *supra* note 106, at 23.

138. *See* GATT 1994 art. VI:2, *supra* note 106, at 23.

139. Stevenson, *supra* note 77, at 165; Ehrenberg, *supra* note 128, at 392-93.

when destined for consumption in the exporting country."[140] If there are no domestic prices the lower of the following should be used: "the highest comparable price for the like product for export to any third country in the ordinary course of trade"[141] or "the cost of production of the production in the country of origin plus a reasonable addition for selling cost and profit."[142] None of these definitions allow for consideration of the regulatory environment that generated the costs and prices of the exporting nation.[143] None of these definitions would result in finding the price in the importing nation was lower than the price in the exporting nation due to the use of child labor.[144] If the export price is not lower there is no dumping margin and there cannot be a countervailing duty.[145]

Furthermore, during GATT negotiations both Canada and the United States argued that "dumping" should only refer to "price dumping."[146] The Cuban delegation's proposal, which would have condemned dumping "whether practiced through the mechanism of price, freight rates, currency depreciation, sweated labor, or by any other means," was rejected.[147]

Article VI was not meant to apply to so-called "social dumping" and should not be expanded. If this "social dumping" argument was successful, the coverage of this provision could conceivably apply anywhere labor standards differed between nations—a result unlikely contemplated by the signatories of GATT.[148] From an economic standpoint, the case for harmonized labor standards is weak. In fact, harmonization can end up hurting the poor nations that the proponents of such harmonization claim they want to help.[149]

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140. *See* GATT 1994 art. VI:1(a) *supra* note 106, at 23.

141. GATT 1994 art. VI:1(b)(i), *supra* note 106, at 23.

142. GATT 1994 art. VI:1(b)(ii), *supra* note 106, at 23.

143. *See* GATT 1994 art. VI, *supra* note 106, at 23.

144. *See* Anti-dumping Agreement art. 2.1, *supra* note 125, at 174. If the price of the good was cheaper by $2 because of the use of child labor, it would be sold for $2 less in both the exporting and importing nations. *See id.* at 174–75 (definitions refer to prices and costs and not to the regulatory environment that those costs were generated in); 19 USC § 1677(15) (2000) (requiring that the sale be "in the ordinary course of trade." This includes sales in the exporting country even if the product embodies the work of children and refers to regular business practices. For example, under U.S. law the term "means the conditions and practices which . . . have been normal in the trade under consideration with respect to merchandise of the same class or kind." This definition does not exclude the use of child labor.).

145. *See* GATT 1994 art. VI:1, *supra* note 106, at 23. Additionally the complaining nation must prove "material injury to an established industry." Some of the industries (such as carpet weaving) that utilize child labor may not have a developed country counterpart, making them immune from this type of attack. A developed country that has no harmed industry should have no ability to complain since lower prices can only benefit that country.

146. *See* Diller and Levy, *supra* note 108, at 681.

147. *Id.* at 680-681; *See also* Stevenson, *supra* note 77, at 165.

148. *See* Belgian Family Allowances, Nov. 7, 1952, G/32 - 1S/59 (declaring a government procurement statute that imposed a levy on goods originating in countries deemed to have an inadequate family allowance system to be a violation of GATT).

149. Drusilla K. Brown et al., *International Labor Standards and Trade: A Theoretical Analysis, in* 1 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 227, 269–72 (Jagdish Bhagwati and Robert E. Hudec eds., 1996). Although these authors believe allowing child labor might

CONCLUSION

Increased globalization has not been and will not be a major determinant of the prevalence of child labor. Developing nations should not restrict trade in the hopes of reducing child labor. Developed countries should not impose unilateral trade bans on goods produced with child labor. First, the likely consequences of a unilateral trade ban are negative, with the most vulnerable suffering the greatest. Second, such action would be impermissible under WTO law.

Child labor is a problem that has afflicted every nation. As wealth has grown the problem has receded. Protectionist demands disguised as humanitarian concerns should be resisted. Trade should be allowed to continue to exert a positive influence on standards of living across the globe.

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be thought of as an "unfair" trade practice, they note that the imposition of a countervailing duty will hurt labor in the low-income country. *Id.* at 270-272. They further note that gains from trade to high-income countries do not require the efficient allocation of resources in low-income countries; these gains are generated from the ability to trade at prices different than the world without trade. *Id.* at 271.

III. APPENDIX

Table 5. Child Labor and Openness (Static Model) – 1960, 1970, 1980, 1990, 1995, and 2002

	1960		1970		1980	
	(IMP + EXP)	(EXP)	(IMP + EXP)	(EXP)	(IMP + EXP)	(EXP)
Constant	2.84***	3.01***	2.44***	2.64***	2.75***	2.88***
	(0.35)	(0.29)	(0.34)	(0.26)	(0.29)	(0.22)
GNI per Capita	0.1709***	0.1708***	0.1077***	0.1056***	0.0951***	0.0874***
	(0.03)	(0.03)	(0.02)	(0.02)	(0.02)	(0.02)
GNI	0.0106	0.0073	0.0390**	0.0355***	0.0273**	0.0266**
	(0.02)	(0.02)	(0.02)	(0.01)	(0.01)	(0.01)
OPEN	0.09**	0.08**	0.11***	0.10***	0.08**	0.08***
	(0.04)	(0.03)	(0.04)	(0.03)	(0.03)	(0.03)
R^2 =	58.7	58.7	60.8	61.8	59.9	60.8
n =	84	84	103	103	122	122

	1990		1995		2000	
	(IMP + EXP)	(EXP)	(IMP + EXP)	(EXP)	(IMP + EXP)	(EXP)
Constant	2.98***	3.19***	3.15***	3.38***	3.17***	3.37***
	(0.24)	(0.18)	(0.23)	(0.17)	(0.21)	(0.16)
GNI per Capita	0.0647***	0.0600***	0.0589***	0.0578***	0.0558***	0.0527***
	(0.01)	(0.01)	(0.01)	(0.01)	(0.01)	(0.01)
GNI	0.0249**	0.0217**	0.0205**	0.0164**	0.0200**	0.0166**
	(0.01)	(0.01)	(0.01)	(0.01)	(0.01)	(0.01)
OPEN	0.10***	0.09***	0.09***	0.08***	0.10***	0.09***
	(0.03)	(0.02)	(0.03)	(0.02)	(0.03)	(0.02)
R^2 =	51.9	52.9	50.1	50.2	50.0	51.5
n =	144	144	151	151	137	137

A positive coefficient means as the variable increases, the prevalence of child labor decreases. Standard errors are in parentheses. * means statistically significant at the 10%-level. ** is at the 5%-level and *** is at the 1%-level.

Table 6. Child Labor and Openness (Dynamic Model – Change Measured at 2000)

	1960		1970		1980	
	(IMP + EXP)	(EXP)	(IMP + EXP)	(EXP)	(IMP + EXP)	(EXP)
Constant	11.27*** (1.14)	11.46*** (1.10)	9.79*** (0.94)	9.93*** (0.88)	6.40*** (0.58)	6.33*** (0.59)
Δ GNI per Capita	0.0004*** (0.00)	0.0004*** (0.00)	0.0004*** (0.00)	0.0004*** (0.00)	0.0004** (0.00)	0.0004** (0.00)
Δ GNI	0.0000 (0.00)	0.0000 (0.00)	0.0000* (0.00)	0.0000* (0.00)	0.0000* (0.00)	0.0000* (0.00)
Δ OPEN	-0.01 (0.02)	-0.01 (0.04)	-0.01 (0.02)	-0.01 (0.03)	-0.02 (0.02)	-0.04 (0.03)
R^2 =	15.1	14.8	20.2	20.0	9.9	10.5
n =	69	69	85	85	84	84

	1990		1995	
	(IMP + EXP)	(EXP)	(IMP + EXP)	(EXP)
Constant	3.97*** (0.34)	3.93*** (0.33)	1.88*** (0.15)	1.88*** (0.15)
Δ GNI per Capita	0.0009*** (0.00)	0.0009*** (0.00)	0.0007* (0.00)	0.0006* (0.00)
Δ GNI	0.0000** (0.00)	0.0000** (0.00)	0.0000** (0.00)	0.0000* (0.00)
Δ OPEN	0.01 (0.01)	0.01 (0.02)	0.01 (0.01)	0.02 (0.01)
R^2 =	11.1	10.9	7.8	7.5
n =	84	84	86	86

A positive coefficient means as the variable increases, the prevalence of child labor decreases. Standard errors are in parentheses. * means statistically significant at the 10%-level. ** is at the 5%-level and *** is at the 1%-level.

Table 7. Child Labor and Changes

	(IMP + EXP)	(EXP)
GNI per Capita$_t$/ GNI per Capita$_{t-10}$	0.01 (0.01)	0.01 (0.01)
GNI$_t$/ GNI$_{t-10}$	-0.17*** (0.05)	-0.17*** (0.05)
OPEN$_t$/ OPEN$_{t-10}$	-0.09 (0.06)	-0.07 (0.05)

A negative coefficient means as the variable increases, the prevalence of child labor decreases. Standard errors are in parentheses. * means statistically significant at the 10%-level. ** is at the 5%-level and *** is at the 1%-level.

SURVIVING UNITED STATES EXPORT CONTROLS POST 9/11: A MODEL COMPLIANCE PROGRAM

*Tara L. Dunn**

PROGRAM FOREWORD

J. Triplett Mackintosh[1]

September 11, 2001 ("9/11") will stand as a defining moment in U.S. export controls. Viewed from the distance of several years, it is now evident that 9/11 brought to the glare of public awareness the troubling reality that non-state terrorists threaten the core of the United States. The prior prevailing view that

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* J.D. 2005, University of Denver Sturm College of Law. Thanks to Professor J. Triplett Mackintosh for his commitment to legal education, to Mark D. Menefee for his generosity in agreeing to write the introduction, and to Whitney Holmes and Christopher J. Walsh of Hogan & Hartson L.L.P. for graciously fielding my Sarbanes-Oxley questions.

1. J. Triplett Mackintosh is a partner with Holland & Hart, LLP, in Denver, Colorado, where he specializes in export controls and white-collar criminal defense. His practice in the area of export controls has spanned the Cold War to the current war on terror. His clients have included major U.S. corporations, non-U.S. companies, and individuals in the United States and abroad. He holds a B.A. from Regis University; an M.A. from the Graduate School of International Studies at the University of Denver; and a J.D. from Georgetown University Law Center.

terrorism was something that affected foreign venues was one of the many casualties of that day. Another victim of 9/11 was the previously held belief that export controls were merely an irritating part of federal trade controls that were more a nuisance than anything else. It was clear that the 9/11 terrorists and their supporters relied on access to U.S.-origin technologies and financial networks to achieve their scheme.[2] It was also clear that throughout the world there were (and are) many other terrorists waiting for the funds and technology required to harm the United States.[3]

9/11 is not the only noteworthy date in the recent chronology of export controls, but it was qualitatively different from the others. Other salient events in the last half of the 1900s have included the conclusion of World War II, the Cold War, and the first Iraqi conflict. Unlike 9/11, these other events placed the United States in conflict with governments, that is, state-actors. As the United States and its allies considered how to keep these state-actors from acquiring technology that could be used offensively or defensively, the focal point of export controls was relatively clear, well-defined.

For example, during the Cold War, the United States and its allies under the "Coordinating Committee on Multilateral Export Controls" ("COCOM") agreed on an Industrial List of technologies that would be controlled for export to the Eastern Bloc.[4] The analysis was relatively simple for regulators and exporters: "what" is going "where."[5] The "where" answered all the questions regarding use. If it was going to the Eastern Bloc, regulators could conclude reasonably that it would be used to the advantage of the communist state to the detriment of the Free World.[6] That meant that licenses were frequently denied and exports restricted.[7]

The end of the Cold War and the first Iraqi conflict changed the equation. On the one hand, regulators had an incentive to support technological development of former Soviet states.[8] On the other hand, regulators saw after the first Gulf War

2. *See* NATIONAL COMMISSION ON TERRORIST ATTACKS AGAINST THE UNITED STATES ("9/11 COMMISSION"), THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, EXECUTIVE SUMMARY 1, 14 (2004), *at* http://www.gpoaccess.gov/911/pdf/cover_execsummary.pdf (last visited Feb. 18, 2005).

3. *See* 9/11 COMMISSION, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 362-63 (2004), *at* http://a257.g.akamaitech.net/7/257/2422/22jul20041130/www.gpoaccess.gov/911/pdf/sec12.pdf (last visited Feb. 18, 2005).

4. *See* Nunn-Wolfowitz Task Force Report: Industry "Best Practices" Regarding Export Compliance Programs 4, *at* http://www.usexportcompliance.com/Papers/nunnwolfowitz.pdf (last visited Feb. 18, 2005).

5. *See* Department of Commerce, Bureau of Industry and Security, Compliance and Enforcement: Export Management Systems Guidelines Introduction, *at* http://www.bxa.doc.gov/ExportManagementSystems/pdf/emsintro.pdf (last visited Feb.18, 2005).

6. *See* Nunn-Wolfowitz Task Force Report, *supra* note 4.

7. *See* Bureau of Industry and Security, Compliance and Enforcement: Export Management Systems Guidelines Introduction, *supra* note 5.

8. *See* Department of Commerce, Office of International Technology, Technology Administration, International Technology Programs, Russia Technology Dialogue, *at* http://www.technology.gov/International/Europe/p_Russia.html (last visited Feb. 18, 2005).

how Iraq had diverted dual-use or commercial items for military purposes.[9] Regulators also learned how countries, such as Brazil, supported Iraq's military development by diverting otherwise lawful exports from the United States.[10] The equation now centered on "use" and "users."[11] Even an export to an erstwhile ally might be diverted for proliferation purposes if the "user" was unreliable.[12]

9/11 only underscored for the U.S. public what regulators had learned during the first Gulf War: the "use" of an export and the "user" were the critical questions.[13] The country of destination became almost secondary as the focus of regulatory controls went to "end-use" and "end-user."[14] The new goal was to keep important technologies from those who would proliferate weapons of mass destruction and their delivery systems.[15] This focus, however, put a new emphasis—and responsibility—on the exporter. This is where Tara Dunn's model program comes in.

Not surprisingly, post-9/11, enforcement of export controls has taken a new importance. Violations are considered a breach of "homeland security" and export controls are a new darling of federal prosecutors across the country.[16] U.S. companies, therefore, have only one choice: comply. The rules are too important and the penalties too great to treat export controls as if they were some other paperwork obligation.[17] Ms. Dunn's model program provides clear guidance for companies facing this compliance burden.

While her program is designed to meet the business activities of a fictional company, the methodology reflected in her program is directly applicable to other companies. Counsel for exporting companies would do well to review the model program and apply it as a rubric to develop a tailored export compliance program.

Ms. Dunn's work on this project was exemplary. The quality of her program resulted in her receiving the 2004 Holland & Hart Private International Law

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9. Douglas Jehl, *Who Armed Iraq? Answers the West Didn't Want to Hear*, N.Y. TIMES, July 18, 1993 at E5, *available at* 1993 WLNR 3365960.

10. *Id.*

11. *See id.*

12. *See id.*; Bureau of Industry and Security, Compliance and Enforcement: Export Management Systems Guidelines Introduction, *supra* note 5.

13. *See* 9/11 COMMISSION, THE 9/11 COMMISSION REPORT *supra* note 3 AT 380-81; *see also* JEHL *supra* note 9; *see also* Bureau of Industry and Security, Compliance and Enforcement: Export Management Systems Guidelines Introduction, *supra* note 5.

14. *See* Bureau of Industry and Security, Compliance and Enforcement: Export Management Systems Guidelines Introduction, *supra* note 5.

15. *See* Bureau of Industry and Security, Compliance and Enforcement: Export Management Systems Guidelines Introduction, *supra* note 5.

16. *See* Justice Ready to Step Up Criminal Prosecution of Export Violations, THE EXPORT PRACT. Nov. 2003, at 7.

17. *See* 22 U.S.C. § 2778(c) (2004) (criminal penalties under the Arms Export Control Act); 15 C.F.R. § 746.3(b) (2004) (criminal penalties under the Export Administration Regulations [hereinafter the "EAR"); 22 C.F.R. § 127.7 (debarment under the International Traffic in Arms Regulations); 15 C.F.R. § 764.3 (a)(2) (denial of export privileges under the EAR); 15 C.F.R. § 764.3 (c)(2) (2004) (cross-debarment by the Department of State for violations of the EAR); 15 C.F.R. § 764.3(c)(2)(ii)(B) (debarment from government contracts by the Department of Defense for violations of the EAR).

Award. This was the first time the scholarship award was won by an entry other than a traditional legal paper. All of us at Holland & Hart are proud of her achievement and to have had the opportunity to support this fine young lawyer.

PROGRAM INTRODUCTION

Mark D. Menefee[18]

When a law enforcement officer looks at a company, one of the first questions he or she asks him or herself will be: "Are these people good guys or bad guys?" Much is at stake for the officer. Initial information about the company's activities helps the officer decide not only how to begin the inquiry but, more importantly, how best to protect the safety of the officer and his or her fellow officers when dealing with the company. An investigator approaching an unknown office building is taking a personal safety risk no less than a police officer approaching a car that has been pulled over on the highway. While an officer investigating a so-called "white collar crime" will be typically less likely to encounter a violent response from the person under investigation than, say, an officer investigating a drug smuggling operation, the training for federal criminal investigators emphasizes the possibly fatal consequences to the officer from making incorrect assumptions about the level of threat posed by a person who is the subject of the officer's initial questions.

If you were a federal agent charged with responsibility for investigating white collar crimes such as export control violations or securities fraud, and felt keenly the need to make a quick and accurate first assessment of whether a company consists of good guys who may have made a technical mistake, or terrorist supporters who wouldn't hesitate to defraud other companies in order to accomplish their mission, and who are completely willing to kill you in the process, what would be your test? On an interpersonal level, your initial "gut reaction" about the truthfulness of the people you meet and interview will tell you a great deal—but only about those individuals, not necessarily about the corporation as a whole. Is there some other information, at the corporate level, that could help you quickly assess the character of the whole organization?

At the initial stage of an investigation the single best indicator of whether a company is law abiding is whether the company has an effective compliance program. "According to available information, only 2 of the 865 corporations sentenced for federal crimes during the last eight years had effective compliance programs. Of the 143 organizations sentenced under Chapter 8 in 2002, *not one maintained any type of compliance program whatsoever.*"[19] These sentencing

18. Of Counsel, Baker & McKenzie LLP. Former Director, Office of Export Enforcement, Bureau of Industry and Security, U.S. Department of Commerce.

19. *Revised Definition of Effective Compliance and Ethics Program in the United States Sentencing Guidelines Takes Effect on November 1, 2004*, CORPORATE COMPLIANCE CLIENT ALERT

statistics must be understood properly. It does not follow from these statistics that a company can avoid possible criminal liability by merely officially adopting a compliance program. What does follow is that there is a strong correlation between crimes committed by corporations and a complete disregard of their compliance responsibilities by the management of those corporations.[20] In other words, companies whose managers choose not to take their compliance responsibilities seriously are flying blind. They are significantly more likely to commit violations of complex regulatory regimes, such as those governing exports, than companies that maintain reasonably effective compliance programs.[21] They also are much more likely to generate the sort of "smoking gun" memos and email that reveal full well their negligence or their knowing and willing intent to violate laws impeding their short term business plans. An experienced federal investigator knows that when he or she finds a company operating without an effective compliance program, the odds are in favor of discovering evidence of a crime.

The vast majority of business people have absolutely no desire to commit regulatory crimes. But small- and medium-sized companies must make difficult choices about how to come up with the money needed to insure a reasonable degree of compliance. Start-up companies find regulatory compliance to be especially difficult to fund. In the area of export controls, where the regulations are quite complex, the costs of running an effective compliance program can be very high. However, because export controls safeguard the national security of the United States and its allies, the penalties for violations can be devastating. It is not uncommon for violators to be subject to criminal and civil fines as well as denials of export privileges; often penalties will be imposed not only against the corporation but against the midlevel managers or senior executives as well.[22] Small- and medium-sized firms, and their owners, are especially susceptible to multiple penalties.

Tara Dunn's model compliance program provides a great service to the international business community. Her program can help a smaller company, or a new start-up firm, reduce its initial export compliance costs while achieving a sophisticated level of compliance. If a company will take to heart the importance of complying with U.S. export controls and use Ms. Dunn's model program as its standard, it will be able to manage its risks effectively and economically.

(Baker & McKenzie LLP, North America), November 2, 2004 at 3 [hereinafter "Baker & McKenzie Client Alert"]. "Chapter 8" refers to Chapter 8 of the United States Sentencing Guidelines on Sentencing Organizations. U.S. SENTENCING GUIDELINES MANUAL § 8 (2004).

20. *See* Baker & McKenzie Client Alert *supra* note 19, at 3.

21. *See* Baker & McKenzie Client Alert *supra* note 19, at 3.

22. *See, e.g.*, 22 U.S.C. § 2778(c) (2004) (criminal penalties under the Arms Export Control Act); 15 C.F.R. § 764.3(b) (2004) (criminal penalties under the Export Administration Regulations); 22 C.F.R. § 127.7 (2004) (debarment under the International Traffic in Arms Regulations); 15 C.F.R. § 764.3 (a)(2) (2004) (denial of export privileges under the Export Administration Regulations); 15 C.F.R. § 764.3 (c)(2)(ii) (2004) (cross-debarment by the Department of State for violations of the Export Administration Regulations); 15 C.F.R. § 764.3(c)(2)(ii)(B) (2004) (debarment from government contracts by the Department of Defense for violations of the Export Administration Regulations).

Moreover, not only will the company detect potentially illegal transactions and avoid being pulled into diversion schemes, it also could use the compliance program as a form of strategic planning for potential overseas markets. Ms. Dunn's model program might strike a reader who is unfamiliar with the nuances of export controls as being overly elaborate and complex, with too much technical terminology. It is not. In fact, the very careful and detailed legal analysis underlying her program needs to be understood by the management of a company when they consider implementing their own compliance program. Managers will need to take the model program and adapt it to fit their company's particular markets, product lines, and business processes. Then they will be able to simplify parts of the model program to fit the level of training and understanding of the employees who will actually implement the program. This is as it should be. What is important is that they begin with a model program that actually gets the law right, and that provides the specific legal basis for particular components. This model compliance program does just that.

I commend Ms. Dunn for her stellar work in developing such a detailed and clear program to assist companies in developing effective export compliance programs. She has laid the groundwork for companies to conduct their export business in ways that are both legal and smart. I also would like to express my respect and appreciation to the University of Denver Sturm College of Law, the law firm of Holland & Hart, and the Denver Journal of International Law and Policy for sharing her fine work with the international business community.

A. PREFACE

In today's post 9/11 world, non-compliance with U.S. export controls is simply not an option. A single export violation subjects a company to a range of potential sanctions: fines of up to $1 million per violation, a loss of export privileges, and debarment from government contracts.[23] After the terrorist attacks of 9/11, enforcement of these controls has become a Department of Justice priority.[24] The potential penalties and renewed enforcement initiatives highlight the importance of recommending, developing, and implementing organization-specific export compliance programs for entities engaged in international trade.[25] In addition to decreasing the risk of violations, an export compliance program serves a critical corporate governance function. For an entity engaged in international trade, an export compliance program can provide information and controls necessary for the principal executive officers to certify periodic reports, and for management to report on internal controls over financial reporting as required under Sarbanes-Oxley.[26] Further, in the event of a violation, an effective export compliance program may factor significantly against prosecuting the organization and/or support a downward departure in criminal penalties.[27]

Much has been written about the importance of and relevant considerations for developing an export compliance program. Unlike much of the existing scholarship on the topic, this model program articulates specific procedures for compliance with the primary U.S. export controls at the operational level of a hypothetical client. While no effective export compliance program is 'one size fits

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23. 22 U.S.C. § 2778(c) (2004) (criminal penalties under the Arms Export Control Act); 15 C.F.R. § 764.3(b) (2004) (criminal penalties under the Export Administration Regulations [hereinafter the "EAR"); 22 C.F.R. § 127.7 (2004) (debarment under the International Traffic in Arms Regulations [hereinafter the "ITAR"]); 15 C.F.R. § 764.3 (a)(2) (2004) (denial of export privileges under the EAR); 15 C.F.R. § 764.3 (c)(2)(ii) (2004) (cross-debarment by the Department of State for violations of the EAR); 15 C.F.R. § 764.3(c)(2)(ii)(B) (2004) (debarment from government contracts by the Department of Defense for violations of the EAR).

24. *Justice Ready to Step Up Criminal Prosecution of Export Violations*, THE EXPORT PRACTITIONER, Volume 17, No. 11 (Nov. 2003) at 7. *See also* Robert Block, *U.S. Cracks Down on Technology Exports to Iran: Concern Grows Over Access to Conventional Weapons By Hostile States, Terrorists*, WALL STREET JOURNAL, Feb. 24, 2005, at A1.

25. Under the "deemed export rule," U.S. companies that employ foreign nationals under circumstances where these employees have access to controlled technologies are considered to be exporting the controlled technology. *See infra* notes 106-119 and accompanying text. As used in this article, the term "engaged in international trade" refers both to physical exports and to exports of technology under the deemed export rule.

26. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 §§ 302, 906, 404 (2002).

27. Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components and U.S. Attorneys, *Principles of Federal Prosecution of Business Organizations*, (Jan. 20, 2003), *at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter "Thompson Memo"] (last visited Mar. 1, 2005); U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (2004); *id.* § 8B2.1. On January 12, 2005, in a 5-4 opinion, the United States Supreme Court held that the Sentencing Guidelines are advisory, rather than mandatory. United States v. Booker, No. 04-104, 04-105, 2005 WL 50108 (Jan.12, 2005) (5-4 decision) (Breyer, J., majority opinion, in part).

all,' this model program provides practitioners representing small to mid-cap companies with a template for developing a comprehensive export compliance program.

Part 1 of this preface discusses the 'beyond export compliance benefits' of an export compliance program. Part 2 sets forth the hypothetical client facts and specific design considerations for the model program.

