



# 2020: Navigating International Trade Trends and Their Impact on Your Global Non-Profit Operations

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# Road Map: It's a Whole New World

- **2020 Global Trends:** Understanding the potential impact on your operations
- **Evolving Operations:** Marrying your goals with the right form of overseas operation and expansion
- **Foreign Jurisdictions:** Identifying and understanding challenges and restrictions including on money flow
- **Corruption Risks:** The practical challenges and high price of anti-corruption
- **Other U.S. Law Considerations:** Restrictions on certain cross-border transactions of goods, services and technology
- **Enhancing Compliance:** Essential considerations and provisions for protecting your interests
- **Real Life Examples:** When fact is crazier than fiction!

# A Recent Real World Challenge: Coronavirus

- Coronavirus (Covid-19) and the Potential Impact on Your Operations
- World Health Organization declared it a public health emergency of international concern, and U.S. Dept. of Homeland Security has imposed certain routing and screening requirements; so what is the potential commercial impact?
  - Practical planning considerations – timing?
  - Contractual liability – Will any Insurance cover this?
  - Force Majeure – How defined within your agreements and applicable law?
  - Performance by Service Providers and Contractors
  - What are the Attendance Considerations? Do you forge on or cancel and regroup?
- As with any novel legal issue, interpretive case law has not yet developed.

# So, Are You Currently Operating Overseas or Just Thinking About It?

- Level set: First identify your entity's overseas activities and goals.
  - Long-term/Short-term?
  - Partner required or independent presence?
  - A local bank account: Required or advisable?
  - What type of activities are contemplated?
    - Education; Sales; Events; Membership Dues; Distribution of Materials; Certification services
- Establish a clear set of objectives, but be flexible, as activities will typically evolve over time.

# Evolving Operations and Organizational Considerations

- Specific/Isolated Event versus Ongoing Presence
  - Host a one-time conference
  - Use of Association Management Company or “Trade Fair Organizer”
  - Affiliation with a similarly-situated association (i.e., a local entity)
  - Joint Venture
  - Local office of a U.S. nonprofit
  - Establish an “In-country Branch”
  - Establish a nonprofit entity under local law
- Generally, the more established the operations, the greater the potential restrictions.
- Key: How to transfer \$\$ to support the activities?

# Employment and Tax Considerations

## Arranging for support personnel for overseas operations

- Avoidance of inadvertently creating a permanent establishment would thereby subject the entity to local registration, tax or liability requirements.
- Consideration of a “shared services” model
- Is a local representative required?

