

# Conducting Operations Overseas: What Every Nonprofit Should Know

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## Road Map: Top Ten Steps to Successful and Compliant International Operations

- Identify Goals in the Foreign Market: What's next?
- Phased Approach: Considerations in entering foreign market
- Foreign Jurisdictions: What locale works for activities?
- Form of Entity: What type of operation best meets your goals?
- How best to protect your Intellectual Property
- Compliance: Anti-Corruption Laws
- Other Important Considerations:
  - Tax and Accounting Issues
  - Contracts: Essential provisions for protecting your interests
  - Employment Issues
  - Compliance: US Export Controls and Economic Sanctions

## I. Goals in the Foreign Market

- Questions to ask?
  - **What is your goal in the foreign jurisdiction?** Identifying what you'd like to accomplish is the first priority. It will dictate almost all of the decisions that follow.
    - Examples: Trade Fair; Educational event; Networking; Formalize ongoing work; Partner with a similar organization to increase membership; Gain access to market
  - **Long term/Short term?** Host of a one-time event or establish a presence
  - **Partner or independent?**
  - **Activities?** Education; Sales; Fairs; Membership dues; Distribution of materials
- Answers will direct considerations as to type of organization or entity to establish abroad, if any.

## II. Phased Approach

- **Recommend:** Dip your toe in the water first!
- **Specific/Isolated Event v. Ongoing Presence**
  - If your organization does not yet have an international presence:
    - Host a one-time conference
    - Use of Association Management Company or “Trade Fair Organizer”
  - Affiliation with a similarly-situated association (i.e., partner with a local association entity)
  - Joint Venture
  - Local office of a US nonprofit
  - Establish an “In-Country Branch” (or Chapter)
  - Establish a nonprofit entity under local law

## III. Geography: What Location Makes the Most Sense for Your Nonprofit?

- **General Factors to Consider in Choosing a Locale:**
  - One-time event or establishing a presence? *Always the threshold question.*
  - Any onerous “registration” requirements?
  - Is it difficult, time-consuming, or expensive to set up a tax-exempt entity?
  - Repatriation restrictions?
  - Any US tax treaty with that country?
  - Any US export controls or economic sanctions prohibiting transactions by US persons in the country or with “nationals” of the country?
  - Is country high on Transparency International’s “Corruption Index”?
  - Any US National Export Initiatives? (e.g., green technology, energy projects, etc.)

## III. Geography: How Your Location May Impact Local (Foreign) Business Operations

- **Business Considerations for Successful Operations:**
  - Does country have strict “**registration**” requirements for establishing an entity if certain threshold of activity?
    - “Charity” – Limited operations? Is it different than a nonprofit? Is nonprofit or charitable status required to accomplish goals in country?
  - **Fundraising**: Restrictions on who can fundraise? Types of entities, Individuals? Amount of money?
  - **Repatriation**: Restrictions on whether money can be sent to US Headquarters? On how money can be used in-country?
  - **Members/Volunteers**: Are they “employees” under local law? Can work be outsourced? How are they treated for tax purposes?
    - What level of in-country work will be accomplished? Required?

## IV. Form of Entity: Organizational Considerations

### Considerations:

Least Control    Least Risk

- Host Conference without Contracting with Local Entity
- Association Management Companies:
  - Careful agreement review: Know what and with whom you are contracting
  - Revenue-producing event?
  - Logistics
  - Specific registration requirements? (e.g., bank accounts)
- Affiliation with Similarly-Situated Entity
  - Due diligence re: organization/association
  - Agreement negotiations
  - Under local laws, are you “doing business”?
  - Use of IP

1

2

3

## Considerations (cont'd.):

### ■ Joint Venture

- Due diligence re: organization/association
- Agreement negotiations
- Under local laws, are you “doing business”?
- Use of IP
- Compliance with FCPA and other national anti-bribery legislation

4

### ■ In-Country Branch v. Independently Incorporated Affiliate

- “Doing Business” under local laws
- Local employment and tax considerations
- Variation in nonprofit treatment under local law
- “Tax Exempt” registration requirements
- Foreign recordation of IP recommended

5

**Greatest  
Control**

**Greatest  
Risk**

## V. Intellectual Property and “Confidential Information”

- **Protecting your Intellectual Property:**
  - IP includes: Logos, Trademarks, Patents
  - Depending on target country, IP rights and protection may be a high-risk issue
  - Is target country signatory to any International IP Conventions?
- **Is your IP Registered and Recorded in the US?**
  - Consider registration of IP (or “international” version of IP) under local laws in target country
  - Differentiating between IP and “Confidential Information,” i.e., proprietary business info (also requires contractual protections)

## V. Intellectual Property and Protection of Information

- **Best Practices for Intellectual Property Protection**
  - Assess your IP and “get house in order” before venturing overseas
  - Determine whether target nation(s) are “high risk”
  - Determine whether target nation(s) are “first to file” or “common law” countries (first to use) for IP/trademark (IP protections are dictated by local laws)
  - Implement governance policies
  - Vet all contract provisions with service providers and potential partners abroad with respect to IP protection, *especially* if governing law is not U.S. law
  - Consult with IP/trademark counsel *before* engaging in activities or setting up entity abroad