1. BEYOND EXPORT COMPLIANCE: THE EXPORT COMPLIANCE PROGRAM'S CRUCIAL ROLE IN CORPORATE GOVERNANCE AND MINIMIZING THE IMPACT OF VIOLATIONS

Principally, an effective export compliance program furthers vital policy objectives behind export control laws. These include national security, foreign policy, anti-terrorism, and non-proliferation.[28] In addition to promoting these policy objectives, an export compliance program can have an important impact on the corporate governance practices of organizations engaged in international trade and may serve to mitigate the impact of inadvertent export violations. Three recent and significant legal developments expanded the 'beyond export compliance benefits' of effective compliance programs for business organizations: (1) the Sarbanes-Oxley Act of 2002's section 302 and 906 certifications, and section 404 disclosure requirements; (2) the Department of Justice's Thompson Memo, outlining principles for federal prosecution of business entities; and (3) the November 2004 amendments to the U.S. Sentencing Guidelines for Sentencing Organizations defining an "effective compliance and ethics program" for mitigating penalties.[29] For organizations engaged in international trade that are subject to the Securities and Exchange Commission's ("SEC") reporting requirements, these developments underscore the critical need to develop and implement a company-specific export compliance program and increase the value of establishing and maintaining a comprehensive compliance program.[30]

28. 22 U.S.C. § 2778(a) (2004); 15 C.F.R. § 730.4 (2004).

29. Sarbanes-Oxley Act of 2002 §§ 302, 906, 404; Thompson Memo, *supra* note 27; U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f); *id.* § 8B2.1.

30. Recent SEC action suggests that a comprehensive, firm-wide compliance program designed to address regulatory matters such as the Foreign Corrupt Practices Act can be an important tool in complying with federal securities laws. *See* Press Release, SEC Sues the Titan Corporation for Payments to Election Campaign of Benin President, 2005-23, at 2-3 *at* http://www.sec.gov/news/press/2005-23.htm (Mar. 1, 2005); Complaint at ¶ 58, p. 16; Securities and Exchange Commission v. Titan Corp. (D. C.) (Civ. A. No. 05-0411), *at* http://www.sec.gov/litigation/compliants/comp19107.pdf (Mar. 1, 2005).

a. SARBANES-OXLEY CONSIDERATIONS: CERTIFICATIONS UNDER SECTIONS 302 AND 906; MANAGEMENT'S ANNUAL REPORT ON INTERNAL CONTROLS OVER FINANCIAL REPORTING UNDER SECTION 404

Under Sarbanes-Oxley section 302, a reporting company's chief executive officer and chief financial officer must personally certify that based on their knowledge there are no material misstatements of material fact or omissions of fact that would make an annual report on Form 10-K or quarterly report on Form 10-Q misleading.[31] Further, the officers must certify that they are responsible for establishing and maintaining the organization's disclosure controls and procedures.[32] Section 302's disclosure controls and procedures are broader than internal controls over financial reporting, and include risk assessment procedures specific to the company's business, including compliance with certain government regulations.[33] Further, section 906 requires the principal executive and financial officers to certify that any periodic report containing financial statements fully complies with the Securities and Exchange Commission ("SEC") rules and regulations governing such reports.[34] The SEC has expressly concluded that in evaluating disclosure controls and procedures, management should examine the company's compliance with other laws and regulations "to ensure that [it makes] required disclosure of legal or regulatory matters . . . ."[35]

In addition to these certifications, Sarbanes-Oxley section 404 requires management to report annually on the company's internal controls over financial reporting.[36] Importantly, the Public Company Accounting Oversight Board has

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31. Sarbanes-Oxley Act of 2002 § 302; 17 C.F.R. §§ 240.13a-14, 240.15d-14 (2004); 17 C.F.R. § 229.601(b)(31) (2004).

32. *See supra* note 29.

33. Certification of Disclosure in Companies' Quarterly and Annual Reports, Exchange Act Release No. 46427 [2002 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 86,720, at 86,131 (Aug. 28, 2002), *available at* http://www.sec.gov/rules/final/33-8124.htm, at 7-8; *id.* at 86,133 n.73, *available at* http://www.sec.gov/rules/final/33-8124.htm, at 10 n.73 (noting, "for example, for some businesses, an assessment and evaluation of operational and regulatory risks may be necessary") (last visited Mar. 3, 2005).

34. Sarbanes-Oxley Act of 2002 § 906; 18 U.S.C. § 1350 (2002); 17 C.F.R. §§ 240.13a-14(b), 240.15d-14(b); 17 C.F.R. § 229.601(b)(32) (2004).

35. Frequently Asked Questions: Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Exchange Act Release 46427, [2004 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 87,262, at 81,001 (Oct. 6, 2004), *available at* http:// http://www.sec.gov/info/accountants/controlfaq1004.htm (Question 10); *see also*, Linda L. Griggs, Requirements for Disclosures about Internal Control over Financial Reporting, RR Donnelly RealCorporateLawyer.com, *at* http://www.realcorporatelawyer.com/faqs/404.html (last visited Feb. 3, 2005); PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, Auditing Standard No. 2: An Audit of Internal Control Over Financial Reporting Performed in Conjunction with An Audit of Financial Statements (Mar. 9, 2004) ¶ 15 at 145, *at* http://pcaobus.org/Rules_of_the_Board/Documents/Rules_of_the_Board/Auditing_Standard_2.pdf (last visited Mar. 1, 2005).

36. Sarbanes-Oxley Act of 2002 § 404 (2002); 17 C.F.R. §§ 240.13a-15, 240.15d-15 (2004); 17 C.F.R. §229.308 (2004). Although initially required as part of a company's annual report on Form 10-K ("10-K"), on November 30, 2004, the SEC granted certain accelerated filers an additional 45 days

concluded that the lack of an effective regulatory compliance program can be a deficiency in internal controls over financial reporting.[37]

Export violations subject the company to the risk of substantial fines, a loss of export privileges, and debarment from government contracts, penalties that may materially impact its operations.[38] Because Sarbanes-Oxley requires certification that the company's quarterly and annual reports are not misleading, and requires management to annually assess and report on internal controls over financial reporting, detailed knowledge of potential export violations is critical to companies engaged in international trade. Absent an effective export compliance program, the certifying officers of an organization engaged in international trade will not have adequate information to assess whether the company is making all required disclosures of regulatory matters or whether the company's internal controls are sufficient to identify export liabilities that should be disclosed in its periodic reports.[39] As a result, the certifying officer will be unable to make the required certifications and will be obligated to disclose deficiencies in both the company's disclosure controls and procedures and its internal controls over financial reporting as required under the Securities Exchange Act of 1934.[40] Therefore, any reporting company engaged in international trade must carefully and critically evaluate its exposure to export control regulations and penalties for non-compliance. If compliance costs or penalties could be material, the company should develop and implement an effective export compliance program in order to meet these certification and reporting requirements.

b. THE THOMPSON MEMO: U.S. DEPARTMENT OF JUSTICE'S PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS[41]

In addition to the important role an export compliance program has in corporate governance, it also may help the organization avoid prosecution in the event of an export violation. In January 2003, Deputy Attorney General Larry D. Thompson issued a memorandum outlining the Department of Justice's ("DOJ") principles for prosecuting business organizations ("Thompson Memo").[42] Generally, under the doctrine of *respondeat superior*, the illegal acts of the

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beyond the date of 10-K to provide management's report on internal controls over financial reporting. Press Release, SEC Postpones Filing Date for Internal Control Reports for Some Accelerated Filers, 2004-162, (Nov. 30, 2004) *at* http://www.sec.gov/news/press/2004-162.htm (last visited Mar. 3, 2005).

37. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, Auditing Standard No. 2: An Audit of Internal Control Over Financial Reporting Performed in Conjunction with An Audit of Financial Statements (Mar. 9, 2004) ¶ 140 at 186, *at* http://pcaobus.org/Rules_of_the_Board/Documents/Rules_of_the_Board/Auditing_Standard_2.pdf (last visited Mar. 1, 2005).

38. *See supra* note 23.

39. *See supra* notes 35 and 37 and accompanying text.

40. 17 C.F.R. §§ 240.13a-14, 240.15d-14 (2004) (certification of disclosure controls and procedures); 17 C.F.R. §§ 240.13a-15, 240.15d-15 (internal controls over financial reports).

41. Thompson Memo, *supra* note 27.

42. Thompson Memo, *supra* note 27, at 1.

organization's employees, directors, officers, or agents may warrant prosecution of the organization, if the acts were taken within the scope of the individual's duties and were intended, in part, to benefit the corporation.[43] According to the DOJ, charging corporations for their agents' wrongdoing benefits the public by creating mass deterrence and by decreasing the risk of further public harm.[44]

The Thompson Memo stresses the importance of scrutinizing the "authenticity of a corporation's cooperation," and specifically directs prosecutors' attention to the effectiveness of the organization's corporate governance practices.[45] In particular, one of the nine relevant factors in the charging decision is the existence and adequacy of the organization's compliance program.[46] Although an ineffective "mere[ly] paper" compliance program, or even the existence of an apparently effective program alone does not support a decision not to charge the organization, a compliance program reasonably designed to detect and prevent misconduct evidences a level of voluntary self-policing that may warrant more lenient treatment.[47] The DOJ instructs that strict application of *respondeat superior* may be unwarranted if the organization has an effective compliance program and the wrongdoing is limited to one "rogue employee."[48] The weight given to an organization's compliance program depends on the design, effectiveness, and managerial commitment to enforcing the program.[49] This organizational commitment turns on whether the project is adequately staffed, funded, and audited for effectiveness.[50] In addition, prosecutors are directed to consider whether the program is truly designed to detect the specific potential misconduct most likely in the corporation's particular business and industry.[51] Notably, a compliance program that does not incorporate regulatory guidance aimed at the organization's industry is unlikely to justify a decision not to bring charges.[52]

In addition to factoring against prosecution, an effective compliance program may influence two of the other nine factors for making charging determinations.[53] First, the corporation's "timely and voluntary disclosure of wrongdoing" and

43. Thompson Memo, *supra* note 27, at 2.

44. Thompson Memo, *supra* note 27, at 1-2.

45. Thompson Memo, *supra* note 27, at 1.

46. Thompson Memo, *supra* note 27, at 2-3. The Thompson Memo's nine factors are: (1) the "nature and seriousness of the offense," (2) the "pervasiveness of wrongdoing within the corporation," (3) the "corporation's history of similar conduct," (4) "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate" (5) the "existence and adequacy of the corporation's compliance program," (6) the "corporation's remedial actions," (7) any collateral consequences, (8) the "adequacy of prosecution of individuals," and (9) the "adequacy of remedies such as civil or regulatory enforcement actions." *Id.*

47. Thompson Memo, *supra* note 27, at 6.

48. Thompson Memo, *supra* note 27; *see id.* at 2.

49. Thompson Memo, *supra* note 27, at 6-7.

50. Thompson Memo, *supra* note 27, at 7.

51. Thompson Memo, *supra* note 27, at 6.

52. Thompson Memo, *supra* note 27, at 6.

53. Thompson Memo, *supra* note 27, at 4-5 (cooperation and voluntary disclosure); *see also id.* at 6-7 (restitution and remediation).

cooperation can justify leniency.[54] A compliance program that effectively detects wrongdoing through self-auditing or internal investigations gives the organization the information necessary to make such disclosure.[55] Second, an organization that develops a compliance program or improves an existing program in response to a violation exemplifies a willingness to cooperate and make restitution, another factor weighing against prosecution.[56]

Although an export compliance program's inherent value lies in preventing wrongdoing in the first instance, the Thompson Memo highlights the additional benefits of an effective compliance program should a violation occur.[57]

c. THE NOVEMBER 2004 AMENDMENTS TO THE U.S. SENTENCING GUIDELINES FOR SENTENCING ORGANIZATIONS[58]

The U.S. Supreme Court's January 2005 decision in *United States v. Booker*[59] held that the U.S. Sentencing Guidelines ("Guidelines") are no longer mandatory, but rather, advisory.[60] The November 1, 2004 amendments to the Guidelines nevertheless provide a detailed framework for evaluating an organization's compliance program for the purposes of mitigating criminal penalties.[61] Based on a multi-year review of the organizational guidelines and Sarbanes-Oxley's directive that the U.S. Sentencing Commission review and amend the Guidelines so they "are sufficient to deter and punish organizational misconduct," the 2004 amendments introduced a separate guideline for an "Effective Compliance and Ethics Program."[62] To meet this criteria, an organization must "exercise due diligence to prevent and detect criminal conduct," and "promote an organizational culture" to encourage "ethical conduct and a commitment to compliance with the law."[63] The Sentencing Guidelines define effectiveness to require that a program

54. Thompson Memo, *supra* note 27, at 4.

55. Thompson Memo, *supra* note 27, at 5-6. The DOJ notes that the effect of an organization's voluntary disclosure is subject to the regulatory limitations of the governing authority. *Id.* For instance, only the first corporation to cooperate with the Antitrust Division qualifies for amnesty. *Id.*

56. Thompson Memo, *supra* note 27, at 7.

57. Thompson Memo, *supra* note 27, at 6, 5, 7.

58. U.S. SENTENCING GUIDELINES MANUAL, ch. 8 (2004). On January 12, 2005, in a 5-4 opinion, the United Stated Supreme Court held that the Sentencing Guidelines are advisory, rather than mandatory. United States v. Booker, No. 04-104, 04-105, 2005 WL 50108 at *27 (Jan. 12, 2005) (5-4 decision) (Breyer, J., majority opinion, in part).

59. *Booker*, No. 04-104, 04-105, 2005 WL 50108 at *27.

60. *Id.*

61. *Id.* While the decision severed the provisions of the Guidelines that made them mandatory, federal courts must continue to consult the Guidelines. *Id.* (stating, "The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing"). *See also* U.S. SENTENCING GUIDELINES MANUAL, at § B2.1, U.S. SENTENCING GUIDELINES MANUAL, at § 8A1.1, cmt. historical background; U.S. SENTENCING GUIDELINES MANUAL, at § 8C2.5(f).

62. U.S. SENTENCING GUIDELINES MANUAL, § 8B2, cmt. background; *id.* § 8B2.1.

63. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a)(1)-(2).

both prevent and detect criminal conduct.[64]

To establish the requisite due diligence and promote a culture of compliance, an organization must meet seven minimum requirements:[65]

1. Focus on Prevention and Detection – The organization must develop a program to "establish standards and procedures to prevent and detect criminal conduct."[66]

2. High-Level Program Commitment – The organization must commit to the compliance program at every level of the organization, with particular emphasis on the board of directors or a committee of the board, and executive management.[67] The board or governing authority must be knowledgeable in both the content and operation of the program, and is charged with exercising "reasonable oversight" over the implementation and effectiveness of the program.[68] Further, high-level personnel, defined to include directors, executive officers, managers of a major functional business unit of the organization, or individuals with substantial ownership interests, must ensure that the compliance program is effective.[69] While executive management may delegate the day-to-day operational responsibility to lower-level personnel, ultimate responsibility for the effectiveness of the program cannot be delegated.[70] To ensure the board or governing authority is sufficiently informed as to the effectiveness of the compliance program, the individual with daily, operational responsibility over the program must make annual reports on the program's effectiveness to the board or a committee of the board.[71] Further, management must allocate adequate resources to the individual with operational oversight of the program, must vest him with appropriate authority, and must provide him with direct access to the board, committee of the board, or governing authority.[72]

3. Avoid Inconsistent Delegations of Responsibility – The organization must take reasonable efforts not to delegate compliance program authority to employees who have engaged in criminal conduct or taken actions that are inconsistent with the compliance program.[73] The guideline's "known or should have known" standard warrants individual screening of employees, with a particular focus on the recency of illegal activity or misconduct.[74]

4. Ongoing Training and Communication – The organization must conduct

64. *Id.* § 8B2.1(a)(2).
65. *Id.* § 8B2.1(b)
66. *Id.* § 8B2.1(b)(1).
67. *See id.* § 8B2.1(b)(2).
68. *Id.* § 8B2.1(b)(2)(A).
69. *Id.* § 8B2.1(b)(2)(B). Application note 1 to § 8B2.1 defines "high level personnel" by incorporating by reference the definition of "high level personnel" in the commentary to § 8A1.2. *Id.* § 8B.1 cmt, n.1.; *id.* § 8A1.2 cmt. n.3.
70. *Id.* § 8B2.1(b)(2)(B)-(C).
71. *Id.* § 8B2.1(b)(2)(C).
72. *Id.*
73. *Id.* § 8B2.1(b)(3)
74. *See id* § 8B2. cmt. n.4.

ongoing training and communicate the program's standards and procedures to the entire organization, including the board, management, and employees.[75] In some circumstances, it may also be appropriate to provide this training to the organization's agents.[76]

5. Ongoing Audit Requirement; Mechanisms for Anonymous Reporting – The organization must monitor and audit the compliance program, and periodically evaluate the program's effectiveness.[77] While not required, the organization may establish procedures allowing employees to make anonymous or confidential requests for further guidance, or to report criminal conduct.[78] Such mechanisms can increase program effectiveness by promoting compliance and active employee participation without fear of retaliation.[79]

6. Create Incentives and Disciplinary Measures – The organization must provide performance incentives for compliance and establish disciplinary measures for criminal conduct or failure to prevent or detect such conduct.[80] While these measures are not specifically required as a component of the compliance program rather than exist as part of the company's personnel review procedures, discipline for program violations should be case specific.[81]

7. Respond Reasonably to Criminal Conduct – Should criminal conduct occur, the organization must respond to prevent further violations.[82] Upon discovery of a violation, the organization should evaluate whether changes or modifications to the compliance program are warranted.[83] Even in the absence of criminal conduct, organizations should update or modify their compliance programs as needed, after periodic review and assessment, to ensure that the program continually meets each of the seven requirements.[84]

In addition to these minimum requirements, the Guideline's Application Notes emphasize that compliance programs should be designed specifically for each organization, taking into account an organization's industry, size, and prior misconduct.[85] Compliance programs that do not conform to industry practices, or meet regulatory standards for compliance programs for specific industries, are unlikely to qualify as effective programs.[86]

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75. *Id.* § 8B2.1(b)(4).
76. *Id.*
77. *Id.* § 8B2.1(b)(5).
78. *Id.* § 8B2.1(b)(5)(C).
79. *Id.* The Sentencing Commission expressly recognizes that procedures allowing for anonymity and confidentiality have both value and limitations, and that the Sentencing Guidelines are intended to allow an organization "maximum flexibility" in designing a system best suited to the organization's culture. *Id.* § 8B2.1 historical notes.
80. *Id.* § 8B2.1(b)(6).
81. *Id.* § 8B2.1 cmt. n.5.
82. *Id.* § 8B2.1(b)(7).
83. *Id.*
84. *Id.* § 8B2.1(c).
85. *Id.* § 8B2.1 cmt. n.2(A).
86. *Id* § 8B2.1 cmt. n.2(B).

Smaller organizations are not expected to implement compliance programs that are as elaborate, costly, and formal as programs required of larger organizations.[87] For example, smaller organizations may implement effective compliance programs that are directly managed by the board; that provide training through routine, but informal staff meetings; that rely on existing personnel, rather than adding additional staff; and that incorporate procedures from existing, well-regarded compliance programs of similar organizations.[88] Besides industry and size considerations, organizations should review their prior business history to identify risk of particular types of criminal conduct.[89]

In sum, an organization may qualify for decreased criminal penalties if it exercises due diligence and promotes the requisite culture of compliance through its export control program.[90] By meeting the seven minimum criteria of an "Effective Compliance and Ethics Program," an export compliance program should not only deter or detect a potential misconduct, but also qualify the corporation for more favorable treatment in the event of a violation.[91]

2. HYPOTHETICAL CLIENT FACTS AND MODEL PROGRAM DESIGN CONSIDERATIONS

a. HYPOTHETICAL CLIENT FACTS: XYZ, LLC[92]

This model export compliance program was developed for XYZ, LLC, a hypothetical, small-cap technology startup. The program addresses export controls under the Export Administration Regulations,[93] Arms Export Control Act,[94] International Emergency Economic Powers Act,[95] and Foreign Corrupt Practices Act.[96]

Tom Johnson, a former engineering professor, founded XYZ, LLC ("XYZ") to service a large contract for a well-known defense contractor, QRS. During his tenure at the university and under a contract with QRS, Johnson developed vision-recognition technology, including the original code that underlies most XYZ products. Several of these university projects were funded directly by the Department of Defense ("DOD"). The core of XYZ's technology is an image

87. *Id* § 8B2.1 cmt. n.2(C)(iii).

88. *Id.*

89. *Id.* § 8B2.1 cmt. n.6(A)(iii).

90. *Id.* § 8C2.5(f).

91. *Id.*

92. The hypothetical client, XYZ, LLC and the hypothetical client facts are fictional. Part II.A is a summarized presentation of the hypothetical facts provided by Professor Trip Mackintosh for his course, "International Business Transactions, Federal Regulation," at the University of Denver Sturm College of Law, Spring Semester, 2004.

93. 15 C.F.R. §§ 730-74 (2004). These sections of the Code of Federal Regulations comprise the Export Administration Regulations, or "EAR."

94. 22 C.F.R. §§ 120-27 (2004). These sections of the Code of Federal Regulations comprise the International Traffic in Arms Regulations, or "ITAR."

95. 50 U.S.C. §§ 1701-1706 (2001).

96. 15 U.S.C. §§ 78dd-1 to 78dd-3 (1998).

recognition feature that allows equipped computers to understand images as discrete as road signs and product variants. XYZ's products include a basic vision recognition package and other software products that enhance products ranging from computer-driven machine tools to aviation training programs. XYZ's non-U.S. customers include automakers, space programs, launch-technology companies, and government highway projects. Because XYZ's products are developed specifically for each purchaser, company sales contracts often require extensive back-and-forth with the customer, including customer visits to XYZ's Colorado office. At the expiration of the contract period, the software automatically disables, unless the licensed user renews the contract and receives a software key from XYZ.

XYZ has small sales, engineering, coordination, and accounting departments. Many of XYZ's sales and engineering employees are university students from India and Pakistan. In addition to CEO Johnson, XYZ has one other executive officer—in-house counsel and CFO, Bob Decisis. In addition to his executive duties, Decisis manages the team that coordinates projects between the sales and engineering groups. XYZ's sales team consists of trained engineers. The company's engineering team consists of twenty part-time code writers who write for specific applications in response to customer needs.

b. DESIGN CONSIDERATIONS: THE MODEL COMPLIANCE PROGRAM

This model program incorporates advice on export compliance "best practices" from the Department of State, Department of Commerce and the Nunn-Wolfowitz Task Force Report: Industry "Best Practices" Regarding Export Compliance Programs.[97] Practitioners reviewing the model program should note four additional considerations.

First, the model program was not designed to include incentives and discipline within the compliance program itself. Instead, the program was developed on the assumption that such procedures would be implemented directly through XYZ's employee compensation and performance reviews.

Second, due to the customer-specific technology requirements for XYZ's products, the model program does not include a product matrix. Practitioners developing export compliance programs for companies selling mass-produced

97. Department of State, Bureau of Political Military Affairs, Office of Defense Trade Controls, Guidelines for DTC Registered Exporters/Manufacturers Compliance Program, *at* http://www.pmdtc.org/docs/Compliance_Programs.pdf (last visited Feb. 3, 2005); Department of Commerce, Bureau of Industry and Security, Compliance and Enforcement: Export Management Systems, *at* http://www.bxa.doc.gov/ExportManagementSystems/Default.htm (last visited Jan. 23, 2005); Nunn-Wolfowitz Task Force Report: Industry "Best Practices" Regarding Export Compliance Programs, *at* http://www.usexportcompliance.com/Papers/nunnwolfowitz.pdf (last visited Feb. 3, 2005).

products should consider developing matrix of company products with their appropriate classifications under the U.S. Munitions List or Commerce Control List.[98]

Third, the model program was created as a paper-based program, but larger clients might be best served with a web or intranet-based program. An electronic program can incorporate technology to track participation in training and performance of program steps by individual employees, allowing the organization to document training and track compliance with required procedures.

Lastly, while the model program is footnoted for publication purposes, practitioners might consider creating compliance programs without extensive footnotes. Frequent citation to legal authority can detract from the straight-forward writing style necessary to make the program both readable and understandable to non-legal employees learning to comply with these complex controls.

B. XYZ, LLC EXPORT COMPLIANCE PROGRAM – BEGINS ON NEXT PAGE

98. 22 C.F.R. § 121 (2004) (U.S. Munitions List); 15 C.F.R. § 774 (2004) (Supp. I-III 1998, 2003, 2003) (Commerce Control List).

XYZ, LLC

EXPORT COMPLIANCE PROGRAM[99]

99. This model program is for general informational purposes and is not intended as legal advice. The requirements of an effective export compliance program for any particular company depend on the organization's operational circumstances and technologies. The Author, J. Triplett Mackintosh, Mark D. Menefee, and the Denver Journal of International Law and Policy expressly disclaim any responsibility for the adaptation or use of this program.

EXPORT COMPLIANCE PROGRAM – TABLE OF CONTENTS

Each department's Export Compliance Program instructions are customized to reflect the differing nature of each department's work. Use this table of contents to determine which sections apply to your department.

All departments should begin with the **OVERVIEW** and read through **PART IX**. From there, turn to your specific department's section for further instruction.

PART I – LETTER FROM TOM JOHNSON, CEO

MM/DD/YYYY

RE: Open Letter to All Employees – XYZ Export Compliance Program

Dear XYZ Employees:

Over the past two years, XYZ has grown from a small technology startup to a respected player in the global intelligent sensing software industry. Together, we have taken a vision and built our company with the skill, dedication, and energy of each of you. Today, I ask each of you for a further commitment to XYZ's continued long-term success.