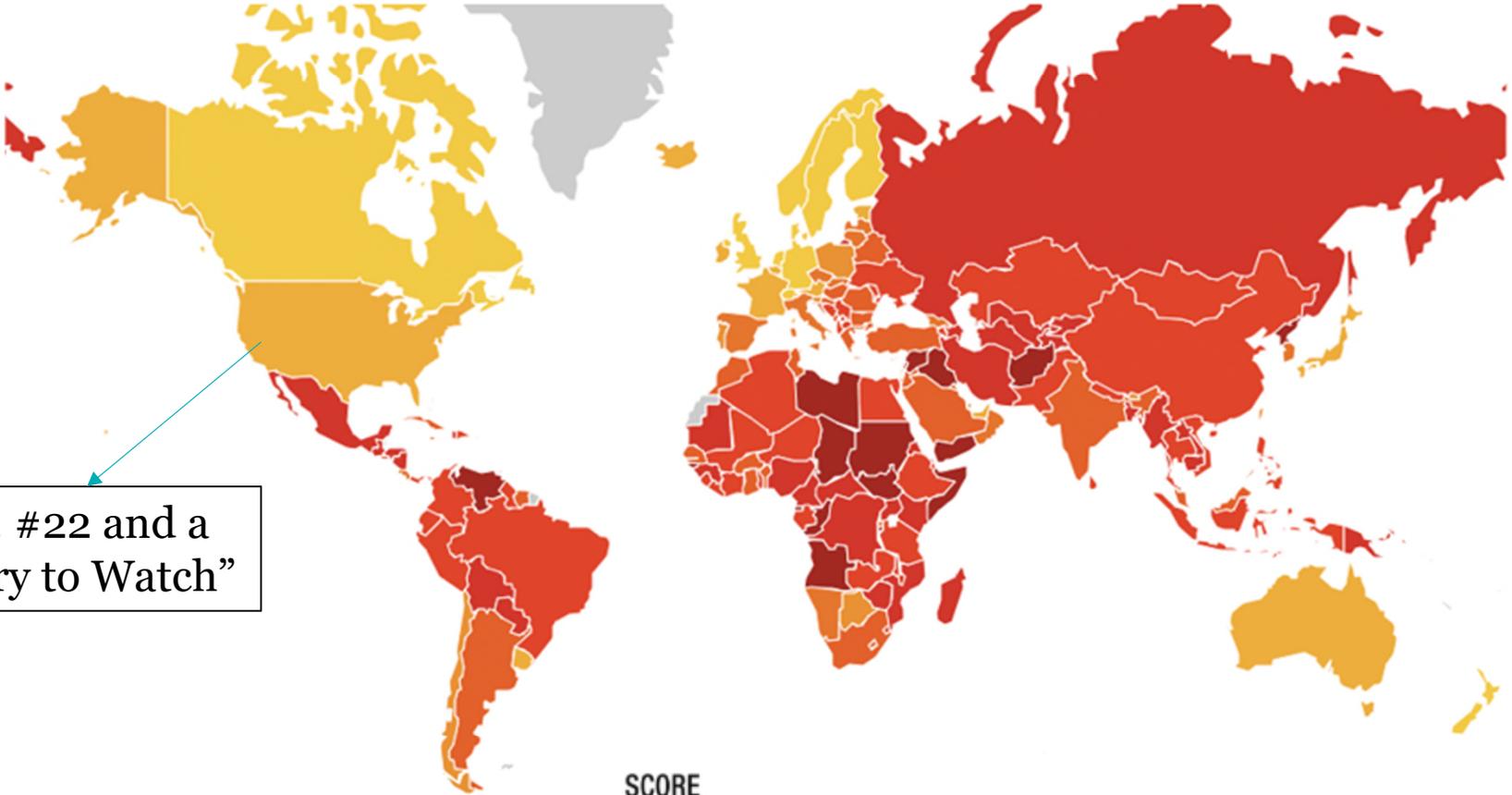
## What about Secondment?

- Issue: Foreign entity wants to employ a U.S. taxpayer, who would like to retain certain U.S. benefits (retirement plan, medical benefits, etc.).
- Solution: U.S. taxpayer is employed by U.S. entity, which enters into secondment arrangement with foreign entity for a defined period of time.
- Tax treatment
  - Employee is subject to foreign and local individual taxes
  - Foreign tax credit regime
  - Potential tax equalization payment for non-creditable foreign taxes
- Subject to both foreign country and U.S. employment laws

# Additional Tax Considerations

- Legal and regulatory restrictions on the movement of cash
- Potential tax and foreign exchange issues
  - Is a non-profit structure viable and what are the requirements?
  - Will there be any impact on the U.S. entity's non-profit status?
  - NB: When governmental authorization is needed, it always takes longer than anticipated!

# The “Heat Map” (aka in the World of Corruption, Not all Countries are Created Equally)



U.S.A. #22 and a “Country to Watch”

Source: <http://www.transparency.org/cpi2018>

# The Consistent Threat of Corruption and U.S. Foreign Corrupt Practices Act (FCPA)

- U.S. law enacted by Congress in 1977 to address rampant bribery of foreign government officials
  - Now, a global trend!
- Anti-Bribery Provisions (also SEC Recordkeeping Provisions):
  - Prohibits the paying of, offering, promising to pay (or 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, but are not universally recognized.