## V. Intellectual Property: Trademark Protection

### ■ Best Practices for Trademark Protection

*\*\*U.S. trademark registration is ineffective in foreign countries,  
thus must affirmatively take steps to protect your brand.*

- Retain express contractual control over use of marks by parties, like “Chapters”
- Exercise actual control over such use
- Do not rely on the independent quality control measures of such parties
- Create a version of your logo/mark that includes the phrase “Foreign Section” or “Chapter”
- Put in place a formal Trademark Policy that licenses use of the logo to foreign chapters and automatically binds them to specific controls on use
- Require that any applications to register Trademarks are filed by, and in the name of, the US headquarters, not the foreign chapter, branch, or section
- Depending on jurisdiction, local recordation may be appropriate

## VI. US and Foreign Anti-Corruption Legislation

- **US Foreign Corrupt Practices Act (“FCPA”):** US law enacted by Congress in 1977 to halt rampant bribery of foreign government officials
- **Anti-Bribery Provisions:**
  - Prohibits paying of, offering, or promising to pay (authorizing to pay or offering) money or “anything of value,”
  - With corrupt intent, directly or indirectly,
  - To a “foreign government official” or political party official
  - For the purpose of (i) influencing an official act or decision; (ii) causing the official to fail to perform his lawful duty; or (iii) obtaining or retaining business or to secure any improper advantage.
- Certain *limited* exceptions and affirmative defenses exist

## VI. US and Foreign Anti-Corruption Legislation (cont'd.)

- **Applicability of the FCPA:**
  - Current “red flag” countries
  - Nonprofits **not** exempt
  - Who is a “foreign official”?
  - “Agency” relationship with partners abroad → US-based nonprofit or association can be held liable for the acts of partners abroad under FCPA
  - Provision of “samples” or other incentives
- **Other national and international anti-bribery laws**
  - Local laws
  - UK Bribery Act
  - OECD

## VII. Contract Considerations

- Essential provisions for protecting your interests:
  - Careful review of any agreement or contract between your US-based nonprofit and a foreign entity is key
- A few “sticky” provisions:
  - Dispute resolution: Forum, place and type (e.g., mediation, arbitration, litigation)
  - Governing law: Excluding a “*conflicts of law provision*”
  - Language
  - Agency v. “Independent Contractor”
  - IP: Firm IP and copyright language
  - Termination provisions (always *in writing*)
  - *Always a country- and fact-specific analysis*

## VIII. Tax and Accounting Issues

### ■ Issues Regarding Taxation

- International tax law questions
  - Often a driver in the analysis
- Applicable tax treaty with the United States?
- IRS rules that apply to US tax-exempt nonprofits will apply similarly to nonprofit's international activities
- Acceptable audit standards for books and records
- Some countries impose restrictions on outflows of currency (e.g., some East Asian countries)

## VIII. Tax: Understanding Financial Reporting Requirements

- Non-US operations may also require the filing of either or both of the following two Forms, depending on structure
  - Treasury Dept. Form 926 is filed to report the formation of the foreign subsidiary
  - Treasury Dept. Form 5471 is filed to report the annual operations of a foreign subsidiary
- **Foreign Financial Accounts**
  - Treasury Dept. Form 90-22.1
    - Filed by June 30 for prior year
    - Not filed with your non-profit income tax return
    - Filed if aggregate foreign financial accounts exceed \$10,000
    - Includes foreign bank accounts, securities accounts, and mutual funds (reporting requirements for investment in foreign hedge funds or private equity funds unclear)
    - IRS initially deferred such reporting

## IX. Insurance and In-Country Employment Considerations

- **Insurance Issues:**
  - What is the scope of your association’s coverage?
  - Per event? Differentiate among events
- **In-Country Employment:**
  - Extent to which “employment” considerations come into play depends on type of entity or operations established
  - Use of Association Management Company or in-country partnership can often mean no need for employment of persons by US-based nonprofit in overseas operations
  - **What are the local laws?**
    - Acting in compliance with local laws is key.
  - “Employment at Will”
  - Background and due diligence

## X. Other US Legal Considerations

### ■ US Export Controls and Economic Sanctions

- Controls on “exports” or releases of US-origin goods, technology and services to certain destinations, entities and end users
- Are you exporting computers, technology or other goods in support of your overseas venture? (Materials for a trade show; hand-carry items can be subject to controls)

## X. Other US Legal Considerations

### ■ US Economic Sanctions (“OFAC”)

- US sanctions are constantly changing and may affect ability to do business in certain countries and with nationals or entities based in those countries
  - Iran; Syria; Cuba; Sudan; N. Korea
  - Other “targeted” sanctions
- Comprehensive sanctions prohibit most transactions with entities, persons, or governmental entities in those countries
- “Targeted” sanctions: Specially Designated Persons
- “Informational Materials” exemption
- Transactional prohibitions

## Questions?

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