XYZ's growth brings new challenges in many areas. One of the most important things we can do is create systems to help our growing company comply with U.S. law. Export laws are of particular importance, both for our company and for the security of the United States. Because these laws protect national security and seek to avoid increasing the military capabilities of certain foreign countries, export violations carry significant penalties at both the individual and company level.[100] These penalties include substantial fines, loss of export control privileges, being barred from work on U.S. government contracts, and even jail time.[101] Each of us at XYZ must take our obligations seriously, and we must make a company-wide commitment to *value compliance over any sale.*

As part of our commitment to compliance, XYZ is implementing an Export Compliance Program, which translates these regulations into user-friendly steps that put compliance within the reach of every one of our employees. To implement the program, we will hold company-wide training sessions this month. Further, we will conduct annual refresher training and make compliance advice available on a daily basis. Despite the significant cost of this program, XYZ management firmly believes that non-compliance carries much larger consequences for our employees, our company, and our country.

Even with the best compliance program, however, mistakes can and may happen. XYZ's Compliance Program provides a step-by-step guide should you make a mistake, have a concern, or suspect a violation. The most important thing you can do if you suspect a problem is to bring it to our attention so we can correct it immediately. To that end, we have created a new position, Export Compliance Officer. Should you ever have a concern or question, contact our Export Compliance Officer, John Complaisant, at (303)123-0911 or jcomp@XYZ.com. The Compliance Program also provides detailed instructions about other methods of reporting concerns or violations, such as anonymous reporting to an export-trained lawyer outside the company or contacting XYZ management. We can only remedy problems if we know about them, so we ask you to join us in placing the utmost importance on export compliance.

100. 22 U.S.C. § 2778(a) (2004); 15 C.F.R. § 730.6 (2004); *see also* 22 U.S.C. § 2778(c); 15 C.F.R. § 764.3(b)(2)(i)-(ii) (2004).

101. 22 U.S.C. § 2778(c); 15 C.F.R. § 764.3(b)(2)(i)-(ii).

We value the commitment each of you has made to XYZ's success. Together, we can continue our pledge to the long-term success of our company and to the safety of our country. Thank you for your vision, support, and dedication.

Sincerely,

Thomas Johnson
Chief Executive, XYZ, LLC

PART II – XYZ COMPLIANCE PROGRAM – OVERVIEW

PART II.A – OVERVIEW

XYZ, LLC is committed to achieving excellence in the global intelligent sensing software industry. In this mission, XYZ must be dedicated to compliance with U.S. export laws. To that end, it is XYZ's corporate policy to *value compliance over any sale.* XYZ's Export Compliance Program provides instruction for our employees in every department, because it takes every one of us to achieve this commitment to compliance.

This **PART II OVERVIEW** section is designed as a broad overview of the purpose of the laws, the scope of their coverage, the agencies that enforce these laws, and the importance of compliance. These sections provide a general overview of the laws, but do not provide specific instructions for compliance. Later sections of this program, designed specifically for each department, will provide the detailed information you need for compliance. If you read this **PART II OVERVIEW** section and have a general understanding of the purpose and scope of the laws, you have successfully achieved the goal of this section.

Throughout this program, the pages assigned to your department have a space in the lower left-hand corner for you to initial each page.[102] Initial and date the page when you have read and understood the section. If you are confused or do not fully understand any part of your assigned sections, ask your supervisor for clarification, or contact XYZ's Export Compliance Officer, John Complaisant, at (303)123-0911 or jcomp@XYZ.com.

PART II.B – PURPOSE BEHIND UNITED STATES EXPORT CONTROL LAWS

U.S. export control laws serve a very important global function. These laws protect U.S. national security, support U.S. foreign policy, control proliferation, and prevent terrorism activities.[103] They also seek to avoid increasing the military capabilities of certain individuals, groups, and foreign countries by controlling defense articles and services and items that can be used for defense purposes.[104] Not only are U.S. export laws aimed at preventing the spread of these threats, but they are also designed to ensure the safety of our armed forces in conflict.[105] Today, more than ever, compliance with these laws is crucial.

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102. The running footer for the XYZ, LLC Export Compliance Program read: "Initials _____, Date _____ • Need Assistance? Go to intranet: **COMPLIANCE 911** for contacts and instructions." This footer has been excluded from the model program for formatting purposes, but should be included on every page of the program.

103. 22 U.S.C. § 2778 (a); 15 C.F.R. § 730.6.

104. 22 U.S.C. § 2751 (2004).

105. *See id.*

PART II.C – SCOPE OF U.S. EXPORT CONTROL LAWS

1. Definition of "Export"

U.S. export control laws broadly define the term "export."[106] Due to the broad definition, the scope of these laws is not always intuitive.[107] Any item that is transferred from a U.S. person to a foreign person is an export.[108] Examples of items are commodities, software, technology, and technical information.[109] Certain items with potential military uses, such as software and encryption codes are strictly controlled.[110] The transfer or export of the item can be by any method.[111] Exports can happen by mail, fax, uploading/downloading via the web, by e-mail, by face-to-face conversation, or even by phone.[112]

2. Definition of "Foreign Person"

Under the laws, a foreign person is any person who is not a "U.S. Person."[113] A U.S. Person is a: (1) U.S. Citizen (including U.S. companies, such as XYZ); (2) Permanent Resident Alien; or (3) Political Refugee protected under the Immigration and Naturalization Act.[114]

3. Location of Transfer

Under U.S. export control laws, it does not matter where the transfer takes place.[115] U.S. Persons must abide by the law even when overseas.[116] Furthermore, an export can take place in the United States if technology is transferred to a foreign person here.[117] Under the law, this is a "deemed export" that is still subject to export controls.[118] The justification for this rule is that at some point, the foreign national might return to their home country.[119]

106. *See* 22 C.F.R. § 120.17 (2004); 15 C.F.R. § 734.2(b) (2004).
107. *See* 22 C.F.R. § 120.17; 15 C.F.R. § 734.2(b).
108. *See* 22 C.F.R. § 120.17; 15 C.F.R. § 734.2(b)(1)-(b)(2), (a)(1).
109. *See* 22 C.F.R. §§ 120.17, 120.6 (2004); 15 C.F.R. § 734.2(a)(1), (b)(1)-(b)(2).
110. 22 C.F.R. §§ 120.6, 120.2 (2004).
111. 22 C.F.R. § 120.17; 15 C.F.R. § 734.2(b)(1)-(3).
112. *See* 22 C.F.R. § 120.17; 15 C.F.R. § 734.2(b)(1)-(3).
113. 22 C.F.R. § 120.16 (2004).
114. 22 C.F.R. §§ 120.15, 120.16 (2004).
115. *Id.* § 120.17; 15 C.F.R. § 734.2(b)(1).
116. 22 C.F.R. § 120.17; 15 C.F.R. § 734.2(b)(2)(i).
117. 22 C.F.R. § 120.17; 15 C.F.R. § 734.2(b)(2)(ii).
118. *See* 22 C.F.R. § 120.17; 15 C.F.R. 734.2(b)(2)(ii).
119. *See* 22 C.F.R. § 120.17; 15 C.F.R. 734.2(b)(2)(ii).

4. Embargoes/Denied Parties

Export laws enforce embargoes against certain countries.[120] U.S. embargos may prohibit travel to, contact with, or business transactions with parties in specified countries.[121] Many of these economic and trade sanctions involve United Nations or other international mandates.[122] In addition to these sanctions, U.S. Persons (remember, this includes U.S. companies) cannot do business with certain foreign nationals suspected of terrorism or who have ties to terrorist organizations.[123]

5. Anti-Boycott and Anti-Corruption Laws

U.S. laws prohibit U.S. Persons from participating in boycotts of countries friendly to the United States.[124] These laws require that U.S. Persons do not participate in illegal boycotts and require U.S. Persons to avoid participation and to report any invitation to participate in an illegal boycott.[125]

In addition to anti-boycott controls, U.S. law forbids U.S. Persons from offering or giving a payment or thing of value to a foreign government official with the intent to improperly influence the individual.[126]

120. *See* Office of Foreign Asset Control, Sanctions Program and Country Summaries, *at* http://www.treas.gov/offices/enforcement/ofac/sanctions/index.html (last visited Jan. 23, 2005).

121. 15 C.F.R. §§ 746.2-746.3, 746.7-746.8 (2004) (restrictions on exports to Cuba, Iraq, Iran, and Rwanda); 15 C.F.R. § 732.3(i) (2004).

122. 15 C.F.R. § 730.8(a)(4)(iii) (2004); *see also, e.g.*, Exec. Order No. 13,315, 68 Fed. Reg. 52,315 (Aug. 28, 2003) (blocking property of former Iraqi officials, in accord with U.N. Security Council Resolution 1483 of May 22, 2003).

123. *See* 15 C.F.R. § 744.12 (2004); *id.* § 744 (Supp. IV 2001).

124. *See* 15 C.F.R. § 760.2 (2004).

125. *See id.*; 15 C.F.R. § 760.5(a) (2004).

126. 15 U.S.C. §§ 78dd-1, 78dd-2 (2004).

6. Examples of XYZ Transactions Covered by U.S. Export Laws

- Sending software to a customer overseas, or making software available on our web or FTP site that a customer could download (even though the site is hosted in the United States. and the customer completes the download independently)[127]
- Furnishing a defense service, by training a foreign person (whether in the United States or abroad) to use XYZ software that was designed or adapted for military use[128]
- Sharing technical data or know-how with a foreign person (could be a customer or co-worker) in person, by phone, live-web support, e-mail, or at a trade show (whether in the United States or abroad)[129]
- Incorporating XYZ software into a foreign made item that a customer sends to you and then shipping the item back to the customer[130]

7. Hiring New Employees

Because sharing technical data with foreign persons in the United States can be an export under U.S. laws, each potential hire must be screened prior to employment for badge/classification requirements.[131]

Each XYZ department must submit the name of potential hires to the Compliance Screeners in the Accounting department ***prior*** to hiring them. Further, you must ***wait*** for approval before hiring any employee. Failure to do so can result in a violation.

127. *See* 22 C.F.R. § 120.17 (2004); 15 C.F.R. § 734.2(b)(2) (2004).
128. *See* 22 C.F.R. § 120.9 (2004).
129. *See* 22 C.F.R. § 120.17(3)-(4); 15 C.F.R. § 734.2(b)(2)-(3).
130. 22 C.F.R. § 120.17; 15 C.F.R. § 734.2(b)(2)(ii).
131. *See supra* note 130.

PART II.D – COMPLIANCE PROGRAM KEY PERSONNEL

In order to execute this program, XYZ has made several personnel changes. The following people are the primary contacts for export control. A detailed list of how to handle suspected problems follows in **PART III, COMPLIANCE 911**.

This section should familiarize you with individuals you can use as resources in the export process.

1. John Complaisant, Compliance Officer – (303)123-0911 – jcomp@XYZ.com

As Compliance Officer, John is XYZ's expert on export control compliance. We selected John for this position because he has worked in Bob Decisis's group since XYZ's start-up and he has an in-depth understanding of our projects, systems and operations. John has received intensive training in export control laws in order to help each XYZ employee make good compliance decisions. In addition to overseeing the program, John provides advice to the Compliance Screeners and applies for required licenses. John is available for your questions and concerns. If you ever suspect a violation or believe you have made a mistake, you can contact John for assistance. If necessary, he will bring in Outside Counsel for assistance.

2. Bob Decisis, In-House Counsel and Chief Financial Officer, Head of Coordination Team – (303)123-1411 – bdecisis@XYZ.com

Bob worked with Tom Johnson, CEO, to raise the necessary funding to start XYZ. He oversees the Coordination Team (which includes John Complaisant, our Compliance Officer.) His responsibilities under the Export Control Program include general oversight and periodic reviews of the various departments and compliance control functions. He also reviews all contracts for the required certifications and declarations.

3. Anne Comptable and Compliance Screeners, Accounting Department – (303)123-4444 – acomptable@XYZ.com

As the Vice President of Accounting, Anne has extensive experience in the finance and contracts for XYZ's projects.

Each employee in the Accounting department has been trained as a Compliance Screener. The Compliance Screeners will perform initial screens on potential customers and employees for license requirements.

4. Jane L. Doe, ABC Firm, LLP, Outside Counsel – (303)999-9999 – jldoe@abclaw.com

As Outside Counsel, Jane understands the critical importance of compliance with U.S. export control laws. Should you ever have a concern, suspect a violation, or believe you may have made a mistake, you can contact her *anonymously* to make a report.

PART II.E – AGENCIES THAT CONTROL U.S. EXPORTS

1. Who Controls Exports

The two main government agencies that administer and enforce U.S. export law are the U.S. Department of State and the U.S. Department of Commerce.

2. State Department

The State Department controls "defense articles" and "defense services."[132] Generally, the State Department controls items and services that are 'born military,' meaning that they were designed, modified or adapted for military application.[133] Because of the inherent military value of these items, they are strictly controlled.[134]

3. Commerce Department

The Commerce Department controls "dual use" items, which are those items which have both commercial and military or proliferation applications.[135] Many commercial items, which may not have *obvious* military uses, are controlled by the Commerce Department.[136] Because some items are mainly commercial in nature, the Commerce Department Rules allow for more or less control, depending on the item.[137] The Commerce Department also administers U.S. anti-boycott laws.[138]

4. Other Agencies

The Treasury Department enforces embargoes that further U.S. foreign policy and security goals.[139] Anti-corruption laws are enforced by the Department of Justice.[140]

A general understanding that the State Department controls items and services that are inherently military and that the Commerce Department regulates dual-use items is sufficient knowledge about these particular agencies for the purpose of this **OVERVIEW** section.

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132. 22 C.F.R. §§ 120.2, 120.17 (2004).

133. 22 C.F.R. § 120.3 (2004).

134. 22 C.F.R. §§ 120.6, 120.2 (2004). The Department of State determines, with consent of the Department of Defense, which items are covered by the U.S. Munitions List. 22 C.F.R. § 120.3; 15 C.F.R. § 730.3 (2004).

135. 15 C.F.R. § 730.3.

136. *See id.*

137. *See id.*; 15 C.F.R. § 730.7 (2004) (noting that few exports covered by the Commerce Department require application to the Bureau of Industry and Security for a license).

138. 15 C.F.R. §§ 760.1-760.5 (2004).

139. *See* 15 C.F.R. § 730.4 (2004).

140. *See* 15 U.S.C. §§ 78dd-1(d)(1)-(d)(2), 78dd-2(e)(1)-(e)(2) (2004).

PART II.F – IMPORTANCE OF COMPLIANCE – COST OF VIOLATIONS

Violations of U.S. export laws carry substantial penalties. Individuals are subject to fines of up to $1 million and/or up to ten years in prison, per violation.[141] Companies face penalties of up to $1 million or five times the value of the transaction, per violation.[142] Because of the broad scope of the laws, each business transaction could involve several violations. In addition, individuals and companies may forfeit the goods or proceeds from a transaction that occurs in violation of these laws.[143]

The government may further penalize violations by taking away export privileges, by prohibiting other parties from doing business with companies and individuals who have violated the law, and by barring companies who violate the law from working on government contracts.[144] Bear in mind that most of XYZ's business over the past two years has been in conjunction with QRS, a large government contractor. A loss of the ability to work with QRS would have devastating effects on XYZ's viability.

Because the cost of violations is so great to every one of us, XYZ takes compliance extremely seriously. Although these penalties are daunting, compliance is within everyone's reach. XYZ has developed this Export Compliance Program to prevent costly violations. Each step of the program describes how to comply and where to turn for help.

Further, XYZ has developed a special section of the program in **PART III** called **COMPLIANCE 911**. It describes in detail how to address questions, concerns, suspicions, or problems. XYZ's goal is to resolve compliance problems in an efficient, confidential manner. We can only resolve issues and support our employees if each of us is committed to identifying and reporting potential problems.

141. 22 U.S.C. §2778 (c) (2004).
142. 15 C.F.R. § 764.3(b)(2)(i)-(ii) (2004).
143. 22 C.F.R. § 127.6 (2004); 15 C.F.R. § 764.3(c)(2)(i).
144. *See supra* note 23.

PART III – COMPLIANCE 911 – HOW TO ADDRESS CONCERNS, SUSPICIONS, OR PROBLEMS

IF YOU SUSPECT A PROBLEM OR VIOLATION:

If you suspect a problem or violation, **don't panic**. These laws are complex, and mistakes can happen. The most important thing you can do is to **contact us**. It is extremely important that you bring any concern to our attention immediately, so that we can correct the problem and minimize any potentially negative consequences. If you believe there has been a violation, suspect you have made a mistake, or are presented with a situation you do not know how to handle, follow the **COMPLIANCE 911 PROTOCOLS**.

COMPLIANCE 911 PROTOCOLS:

1. **Don't panic.**

2. **Stop the transaction immediately**. If the transaction involves a shipment of goods, stop the shipment. If the transaction involves communication with a foreign person, terminate the communication.

3. **Retain all records**. Records can form the basis of a defense or help document the steps of the transaction that led to the concern.

4. **Contact *any* of the following people to report the concern**. If you would like to report ***anonymously***, contact Jane L. Doe, Outside Counsel, at the number below.
   a. John Complaisant – Compliance Officer – (303)123-0911 – jcomp@XYZ.com
   b. Bob Decisis – In-House Counsel/CFO – (303)123-1411 – bdecisis@XYZ.com
   c. Anne Comptable – Accounting/Compliance Screening – (303)123-4444 – acomptable@XYZ.com
   d. Tom Johnson – CEO – (303)123-7777 – tjohnson@XYZ.com
   e. Jane L. Doe – Outside Counsel – (303)999-9999 – jldoe@abclaw.com

5. **Maintain confidentiality**. After properly reporting the incident, keep the matter confidential. This will allow us to thoroughly assess the situation. Talking about the matter may jeopardize any attorney/client privilege that may exist.

6. **Wait for further instruction**. If you have contacted XYZ management, we will immediately contact Outside Counsel and then determine the best course of action. If you have contacted Outside Counsel directly, she will provide you with instructions directly.

You can access the **COMPLIANCE 911 PROTOCOLS** and the **COMPLIANCE 911** Contact List on the XYZ intranet link entitled **COMPLIANCE 911**.

PART IV – AVOIDING INADVERTENT VIOLATIONS – CUSTOMER 'RED FLAGS'

PART IV.A – BE ALERT TO 'RED FLAGS'

Often, avoiding violations is as simple as being alert to 'red flags' that may signal that a customer presents a risk of a violation.[145] Being aware of common signals that can indicate an individual is trying to obtain U.S. exports unlawfully can help you avoid making a mistake.[146] The best and safest approach to compliance is to be careful not to 'self-blind.'[147] Under the law, we each have an affirmative duty to know certain information related to our transactions.[148] Ostrich-like behavior or avoiding hearing 'bad' information does not protect anyone from liability.[149]

PART IV.B – LOOKING FOR RED FLAGS IS AN ONGOING DUTY

The best way to avoid violations is to be on the alert for red flags at *all* times. Just because a customer has not shown red flags at the beginning of the transaction does not mean they may not exhibit red flags later in the transaction.

145. 15 C.F.R. § 732 (Supp. III 1997).

146. *See id.* § 732 (Supp. III(b) 1997).

147. *Id.* § 732 (Supp. III(a)(3) 1997).

148. *See id.* § 732 (Supp. III(a)(2) 1997). The knowledge required under the EAR depends on the situation. *See id.* If 'red flags' are present, they create an affirmative duty to inquire further. *Id.* Absent 'red flags,' it is appropriate to rely on a customer's representations. *Id.*

149. *Id.* § 732 (Supp. III(a)(3) 1997).

PART IV.C – RED FLAGS TO LOOK OUT FOR

Later sections of the program will address how to conduct a specific screening for red flags. In this section, however, it is important to familiarize yourself with potential red flags so that you can be on the lookout for these signs throughout your work.[150] Don't be afraid to 'hold up' a sale or 'kill the deal.' It is much more important to contact someone to discuss the concern instead of going ahead with the transaction.[151] Remember, compliance is *more important than any sale.*

If you see a red flag or have *any* doubts, do not continue the transaction.[152] Treat it like a suspected violation and utilize the **COMPLIANCE 911 PROTOCOLS**, located in **PART III** or on the XYZ intranet at the link entitled **COMPLIANCE 911**.

1 The customer's name or address is similar to someone who comes up on an individual screening list.[153] Often, individuals on screening lists go by several names or share addresses. The accounting department Compliance Screener will conduct this screen.

2. The customer is reluctant to offer information about the end-use of the item.[154] For example, when you ask the customer about the software's end-use or inform the customer that XYZ requires a certification of end use, the customer hesitates or does not call back for several days. Sales and engineering employees should be alert for this.

3. XYZ's software capabilities do not fit the customer's line of business, such as a plant nursery or construction equipment business inquiring about XYZ's high-resolution image recognition software.[155] Sales and engineering employees should be alert for this.

4. XYZ's software is incompatible with the technical level of the country it will be shipped to, such as a third-world country that does not have either a space or engineering industry.[156] Sales, engineering, and accounting employees should be alert for this.

5. The customer has little or no business background in either the engineering or space industry.[157] Sales and engineering employees should be alert for this.

6. The customer is willing to pay cash up front, which would be unusual because XYZ's customers generally pay with letters of credit or staged cash payment during the development of the software for the contract.[158] Sales and accounting employees should be alert for this.

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150. *See id.* § 732 (Supp. III(b) 1997).
151. *See id.* § 732 (Supp. III(a)(6) 1997).
152. *See id.*
153. *See infra* Part X.II.A.
154. 15 C.F.R. § 732 (Supp. III(b)(1) 1997).
155. *Id.* § 732 (Supp. III(b)(2) 1997).
156. *Id.* § 732 (Supp. III(b)(3) 1997).
157. *Id.* § 732 (Supp. III(b)(4) 1997).
158. *Id.* § 732 (Supp. III(b)(5) 1997).

7. The customer is unfamiliar with the basic functionality of sensing software or image recognition technology.[159] Sales and engineering employees should be alert for this.

8. The customer declines the training and maintenance services that XYZ provides as part of each software contract.[160] Sales, engineering, and accounting employees should be alert for this.

9. The customer is vague about delivery dates or wants deliveries made to odd destinations, such as Post Office boxes, remote locations or destinations that are far away from the customer's place of business.[161] Sales and accounting employees should be alert for this.

10. The customer gives a freight forwarder as the product's final destination.[162] Sales and accounting employees should be alert for this.

11. The shipping route is abnormal, such as a customer with a reported ultimate destination in France routing the delivery through India.[163] Sales and accounting employees should be alert for this.

12. The customer requests unusual packaging, such as asking for an unmarked box or providing their own packaging materials.[164] Sales and accounting employees should be alert for this.

13. The buyer is evasive or makes contradictory statements about the software's use, such as stating that they will use the software in a plant in Colorado but making frequent references to their engineering facility in China.[165] Sales and engineering should be alert for this.

159. *Id.* § 732 (Supp. III(b)(6) 1997).
160. *Id.* § 732 (Supp. III(b)(7) 1997).
161. *Id.* § 732 (Supp. III(b)(8) 1997).
162. *Id.* § 732 (Supp. III(b)(9) 1997).
163. *Id.* § 732 (Supp. III(b)(10) 1997).
164. *Id.* § 732 (Supp. III(b)(11) 1997).
165. *Id.* § 732 (Supp. III(b)(12) 1997).

PART V – ANTI-BOYCOTT PROTECTIONS

PART V.A – AVOIDING AND REPORTING ILLEGAL BOYCOTTS

U.S. anti-boycott laws are designed to prevent U.S. Persons (including U.S. companies) from participating in boycotts against countries friendly to the United States.[166] This can be confusing, because you *must* comply with U.S. sanctions and embargoes, but you *cannot* comply with invitations to participate in embargoes against countries friendly to the United States.[167]

Participation in any boycott of a country friendly to the United States is prohibited.[168] Currently, your primary concern is the Arab League Boycott of Israel.[169] This long-standing boycott is aimed at Israel, with people who do business with Israel, or those who do business with parties the Arab League places on its "black list."[170]

Therefore, if your project involves countries in the Arab League, be on the alert for inquiries about whether XYZ does business with Israel or with companies who do business with Israel. Such questions are invitations to participate in the boycott and must be reported.[171] More information on the reporting requirement is in the section below called **PART V.C.2 – POSITIVE OBLIGATIONS.**[172]

Also prohibited are agreements to discriminate against others based on race, religion, sex, national origin, or nationality.[173]

166. 15 C.F.R. §§ 760.2(a), 760.1(a), (e) (2004).

167. 15 C.F.R. § 760.2(a).

168. *Id.*

169. *See* Bureau of Industry and Security, Department of Commerce, Office of Antiboycott Compliance, *at* http://www.bxa.doc.gov/antiboycottcompliance/oacrequirements.html (last visited Feb. 3, 2005).

170. Eugene Kontorovich, *The Arab League Boycott and WTO Accession: Can Foreign Policy Excuse Discriminatory Sanctions?*, 4 CHI. J. INT'L L. 283, 286-88 (2003).

171. 15 C.F.R. §§ 760.2(a), 760.5(a)(1) (2004).

172. *See infra* Part V.C.

173. 15 C.F.R. § 760.2(b).

PART V.B – ARAB LEAGUE MEMBER STATES[174]

Jordan
United Arab Emirates
Bahrain
Tunisia
Algeria
Djibouti
Saudi Arabia
Sudan
Syria
Somalia

PART V.C – NEGATIVE AND POSITIVE OBLIGATIONS

Under U.S. Anti-Boycott law, there are both and negative and positive obligations.[175] The **negative** obligations are things you *cannot* do, and the **positive** obligations are things you *must* do. The boycott you should currently be concerned with is the Arab League Boycott of Israel, but keep in mind that any minimal request for information might be part of an illegal boycott.[176]

174. *See* League of Arab States: Member States, *at* http://www.arableagueonline.org/arableague/english/level2_en.jsp?level_id=11 (last visited Jan. 16, 2005).

175. *See* 15 C.F.R. § 760.2(a), (b) (prohibitions against participating in boycotts and against discrimination); 15 C.F.R. § 760.5(a) (requirement to report invitations to participate in boycotts).

176. *See* Bureau of Industry and Security, Department of Commerce, Office of Antiboycott Compliance, *at* http://www.bxa.doc.gov/antiboycottcompliance/oacrequirements.html (last visited Feb. 3, 2005).