# Understanding the FCPA (aka the “Follow the Money” Act)

- **Applicability of the FCPA:**
  - Current “red flag” countries
  - Nonprofits are *not* exempt
  - Who is a “foreign government official?”
  - “Agency” relationship with partners abroad → U.S.-based nonprofit can be held liable for the acts of partners abroad under FCPA
  - Watch out for the provision of “samples” or other incentives
- **Other National and International Anti-Bribery Laws**
  - Local laws (China, Brazil, Germany, Italy, etc.)
  - UK Bribery Act (includes commercial bribery)
  - OECD (International recognition and implementation)

# Other U.S. Law Considerations

- **Accurate Recording and Reporting:**
  - Accurate books and records a must — No “slush” funds
  - Strict reporting requirements for multiple government agencies
- **Anti-Money Laundering (AML) Concerns:**
  - U.S. Department of Treasury reporting requirements
  - “Know Your Customer” considerations
- **Anti-Boycott Reporting: (e.g. “Don’t use Bank X”):**
  - U.S. Department of Commerce (even if boycott not followed)
  - IRS reporting requirements

## Other U.S. Law Considerations cont'd.

- Reporting to U.S. Customs and Border Protection:
  - How are your overseas programs funded?
  - Paying or receiving payment for services?
  - Returning to the U.S. with more than \$10,000 in cash or equivalent for convenience?
    - Members carrying cash?
    - Don't "evade" by splitting payments.
    - Report upon arrival to avoid False Statement claim.

# Even More U.S. Law Considerations

- **U.S. Economic Sanctions (OFAC)**
  - U.S. 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 (e.g., Russia)
  - Comprehensive sanctions prohibit most transactions with entities, persons or governmental entities in those countries
  - “Targeted” Sanctions: New approach; SDN listings (incl. Banks)
  - “Informational Materials” exemption
  - Transactional prohibitions, including payments and remittances
- **U.S. Export Controls and Economic Sanctions**
  - Controls on “exports” or releases of U.S.-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; Fair payment?)

# Foreign Law Considerations

- **Know the Restrictions!**
  - Any Foreign Controls on Currency Flow?
    - License required?
    - Prohibitions on Hard Currency Movement?
    - Limitations on Remittances or Banking?
    - Practical challenges in collection of dues/revenue or repatriation of funds to U.S. nonprofit?
- **Understand Foreign Investment Concerns**
  - Any Restrictions by Local Law on Foreign Investment in that Country?
  - Consistent with National Public Policy Priorities?
  - Target of any Nationalistic Policy Controls?
  - New Era of Protectionism and its Possible Impact Abroad.

# Your Compliance Considerations

- **Essential provisions for protecting your interests:**
  - Regulatory versus Contractual Considerations
    - Compliance with U.S. *and* Local Laws/Regulations
    - Careful review of any agreement between your U.S.-based nonprofit and any foreign person/entity is key
- **A few “sticky” provisions for Agreements:**
  - Dispute Resolution: Forum, Place, and Type (e.g., Mediation, Arbitration, Litigation)
  - Compliance with Laws (Anti-corruption, Export controls/sanctions, Anti-boycott, AML, etc.)
  - Governing Law: *Excluding* a “conflicts of law provision”
  - Agency versus “Independent Contractor”
  - IP: Firm IP, TM and Copyright language
  - Termination Provisions (always *in writing*)
  - NB: Always a country- and fact-specific analysis
  - Local counsel advice and Privilege considerations

# Examples: You Can't Make This Stuff Up!

- **Requests to “Over-Invoice” or Double Invoice**
  - Requests for more than materials or services provided
  - Double invoice at different levels
    - Evasion of local tax obligations
    - Avoid restrictions on export of currency
    - Aiding and abetting the actions!
- **Requests to Pay Outside of Foreign Country**
  - Requests to pay into 3rd country bank account
  - Payments to other person or entity (including a “middleman”)
    - Risks: See above!
- **Avoid the “Cash Mule”: Warnings to your team**
  - Follow the Money: Educate, Train and Audit!
  - Get Guidance from Counsel:
    - To disclose or Not to Disclose?

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**Questions?**

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# UBIT: The Tax Consequences of Revenue Generating Activities for Your Nonprofit

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