1. Negative Obligations – Things You Cannot Do:

a. Agree to refuse or refuse to do business with companies located in boycotted countries, businesses organized in boycotted countries, or blacklisted companies[177]

b. Agree to furnish or furnish information about business with boycotted countries, businesses organized in boycotted countries or blacklisted companies[178]

You *may* be able to provide a Certificate of Origin that attests that the software was manufactured in the United States.[179] These forms are available on the intranet under **COMPLIANCE/FORMS**.[180]

c. Agree to discriminate against others based on race, religion, sex, national origin, or nationality[181]

d. Agree to furnish or furnish information about race, religion, sex, national origin, or nationality[182]

e. Pay with or accept letters of credit that include requirements that violate any of these negative obligations[183]

f. Agree to follow the laws of countries participating in a prohibited boycott[184] (see the list of Arab League members in **PART V.B**), which may include requirements to comply with the Arab League Boycott of Israel

To avoid this problem, you *may* agree to follow the laws of a country *unless the laws conflict with U.S. law.*[185]

177. 15 C.F.R. § 760.2(a), (d).

178. *Id.*

179. 15 C.F.R. § 760 (Supp. I pt. I 1979).

180. The model program does not include a sample certificate of origin. For more information on certificate of origin, *see id.*

181. 15 C.F.R. § 760.2(b).

182. *Id.* § 760.2(c).

183. *Id.* § 760.2(f).

184. *Id.* § 760.2(a)(5).

185. 15 C.F.R. § 760 (Supp. I pt. II(A) 1979).

2. Positive Obligations – Things You Must Do:

a. **Report** any invitation to participate in a boycott[186]

An invitation includes:

- Being asked to *comply* with the boycott[187]
- Being asked *to furnish information* that helps the country carry out the boycott[188]

b. If you believe you have received an invitation to participate in an illegal boycott, **do not** furnish information or answer questions, **STOP** the transaction, and immediately contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com.

PART V.D – HOW TO CONTINUE IN A TRANSACTION AND AVOID VIOLATIONS

It is possible to *receive an invitation* to participate in a boycott but *stay in compliance* and complete the transaction by avoiding participation in the boycott and making the proper report.[189]

For example:

- If a customer asks you to agree to follow the laws of Syria:
    - You could respond that you would be willing to "follow the laws of Syria unless these laws conflict with U.S. law."[190]
    - You would need to contact John Complaisant, XYZ's Compliance Officer, so that he could make the required report.[191] As long as you report the invitation and do not comply with the request, you could continue the transaction.[192]
- If a customer asks you if you will certify that the software does not use any Israeli-based technology:
    - You could respond by saying, "I am not able to answer that question, but I can provide a Certificate of Origin."[193]
    - This would require contacting John Complaisant so that he could report the invitation.[194]

186. *Id.* § 760.5(a)(1) (2004).
187. *Id.*
188. *Id.*
189. *See id.* §§ 760.2, 760.5(a)(1).
190. *See id.* § 760 (Supp. I pt. II(A) 1979).
191. *Id.* § 760.5(a).
192. *See id.*
193. *Id.* § 760 (Supp. I pt. I 1979).
194. *Id.* § 760.5(a).

PART VI – ANTI-BRIBERY PROTECTIONS

Under U.S. anti-bribery laws, U.S. citizens, nationals, residents and businesses are prohibited from giving a corrupt payment to a foreign government official for the purpose of influencing a decision of the official in his official capacity.[195]

PART VI.A – PROHIBITED PAYMENTS

Specifically, a "corrupt payment" is the payment of money or an offer or promise to give *anything* of value to influence the official in his official capacity, to influence the official to violate his/her lawful duty, or to seek an improper advantage.[196] For example, making a contribution to the private school the official's children attend, or making charitable contributions to the official's favored charity could be a corrupt payment, if made with the intent to obtain an improper advantage or to secure the official's action in his/her official capacity.[197]

Under the law, even making an offer of payment, as long as it is made with the intent to influence, obtain improper advantage, or induce improper influence, is all that is required for a violation.[198] Even if the official refuses to accept the benefit, or accepts the benefit but does not take the desired action, it is still a violation.[199]

PART VI.B – LIMITED EXCEPTIONS FOR COMMON BUSINESS PRACTICES AND PAYMENTS

Certain common business practices, such as paying the costs of a foreign official to travel to a plant for a plant visit may be legal.[200] In addition, certain payments as part of routine government action *may* be allowed.[201] Because the exceptions are *extremely limited*, you must contact XYZ's Compliance Manager, for preauthorization for any payment to a foreign official.[202] Contact John Complaisant, at (303)123-0911 or jcomp@XYZ.com for pre-approval and the instructions for reimbursement for these limited, pre-approved transactions.

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195. *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (2004).

196. *Id.*

197. *Id.*

198. 15 U.S.C. §§ 78dd-1(a)(1), 78dd-2(a)(1). Under the statute, both offers and payments are prohibited. *Id.*

199. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

200. 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2).

201. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b).

202. 15 C.F.R. § 760.5 (2004).

PART VI.C – THIRD PARTY PAYMENTS CAN CREATE LIABILITY

If a third party, such as a XYZ project partner makes an illegal payment, XYZ can still be liable, even if our employees have *no knowledge* of the payment.[203] Therefore, it is extremely important to let our project partners, agents, and market makers know that they must abide by U.S. law.[204] Non-compliance is grounds for XYZ to unilaterally terminate the contract. If you ever suspect that a project partner may violate or has violated anti-bribery law, report your concerns immediately to John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com.

PART VI.D – HIGH RISK PROJECTS

Even though XYZ employees are strictly prohibited from making an illegal payment or offer, you may receive a request for corrupt payment from a foreign official. Certain XYZ projects may be at higher risk than others for violations of anti-bribery laws. When a foreign government has regulatory control over a large infrastructure project such as XYZ's South American Highway Project, this may create an incentive for officials to request bribes or 'payoffs' in exchange for favorable treatment on the project. Further, some countries are considered to present a higher risk for bribery requests or inadvertent violations.[205] When the Compliance Screener initially screens your **NEW CONTACT FORM**, he will perform a specific screen and let you know when the project may be particularly at risk for bribery issues.

If you are notified that the project is at increased risk because of the specific countries involved, proceed with caution. If you have any questions or concerns during the project, contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com.

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203. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

204. *Id.*

205. *See* Transparency International, *Corruption Perceptions Index 2004*, *at* http://www.transparency.org/cpi/2004/cpi2004.en.html#cpi2004 (last visited Feb. 14, 2005).

PART VII – RECORDKEEPING

PART VII.A – DOCUMENTING COMPLIANCE STEPS AND EXPORT DECISIONS

A well-documented export procedure is an integral part of complying with export laws and defending against any possible liability. Throughout this program, employees will receive instructions on how to complete screening checklists, document consultations, and record the analytical process used to make export decisions. In addition to the documentation required by each step, you *must* keep *all records* of correspondence and negotiations.[206] Following these procedures is an extremely important part of the compliance process and allows XYZ to document the analysis underlying export transactions.

PART VII.B – RECORD RETENTION

Under U.S. export laws, these records must be kept for a minimum of five years, and occasionally longer.[207] As a rule, keep all records for at least five years.[208] In accordance with XYZ's Document Retention Policy, after the five-year term has expired, you must get written permission from John Complaisant, Compliance Officer, before sending any export records to document destruction.

206. 22 C.F.R. § 122.5(a) (2004); 15 C.F.R. § 762.6(a) (2004).
207. 22 C.F.R. § 122.5(a); 15 C.F.R. § 762.6(a).
208. 22 C.F.R. § 122.5(a); 15 C.F.R. § 762.6(a).

PART VIII – TRAINING AND ACCOUNTABILITY

PART VIII.A – INITIAL TRAINING

Upon the implementation of this program, all current XYZ employees will undergo an intensive training procedure designed to help all employees be sure that they are following the steps necessary for compliance.[209] All new hires will be trained prior to beginning work.

PART VIII.B – ANNUAL REFRESHER TRAINING

Refresher training will be conducted annually for all employees.[210] If at any time you feel you would benefit from additional guidance or training, contact the Compliance Officer, John Complaisant, at (303)123-0911 or jcomp@XYZ.com.

PART VIII.C – COMPANY AUDITS

In order to be sure that our program is effective, XYZ will complete internal and external audits from time to time as counsel deems necessary.[211] Outside Counsel will direct these audits.[212]

PART VIII.D – DUTY TO REPORT

The duty to report questions, problems, concerns, and suspected violations as described in the section entitled **COMPLIANCE 911** is an *ongoing requirement* for each employee at XYZ. As outlined in that section, you may report either to management or anonymously to Outside Counsel. Rather than viewing compliance as an extra task, consider ***compliance*** the ***foremost commitment*** of your job.

Should an outside party contact you regarding XYZ's compliance program or export procedures, you are *not* obligated to speak with them. If you feel more comfortable, you may request that XYZ provide you with representation before you respond to any third party. It is, however, XYZ's policy to cooperate with the government, and as such, the company is happy to provide you with representation in response to any inquiry.

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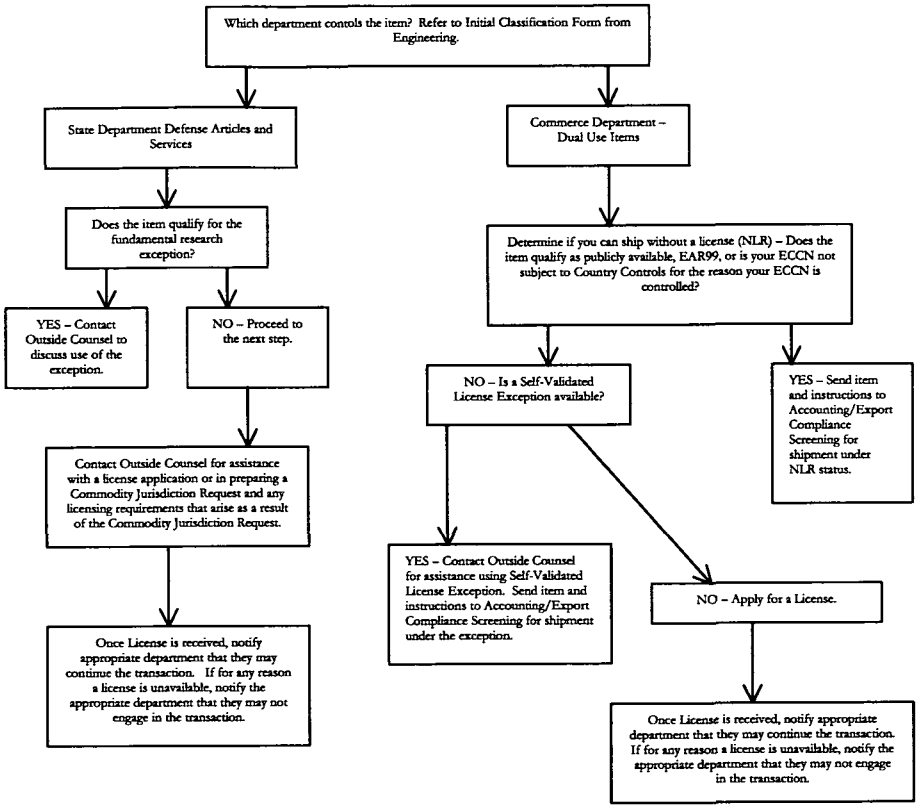
209. *See* U.S. Bureau of Industry and Security, *Export Management Systems Guidelines, Element 4: Training, at* http://www.bxa.doc.gov/Export ManagementSystems/pdf/admin4.pdf (last visited Feb. 23, 2005).

210. *Id.*

211. U.S. Bureau of Industry and Security, *Export Management Systems Guidelines, Element 5: Internal Reviews, at* http://www.bxa.doc.gov/Export ManagementSystems/pdf/admin5.pdf (last visited Feb. 23, 2005).

212. *Id.*

PART IX – XYZ EXPORT DECISION TREE



PART X – SALES DEPARTMENT

SALES DEPARTMENT INDEX

Mandatory Export Compliance Section	Part	Date Read/Initials
CEO's Letter	I	_____/_____
Overview	II	_____/_____
Compliance 911	III	_____/_____
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Anti-Boycott Protections	V	_____/_____
Anti-Bribery Protections	VI	_____/_____
Recordkeeping	VII	_____/_____
Training and Accountability	VIII	_____/_____
Export Decision Tree	IX	_____/_____
SALES DEPARTMENT SECTIONS	**X**	_____/_____
Knowing Your Customer – Sales	X.A	_____/_____
Diversion Risk/Red Flag Checklist – Sales	X.B	_____/_____
Proliferation Risk Checklist – Sales	X.C	_____/_____
Certification & Declaration – Sales	X.D	_____/_____
Initiating Production	X.E	_____/_____
Forms/Sales	X.F	_____/_____

PART X.A – KNOWING YOUR CUSTOMER - SALES

1. Salesperson – XYZ's First Line of Defense

As a XYZ salesperson, you are uniquely situated. Usually, you are the first point of contact for any potential XYZ customer. This position brings an important responsibility—to make sure you are not inadvertently "exporting" tech data while getting to know the potential customer, and to make sure that XYZ can do business with the lead you are pursuing.[213] Remember, it is XYZ's policy to *value compliance over any sale.*

2. Avoiding an Inadvertent Export

Generally, export laws require a license for the export of technical data.[214] Because many of you are trained engineers, be careful not to reveal technical data about XYZ's software when talking initially with potential customers.[215] Doing so, before screening procedures are completed and licenses are secured could result in a violation. Further, because certain sanctions prohibit any contact with embargoed countries, even calling a customer in an embargoed country or mailing a brochure could be violation.[216]

213. *See* 22 C.F.R. § 120.17(a)(3)-(4) (2004) (defining export of technical data); *see also* 15 C.F.R. § 734.2(b)(2)-(3) (2004) (defining export of technology or software).

214. *See* 22 C.F.R. § 120.10 (2004) (defining technical data); *see also* 15 C.F.R. § 734.2(b)(2), (b)(9) (2004) (defining export of technology or software).

215. *See supra* note 213.

216. *See, e.g.*, 15 C.F.R. §§ 746.2-746.3, 746.7-746.8 (2004) (restrictions on exports to Cuba, Iraq, Iran, and Rwanda); *see also* 15 C.F.R. § 732.3(i) (2004).

3. Screening the Customer

As early as possible in the discussions with a potential customer, submit information about the potential customer to the Accounting Department for an Individual/Country Screen. This may be done by filling out the form in the Forms/Sales section entitled **NEW CONTACT FORM**. This form is also available on the intranet under **COMPLIANCE/FORMS**. Once you have filled out the form, give it to Accounting, for a Compliance Screening of the individual and country.

This screening process will allow XYZ to avoid doing business with individuals who have been banned from receiving exports due to export violations.[217] In some cases, doing business with certain customers will require an export license for similar reasons.[218] This process allows us to identify parties who we can't do business with or with whom business may be transacted only after getting the appropriate license.[219] Vigilance at this step can prevent a violation. Further, by determining that it is safe to pursue business with a customer, you will be able to spend your time selling to customers with whom XYZ can do business.

This screening step also checks the contact's country. A customer's country can be the basis for prohibiting a transaction or trigger a licensing requirement.[220] By learning right away if a license is required, you will you will be able to explain the need for time to get a license, thus avoiding any last-minute surprises.

If you plan to pursue a business lead and have not yet made contact, fill out the **NEW CONTACT FORM** to the best of your ability and submit to Accounting for initial screening. Do not initiate contact until you have received instructions from the Compliance Screener.

217. 15 C.F.R. § 744.1(a) (2004); *see* 22 C.F.R. § 127.7 (2004) (describing debarment).

218. 15 C.F.R. § 744.2(b) (2004).

219. *See* 22 C.F.R. § 127.7 (debarment); 15 C.F.R. § 744.1(a) (prohibiting exports to certain end-users); 15 C.F.R. § 744.2(b) (license requirement to do business with certain end-users).

220. *See, e.g.*, 15 C.F.R. § 746.1 (2004).

4. Customer-Initiated Contacts

If you meet a contact at a trade show, or a potential customer contacts you, submit the **NEW CONTACT FORM** to Accounting for an initial screen as soon as possible after the initial contact. Limit communications with the contact, to the extent that you can, while you await instructions from the Compliance Screener.

5. Understanding the Results from Compliance Screener's Individual/Country Screens

The initial **INDIVIDUAL/COUNTRY SCREEN** should take less than 48 hours. While you await the results, ***do not contact*** the potential customer. If the potential customer contacts you, be polite, but try to limit your communication.

The Compliance Screener will either tell you that it is either:

- **OK to Proceed**
    - If it is OK to proceed, date and initial the **CUSTOMER TRACKING FORM** to document that you received the results from the Compliance Screener. Keep the results of the screen in the **CUSTOMER EXPORT FILE**.
    - Go to the **DIVERSION RISK/RED FLAG CHECKLIST**, at **PART X.C**.
- **Stop** – You **cannot** continue the transaction at this time.
    - This does not necessarily mean XYZ cannot work with the customer. It generally means that a license is required. If a license is required, the Compliance Screener will begin the licensing process immediately upon determining that a license is required. Once a license is granted, you will be notified.
        - If you receive an approval, proceed under the directions for **OK to Proceed** directly above this section.
    - If the result is a flat-out denial (because the government has placed the potential customer is on a debarred list), you will be notified with the results of the Individual/Country screen.
    - If the Compliance Screener changes the result to **OK**, document as required above and go to the next step, the **DIVERSION RISK/RED FLAG CHECKLIST**, at **PART X.B**.

PART X.B – DIVERSION RISK/RED FLAG CHECKLIST – SALES

In the sales department, you may have the best chance to assess whether or not the customer is a diversion risk—meaning that the customer says one thing but plans to do another.[221] These are the 'Red Flags' that were introduced in the Overview section.[222]

Protecting against possible violations requires that you not 'self-blind' and that you be aware of signals that may indicate a customer is attempting to obtain U.S. exports illegally.[223] Not knowing 'bad' information does not protect you or XYZ from liability.[224] Rather, by actively evaluating each customer, you protect both yourself and the company.

Complete the **DIVERSION RISK/RED FLAG CHECKLIST**. This is available in the Forms/Sales section and on the intranet under **COMPLIANCE/FORMS**.

- If the answer to ***any*** of the questions is **Yes, STOP** the transaction immediately and contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com.
- If the answer to ***all*** of the questions is **No**, it is **OK to Proceed**, you may continue in the transaction.
    - Date and initial the **CUSTOMER TRACKING FORM** to document that you completed the **DIVERSION RISK/RED FLAG CHECKLIST**. Keep the results of the screen in the **CUSTOMER EXPORT FILE**.
        - Go to the **PROLIFERATION RISK CHECKLIST**, at **PART X.C**.
    - Don't forget that your impressions about these questions can ***change over time***. If later in the transaction you have *any doubts* in your answers to the Diversion Risk/Red Flag Checklist, **stop** the transaction immediately contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com.

221. *See supra* Part IV.C.

222. *See supra* Part IV.C.

223. 15 C.F.R. § 732 (Supp. III(a)(3) 1997).

224. *Id.* § 732 (Supp. III(a)(2) 1997). The knowledge required under the EAR depends on the situation. *Id.* If 'red flags' are present, they create an affirmative duty to inquire further. *Id.* Absent 'red flags,' it is appropriate to rely on a customer's representations. *Id.*

PART X.C – PROLIFERATION RISK – SALES

Assessing the customer's business activities is a crucial part of determining whether or not a transaction will require an export license.[225] The customer's business or personal activities can trigger a licensing requirement if the customer is involved in: (1) nuclear activities; (2) the design, development, production, or use of missiles; (3) the design, development, production, stockpiling, or use of chemical or biological weapons.[226] These activities need not be the customer's direct business activity, as indirect involvement can also trigger the licensing requirements.[227] Further, the activities do not have to involve XYZ's software or services to require a license.[228] The fact that the customer is involved in the activities can be all that is required to trigger a licensing requirement if the government determines that doing business with the customer will somehow support the customer's proliferation activities.[229]

Completing this step requires you to inquire with the customer about their business and complete the **PROLIFERATION RISK CHECKLIST**.[230] Some of the information you need to answer the questions may come up in your initial conversations about end-use and end-user. If you don't feel you have obtained enough information about the customer's business while completing the **NEW CONTACT FORM**, you may wish to inquire about the customer's business history during routine conversation.

225. 15 C.F.R. § 744.2(a) (2004).

226. 15 C.F.R. §§ 744.2, 744.3, 744.4 (2004).

227. 15 C.F.R. § 744.2(a).

228. *Id.* § 744.2(b) (license requirement triggered by high diversion risk).

229. *Id.*

230. *Id.* § 744.2(a) n.1. "Knowledge" with respect to proliferation risk includes "reason to know." *Id.*

Complete the **PROLIFERATION RISK CHECKLIST**. This is available in the Forms/Sales section and on the intranet under **COMPLIANCE/FORMS**.

- If the answer to ***any*** of the questions is **Yes, STOP** the transaction immediately and contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com. Wait for his instruction before proceeding.
- If the answer to ***all*** of the questions is **No**, you may continue in the transaction.
    - Date and initial the **CUSTOMER TRACKING FORM** to document that you completed the **PROLIFERATION RISK CHECKLIST**. Keep the results of the screen in the **CUSTOMER EXPORT FILE**.
        - Go to the **CERTIFICATIONS/DECLARATIONS** section at **PART X.D**.
    - Don't forget that your impressions about these questions can ***change over time***. If later in the transaction you have *any doubts* in your answers to the Proliferation Risk Checklist, **stop** the transaction and immediately contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com.

PART X.D – CERTIFICATIONS AND DECLARATIONS – SALES

Certifications and Declarations Are Always Required

Should a customer inquire, XYZ requires certain certifications and declarations in order to do business. Issues covered include certifications of final destination, end-user, end-use, involvement in proliferation activities, and anti-bribery controls.[231] Violation of these certifications is grounds for XYZ's unilateral termination of any contract.

As part of the compliance procedure, you are *not* responsible for getting these certifications and declarations. Nonetheless, this topic may come up in business negotiations, so you should be aware of XYZ's policies.

If the topic of certifications and declarations comes up during the course of the transaction, the customer's response may raise a 'red flag.'[232] Be familiar with the 'red flags,' and contact the Compliance Officer, John Complaisant, at (303)123-0911 or jcomp@XYZ.com if you have any concerns. A copy of the **DIVERSION RISK/RED FLAG CHECKLIST** is available in this section under Forms/Sales or on the intranet under **COMPLIANCE/FORMS**.

If a customer asks for details regarding the relevant certifications and declarations, contact a Compliance Screener in Accounting.

Now review the procedure for **INITIATING PRODUCTION** at **PART X.E**.

231. *See* 22 C.F.R. § 123.9(a)-(c) (2004); 15 C.F.R. § 758.6 (2004).

232. *See supra* Part IV.

PART X.E – INITIATING PRODUCTION – SALES

1. Steps You Should Have Taken to Reach this Point

Before you proceed, be sure you have completed each of the steps below. If you are directed to stop (at any step), contact John Complaisant and do NOT proceed.

a. Submit **NEW CONTACT FORM** to Compliance Screeners for **INDIVIDUAL/COUNTRY SCREEN**[233]

b. Receive **OK to Proceed** status on the **INDIVIDUAL/COUNTRY SCREEN**[234]

c. Conduct the **DIVERSION RISK/RED FLAG CHECKLIST** and determine that it is OK to proceed[235]

d. Conduct the **PROLIFERATION RISK CHECKLIST** and determine that it is OK to proceed[236]

e. Inform the customer about required **CERTIFICATIONS/DECLARATIONS**[237]

f. Comply with all **ANTI-BOYCOTT** and **ANTI-BRIBERY LAWS**[238]

2. Initiating Production

Once you are certain you have completed each of these steps and do not have any reason to stop the transaction, the project is ready to move to the Engineering Department.

In accordance with XYZ's regular business practices, contact someone on Bob Decisis's Coordination Team to discuss the project. They will route it to the appropriate engineers. Note the date that you sent the project to the Coordination Team on the **CUSTOMER TRACKING FORM**.

233. *See supra* Part X.A.3.
234. *See supra* Part X.A.4-X.A.5.
235. *See supra* Part X.B.
236. *See supra* Part X.C.
237. *See supra* Part X.D.
238. *See supra* Part V, VI.

PART X.F – SALES DEPARTMENT FORMS

NEW CONTACT FORM – SALES

NAME OF CONTACT (note any inconsistencies in spelling, nicknames, etc.)
_____

PERSON FILLING OUT FORM/INTIAL _____/_____
DATE COMPLETED _____

CONTACT ADDRESS_____
DATE OF FIRST CONTACT_____
SOURCE OF LEAD/CONTACT (describe in detail) _____
_____

XYZ PRODUCT CONTACT INTERESTED IN (describe in detail, if known)
_____
_____
CONTACT'S END USE FOR PRODUCT_____
COUNTRY OF PRODUCT'S ULTIMATE DESTINATION_____

OTHER INFORMATION YOU BELIEVE WOULD BE HELPFUL
_____
_____
_____
_____

CUSTOMER TRACKING FORM – SALES

NAME OF CONTACT _____

CONTACT ADDRESS_____

DATE OF FIRST CONTACT_____

PERSON FILLING OUT FORM/INTIAL _____/_____

INDIVIDUAL COUNTRY SCREEN (performed by Compliance Screener)

- Date submitted to Accounting/Compliance Screening _____
- Date results returned by Accounting/Compliance Screening _____
- Result of Screen: **OK to Proceed** _____ **Stop**_____
    - If transaction **stopped**, date stopped:_____
    - If transaction **resumed** (status change from **Stop** to **OK to Proceed** because license obtained), date resumed:_____

DIVERSION RISK CHECKLIST (performed by salesperson)

- Date Checklist Completed/Initials_____/_____
- Result of Screen: **OK to Proceed** _____ **Stop**_____
    - If transaction **stopped**, date stopped:_____
    - If transaction **resumed** (status change from **Stop** to **OK to Proceed** because license obtained), date resumed:_____

PROLIFERATION RISK CHECKLIST (performed by salesperson)

- Date Checklist Completed/Initials_____/_____
- Result of Screen: **OK to Proceed** _____ **Stop**_____
    - If transaction **stopped**, date stopped:_____
    - If transaction **resumed** (status change from **Stop** to **OK to Proceed** because license obtained), date resumed:_____

Date Project Sent to Coordination Team (if applicable) _____

DIVERSION RISK/RED FLAG CHECKLIST – SALES

NAME OF CUSTOMER BEING SCREEENED_____

CUSTOMER ADDRESS_____

XYZ PRODUCT TO BE PURCHASED (describe in detail) _____

_____

CUSTOMER'S END USE FOR PRODUCT_____

COUNTRY OF PRODUCT'S ULTIMATE DESTINATION_____

PERSON PERORMING SCREEN/INTIAL _____/____

DATE PERFORMED_____

*If the answer to any of these is ***yes*** or you have ***any*** doubts, do not continue in the transaction. Contact XYZ's Compliance Manager, John Complaisant, at (303)123-0911 or jcomp@XYZ.com for assistance.

1. The customer is reluctant to offer information about the end-use of the item.[239] For example, when you ask the customer about the software's end use or inform the customer that XYZ requires a certification of end use, the customer hesitates or does not call back for several days. YES___ NO___

2. XYZ's software capabilities do not fit the customer's line of business, such as a plant nursery or construction equipment business inquiring about XYZ's high-resolution image recognition software.[240] YES___ NO___

3. XYZ's software is incompatible with the technical level of the country it will be shipped to, such as a third-world country that does not have either a space or engineering industry.[241] YES___ NO___

4. The customer has little or no business background in either the engineering or space industry.[242] YES___ NO___

5. The customer is willing to pay cash up front, which would be unusual because XYZ's customers generally pay with letters of credit or staged cash payment during the development of the software for the contract.[243] YES___ NO___

6. The customer is unfamiliar with the basic functionality of sensing software or image recognition technology.[244] YES___ NO___

7. The customer declines the training and maintenance services that XYZ provides as part of each software contract.[245] YES___ NO___

239. 15 C.F.R. § 732 (Supp. III(b)(1) 1997).
240. *Id.* § 732 (Supp. III(b)(2) 1997).
241. *Id.* § 732 (Supp. III(b)(3) 1997).
242. *Id.* § 732 (Supp. III(b)(4) 1997).
243. *Id.* § 732 (Supp. III(b)(5) 1997).
244. *Id.* § 732 (Supp. III(b)(6) 1997).
245. *Id.* § 732 (Supp. III(b)(7) 1997).

8. The customer is vague about delivery dates or wants deliveries made to odd destinations, such as Post Office boxes, remote locations, or destinations that are far away from the customer's place of business.[246] YES___ NO___

9. The customer gives a freight forwarder as the product's final destination.[247]

YES___ NO___

10. The shipping route is abnormal, such as a customer with a reported ultimate destination in France routing the delivery through India.[248] YES___ NO___

11. The customer requests unusual packaging, such as asking for an unmarked box or providing their own packaging materials.[249] YES___ NO___

12. The buyer is evasive or makes contradictory statements about the software's use, such as stating that they will use the software in a plant in Colorado but making frequent references to their engineering facility in China.[250]

YES___ NO___

246. *Id.* § 732 (Supp. III(b)(8) 1997).
247. *Id.* § 732 (Supp. III(b)(9) 1997).
248. *Id.* § 732 (Supp. III(b)(10) 1997).
249. *Id.* § 732 (Supp. III(b)(11) 1997).
250. *Id.* § 732 (Supp. III(b)(12) 1997).

PROLIFERATION RISK CHECKLIST – SALES

NAME OF CUSTOMER BEING SCREEENED_____

CUSTOMER ADDRESS_____

NEW CUSTOMER: YES_____ NO_____ If yes, list date of last order_____

PERSON PERORMING SCREEN/INTIAL _____/_____

DATE PERFORMED_____

XYZ PRODUCT TO BE PURCHASED (describe in detail)

_____

CUSTOMER'S END USE FOR PRODUCT_____

COUNTRY OF PRODUCT'S ULTIMATE DESTINATION_____

For the purposes of this **PROLIFERATION RISK CHECKLIST**, whether or not you ***know*** does not matter. Your assessment should include *actual knowledge*, or a *suspicion* that the answer is *yes*.[251]

1. Do you know, or are there indications that the customer is directly or indirectly involved in any nuclear explosive activities (whether or not related to customer's interest in XYZ software)?[252] YES___ NO___

2. Do you know, or are there indications that the customer is directly or indirectly involved in the design, development, production, or use of missiles (whether or not related to customer's interest in XYZ software)?[253]

YES___ NO___

3. Do you know, or are there indications that the customer is directly or indirectly involved in the design, development, production, stockpiling, or use of chemical or biological weapons (whether or not related to customer's interest in XYZ software)?[254] YES___ NO___

*If the answer to any of the preceding questions was ***yes***, or raised ***any*** doubts, do not continue in the transaction. Contact XYZ's Compliance Manager, John Complaisant, at (303)123-0911 or jcomp@XYZ.com for assistance.

251. *See* 15 C.F.R. § 744.2(a) n.1 (2004).
252. *See id.* § 744.2(a).
253. *See id.* § 744.3(a)(2) (2004).
254. *See id.* § 744.4(a) (2004).

PART XI – ENGINEERING DEPARTMENT

ENGINEERING DEPARTMENT INDEX

Mandatory Export Compliance Section	Part	Date Read/Initials
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Anti-Bribery Protections	VI	_____/_____
Recordkeeping	VII	_____/_____
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PART XI.A – KNOWING YOUR CUSTOMER – ENGINEERING

1. Avoiding an Inadvertent Export

Generally, export laws require a license for the export of technical data.[255] As an engineer, you are at a particularly high risk for inadvertently revealing technical data. Doing so, before screening procedures are completed and licenses are secured could result in a violation. Revealing technical data in a conversation with a foreign customer or even an employee may require a license.[256] Further, because certain embargos prohibit any contact with sanctioned countries, even calling a customer in an embargoed country or mailing a brochure could be violation.[257]

2. Licensing Protections

At the sales level, potential customers are screened for individual and country status that may require a license. Once someone on the Coordination Team contacts you with a pre-screened contact, it is safe to discuss business with the contact.

Further, all employees are screened for potential licensing issues. Following XYZ's Badge/Classification Requirements is all that is required regarding licensing issues with co-workers.

3. Import Licensing Requirements

Occasionally, a customer may wish to send you an item to examine for software development or adaptation. To receive this import, a license may be required.[258] Should a customer inquire about sending an item to XYZ, first contact the Compliance Officer, John Complaisant, at (303)123-0911 or jcomp@XYZ.com to see if a license is required. As with any export, an export license may be required to return the item to the customer after examination.[259] Contact John Complaisant for assistance before returning any item.

255. *See* 22 C.F.R. § 120.10 (2004); 15 C.F.R. § 734.2(b)(2), (b)(9) (2004).

256. *See* 22 C.F.R. § 120.17(3)-(4) (2004); 15 C.F.R. § 734.2(b)(2)-(3).

257. 15 C.F.R. §§ 746.2-746.3, 746.7-746.8 (2004) (restrictions on exports to Cuba, Iraq, Iran, and Rwanda); *see* 15 C.F.R. § 732.3(i) (2004).

258. *See* 22 C.F.R. § 120.18 (2004).

259. *See id.* § 120.17(a)(1); 15 C.F.R. § 730.5(a) (2004).

PART XI.B – DIVERSION RISK/RED FLAG CHECKLIST – ENGINEERING

In the engineering department, you may observe customer behavior signaling a diversion risk—the customer is saying one thing but plans to do another.[260] These are the 'Red Flags' that were introduced in the Overview section.[261]

Protecting against possible violations requires that you not 'self-blind' and that you be aware of signals that may indicate a customer is attempting to obtain U.S. exports illegally.[262] Not knowing 'bad' information does not protect you or XYZ from liability.[263] Rather, by actively evaluating each customer, you protect both yourself and the company.

After discussing the customer's product needs, complete the **DIVERSION RISK/RED FLAG CHECKLIST**. This is available in the Forms/Engineering section and on the intranet under **COMPLIANCE/FORMS**.

- If the answer to ***any*** of the questions is **Yes, STOP** the transaction immediately and contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com.
- If the answer to ***all*** of the questions is **No**, you may continue in the transaction.
- Date and initial the **PROJECT TRACKING FORM** to document that you completed the **DIVERSION RISK/RED FLAG CHECKLIST**. Keep the results of the screen in the **PROJECT FILE**.
    - Go to the **PROLIFERATION RISK** section, at **PART XI.C**.
- Don't forget that your impressions about these questions can ***change over time***. If later in the transaction you have *any doubts* in your answers to the Diversion Risk/Red Flag Checklist, **stop** the transaction immediately contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com.

260. *See supra* Part IV.

261. *See supra* Part IV.

262. *See* 15 C.F.R. § 732 (Supp. III(a)(3) 1997).

263. *Id.* § 732 (Supp. III(a)(2) 1997). The knowledge required under the EAR depends on the situation. If 'red flags' are present, they create an affirmative duty to inquire further. *Id.* Absent 'red flags,' it is appropriate to rely on a customer's representations. *Id.*

PART XI.C – PROLIFERATION RISK – ENGINEERING

1. Proliferation Risk

Assessing the customer's business activities is a crucial part of determining whether a transaction will require an export license.[264] The customer's business or personal activities can trigger a licensing requirement if the customer is involved in: (1) nuclear activities; (2) the design, development, production or use of missiles; (3) the design, development, production, stockpiling, or use of chemical or biological weapons.[265] These activities need not be the customer's direct business activity, as indirect involvement can also trigger the licensing requirements.[266] Further, the activities need not involve XYZ's software or services to require a license.[267] The fact that the customer is involved in the activities can be all that is required to trigger a licensing requirement.[268]

2. Your Role in Assessing Proliferation Risk

The sales department conducts a proliferation risk screen prior to your work with the customer. Your role is to **be aware** of indicators that signal possible proliferation activities.[269] If at *any* time you suspect that the customer may be involved in any of the above-listed proliferation activities, **stop** the transaction or communications immediately, and contact John Complaisant, compliance Officer, at (303)123-0911 or jcomp@XYZ.com.

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264. *See* 15 C.F.R. § 744.2(a) (2004).

265. *Id.* §§ 744.2-744.4 (2004).

266. *Id.* § 744.2(a).

267. *See id.* § 744.2(b) (license requirement triggered by high diversion risk).

268. *See id.*

269. *Id.* § 744.2(a) n.1. "Knowledge" with respect to proliferation risk includes "reason to know." *Id.*

PART XI.D – CLASSIFYING THE ITEM – ENGINEERING

1. How the Classification Process Begins

In some circumstances, the results of screening at the sales department level will mandate the need for a license. In that case, John Complaisant, Compliance Officer, will contact you to discuss product classification for licensing purposes before you begin work on the project.

In other circumstances, the Coordination Team will contact you about a project, but no license application will have been initiated by the time you receive the project. In this case, nothing in the initial screening process triggered a licensing requirement. When you receive a project from the Coordination Team and no license has been obtained, you must recommend a product classification to the Compliance Officer, who will determine whether or not a license is required.

2. Classification and Your Role in the Licensing Process

As an engineer, your specific knowledge about software and services will be critical in making the determination about whether or not a license is required. You will not be responsible for license applications, but your classification work will be an important part of the licensing process. This section provides step-by-step instructions on how to assist in the classification.

It is your responsibility to:

- Assist in the classification process upon request from the Compliance Officer or upon being assigned to a project by the Coordination Team
- Complete the INITIAL CLASSIFICATION FORM, located under Forms/Engineering or on the intranet under COMPLIANCE/FORMS.

3. Determining Which Agency Regulates the Export

The two main government agencies that administer and enforce U.S. export law are the Department of State and the Department of Commerce.

The State Department controls "defense articles" and "defense services."[270] The general State Department rule is that these regulations cover items and services that are 'born military,' meaning that they were designed, modified, or adapted for military application.[271] Because of the inherent military value of these items, they are strictly controlled.[272]

The Commerce Department controls "dual use" items, which are those items which have both commercial and military or proliferation applications.[273] Many commercial items, which may not have *obvious* military use, are controlled by the Commerce Department.[274] Because some items are mainly commercial in nature, the Commerce Department Rules allow for more or less control, depending on the item.[275] The Commerce Department also administers U.S. anti-boycott laws.[276]

270. 22 C.F.R. §§ 120.2, 120.17 (2004).

271. 22 C.F.R. § 120.3(a)-(b) (2004).

272. 22 C.F.R. §§ 120.6, 120.2 (2004) The Department of State determines, with consent of the Department of Defense, which items are covered by the U.S. Munitions List. *Id.* § 120.2.

273. 15 C.F.R. § 730.3 (2004).

274. *See id.*

275. *See id.*; 15 C.F.R. § 730.7 (2004) (noting that few exports covered by the Commerce Department require application to the Bureau of Industry and Security for a license).

276. 15 C.F.R. §§ 760.1-760.5 (2004).

PART XI.E – CLASSIFYING THE ITEM – ENGINEERING – DEFENSE ARTICLES AND DEFENSE SERVICES CONTROLLED BY THE STATE DEPARTMENT

1. State Department Export Controls

Because the State Department controls inherently military articles and services, they will apply in any circumstance where it appears that both the State and Commerce Department rules could apply.[277] For this reason, the classification analysis begins with a determination of whether or not the item or service is controlled by the State Department.

2. State Department – U.S. Munitions List

The State Department's rules apply to items on the U.S. Munitions List ("Munitions List").[278] This list covers anything designed, developed, configured, or adapted for military application.[279] Determining whether the Munitions List covers an item is not always easy. Often, it requires a request to the State Department for help in this classification.[280] This request is called a COMMODITY JURISDICTION REQUEST.[281]

3. Your Role in Classifying Software and Services under the Munitions List

You will not be responsible for making a Commodity Jurisdiction Request, as those are handled by the Compliance Officer. Your role, however, is to help determine if a Commodity Jurisdiction Request is necessary. Your determination that an item or service was designed, developed, configured, or adapted for military application generally means a Commodity Jurisdiction Request will be necessary.[282]

4. Classification for Software (Technical Data) and Defense Services Based on Final Product

Under State Department rules, classification of technical data (which includes software) and defense services are *based on the final product* into which they will be integrated.[283] When classifying software, technical data, or defense services, look for completed, end products into which these items will be incorporated. Therefore, even if the software is not by itself inherently military, it can still be covered by the Munitions List.[284] An example would be intelligent sensing software designed for use in guided or ballistic missiles.[285]

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277. *See* 22 C.F.R. §120.5 (2004); *see* 15 C.F.R. §734.3(b)(1)(i) (2004).
278. 22 C.F.R. §§ 120.2, 121.1 (2004).
279. 22 C.F.R. § 120.3 (2004).
280. *See* 22 C.F.R. § 120.4 (2004).
281. *Id.*
282. *See id.*
283. *See* 22 C.F.R. § 121.1(a).
284. *See id.*
285. *See* 22 C.F.R. § 121.16 (Item 11) (2004).

5. Technical Data and Defense Services Covered by the Munitions List

The Munitions List controls technical data and defense services.[286] Inherently military software or software that will be used for an inherently military end product is covered under technical data on the Munitions List.[287]

6. Technical Data

Under the Munitions List, ***software*** includes (but is not limited to): system functional design, logic flow, algorithms, application programs, operating systems, and support software for design, implementation, test, operation, diagnosis, and repair of defense articles.[288]

Technical data also includes information *other than software* for the design, development, production, repair, or modification of defense articles or services.[289]

7. Defense Service

Under the Munitions List, defense services include giving assistance or training to foreign persons (in the United States or abroad) in the design, development, production, repair, or modification of defense articles.[290] Providing assistance with technical data covered by the Munitions List to foreign persons, and providing training or educational publications to foreign persons or a foreign military is providing a defense service.[291]

8. Strictly Adhere to All Badging and Classification Rules

From time to time, XYZ may employ foreign persons in non-technical roles. Because the transfer of technical data to a foreign person may require a State Department license, all XYZ Engineers must be vigilant in adhering to XYZ's badge/classification requirements. If you need to review the policy, go to the intranet under BADGE/CLASSIFICATION REQUIREMENTS.[292] This system protects against accidental exports of defense services to unclassified co-workers. Even a quick conversation about encryption code in the hallway, if within earshot of an unclassified co-worker, can be a violation of both the XYZ badge requirements and export laws.[293]

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286. 22 C.F.R. §§ 120.2, 120.17 (2004).

287. *See* 22 C.F.R. § 120.6 (2004).

288. 22 C.F.R. § 121.8(f) (2004).

289. 22 C.F.R. § 120.10(a)(1) (2004).

290. 22 C.F.R. § 120.9(a)(1) (2004).

291. *Id.* § 120.9(a).

292. These requirements are not included within the model program, but should include mechanisms to allow co-workers to assess whether they can share technical data with an individual without risking a violation of the deemed export rule. *See* 15 C.F.R. § 734.2(b)(2)(ii) (2004); *see also supra* Part II.C.

293. *See* 22 C.F.R. § 120.17(a)(4) (2004).

9. Munitions List Categories

If you determine that the software/service is likely to be covered under the State Department's Munitions List, note this on the **INITIAL CLASSIFICATION FORM**.

The categories on the Munitions List are as follows. They are also available on the State Department website at http://pmdtc.org/usml.htm.[294]

Category	Description
1	Firearms, Close Assault Weapons and Combat Shotguns
2	Guns and Armament
3	N/A
4	Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs, and Mines
5	N/A
6	Vessels of War and Special Naval Equipment
7	Tanks and Military Vehicles
8	Aircraft and Associated Equipment
9	Military Training Equipment
10	Protective Personnel Equipment
11	Military Electronics
12	Fire Control, Range Finder, Optical and Guidance and Control Equipment
13	Auxiliary Military Equipment
14	Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment
15	Spacecraft Systems and Associated Equipment
16	Nuclear Weapons, Design and Testing-Related Items
17	Classified Articles, Technical Data and Defense Services Not Listed in Other Categories
18	Directed Energy Weapons
19	N/A
20	Submersible Vessels, Oceanographic and Associated Equipment
21	Miscellaneous Articles

294. 22 C.F.R. § 121 (2004), *available at* Directorate of Defense Trade Controls, U.S. Department of State, Defense Trade Controls – United States Munitions List Categories, http://www.pmdtc.org/usml.htm.

10. Exception for Fundamental Research

Under the Munitions List, there is a *licensing exception* for research considered **fundamental research.**[295] Because much of XYZ's software is based on the work that Tom Johnson did at the university, there is a strong possibility that this exception may apply.[296] You are *not* responsible for making the actual determination. You *must*, however, notify John Complaisant, Compliance Officer, of relevant information relating to the possibility of using this exception. Submit this on the **INITIAL CLASSIFICATION FORM.**

Fundamental research is:

- Conducted in engineering at accredited U.S. colleges[297]
- Information ordinarily published/shared broadly in the scientific community[298]

Research is *not* fundamental if:

- It is funded by the U.S. government and the government places controls on the dissemination of the information as part of the funding requirement[299]
- The university agreed to restrictions (from sources other than the government) on the publication of the research[300]

11. Special Licenses for Ongoing Software or Service Projects

A special license is available when a project will involve ongoing use of software or services (but will not grant the customer a right to manufacture the software).[301] If you believe the project may qualify for this special license, check the line called "Ongoing Project/Technical Assistance Agreement May Apply" on the **INITIAL CLASSIFICATION FORM** so that John Complaisant can consider applying for this special license.

295. 22 C.F.R. §§ 120.11(8), 120.10(a)(5) (2004).
296. *See id.* § 120.11(8).
297. *Id.*
298. *Id.*
299. *Id.* § 120.11(8)(ii).
300. *Id.* § 120.11(8)(i).
301. *See* 22 C.F.R. §120.22 (2004).

12. Providing Information to Assist in Commodity Jurisdiction Request

If software or services appear to be subject to the Munitions List, John Complaisant will work with Outside Counsel to submit a Commodity Jurisdiction Request to make the final determination. Your job in this process is to provide information that will be the basis for the request. On the **INITIAL CLASSIFICATION FORM**, fill out the section entitled "Commodity Jurisdiction Request Information."

Part of making an accurate request involves understanding the nature of the software or identity of the final item in which the software or service will be used. In some cases, items that *seem* inherently military will **not** be covered by the State Department's Munitions List if:

- The application of the item is ***predominantly civil*** and has a ***performance equivalent*** in ***civil application***.[302]
    - Performance equivalent is defined by *form*, *fit*, or *function*.[303]
    - The *intended use* of the item is *not* relevant to the inquiry (*i.e.* even though an item is being designed for a civil application, if it is not predominantly civil and does not have a performance equivalent in civil application, the item will still be covered by the Munitions List).[304]

13. Information You Must Provide for Commodity Jurisdiction Request

The information you will need to provide for the Commodity Jurisdiction Request includes:

- Description of the article or service[305]
- History of the item's design, development, and use[306]
- Brochures or documents related to the item[307]

14. Start the Initial Classification Process Early

Because Commodity Jurisdiction Requests can take forty-five days (and then require licensing after the request is returned), it is important to complete the **INITIAL CLASSIFICATION FORM** as quickly as possible.[308]

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302. 22 C.F.R § 120.3(a)(ii) (2004).
303. *Id.*
304. *See id.* § 120.3(b).
305. *See* 22 C.F.R. § 120.4(c) (2004).
306. *Id.*
307. *Id.*
308. *See id.* § 120.4(e).

15. Next Steps

If you believe State Department rules apply, send your completed **INITIAL CLASSIFICATION FORM** to John Complaisant. He will instruct you on how to proceed. You may be able to do some work while awaiting the license, as long as you aren't providing the customer with technical data or defense services.

16. If State Department Rules Don't Seem to Apply

Should you determine that the State Department's Munitions List does *not* appear to cover your software or service, you *must* notify John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com for confirmation of your assessment. Once you have received this confirmation, document this on the **PROJECT TRACKING FORM**, available under Forms/Engineering or on the intranet under **COMPLIANCE/FORMS**. Then, go to the next section, **COMMERCE DEPARTMENT CLASSIFICATION** at **PART XI.F**.

PART XI.F – CLASSIFYING THE ITEM – ENGINEERING – COMMERCE DEPARTMENT CLASSIFICATION

1. Your Role in Classifying Software and Services under the Commerce Department Rules

If you determine that the State Department Rules do not apply and you have gotten approval on this determination from John Complaisant, you will need to classify the item under the Commerce Department rules.[309]

The Commerce Department controls items that can have "dual use," or both civil and military use.[310] Unlike the controls of the State Department, these are not items or services designed, modified, or adapted for military use. Because there is less "risk" with these items, the classification is more user-friendly. The Commerce Department's Commerce Control List uses very specific, detailed descriptions.[311] Because our engineers have detailed knowledge of XYZ's specific projects and services, each engineer will classify their own projects.

2. Determining the Item/Service's Export Control Classification Number

To make a classification under the Commerce Control List, you must determine the item or service's Export Control Classification Number ("ECCN").[312] Once you have determined the ECCN, list it on the **INITIAL CLASSIFICATION FORM** and send it to John Complaisant, Compliance Officer.

An ECCN is a 5-character classification:[313]

- The first digit represents the category of the item or service.[314] For example, a first digit of **4** represents computers.[315] Most of XYZ's software and services will begin with **3**, **4**, **5**, or **6** (3=computers, 4=telecommunications, 5=information security, 6=sensors and lasers).
- The second character, a letter, represents the product group.[316] Most of XYZ's products will be classified **D**, software.[317]

309. 22 C.F.R. § 120.5; 15 C.F.R. § 730.3 (2004).
310. 15 C.F.R. § 730.3.
311. *See* 15 C.F.R. § 774 (Supp. I 1998).
312. *See* 15 C.F.R. § 738.2(c) (2004).
313. *Id.* § 738.2(d).
314. *See id.*
315. 15 C.F.R. § 738.2(a).
316. *Id.* § 738.2(d).
317. *Id.* § 738.2(b).

3. Finding an ECCN

To find an item's ECCN, you may search by:

- Item Classifications listed by *ECCN* (numeric/alpha classifications) at http://www.access.gpo.gov/bis/ear/pdf/indexnum.pdf[318]
- Item Classification listed by *item names* (alphabetized listing of items) at http://www.access.gpo.gov/bis/ear/pdf/indexccl.pdf[319]

Once you link to the list, use the binoculars located in the upper toolbar to "jump" to a certain spot in the list. Type in the number (i.e., type **4A001** to get to the first item in the computers category) or name and click return.

4. How to Find an ECCN for Technology

When determining the ECCN for technology, if it is *required* for the development, production, or use for *items* on the ECCN, it is classified under the ECCN of the *item the technology is required to develop, produce, or use.*[320]

The *actual use* of the technology (i.e. for a lesser-controlled item) *does not change* the classification of the technology. The ECCN is based on the most *highly-controlled level* applicable for the technology.[321]

5. Print and Attach a Copy of ECCN Details

Print and attach a copy of the ECCN details from the Commerce Control List to the **INITIAL CLASSIFICATION FORM.**

6. If You Can't Find an ECCN

If you cannot find an ECCN for your item, it is covered by the catch-all category "EAR99."[322] List "EAR99" in the ECCN blank on the **INITIAL CLASSIFICATION FORM.**

7. Questions about Finding an ECCN

If you have any questions or would like help determining the proper ECCN, contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com for assistance.

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318. 15 C.F.R. § 774 (Supp. I-III 1998, 2003, 2003), *available at* Export Administration Regulations Database, Numerical Index to the Commerce Control List, http://www.access.gpo.gov/bis/ear/pdf/indexnum.pdf.

319. 15 C.F.R. § 774 (Supp. I-III 1998, 2003, 2003), *available at* Export Administration Regulations Database, Alphabetical Index to the Commerce Control List, http://www.access.gpo.gov/bis/ear/pdf/indexccl.pdf.

320. *See* 15 C.F.R. § 738.2(a)-(c)

321. *See id.* § 774 (Supp. II pt. 1 2003).

322. *See* 15 C.F.R. § 774.1 (2004).

8. Next Steps

Once you have assigned an ECCN, send your completed **INITIAL CLASSIFICATION FORM** to John Complaisant, and document this step on the **PROJECT TRACKING FORM**, located in this section under Forms/Engineering or in the intranet under **COMPLIANCE/FORMS**. Await instruction from John Complaisant on how to proceed. You may be able to do some work while awaiting the license.

PART XI.G – ENGINEERING DEPARTMENT FORMS

PROJECT TRACKING FORM – ENGINEERING

NAME OF CUSTOMER _____

CUSTOMER ADDRESS_____

DATE PROJECT RECEIVED FROM COORDINATION TEAM _____

PERSON FILLING OUT FORM/INTIAL _____/_____

DIVERSION RISK CHECKLIST (performed by engineer)

- Date Checklist Completed/Initials_____/_____
- Result of Screen: **OK to Proceed** _____ **Stop**_____
    - If transaction **stopped**, date stopped:_____
    - If transaction **resumed** (status change from **Stop** to **OK to Proceed** because license obtained), date resumed:_____

Date **Compliance Manager Approved Decision NOT to Classify** Under State Department Rules (if applicable) _____

Date **INITIAL CLASSIFICATION FORM** sent to Compliance Manager _____

DIVERSION RISK/RED FLAG CHECKLIST – ENGINEERING

NAME OF CUSTOMER BEING SCREEENED_____

CUSTOMER ADDRESS_____

XYZ PRODUCT TO BE PURCHASED (describe in detail) _____

_____

CUSTOMER'S END USE FOR PRODUCT_____

COUNTRY OF PRODUCT'S ULTIMATE DESTINATION_____

PERSON PERORMING SCREEN/INTIAL _____/____

DATE PERFORMED_____

*If the answer to any of these is ***yes*** or you have ***any*** doubts, do not continue in the transaction. Contact XYZ's Compliance Manager, John Complaisant, at (303)123-0911 or jcomp@XYZ.com for assistance.

1. The customer is reluctant to offer information about the end-use of the item.[323] For example, when you ask the customer about the software's end use or inform the customer that XYZ requires a certification of end use, the customer hesitates or does not call back for several days. YES___ NO___

2. XYZ's software capabilities do not fit the customer's line of business, such as a plant nursery or construction equipment business inquiring about XYZ's high-resolution image recognition software.[324] YES___ NO___

3. XYZ's software is incompatible with the technical level of the country it will be shipped to, such as a third-world country that does not have either a space or engineering industry.[325] YES___ NO___

4. The customer has little or no business background in either the engineering or space industry.[326] YES___ NO___

5. The customer is willing to pay cash up front, which would be unusual because XYZ's customers generally pay with letters of credit or staged cash payment during the development of the software for the contract.[327] YES___ NO___

6. The customer is unfamiliar with the basic functionality of sensing software or image recognition technology.[328] YES___ NO___

323. *See* 15 C.F.R. § 732 (Supp. III(b)(1) 1997).
324. *See id.* § 732 (Supp. III(b)(2) 1997).
325. *See id.* § 732 (Supp. III(b)(3) 1997).
326. *See id.* § 732 (Supp. III(b)(4) 1997).
327. *See id.* § 732 (Supp. III(b)(5) 1997).
328. *See id.* § 732 (Supp. III(b)(6) 1997).

7. The customer declines the training and maintenance services that XYZ provides as part of each software contract.[329] YES___ NO___

8. The customer is vague about delivery dates or wants deliveries made to odd destinations, such as Post Office boxes, remote locations or destinations that are far away from the customer's place of business.[330] YES___ NO___

9. The customer gives a freight forwarder as the product's final destination.[331]

YES___ NO___

10. The shipping route is abnormal, such as a customer with a reported ultimate destination in France routing the delivery through India.[332] YES___ NO___

11. The customer requests unusual packaging, such as asking for an unmarked box or providing their own packaging materials.[333] YES___ NO___

12. The buyer is evasive or makes contradictory statements about the software's use, such as stating that they will use the software in a plant in Colorado but making frequent references to their engineering facility in China.[334]

YES___ NO___

329. *See id.* § 732 (Supp. III(b)(7) 1997).
330. *See id.* § 732 (Supp. III(b)(8) 1997).
331. *See id.* § 732 (Supp. III(b)(9) 1997).
332. *See id.* § 732 (Supp. III(b)(10) 1997).
333. *See id.* § 732 (Supp. III(b)(11) 1997).
334. *See id.* § 732 (Supp. III(b)(12) 1997).

INITIAL CLASSIFICATION FORM – ENGINEERING

NAME OF CUSTOMER_____

XYZ JOB NUMBER_____

PERSON FILLING OUT FORM/INTIAL _____/____

DATE COMPLETED _____

SOURCE OF CLASSIFICATION REQUEST:

REQUEST FROM COMPLIANCE MANAGER_____

ENGINEERING – NORMAL PROJECT FLOW_____

AGENCY COVERAGE:

AGENCY EXPECTED TO CONTROL EXPORT:

STATE _____ COMMERCE_____

DATE COMPLIANCE MANAGER CONFIRMED THAT STATE DEPARTMENT RULES DO NOT APPLY (if applicable) _____

STATE DEPARTMENT CLASSIFICATION:

MUNITIONS LIST CATEGORY NUMBER[335]_____

PROJECT MIGHT BE FUNDAMENTAL RESEARCH?[336] YES____ NO_____

ONGOING PROJECT/TECHNICAL ASSISTANCE AGREEMENT MIGHT APPLY?[337] YES_____ NO_____

COMMODITY JURISDICTION REQUEST INFORMATION:[338]

PREDOMINANTLY CIVIL APPLICATION? YES_____ NO_____

PERFORMANCE EQUIVALENT IN CIVIL APPLICATION (form, fit, and function)? YES_____ NO_____

IF YES TO EITHER OF ABOVE, DESCRIBE IN DETAIL_____

_____

_____

335. *See supra* Part XI.E.1-XI.E.9.
336. *See supra* Part XI.E.10.
337. *See supra* Part XI.E.11.
338. *See supra* Part XI.E.12-XI.E.14.

COMMERCE DEPARTMENT CLASSIFICATION[339]

ECCN_____

PRINT AND ATTACH COPY OF PAGES LISTING THE ECCN DETAILS (check once attached) _____

339. *See supra* Part XI.F.

PART XII – ACCOUNTING/EXPORT COMPLIANCE SCREENING DEPARTMENT

INDEX

PART XII.A – INDIVIDUAL/COUNTRY SCREEN (POTENTIAL CUSTOMERS) – ACCOUNTING/EXPORT COMPLIANCE SCREENING DEPARTMENT

1. Screening Individuals/Countries

Potential customers, their countries, and the countries of ultimate destination for XYZ products must be screened to determine if export licenses are required. These screens can be done using the **INDIVIDUAL/COUNTRY SCREEN** form, available at the end of this section under **FORMS – ACCOUNTING/COMPLIANCE SCREENING** or on the intranet under **COMPLIANCE/FORMS**.

2. Requests from Sales Department

The sales department will submit customer information for screening on the **NEW CONTACT FORM**. Screen the individual and the country following the links on the **INDIVIDUAL/COUNTRY SCREEN** form. The directions for screening are right on the form.

To search lists, link to the list. Use the binoculars, located in the upper toolbar to find and "jump" to sections of the list.

3. Individual or Country Matches

If the countries or individuals match (or are very similar to a name or address on a list), contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com so he may begin the licensing process.

File the completed **INDIVIDUAL/COUNTRY SCREEN** form in the **CUSTOMER FILE**. Notify the salesperson via email (read receipt requested) that they must **STOP** the transaction. Print the email, including the read receipt, and file it in the **CUSTOMER FILE**. If and when a license is obtained, the Compliance Officer will notify the salesperson that they may resume the transaction. You will be copied on this email. Print a copy of the email for the **CUSTOMER FILE**.

4. Corruption/Bribery Risk

Follow the link on the **INDIVIDUAL/COUNTRY SCREEN** form.[340] If the customer's country is listed in the ***last 50*** countries on the list (those deemed most susceptible to corruption risk), notify the salesperson via email (read receipt requested).[341] Your message should be a simple warning to let them know that the customer's country has a high risk of corruption or illegal bribery and that they should take the utmost caution in the transaction. Print the email, including the read receipt, and file it in the **CUSTOMER FILE**.

340. *See infra* Part XII.G (Individual/Country Screen Forms).

341. *See* Transparency International, *Corruption Perceptions Index 2004*, *at* http://www.transparency.org/cpi/2004/cpi2004.en.html#cpi2004 (last visited Feb. 14, 2005).

PART XII.B – INDIVIDUAL SCREEN (POTENTIAL EMPLOYEES) – ACCOUNTING/EXPORT COMPLIANCE SCREENING DEPARTMENT

Under export control laws, potential employees who are **not** U.S. Persons may require licenses to receive certain data or training.[342] Exports can take place in the United States, even on the XYZ campus, if technology is transferred to a foreign person here.[343] The law presumes that at some point, a foreign national will return to their home country.[344] This is the ***deemed export rule***.[345] For this reason, all XYZ departments will submit names and addresses of potential hires to you for screening prior to hire.

When any department notifies you by email of a potential hire, screen the name against the Individuals section of the **INDIVIDUAL/COUNTRY SCREEN** form.

- If there are **ANY** matches, notify John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com so he can apply for a license. File the completed form in the **POTENTIAL EMPLOYEE FILE**.
- If there are **NO** matches, notify the appropriate department via email (read receipt requested) that they may hire the employee. Print a copy of the email, including the read receipt, and file it in the **POTENTIAL EMPLOYEE FILE**.

For more information on the deemed export rule, go to http:www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html.[346]

If you have any problems, concerns, or questions, contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com.

342. *See* 22 C.F.R. § 120.17 (2004); 15 C.F.R. §§ 734.2(b)(1)-(3) (2004).

343. *See supra* note 342.

344. 15 C.F.R. § 734.2(b)(2)(ii).

345. *Id.*

346. Bureau of Industry and Security, U.S. Department of Commerce, *"Deemed Export" Questions and Answers*, *at* www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html (last visited Feb. 14, 2005).

PART XII.C – LETTERS OF CREDIT AND METHODS OF PAYMENT – ACCOUNTING/EXPORT COMPLIANCE SCREENING DEPARTMENT

1. Letters of Credit – High Risk for Illegal Boycott Violations

In the accounting department, it is critical that you be aware of the laws against participating in illegal boycotts.[347] Often, conditions in letters of credit specify that the customer or vendor follows the laws of a certain country or certify the origin of products.[348] You *must* review each letter of credit to make sure it does not violate U.S. Anti-Boycott laws.[349]

Review the **ANTI-BOYCOTT PROTECTIONS** section located at **PART V** for details.[350] If you have any questions or concerns, contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com.

2. Methods of Payment – Be Alert for Red Flags

The way customers pay for XYZ software and services may present 'red flags' in the transaction.[351] Because most of XYZ's customers pay by staged cash payments, other methods or sources of payment may indicate a risk of diversion or other illegal activity such as illegal transfers of funds.[352] Review the section entitled **CUSTOMER RED FLAGS** at **PART IV** to review the red flag indicators if you have any concerns. Contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com if anything about the customer's payment seems suspicious.

347. *See supra* Part V.
348. *See* 15 C.F.R. 760.2(f) (2004).
349. *Id.*
350. *See supra* Part V.
351. *See supra* Part IV.
352. *See* 15 C.F.R. § 732 (Supp. III(b)(5) 2005).

PART XII.D – REIMBURSEMENTS AND ANTI-BRIBERY PROTECTIONS – ACCOUNTING/EXPORT COMPLIANCE SCREENING DEPARTMENT

All Requests to Pay Customer Expenses Require Pre-Approval

Due to the complexity of anti-corruption laws, all requests to cover expenses for trips, entertainment, etc. require pre-approval from John Complaisant.[353] Should an employee inquire about being reimbursed or getting approval for expenses, contact John Complaisant, at (303)123-0911 or jcomp@XYZ.com.

PART XII.E – CONTRACTS, INVOICES AND OTHER DOCUMENTS – ACCOUNTING/EXPORT COMPLIANCE SCREENING DEPARTMENT

1. Certifications and Declarations Required in Contracts

XYZ requires certain certifications and declarations in order to do business. Issues covered include final destination, end-user, end-use, involvement in proliferation activities, and anti-bribery controls. Violation of these certifications is grounds for XYZ to unilaterally terminate any contract.

To enact and enforce these requirements, the following clauses **must** be in **all** contracts. They are available on the intranet under COMPLIANCE/CONTRACTS:[354]

- Certification of Final Destination
- Certification of End-Use and End-User
- Certification of Non-Proliferation
- Agreement to Abide by U.S. Anti-Bribery Laws

2. License Numbers Required on All Invoices, Bills of Lading, and Shipping Documents

All invoices, bills of lading, and shipping documents must include the proper license number and other designation as required by the State or Commerce Department.[355] John Complaisant, Compliance Officer, will provide this information to you once he obtains the required license.

353. *See supra* Part VI.

354. These certifications and agreements are not included in the model program. For more information, *see infra* Part XII.E.3 (addressing final destination and end use); *infra* Part IV (addressing non-proliferation protections); *supra* Part VI (addressing anti-bribery protections).

355. *See* 22 C.F.R. § 123.22 (2004); 15 C.F.R. § 732.5 (2004).

3. Shippers Export Declaration – Invoices, Bills of Lading, and Shipping Documents

This language *must* be printed on *all* XYZ invoices, bills of lading, and shipping documents for items sent with a **State Department** License:

"These commodities are authorized by the U.S. Government for export only to [country of ultimate destination] for use by [end-user]. They may not be transferred, transshipped on an non-continuous voyage, or otherwise be disposed of in any other country, either in their original form or after being incorporated into other end-items, without the prior written approval of the U.S. Department of State."[356]

The following language *must* be printed on all XYZ invoices, bills of lading, and shipping documents for items covered by **Commerce Department** rules or licenses:

"[These/this] [commodities, technology, software] [were/was] exported from the United States in accordance with the Export Administration Regulations. Diversion contrary to U.S. law is prohibited."[357]

356. 22 C.F.R. § 123.9(b) (2004).
357. 15 C.F.R. § 758.6 (2004).

PART XII.F – VERIFICATIONS – PRE-SHIPMENT & PRIOR TO SENDING SOFTWARE KEYS – ACCOUNTING/EXPORT COMPLIANCE SCREENING DEPARTMENT

1. Quarterly Customer/List Verifications

Once per quarter, screen all open customer files against the lists on the INDIVIDUAL/COUNTRY SCREEN list.[358] This will identify any changes in customer or country status that could lead to an inadvertent violation. If you get a match, **STOP** any ongoing or potential transactions (by notifying the sales or engineering department) and contact John Complaisant, Compliance Officer, at (303)777-7911 or jcomp@XYZ.com.

2. Pre-Shipment – Final Verification

When Engineering sends you a final item to be packaged for shipment, re-run the customer and country through the INDIVIDUAL/COUNTRY SCREEN. If the customer or country matches *any* lists, **STOP** the transaction and immediately contact John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com. Keep a copy of the PRE-SHIPMENT INDIVIDUAL/DESTINATION SCREEN in the CUSTOMER EXPORT FILE.

3. Requests for Software Keys – Verification and Re-Certification Required

XYZ software comes with an internal "bomb" which causes the software to become disabled at the end of the contract period unless the user obtains a software key from XYZ. As a condition to providing the key to disable the bomb, you must re-screen the customer and country using the INDIVIDUAL/COUNTRY SCREEN form. Further, the customer must re-certify their uses and agreement to comply with U.S. law. This agreement is available on the XYZ intranet under CONTRACT EXTENSION/RECERTIFICATION.

358. *See, e.g.*, Bureau of Industry and Security U.S. Department of State, *Export Management Systems Guidelines, Denied Persons Screen*, at 34, *at* http://www.bxa.doc.gov/exportmanagementsystems/pdf/screen1.pdf (last visited Feb. 14, 2005) (describing the need for a process for updating customer lists).

PART XII.G – ACCOUNTING/EXPORT COMPLIANCE SCREENING DEPARTMENT FORMS

INDIVIDUAL/COUNTRY SCREEN (POTENTIAL CUSTOMERS) – ACCOUNTING/COMPLIANCE SCREENER

NAME OF CUSTOMER BEING SCREEENED_____

ADDRESS_____

XYZ PRODUCT TO BE PURCHASED (describe in detail) or INVOICE NUMBER _____

CUSTOMER'S END-USE FOR PRODUCT_____

COUNTRY OF PRODUCT'S ULTIMATE DESTINATION_____

PERSON PERORMING SCREEN/INTIAL _____/_____

DATE PERFORMED_____

PURPOSE of SCREEN:

Initial Screen_____ Pre-Shipment _____ Software Re-certification _____

SCREENING INDIVIDUALS

Look for the customer's name on the following six lists:

1. **Denied Persons List** – http://www.bxa.doc.gov/dpl/thedeniallist.asp.[359]

   MATCH? YES___ NO___

   If **re-screening** a party screened in the last 90 days, go to the recent update site (for a faster screen of the Denied Parties List). Go to http://www.bxa.doc.gov/dpl/recentchanges.asp.[360] MATCH? YES___ NO___

2. **Debarred List** – www.pmdtc.org/debar059.htm.[361] MATCH? YES___ NO___

3. **Specially Designated Nationals** – www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf.[362] MATCH? YES___ NO___

359. 15 C.F.R. § 764 (Supp. I. 2002), Bureau of Industry and Security U.S. Department of Commerce, *The Denied Persons List*, *available at* http://www.bxa.doc.gov/dpl/thedeniallist.asp (last visited Feb. 14, 2005.

360. Bureau of Industry and Security, U.S. Department of Commerce, *Recent Changes to the Denied Persons List*, *at* http://www.bxa.doc.gov/dpl/recentchanges.asp (last visited Feb. 14, 2005).

361. 22 C.F.R. § 127.7 (2004), Directorate of Defense Trade Controls, U.S. Department of State, *List of Statutorily Debarred Parties, July 1988-April 2004*, *available at* http://www.pmdtc.org/debar059.htm.

362. Office of Foreign Assets Control, U.S. Department of Treasury, *Specially Designated Nationals and Blocked Persons*, *at* http://www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf (last visited Feb. 23, 2005).

4. **Federal Register** – http://www.access.gpo.gov/bis/fedreg/ear_fedreg.html.[363] Look for list updates. MATCH? YES___ NO___

5. **Entity List** – http://www.access.gpo.gov/bis/ear/pdf/744spir.pdf.[364] MATCH? YES___ NO___

6. **Unverified List** – http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified_parties.html.[365] MATCH? YES___ NO___

Interpreting the results of the Individual Screen:

- If *any* of the above is a match, immediately contact John Complaisant at (303)123-0911 or jcomp@XYZ.com.
- If *none* of the above match, the individual has **passed** this section of the screen.

COUNTRY SCREEN

Look for the customer's country on the following two lists:

1. **Office of Foreign Asset Control Embargo List** – http://www.treas.gov/offices/enforcement/ofac/sanctions/.[366] MATCH? YES___ NO___

2. **Office of Defense Trade Control Arms Embargo List** – http://pmdtc.org/country.htm.[367] MATCH? YES___ NO___

Interpreting the results of the Country Screen:

- If *any* of the above is a match, immediately contact John Complaisant at (303)123-0911 or jcomp@XYZ.com.
- If *none* of the above match, the customer has **passed** this section of the screen.

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363. U.S. Government Printing Office, *Federal Register Rules Affecting the Export Administration Regulations*, *at* http://www.access.gpo.gov/bis/fedreg/ear_fedreg.html (last visited Feb. 23, 2005).

364. 15 C.F.R. § 774 (Supp. IV 2001), Bureau of Industry and Security, U.S. Department of Commerce, *Entity List*, *available at* http://www.access.gpo.gov/bis/ear/pdf/744spir.pdf (last visited Feb. 14, 2005).

365. Bureau of Industry and Security, U.S. Department of Commerce, *Unverified List*, *at* http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified_parties.html (last visited Feb. 14, 2005).

366. Office of Foreign Asset Control, U.S. Treasury Department, *Sanctions Program and Country Summaries*, *at* http://www.treas.gov/offices/enforcement/ofac/sanctions/ (last visited Feb. 23, 2005).

367. 22 C.F.R. § 126.1 (2004), Directorate of Defense Trade Controls, U.S. Department of State, *Embargo Reference Chart*, *available at* http://pmdtc.org/country.htm (last visited Feb. 14, 2005).

CORRUPTION/BRIBERY RISK SCREEN

Compare customer's country and project location against the Transparency International website for corruption/bribery risk: http://www.transparency.org/cpi/2004/cpi2004.en.html#cpi2004.[368]

Interpreting the results of the Individual Screen:

- If the country is listed in the last **50** countries on the list (countries at the end of the list being at higher risk for corruption or bribery), notify the salesperson requesting the screen, and tell them to proceed with *caution*.[369]
- If the country is not in the bottom 50 on the list, you don't need to do anything further.

INDIVIDUAL/COUNTRY SCREEN RESULTS (Potential Customers)

Individual Screen

_____ Matched on any list, if **yes**, date John Complaisant notified _____

_____ Did not have any matches

Country Screen

_____ Matched on any list, if **yes**, date John Complaisant notified _____

_____ Did not have any matches

Corruption/Bribery Screen

Country in bottom 50 on Transparency.org website,[370] notified salesperson OK to proceed with *caution*

_____Country not in bottom 50

STATUS:

OK to PROCEED_____, or

STOP to await licensing or further instruction from John Complaisant_____.

Date employee notified_____.

368. Transparency International, *Corruption Perceptions Index 2004*, *at* http://www.transparency.org/cpi/2004/cpi2004.en.html#cpi2004 (last visited Feb. 14, 2005).

369. *See id.*

370. *Id.*

INDIVIDUAL/COUNTRY SCREEN (POTENTIAL EMPLOYEES) – ACCOUNTING/COMPLIANCE SCREENER

NAME OF POTENTIAL EMPLOYEE BEING SCREEENED_____
ADDRESS_____

PERSON PERORMING SCREEN/INTIAL _____/____
DATE PERFORMED_____

SCREENING POTENTIAL EMPLOYEES

Look for the customer's name on the following list:

1. **Denied Persons List** – http://www.bxa.doc.gov/dpl/thedeniallist.asp.[371]

   MATCH? YES___ NO___

   If **re-screening** a party screened in the last 90 days, go to the recent update site (for a faster screen of the Denied Parties List). Go to http://www.bxa.doc.gov/dpl/recentchanges.asp.[372] MATCH? YES___ NO___

2. **Debarred List** – www.pmdtc.org/debar059.htm.[373] MATCH? YES___ NO___

3. **Specially Designated Nationals** – www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf.[374] MATCH? YES___ NO___

4. **Federal Register** – http://www.access.gpo.gov/bis/fedreg/ear_fedreg.html.[375] Look for list updates. MATCH? YES___ NO___

5. **Entity List** – http://www.access.gpo.gov/bis/ear/pdf/744spir.pdf.[376] MATCH? YES___ NO___

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371. 15 C.F.R. § 764 (Supp I 2002), Bureau of Industry and Security, U.S. Department of Commerce, *The Denied Persons List, available at* http://www.bxa.doc.gov/dpl/thedeniallist.asp (last visited Feb. 14, 2005).

372. Bureau of Industry and Security, U.S. Department of Commerce, *Recent Changes to the Denied Persons List, at* http://www.bxa.doc.gov/dpl/recentchanges.asp (last visited Feb. 14, 2005).

373. 22 C.F.R. § 127.7 (2004), Directorate of Defense Trade Controls, U.S. Department of State, *List of Statutorily Debarred Parties, July 1988-April 2004, available at* http://www.pmdtc.org/debar059.htm (last visited Feb 14, 2005).

374. Office of Foreign Assets Control, U.S. Department of Treasury, *Specially Designated Nationals and Blocked Persons, at* http://www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf, (last visited Feb. 15, 2005)

375. U.S. Government Printing Office, *Federal Register Rules Affecting the Export Administration Regulations, at* http://www.access.gpo.gov/bis/fedreg/ear_fedreg.html (last visited Feb. 23, 2005).

376. 15 C.F.R. § 744 (Supp. IV 2001); Bureau of Industry and Security, U.S. Department of Commerce, *Entity List, at* http://www.access.gpo.gov/bis/ear/pdf/744spir.pdf (last visited Feb. 14, 2005).

6. Unverified List –
http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified_parties.html.[377]
MATCH? YES___ NO___

Interpreting the results of the Individual Screen:

- If *any* of the above is a match, immediately contact John Complaisant at (303)123-0911 or jcomp@XYZ.com.
- If *none* of the above match, the individual has **passed** the screen.

INDIVIDUAL/COUNTRY SCREEN RESULTS (Potential Employees)

Individual Screen

_____ Matched on any list, if **yes**, date John Complaisant notified _____

_____ Did not have any matches

STATUS:

OK to PROCEED_____, or

STOP to await licensing or further instruction from John Complaisant_____

Date employee notified_____

377. Bureau of Industry and Security, U.S. Department of Commerce, *Unverified List*, *at* http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified_parties.html (last visited Feb. 14, 2005).

PART XIII – COORDINATION TEAM

COORDINATION TEAM INDEX

PART XIII.A – REQUIRED READING – SALES AND ENGINEERING DEPARTMENT SECTIONS – COORDINATION TEAM

Required Reading – Sales and Engineering Department Sections

As the go-between group that coordinates work between the Sales and Engineering Departments, it is critical that you understand their functions in the export compliance process. Be sure you have completed the reading requirements for **both** the SALES and ENGINEERING SECTIONS, at PARTS X AND XI before going any further.

You can initial the sections in their SALES and ENGINEERING INDEXES in your copy of the Compliance Program manual to document your completion of these steps.

PART XIII.B – KNOWING YOUR CUSTOMER – COORDINATION TEAM

1. Danger of Export Violations in Early Contacts

Generally, export laws require a license for the export of technical data.[378] Be careful not to reveal technical data about XYZ's software when talking initially with potential customers.[379] Doing so, before screening procedures are completed and licenses are secured could result in a violation. Further, because certain sanctions prohibit any contact with embargoed countries, even calling a customer in an embargoed country or mailing a brochure could be violation.[380]

378. *See* 22 C.F.R. § 120.10 (2004); 15 C.F.R. §§ 734.2(b)(2), (b)(9) (2004).

379. *See* 22 C.F.R. § 120.17(3)-(4) (2004); 15 C.F.R. §§ 734.2(b)(2)-(3).

380. 15 C.F.R. §§ 746.2-746.4, 746.7-746.8 (2004) (restrictions on exports to Cuba, Iraq, Iran, and Rwanda); 15 C.F.R. § 732.3(i) (2004).

2. Screening the Customer

As early as possible in the discussions with a potential customer, submit information about the potential customer to the Accounting Department for an **INDIVIDUAL/COUNTRY SCREEN**. This may be done by filling out the form in the Forms/Coordination Team section entitled **NEW CONTACT FORM**. This form is also available on the intranet under **COMPLIANCE/FORMS**. Once you have filled out the form, give it to Accounting, for a Compliance Screening of the individual and country.

This screening process will allow XYZ to avoid doing business with individuals who have been banned from receiving exports due to export violations.[381] In some cases, doing business will require obtaining an export license for similar reasons.[382] This process allows us to identify parties who we can't do business with or with whom business may be transacted only after getting the appropriate license.[383] Vigilance at this step can prevent a violation. Further, by determining that it is safe to pursue business with a customer, you will be able to spend your limited time working on customers with whom XYZ can do business.

This screening step also checks the contact's country, which can prohibit a transaction or merely trigger a licensing requirement.[384]

3. Pursuing New Leads

If you plan to pursue a business lead and have not yet made contact, fill out the **NEW CONTACT FORM** to the best of your ability and submit to a Compliance Screener in Accounting for **INDIVIDUAL/COUNTRY SCREEN**. ***Do not forward*** contacts to the Sales Department without instructions from the Compliance Officer after receiving results of this screen. If you are given approval to proceed, send a copy of the approval with the contact information to the Sales Department.

If you meet a contact at a trade show, or the potential customer contacts you, submit the **NEW CONTACT FORM** to Accounting for an initial screen as soon as possible after the initial contact. Do not continue communicating with the contact, to the extent that you can control it, while you await instructions from the Compliance Officer. If you are given approval to proceed, send a copy of the approval with the contact information to the Sales Department.

381. 22 C.F.R. § 127.7 (2004); 15 C.F.R. § 744.1(a) (2004).
382. *See, e.g.*, 15 C.F.R. § 744.2(b) (2004).
383. *See* 22 C.F.R. § 127.7; 15 C.F.R. § 744.1(a); 15 C.F.R. § 744.2(b).
384. 15 C.F.R. §§ 746.1(a)(1), 746.1 (2004).

PART XIII.C – DIVERSION RISK/RED FLAGS – COORDINATION TEAM

Always bear in mind the Red Flags that were introduced in the **OVERVIEW** section at **PART IV**.[385] If a potential customer engages in suspicious behavior, do not forward the contact to the Sales Department without first discussing your concerns with John Complaisant, Compliance Officer, at (303)123-0911 or jcomp@XYZ.com.

PART XIII.D – CONTRACT REVIEW – COORDINATION TEAM

Higher Level Review Required on Certification/Declaration Clauses of All Contracts

As the department that reviews all XYZ contracts, it is important to be sure that the required Certifications and Declarations are in all company contracts.[386] These clauses require our customer and business partners to follow U.S. export laws. Further, they give us the opportunity to unilaterally terminate any contract should the other party violate these certifications.

As you review contracts, make sure the required certifications/declarations are included. These are available on the intranet under **COMPLIANCE/CONTRACTS**. Once you have included these clauses, Bob Decisis *must* review and approve the clauses. Document the date of Bob's review and approval and file it in the **PROJECT CONTRACT FILE**.

385. *See supra* Part IV.

386. 22 C.F.R. §123.9(b) (2004); 15 C.F.R. § 758.6 (2004); *see also supra* Part XII.E.

PART XIII.E – COORDINATION TEAM FORMS

NEW CONTACT FORM – COORDINATION TEAM

NAME OF CONTACT (note any inconsistencies in spelling, nicknames, etc.)
_____

PERSON FILLING OUT FORM/INTIAL _____/_____
DATE COMPLETED _____

CONTACT ADDRESS_____
DATE OF FIRST CONTACT_____
SOURCE OF LEAD/CONTACT (describe in detail) _____
_____

XYZ PRODUCT CONTACT INTERESTED IN (describe in detail, if known)
_____
_____

CONTACT'S END USE FOR PRODUCT_____
COUNTRY OF PRODUCT'S ULTIMATE DESTINATION_____

OTHER INFORMATION YOU BELIEVE WOULD BE HELPFUL
_____
_____
_____

PART XIV – EXPORT COMPLIANCE OFFICER

EXPORT COMPLIANCE OFFICER INDEX

Mandatory Export Compliance Section	Part	Date Read/Initials
CEO's Letter	I	_____/_____
Overview	II	_____/_____
Compliance 911	III	_____/_____
Customer Red Flags	IV	_____/_____
Anti-Boycott Protections	V	_____/_____
Anti-Bribery Protections	VI	_____/_____
Recordkeeping	VII	_____/_____
Training and Accountability	VIII	_____/_____
Export Decision Tree	IX	_____/_____
Handling Compliance 911 Reports	XIV.A	_____/_____
Individual/Country Screens – Potential Customers	XIV.B	_____/_____
Deemed Export Rule – Potential Employees	XIV.C	_____/_____
Responding to Employees' Questions or Concerns	XIV.D	_____/_____
Licensing Process Flowchart	XIV.E	_____/_____
Applying For State Department Licenses	XIV.F	_____/_____
Commodity Jurisdiction Requests	XIV.G	_____/_____
Commerce Department Rules	XIV.H	_____/_____

PART XIV.A – HANDLING COMPLIANCE 911 REPORTS – EXPORT COMPLIANCE OFFICER

1. If an Employee Contacts you under the COMPLIANCE 911 PROTOCOLS

a. Make sure the employee has **stopped the transaction, communication, or shipment.**

b. Remind the employee to **retain all records.**

c. Remind employee to maintain **confidentiality.**

d. Immediately contact Jane L. Doe, Outside Counsel, at (303)999-9999 or jldoe@abclaw.com. She will assist you in handling the matter.

e. Document the receipt of the report and the date you contacted OutsideCounsel in the **COMPLIANCE 911 REPORTS** folder.

2. Consider the Benefits of Voluntary Disclosure

In the event that an investigation conducted in conjunction with and at the direction of Outside Counsel discovers a possible violation, voluntary reporting of the violation to the appropriate government agency can be a mitigating factor in the assessment of penalties.[387] Outside Counsel will discuss this option and the possible risks and benefits of pursuing this course of action should this matter arise.

387. 22 C.F.R. § 127.12(a) (2004); 15 C.F.R. § 764.5(a) (2004); *see also supra* notes 54-55 and accompanying text (discussing voluntary disclosure as a factor weighing against prosecuting the organization).

PART XIV.B – INDIVIDUAL/COUNTRY SCREEN (POTENTIAL CUSTOMERS) – EXPORT COMPLIANCE OFFICER

1. Individual/Country Screen

If a customer's name or country matches Commerce or State Department lists, the Compliance Screener will notify you. Some matches mean there is an absolute prohibition against doing business with the party.[388] In other cases, it will necessitate getting a license.[389]

2. Complete Bans on Transactions

If a potential customer's name comes up as a match on the following lists, it is a complete ban on doing business with the party. Should the Compliance Screener notify you of a match, confirm it by searching the match at the appropriate website.

a. Denied Persons List – http://www.bxa.doc.gov/dpl/thedeniallist.asp.[390]

If **re-screening** a party screened in the last 90 days, go to the recent update site (for a faster screen of the Denied Parties List). Go to http://www.bxa.doc.gov/dpl/recentchanges.asp.[391]

b. Debarred List – http://www.pmdtc.org/debar059.htm.[392]

c. Specially Designated Nationals – http://www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf.[393]

d. Federal Register –http://www.access.gpo.gov/bis/fedreg/ear_fedreg.html.[394] Look for list updates.

If you confirm a match, notify the Compliance Screener immediately so that they can notify the employee requesting the screen of the total ban. If the name is close to a name on the above lists, contact Jane L. Doe, Outside Counsel, at (303)999-9999 or jldoe@abclaw.com for advice on how to proceed. Document the date you checked the lists and the date you discussed the matter with Outside Counsel in the **COMPLIANCE CONSULTATION FILE**.

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388. 15 C.F.R. § 744.12 (2004); *see also* 15 C.F.R. §S 746.2-746.4, 746.7-746.8 (2004) (restrictions on exports to Cuba, Iraq, Iran, and Rwanda); *id.* §732.3(i) (2004).

389. 15 C.F.R. § 746.1 (a)-(b) (2004).

390. 15 C.F.R. § 764 (Supp. I 2002); Bureau of Industry and Security, U.S. Department of Commerce, *The Denied Persons List*, *available at* http://www.bxa.doc.gov/dpl/thedeniallist.asp.

391. Bureau of Industry and Security, U.S. Department of Commerce, *Recent Changes to the Denied Persons List*, *at* http://www.bxa.doc.gov/dpl/recentchanges.asp (last visited Feb. 20, 2005).

392. 22 C.F.R. § 127.7 (2004); Directorate of Defense Trade Controls, U.S. Department of State, *List of Statutorily Debarred Parties, July 1988-April 2004*, *available at* http://www.pmdtc.org/debar059.htm (last visited Feb. 20, 2005).

393. Office of Foreign Assets Control, U.S. Department of Treasury, *Specially Designated Nationals and Blocked Persons*, *at* http://www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf (last visited Feb. 25, 2005).

394. U.S. Government Printing Office, *Federal Register Rules Affecting the Export Administration Regulations*, *at* http://www.access.gpo.gov/bis/fedreg/ear_fedreg.html (last visited Feb. 20, 2005).

3. Transactions That Require a License (at a minimum)

If a potential customer's name comes up as a match on the following lists, a license will be required, but is not guaranteed to be granted, in order to do business with the party. Should the Compliance Screener notify you of a match, confirm it by searching the name on the appropriate website.

a. Entity List – http://www.access.gpo.gov/bis/ear/pdf/744spir.pdf.[395]

b. Unverified List – http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified_parties.html.[396]

c. Office of Foreign Asset Control Embargo List – http://www.treas.gov/offices/enforcement/ofac/sanctions/.[397]

d. Office of Defense Trade Control Arms Embargo List – http://pmdtc.org/country.htm.[398]

If you confirm a match, notify the Compliance Screener immediately, and notify the employee requesting the screen of the need to wait while you apply for a license.

i. Document the date you checked the lists and the date you notified the Compliance Screener and the employee of the need to wait for a license in **COMPLIANCE CONSULTATION FILE.**

ii. Contact the Engineering department to have them complete an **INITIAL CLASSIFICATION FORM**, so that you can determine whether to apply for a State or Commerce License.

iii. Upon receipt of the **INITIAL CLASSIFICATION FORM** from Engineering, follow the directions for applying for a license under the appropriate agency.

395. 15 C.F.R. § 744 (Supp. IV 2001), Bureau of Industry and Security, U.S. Department of Commerce, *Entity List*, *available at* http://www.access.gpo.gov/bis/ear/pdf/744spir.pdf (last visited Feb. 20, 2005).

396. Bureau of Industry and Security, U.S. Department of Commerce, *Unverified List*, *at* http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified_parties.html (last visited Feb. 20, 2005).

397. Office of Foreign Asset Control, U.S. Treasury Department, *Sanctions Program and Country Summaries*, *at* http://www.treas.gov/offices/enforcement/ofac/sanctions/ (last visited Feb. 20, 2005).

398. 22 C.F.R. § 126.1 (2004); Directorate of Defense Trade Controls, U.S. Department of State, *Embargo Reference Chart*, *available at* http://pmdtc.org/country.htm (last visited Feb. 20, 2005).

PART XIV.C – DEEMED EXPORT RULE – POTENTIAL EMPLOYEES – EXPORT COMPLIANCE OFFICER

1. Deemed Export Rule

Under export control laws, potential employees who are **not** U.S. Persons may require licenses to receive certain data or training.[399] Exports can take place in the United States, even on the XYZ campus, if technology is transferred to a foreign person here.[400] The law presumes that at some point, a foreign national will return to their home country.[401] This is the ***deemed export rule***.[402] The Compliance Screeners will screen all potential employees against the lists below. If they find a match, they will contact you. In the event of a match, contact Jane L. Doe, Outside Counsel, at (303)999-9999 or jldoe@abclaw for guidance on what licenses may be required and if XYZ's **BADGE/CLASSIFICATION REQUIREMENTS** can adequately prevent possible violations if a license is required.

a. Denied Persons List – http://www.bxa.doc.gov/dpl/thedeniallist.asp.[403]

If **re-screening** a party screened in the last 90 days, go to the recent update site (for a faster screen of the Denied Parties List). Go to http://www.bxa.doc.gov/dpl/recentchanges.asp.[404]

b. Debarred List – http://www.pmdtc.org/debar059.htm.[405]

c. Specially Designated Nationals – http://www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf.[406]

d. Federal Register –http://www.access.gpo.gov/bis/fedreg/ear_fedreg.html.[407] Look for list updates.

e. Entity List – http://www.access.gpo.gov/bis/ear/pdf/744spir.pdf.[408]

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399. 22 C.F.R. § 120.17 (a)(3)-(4) (2004); 15 C.F.R. § 734.2(b)(2)(ii) (2004).

400. *See supra* note 383.

401. *See supra* note 383.

402. *See supra* note 383.

403. 15 C.F.R. § 764 (Supp. I 2002); Bureau of Industry and Security, U.S. Department of Commerce, *The Denied Persons List*, *available at* http://www.bxa.doc.gov/dpl/thedeniallist.asp (last visited Feb. 20, 2005).

404. Bureau of Industry and Security, U.S. Department of Commerce, *Recent Changes to the Denied Persons List*, *at* http://www.bxa.doc.gov/dpl/recentchanges.asp (last visited Feb. 20, 2005).

405. 22 C.F.R. § 127.7 (2004); Directorate of Defense Trade Controls, U.S. Department of State, *List of Statutorily Debarred Parties, July 1988-April 2004*, *available at* http://www.pmdtc.org/debar059.htm (last visited Feb. 20, 2005).

406. Office of Foreign Assets Control, U.S. Department of Treasury, *Specially Designated Nationals and Blocked Persons*, *at* http://www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf (last visited Feb. 25, 2005).

407. U.S. Government Printing Office, *Federal Register Rules Affecting the Export Administration Regulations*, *at* http://www.access.gpo.gov/bis/fedreg/ear_fedreg.html (last visited Feb. 23, 2005).

408. 15 C.F.R. § 744 (Supp. IV 2002): Bureau of Industry and Security, U.S. Department of Commerce, *Entity List*, *available at* http://www.access.gpo.gov/bis/ear/pdf/744spir.pdf (last visited Feb. 20, 2005).

f. Unverified List –
http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified_parties.html.[409]

For more information on the **deemed export rule**, go to http://www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html.[410]

409. Bureau of Industry and Security, U.S. Department of Commerce, *Unverified List*, *at* http://www.bxa.doc.gov/Enforcement/UnverifiedList/unverified_parties.html (last visited Feb 23, 2005).

410. Bureau of Industry and Security, U.S. Department of Commerce, *"Deemed Export" Questions and Answers*, *at* http://www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html (last visited Feb. 23, 2005).

PART XIV.D – RESPONDING TO EMPLOYEES' QUESTIONS OR CONCERNS – EXPORT COMPLIANCE OFFICER

1. Diversion Risk/Red Flags

If a customer provides indications that they may be a diversion risk under the **DIVERSION RISK/RED FLAG CHECKLIST**, employees will contact you.[411] Contact Jane L. Doe, Outside Counsel, at (303)999-9999 or jldoe@abclaw.com to discuss any reported concerns.

2. Proliferation Risk

If an employee suspects that a customer may be involved in proliferation activities such as nuclear activities; the design, development, production, or use of missiles; or the design, development, production, stockpiling, or use of chemical or biological weapons, they will notify you. Upon this notification, you will need to apply for a **Commerce Department license** if the potential export falls under Commerce Department rules.[412] Contact the Engineering department to have them complete an **INITIAL CLASSIFICATION FORM**, so that you can determine whether to apply for a State or Commerce License.

3. Anti-Boycott Protections

If an employee contacts you with suspicions or concerns regarding an illegal boycott, follow the steps for handling reports under **COMPLIANCE 911 PROTOCOLS** while you investigate.[413] Identify any invitations to participate and any employee response to such invitation.[414] Contact Jane L. Doe, Outside Counsel, at (303)999-9999 or jldoe@abclaw.com to discuss any possible violations and to complete any reports of invitations required under the law.[415]

411. 15 C.F.R. § 732 (Supp. III 1997); *see also supra* Part IV.
412. 15 C.F.R. §§ 744.2(a), 744.3(a), 744.4(a) (2004).
413. *See supra* Part V.
414. *See* 15 C.F.R. §§ 760.2-760.5 (2004).
415. *See id.*

4. Anti-Bribery Protections

Employees have been explicitly instructed that any requests for reimbursement or requests to cover expenses must be approved by the Compliance Officer, in order to avoid the payment of illegal bribes.[416]

In some cases, certain common business practices, such as paying the costs of a foreign official to travel for a plant visit and certain ministerial payments are allowed under the law.[417] It is important that XYZ employees understand that they are *not* to identify potential exceptions to the general ban against payments. Instead, only you can make this determination.

Exceptions under the Anti-Bribery laws include payments to facilitate *routine government actions*.[418] Examples would be obtaining permits or licenses and getting utilities or phone lines connected. Payments that are *lawful under the laws of the particular foreign country* also are an exception to the general ban on payments.[419]

As a general rule, avoid reimbursing officials for expenses incurred. Rather, let XYZ incur the expenses directly. This creates a paper trail documenting actual use of the payment.

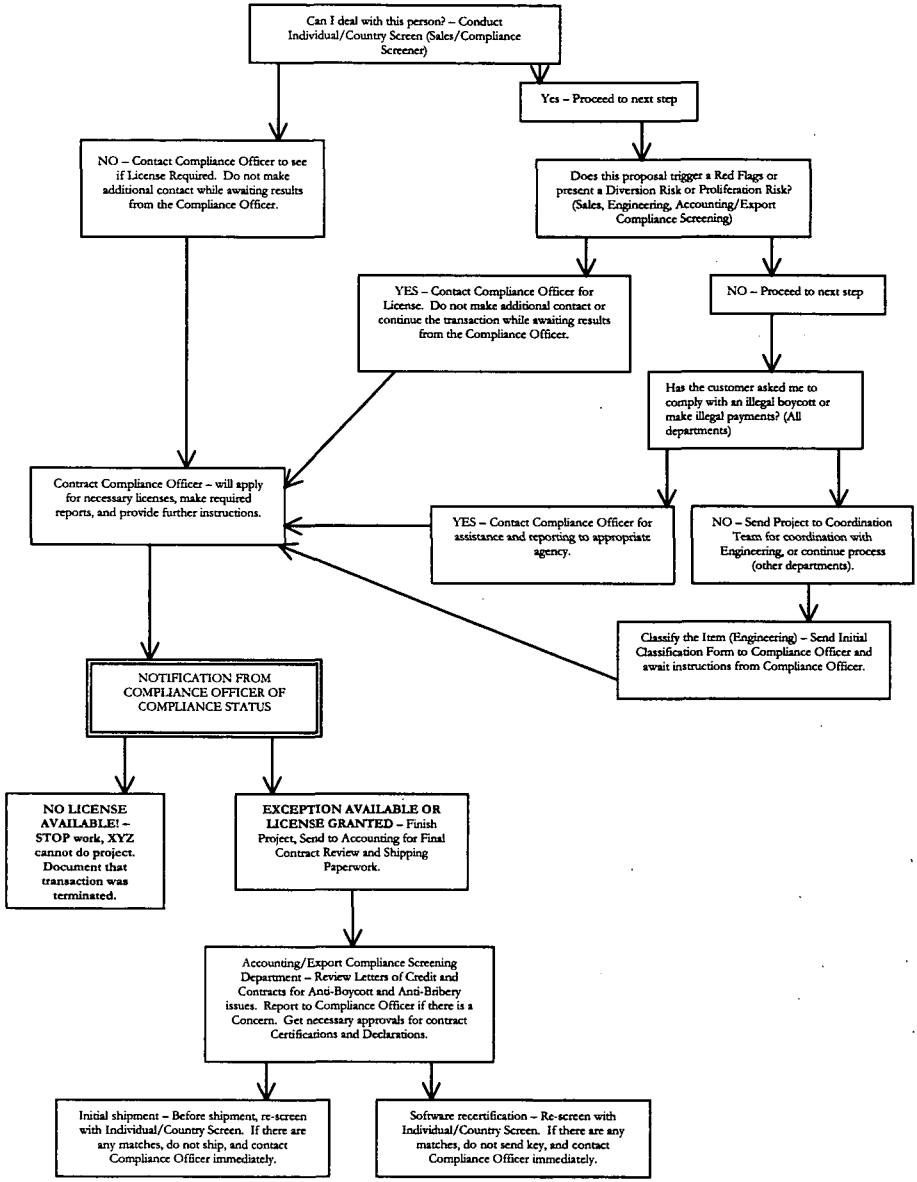
Contact Jane L. Doe, Outside Counsel, at (303)999-9999 or jldoe@abclaw.com to discuss whether a proposed payment might qualify for an exception. It is extremely important that you document the sources of information used to approve any payment in the **COMPLIANCE CONSULTATION FILE**.

5. Import and Export of Customer Item

Engineers may contact you regarding the temporary import of customer items for projects. Often these imports require a license.[420] Further, once the item enters the United States, even if it belongs to a customer, XYZ may need a license to return the item, because the item becomes subject to U.S. export laws when it enters the United States.[421] Contact Jane L. Doe, Outside Counsel, at (303)999-9999 or jldoe@abclaw.com for assistance with these issues.

416. *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (2004).
417. 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2); *id.* §§ 78dd-1(b), 78dd-2(b).
418. 15 U.S.C. §§ 78dd-1(b), 78dd-2(b).
419. 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(2).
420. 22 C.F.R. § 120.18 (2004).
421. 22 C.F.R. § 120.17(a)(1) (2004); 15 C.F.R. § 730.5(a) (2004).

PART XIV.E– XYZ LICENSING PROCESS – EXPORT COMPLIANCE OFFICER



PART XIV.F – APPLYING FOR STATE DEPARTMENT LICENSES – EXPORT COMPLIANCE OFFICER

1. State Department Licenses

Upon your request (after an **INDIVIDUAL/COUNTRY SCREEN** indicates the need for a license) or after receiving a project, the Engineering department will fill out an **INITIAL CLASSIFICATION FORM**. If they determine that an item is inherently military because it was designed, modified, or adapted for military application, they will indicate that its export is controlled by the State Department's U.S. Munitions List ("Munitions List").[422]

Once the engineer has determined that the item is subject to the Munitions List and a State Department license is required, they will provide the following information on the **INITIAL CLASSIFICATION FORM**:

- A proposed Munitions List **category number**[423]
- Whether they believe the item may be the product of fundamental research and qualify for a licensing exception[424]
- Whether they believe the project is ongoing in nature and may qualify for licensing under a Technical Assistance Agreement[425]
- Relevant information for preparation of a **Commodity Jurisdiction Request**[426]

2. If Engineering Does Not Think the State Department Controls the Export

If the Engineering Department determines that the potential export is **not** controlled by the State Department, they will ask for your approval of this determination on their **INITIAL CLASSIFICATION FORM**. If you agree with their determination, sign off on the form and return it to the employee. Keep a copy in the **COMPLIANCE CONSULTATION FILE**. Go to the next section, **EXPORTS UNDER COMMERCE DEPARTMENT RULES** at **PART XIV.H**.

If you are unsure whether or not State Department rules apply, continue through this section. If you still do not feel comfortable making the determination, contact Jane L. Doe, Outside Counsel at (303)999-9999 or jldoe@abclaw.com for assistance.

422. 22 C.F.R. § 120.3(a) (2004).
423. *Id.* § 121 (2004).
424. *Id.* §§ 120.11 (a) (8), 120.10(a)(5) (2004).
425. *Id.* § 120.22 (2004).
426. *Id.* § 120.4 (2004).

3. Fundamental Research Licensing Exception

Under the Munitions List, there is a licensing exception for fundamental research.[427] Because much of XYZ's software is based on the work that Tom Johnson did at the university, there is a strong possibility that this exception may apply.

Fundamental research is:

- Conducted in engineering at accredited U.S. colleges[428]
- Information ordinarily published/shared broadly in the scientific community[429]

Research is not fundamental if:

- It is funded by the U.S. government and the government places controls on the dissemination of the information as part of the funding requirement[430]
- The university agreed to restrictions (from sources other than the government) on the publication of the research[431]

4. Technical Assistance Agreements

A Technical Assistance Agreement is available if a project will involve ongoing use of software or services (but will not grant the customer a right to manufacture the software).[432]

5. Using the Fundamental Research Exception and Technical Assistance Agreements

Contact Jane L. Doe, Outside Counsel, at (303)999-9999 or jldoe@abclaw.com for assistance determining whether an export qualifies as fundamental research or if a Technical Assistance Agreement may apply.

6. Determining that a State Department License is Required

To make a final determination that a State Department license is required, you must make a Commodity Jurisdiction Request.[433] See **PART XIV.G** for details on preparing a **COMMODITY JURISDICTION REQUEST**.

427. *Id.* § 120.11 (a)(8).
428. *Id.*
429. *Id.*
430. *Id.* § 120.11(8)(ii).
431. *Id.* § 120.11(8)(i).
432. *See id.* §120.22 (2004).
433. *Id.* § 120.4 (2004).

PART XIV.G – COMMODITY JURISDICTION REQUEST WITH STATE DEPARTMENT – EXPORT COMPLIANCE OFFICER

Commodity Jurisdiction Requests are complex applications to the State Department for determination whether or not the Munitions List covers the potential export.[434] The Munitions List *does not cover* items that are *predominantly civil* and have a *performance equivalent* in civil application.[435] The key to a Commodity Jurisdiction Request is to identify and adequately describe the predominantly civil nature of the item and its performance equivalent in civil application, if applicable.[436]

- **Performance equivalent** is defined by *form, fit,* or *function.*[437]
- The *intended use* of the item is *not* relevant to the inquiry. For example, even though an item is being designed for a civil application, if it is not predominantly civil and does not have a performance equivalent in civil application, the item will still be covered by the Munitions List.[438]

1. Information Required for Commodity Jurisdiction Request

Engineering will provide the information you will need to provide for the Commodity Jurisdiction Request with the INITIAL CLASSIFICATION FORM:

- Description of the article or service[439]
- History of design, development and use[440]
- Brochures or documents related to the item[441]

For more information on the documents required for a Commodity Jurisdiction Request, go to http://www.pmdtc.org/docs/cj.pdf.[442]

2. Filing a Commodity Jurisdiction Request

Once you have compiled the information for a commodity jurisdiction request, contact Jane L. Doe, Outside Counsel, at (303)999-9999 or jldoe@abclaw.com for preparation of the request.

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434. *See id.*
435. *Id.* § 120.3(a)(i)-(ii) (2004).
436. *See id.*
437. *Id.* § 120.3(a)(ii).
438. *See id.* § 120.3(b).
439. *See id.* § 120.4(c) (2004).
440. *Id.*
441. *Id.*
442. Directorate of Defense Trade Controls, U.S. Department of State, *Guidelines for Preparing Commodity Jurisdiction Requests, at* http://www.pmdtc.org/docs/cj.pdf (last visited Jan. 25, 2005).

3. Begin the Initial Classification Process Early

Because Commodity Jurisdiction Requests can take up to forty-five days (and then require licensing after the request is returned), it is important to complete the INITIAL CLASSIFICATION FORM as quickly as possible.[443]

4. Appealing the Results of a Commodity Jurisdiction Request

The results of the Commodity Jurisdiction Request are not final, they may be appealed.[444] If you strongly disagree with the State Department's determination, contact Jane L. Doe, Outside Counsel, at (303)999-9999 or jldoe@abclaw.com to discuss the possibility of an appeal.

443. *See* 22 C.F.R. §120.4(e).
444. *Id.* § 120.4(g).

PART XIV.H – EXPORTS UNDER COMMERCE DEPARTMENT RULES – EXPORT COMPLIANCE OFFICER

1. Exports Covered by the Commerce Department

If the export is not covered by the State Department, you must determine whether it is subject to Commerce Department rules.[445] The Commerce Department covers items considered "dual use," or those that may have both civilian and military application.[446] Almost any item can fall under the Commerce Department rules. Under these rules, your export may:

- Be eligible for export *without* a license[447]
- Be eligible for export under a *license exception* (a self-validated license the exporter "grants" themselves, a "Self-Validated License Exception")[448]
- Require a license[449]

2. Refer to the Initial Classification Form from Engineering

To determine what requirements apply to your export under the Commerce Department Rules, you will need to refer to the Export Classification Control Number ("ECCN") assigned by the Engineering and the ECCN details the Engineer attached to the INITIAL CLASSIFICATION FORM.[450]

3. Steps under Commerce Department Rules

Under the Commerce Department rules, follow these steps:[451]

a. Determine whether a license is required or you can ship without a license – **No License Required – NLR**

b. If a license is required, search for an exception (a **Self-Validated License Exception**)

c. If there is no exception, **apply for a license**

445. *See* 22 C.F.R. § 120.5 (2004); 15 C.F.R. § 730.3 (2004).
446. 15 C.F.R. § 730.3.
447. *See id.* §§ 732.1(d)-(e) (2004).
448. *See id.* § 732.4(a) (2004).
449. *See id.* § 732.1(d) (2004).
450. *See id.* § 738.2(c) (2004).
451. *See id.* § 732.1; *see also id.* § 732 (Supp. II 1997).

PART XIV.I – SHIPPING WITHOUT A LICENSE UNDER COMMERCE DEPARTMENT RULES – (NLR) – EXPORT COMPLIANCE OFFICER

Under the Commerce Department rules, a Commerce Department license is not required if:

- It is software or technology that is **publicly available,**[452]
- The item is **EAR99,**[453] or
- There are **no controls** on the **country of ultimate destination** for the **reasons** your particular export's ECCN is controlled.[454]

1. NLR Option 1 – Publicly Available Software/Technology

Software or technology can be exported under NLR status if the following three conditions are met:

a. The technology or software is **publicly available.**[455]

b. The technology or software is ***not being used*** in support of **proliferation** activities.[456]

c. The technology or software is ***not*** **encryption code, ECCN 5D002.**[457]

You *cannot use* the NLR status if the individual is on the **DENIED PERSONS LIST** in the **INDIVIDUAL/COUNTRY SCREEN.**[458] You must **apply for a license.** Go to **PART XIV.L.**

a. Publicly Available

Publicly available means the software or technology is available to the public in the form of periodicals, books, electronic, or any other media; readily available at libraries; covered by patents or published patent applications; released at conferences open to the public.[459] *Software* is considered *publicly available* when it is available through general distribution at a cost not exceeding the cost of reproducing and distributing it.[460]

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452. 15 C.F.R. § 734.3(b)(3) (2004).

453. *See* 15 C.F.R. §§ 732.3(d)(5), 732.3(g)-(l), *but see infra* note 466 (describing the potential need for a license for EAR99 items being reexported to Iran).

454. 15 C.F.R. § 738.4(a)(2) (2004).

455. *Id.* § 734.3(b)(3).

456. *Id.* §§ 744.2-744.4 (2004).

457. *Id.* § 774 (Supp. I 1998).

458. *Id.* §§ 736.2(b)(4), 744.1(c) (2004).

459. *Id.* §§ 734.3(b)(3), 734.7(a) (2004).

460. *Id.* § 734.7(b) (2004).

b. Not Used in Proliferation Activities[461]

The Sales and Engineering departments screen for customer proliferation activities. Contact the salesperson on the project for a copy of their **PROLIFERATION RISK CHECKLIST** from the **CUSTOMER FILE**.

In addition, contact the engineer on the project to confirm that there were no indications that the customer is involved in proliferation activities. Document these communications in the **PROJECT LICENSING FILE**.

c. Not ECCN 5D002[462]

The Engineer will have provided an ECCN on the **INITIAL CLASSIFICATION FORM**. If the ECCN is *not* **5D002**, file the **INITIAL CLASSIFICATION FORM** with the **PROJECT LICENSING FILE**.

If your export meets all of these requirements, go to **PART XIV.I.4** for further instructions.

461. *Id.* § 736.2(b)(7).
462. *Id.* § 734.3(b)(3).

2. NLR Option 2 – Item is EAR99

Exports classified as EAR99 can be exported under NLR status if the following six conditions are met:[463]

a. The item is **EAR99**.[464]

b. The **CUSTOMER SCREENS** did not specifically trigger the need for a license.[465]

c. The export is not going to an **embargoed destination**.[466]

d. The export is **not being used** in support of **proliferation** activities.[467]

e. The shipment will **not travel through** or be **temporarily unloaded** in: Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Cambodia, Cuba, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Laos, Latvia, Lithuania, Mongolia, North Korea, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan or Vietnam.[468]

f. The technology or software is **not encryption code, ECCN 5D002**.[469]

You *cannot use* the NLR status if the individual is on the **DENIED PERSONS LIST** in the **INDIVIDUAL/COUNTRY SCREEN**.[470] You must **apply for a license**. Go to **PART XIV.L**.

a. Item is EAR99

The Engineer will have provided an ECCN on the **INITIAL CLASSIFICATION FORM**. If the item classification is **EAR99**, file the **INITIAL CLASSIFICATION FORM** with the **PROJECT LICENSING FILE**.

b. Customer Screens Did NOT Trigger Need for License[471]

The Coordination Team will contact you if any screens indicated the need for a license. All departments will contact you if they have concerns about any customer or transaction that might trigger the need for a license. If the article is to be exported or reexported to Iran, contact Outside Counsel for assistance in determining whether any additional licensing requirements may apply.[472]

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463. *See id.* § 732.3(d)(5).

464. *Id.*; *see also infra* note 466.

465. *See supra* Part XII.A; 15 C.F.R. § 732.3(g)-(h) (2004).

466. 15 C.F.R. § 732.3(i) (2004). In certain circumstances, re-export of an EAR99 item to Iran may *not* be subject to a licensing requirement under the EAR (NLR), but *still* be subject to a licensing requirement under the Office of Foreign Asset Controls [hereinafter "OFAC"]. *Id.* § 746.7. Exports made in violation of OFAC licensing requirements also violate the EAR. *Id.* § 746.7 (prohibiting exports or re-exports to Iran of items subject to both the EAR and OFAC's Iranian Transactions Regulations without OFAC authorization). The author extends special thanks to Mark D. Menefee for pointing out and clarifying this overlap of Commerce and Treasury Department regulations.

467. *Id.* § 732.3(j).

468. *Id.* §§ 732.3(k), 736.2(b)(8)(ii) (2004).

469. *Id.* § 734.3(b)(3).

470. *Id.* §§ 736.2(b)(4), 744.1(c) (2004).

471. *See supra* Part XII.A; 15 C.F.R. § 732.3(g)-(h).

472. *See supra* note 466.

c. Not Going to Embargoed Destination

The Compliance Screeners screen for embargoed destinations. Contact the Compliance Screener on the project for a copy of their **INDIVIDUAL/COUNTRY SCREEN** from the **CUSTOMER FILE**. File a copy of this the **INDIVIDUAL/COUNTRY SCREEN** in the **PROJECT LICENSING FILE**.

d. Not Used in Proliferation Activities

The Sales and Engineering Departments screen for customer proliferation activities. Contact the salesperson on the project for a copy of their **PROLIFERATION RISK CHECKLIST** from the **CUSTOMER FILE**.

e. Export will Not Travel through or Be Unloaded in the Prohibited Countries[473]

Contact Accounting for details on the country of ultimate destination and shipment route of the proposed export. Compare this against the list above. File a copy of this information in the **PROJECT LICENSING FILE**.

f. Not ECCN 5D002[474]

The Engineer will have provided an ECCN on the **INITIAL CLASSIFICATION FORM**. If the ECCN is *not* **5D002**, file the **INITIAL CLASSIFICATION FORM** with the **PROJECT LICENSING FILE**.

If your export meets all of these requirements, go to **PART XIV.I.4** for further instructions.

473. *See supra* Part XIV.H.2.

474. 15 C.F.R. § 734.3(b)(3).

3. NLR Option 3 – No Country Controls for Reason Your ECCN is Controlled

Exports that are not controlled for reasons the Commerce Department controls exports to your country of ultimate destination can be exported under NLR status if the following three conditions are met:

a. The **combination** of your **ECCN** and **Country** of ultimate destination do not require a license.[475]

b. The **CUSTOMER SCREENS** did not specifically trigger the need for a license.[476]

c. The export is not going to an **embargoed destination**.[477]

d. The export is **not being used** in support of **proliferation** activities.[478]

e. The shipment will **not travel through** or be **temporarily unloaded** in: Albania, Armenia, Azerbaijan, Belarus, Bulgaria, Cambodia, Cuba, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Laos, Latvia, Lithuania, Mongolia, North Korea, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan or Vietnam.[479]

a. ECCN and Country Chart Combination

Determine whether your item or technology's ECCN is controlled for the reasons shipment to the country of ultimate destination is controlled.[480]

- Review the ECCN details attached to the **INITIAL CLASSIFICATION FORM** from Engineering. Determine the reason(s) for control.[481]
- Cross reference the ***Country Chart***, at http://www.access.gpo.gov/bis/ear/pdf/738spir.pdf.[482] If the reason your ECCN is controlled is *not* marked with an *X*, continue with the steps to determine if you can make the export under NLR designation.[483]

b. Customer Screens Did NOT Trigger Need for License[484]

The Coordination Team will contact you if any screens indicated the need for a license. All departments will contact you if they have concerns about any customer or transaction that might trigger the need for a license.

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475. *Id.* § 738.4(a) (2004).
476. *See supra* Part VII.A; 15 C.F.R. § 732.3(g)-(h) (2004).
477. 15 C.F.R. § 732.3(i) (2004).
478. *Id.* § 732.3(j).
479. *Id.* §§ 732.3(k); 736.2 (b)(8)(ii) (2004).
480. *Id.* § 738.4(a).
481. *Id.* § 738.2(d)(2)(i) (2004).
482. *Id.* § 738 (Supp. I 2003), Export Administration Regulations Database, Supplement I to Part 738, *available at* http://www.access.gpo.gov/bis/ear/pdf/738spir.pdf (last visited Feb. 12, 2005).
483. 15 C.F.R. § 738.4(a)-(b) (2004).
484. *See supra* Part VII.A; 15 C.F.R. § 732.3(g)-(h).

c. Not Going to Embargoed Destination

The Compliance Screeners screen for embargoed destinations. Contact the Compliance Screener on the project for a copy of their **INDIVIDUAL/COUNTRY SCREEN** from the **CUSTOMER FILE**. File a copy of this the **INDIVIDUAL/COUNTRY SCREEN** in the **PROJECT LICENSING FILE**.

d. Not Used in Proliferation Activities

The Sales and Engineering Departments screen for customer proliferation activities. Contact the salesperson on the project for a copy of their **PROLIFERATION RISK CHECKLIST** from the **CUSTOMER FILE**.

e. Export will Not Travel through or Be Unloaded in the Prohibited Countries[485]

Contact Accounting for details on the country of ultimate destination and shipment route of the proposed export. Compare this against the list above. File a copy of this information in the **PROJECT LICENSING FILE**.

If your export meets all of these requirements, go to **PART XIV.I.4** for further instructions.

485. *See supra* Part XIV.H.3.

4. Exporting Under NLR (No License Required) Status

If the export meets the requirements of the *publicly available exception*, the *EAR99 exception* requirements, or is *not controlled for the reasons the country of its ultimate destination is controlled*, it may be exported without a license.[486] All invoices, bills of lading, and shipping documents must specify "NLR."[487] Inform Accounting they may use the NLR designation in the license fields on all paperwork. If the reason the export has NLR status is because the export is *EAR99*, it should be listed on paperwork as "NLR-EAR99."[488] Document these steps in the **PROJECT LICENSE FILE**.

5. Remember, NO NLR Status for Exports to Denied Persons

Remember, if the potential customer or employee matched on the **DENIED PERSONS LIST** on the **INDIVIDUAL/COUNTRY SCREEN**, you ***cannot*** export to them under NLR status.[489] You must **apply for a license**. Go to **PART XIV.L**.

6. If the Export Does NOT Qualify for NLR Status

If the export does not qualify for NLR status, go to the next step, **FINDING EXCEPTIONS** at **PART XIV.J**.

486. 15 C.F.R. § 734.3(b)(3) (2004) (not subject to the EAR because technology or software is publicly available); *id.* § 732.3(d)(5) (exports classified as EAR99); *id.* § 738.4(a)(2)(ii)(B) (export not controlled with respect to reason for control and destination).

487. 15 C.F.R. § 758.1(g)(3) (2004).

488. *Id.*

489. *Id.* § 736.2(b)(4) (2004).

PART XIV.J – SELF-VALIDATED LICENSE EXCEPTIONS UNDER COMMERCE DEPARTMENT RULES – EXPORT COMPLIANCE OFFICER

1. Self-Validated License Exceptions

As long as your export is not further limited by the Commerce Department Rules, you may be able to export under a **SELF-VALIDATED LICENSE EXCEPTION**. Essentially, this is a license you grant to yourself.[490]

2. NO Self-Validated License Exceptions for Denied Persons

If the individual matched on the **DENIED PERSONS LIST** on the **INDIVIDUAL/COUNTRY SCREEN**, you ***cannot*** use a Self-Validated License Exception.[491] You need to **apply for a license**. Go to **PART XIV.L**.

3. No Express Limitation on Using Self-Validated License Exceptions

There are *two lists* to check for *express limitation* on using Self-Validated License Exceptions. These will require you to reference the ECCN that Engineering assigned the project on the **INITIAL CLASSIFICATION FORM**.

- Section 740 of the Commerce Department rules:[492] http://www.access.gpo.gov/bis/ear/pdf/740.pdf[493] – use the binoculars in the upper toolbar to "jump" to §740.2. If your ECCN is listed in §740.2, contact Jane L. Doe, Outside Counsel, at (303)999-9999 or jldoe@abclaw.com to determine whether you can use a Self-Validated Exception.
- Section 742 of the Commerce Department rules:[494] http://www.access.gpo.gov/bis/ear/pdf/742.pdf[495] – use the binoculars in the upper toolbar to see if your ECCN is listed in §742, contact Jane L. Doe, Outside Counsel, at (303)999-9999 or jldoe@abclaw.com to determine whether you can use a Self-Validated Exception.

If your ECCN is ***not*** on either list, continue to search for a Self-Validated License Exception.

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490. *Id.* § 740.1(a) (2004).

491. *See id.* §§ 736.2(b)(4)(i), 740.2(a)(2).

492. *See id.* § 740 (2004).

493. *Id.* § 740 (Supp. I 2001), Export Administration Regulations Database– License Exceptions, *available at* http://www.access.gpo.gov/bis/ear/pdf/740.pdf (last visited Feb. 12, 2005).

494. 15 C.F.R. § 742 (2004).

495. *Id.*; Export Administration Regulations Database, Part 742 – Control Policy – CCL Based Controls, *available at* http://www.access.gpo.gov/bis/ear/pdf/742.pdf (last visited Feb. 12, 2005).

PART XIV.K – SELF-VALIDATED LICENSE EXCEPTION EXAMPLE – EXPORT COMPLIANCE OFFICER

There are many different Self-Validated License Exceptions.[496] These can be found at http://www.access.gpo.gov/bis/ear/pdf/740.pdf in §§740.3-740.18.[497]

One commonly applicable Self-Validated License Exceptions is described in step-by-step detail below as an example. Contact Jane L. Doe, Outside Counsel, at (303)999-9999 or jldoe@abclaw.com for assistance using a Self-Validated License Exception for the first time or if you determine that a license exception in §740 of the Commerce Department Rules other than those described in this manual may apply.

When reviewing the Self-Validated License Exceptions, remember that the specific exception *must* be listed as an *available exception* under your export's ECCN as determined by Engineering on the INITIAL CLASSIFICATION FORM.[498]

1. Example of Self-Validated License Exception - Limited Value Shipments Self-Validated License Exception (LVS)

LVS Exception requires:[499]

a. That *LVS* be an available License Exception for your ECCN[500]

b. That the *value of the shipment not exceed* the LVS amounts for the *individual shipment* or cause the *annual value* of all shipments of this particular ECCN *to exceed* the LVS annual allowance for the ECCN[501]

c. The *country of ultimate destination* must be on ***Country Group B***[502]

2. Consider Whether the Export Qualifies for the LVS Exception

a. Confirm that LVS is an Available Exception for your ECCN

Refer to the ECCN information attached to the INITIAL CLASSIFICATION FORM from Engineering. Confirm that under *License Exceptions*, ***LVS*** is an available exception.

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496. *See* 15 C.F.R. §§ 740.3-740.18 (2004).

497. *Id.*; Export Administration Regulations Database, Part 740 – License Exceptions, *available at* http://www.access.gpo.gov/bis/ear/pdf/740.pdf (last visited Feb. 12, 2005).

498. 15 C.F.R. § 738.2(d)(2)(ii) (2004).

499. *See id.* § 740.3.

500. *See id.* § 738.2(d)(2)(ii).

501. *Id.* § 740.3(c)-(d).

502. *Id.* § 740.3(b).

b. Determine the LVS Limits for Your ECCN

Refer to the ECCN information attached to the **INITIAL CLASSIFICATION FORM**. The *LVS per shipment* is the amount next to the LVS exception.[503] The *Annual LVS Limit* is 12 times the amount of the *LVS per shipment*.[504]

c. Country of Ultimate Destination is on Country Group B

Go to http://www.access.gpo.gov/bis/ear/pdf/740spir.pdf. and use the binoculars to "jump" to "Country Group B."[505] Determine whether or not your country of ultimate destination is on Country Group B. Print a copy of Country Group B and file in the **PROJECT LICENSE FILE**.

3. If You Determine the Export Qualifies for a Self-Validating License Exception

Contact Jane L. Doe, Outside Counsel, at (303)999-9999 or jldoe@abclaw.com if you would like to confirm the availability of this Self-Validating License Exception. Document that the exception is available in the **PROJECT LICENSE FILE** and notify **Accounting** about how to use this Self-Validating License Exception on export documents.

4. Other Self-Validating License Exceptions to Consider

As noted above, there are many Self-Validating License Exceptions available. All of the exceptions listed in § 740 of the Commerce Department Rules should be considered. A few exceptions may be of particular relevance for XYZ's business:

- Technology and Software Under Restriction (TSR) – § 740.6[506]
- Computers (CTP) – § 740.7[507]
- Technology and Software Unrestricted (TSU) – § 740.13[508]
- Encryption Commodities and Software (ENC) – § 740.17[509]

Contact Jane L. Doe, Outside Counsel, at (303)999-9999 or jldoe@abclaw.com for questions about any of these Self-Validating License Exceptions and assistance in walking through the specific requirements of each exception.

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503. *See id.* § 774 (Supp. I 1998).

504. *Id.* § 740.3(d)(2).

505. *Id.* § 740 (Supp. I 2001), Export Administration Regulations Database, *available at* http://www.access.gpo.gov/bis/ear/pdf/740spir.pdf (last visited Feb. 12, 2005).

506. 15 C.F.R. § 740.6 (Supp. I 2001), Export Administration Regulations Database, *available at* http://www.access.gpo.gov/bis/ear/pdf/740spir.pdf (last visited Feb. 12, 2005).

507. *Id.* § 740.7 (Supp. I 2001), Export Administration Regulations Database, *available at* http://www.access.gpo.gov/bis/ear/pdf/740spir.pdf (last visited Feb. 12, 2005).

508. *Id.* § 740.13 (Supp. I 2001), Export Administration Regulations Database, *available at* http://www.access.gpo.gov/bis/ear/pdf/740spir.pdf (last visited Feb. 12, 2005).

509. *Id.* § 740.17 (Supp. I 2001), Export Administration Regulations Database, *available at* http://www.access.gpo.gov/bis/ear/pdf/740spir.pdf (last visited Feb. 12, 2005).

PART XIV.L – APPLYING FOR A COMMERCE DEPARTMENT LICENSE – EXPORT COMPLIANCE OFFICER

Should you determine that your export does not qualify for NLR status or a Self-Validating License Exception, you will need to apply for an Individual Validated License.[510] You can find information on Commerce Department Licenses at http://www.bxa.doc.gov/Licensing/facts1.htm.[511]

The Commerce Department has a user-friendly on-line license processing system called "SNAP."[512] Details are available at http://www.bxa.doc.gov/Licensing/facts5.htm.[513] Contact Jane L. Doe, Outside Counsel, at (303)999-9999 or jldoe@abclaw.com for assistance on how to participate in SNAP.

Once you receive an approved license, notify Accounting so they may complete the shipping paperwork, and document this step in the **PROJECT LICENSING FILE**.

510. 15 C.F.R. §§ 748.4, 748.6 (2004).

511. *Id.*, Bureau of Industry and Security, U.S. Department of Commerce, *Licensing Facts*, *available at* http://www.bxa.doc.gov/Licensing/facts1.htm (last visited Feb. 12, 2005).

512. *See* 15 C.F.R. § 748.7(a) (2004).

513. *Id.*: Bureau of Industry and Security, U.S. Department of Commerce, *Licensing Facts*, *available at* http://www.bxa.doc.gov/Licensing/facts5.htm (last visited Feb. 12, 2005).

PART XIV.M – EXPORT COMPLIANCE FORMS – EXPORT COMPLIANCE OFFICER

PROJECT LICENSING FORM –EXPORT COMPLIANCE OFFICER

NAME OF CUSTOMER_____

XYZ JOB NUMBER_____

Agency Controlling Export: State _____ Commerce_____

Compliance Officer Name/Initial _____/_____

Date File Opened _____

Date License Obtained (or exception determined, if applicable) _____

Date Accounting or Applicable Department Notified With Licensing Details on How to Proceed_____

State Department Licenses

Munitions List Category Number[514] _____

Fundamental Research Exception?[515] YES____ NO_____

Technical Assistance Agreement Sought/Received?[516] YES_____ NO_____

Commodity Jurisdiction Request Information:[517]

Predominantly Civil Application? YES_____ NO_____

Performance Equivalent in Civil Application (form, fit, and function)?

YES_____ NO_____

Date Commodity Jurisdiction Request Completed/Submitted_____

File Copy of

CJR Application (date) _____

Results from State Department in Project Licensing File (date) _____

514. *See supra* Part XIV.G.
515. *See supra* Part XIV.F.3.
516. *See supra* Part XIV.F.4.
517. *See supra* Part XIV.G.

Commerce Department Licenses

ECCN:[518] _____

Individual on Denied Parties List?[519] YES____ NO_____ If YES, apply for license

Eligible to ship without a license/NLR?[520] YES____ NO_____

If YES, list reason_____

Self-Validating License Exception Applies?[521] YES____ NO_____

If YES, list applicable exception_____

License Required? YES____ NO_____

If YES, Date applied_____, Date received_____

518. *See supra* Part XIV.H.2.
519. *See supra* Part XIV.I.5.
520. *See supra* Part XIV.I4.
521. *See supra* Part XIV.J.