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Setting Up Shop in Africa: A Growing Challenge for U.S. Research Institutions

By WILLIAM F. FERREIRA

Research institutions in the United States increasingly are becoming involved in sponsored programs that require them to establish significant operations in one or more countries in Africa. One example of such a program is the President's Emergency Plan for AIDS Relief (PEPFAR), which sponsors HIV/AIDS treatment programs in 15 African countries, and in over 100 other countries outside the United States. Over 40 U.S. institutions currently are involved in the PEPFAR program, and although for each of them the greatest and most important challenge is achieving the program's medical and scientific aims, each at the outset also must solve another very practical problem—how to set up shop in Africa.

Institutions whose experience is primarily limited to North America or Western Europe may underestimate the degree of difficulty they will face, and the delays they will encounter, in establishing local operations in Africa. Although none of the necessary steps in the process presents a conceptually difficult problem, the combination of formality and inefficiency that characterizes most government functions in African countries makes the process lengthy and sometimes frustrating. Because program sponsors often are very eager for institutions to begin operations as soon as possible after funding is awarded, and because in many host countries it is illegal to begin operations until certain formalities have been completed, it is important for participating institutions to find the fastest and surest way possible through

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the legal thickets of registering and otherwise qualifying in the host countries.

Each African country has its own laws, regulations, paperwork, and various hoops to jump through before it will allow program activities to begin. An approach that works in one country may be entirely inadequate in another, and legal solutions that make sense from a U.S. law perspective may be totally unworkable in Africa. To make matters worse, officials in Africa can be infuriatingly bureaucratic, inflexible, and slow.

The following is a summary of issues and requirements typically encountered by institutions setting up operations in African countries. The list is limited to general business issues, as opposed to special issues that may arise because of the nature of the program activities. For example, in clinical research programs, compliance with ethical and legal requirements applicable to treatment of human subjects is a particular challenge, as is the question of compensating trial participants for study-related illness or injury. These issues are worthy of coverage in their own lengthy article, and are not addressed here.

- **Registration:** The principal way for an institution to begin nonprofit activities is to “register” with the country. But registration means different things in different countries. In some countries, such as Kenya, the institution could be subject to civil or criminal penalties for operating a major charitable activity without registering as an international non-governmental organization. In other countries the institution must register as a foreign “for-profit” company and only later convince the local government that it is exclusively charitable in nature. And in still other countries the entire process of registration is bypassed when the relevant ministry of health will agree to a memorandum of understanding (MOU) with the foreign entity. From an administrative perspective, keeping track of an institution's ob-

ligations under each agreement can be daunting. Moreover, some countries are notoriously slow in approving a registration, and it is not uncommon for several months or even a year to pass before registration has been fully completed. The impediments to registration are rarely difficult individually, but they always are numerous. Important issues that may have to be addressed include, for example: Does the institution have at least one citizen and resident of the foreign nation playing a leadership role on the project? Can the institution produce an approval letter from its board of trustees? Has the institution translated documents into the local language? Have the necessary authentications been obtained from the host country's U.S. Embassy and the U.S. State Department? These are just a few of the many things on most registration checklists.

- **Memorandum of Understanding:** Almost every country in Africa requires foreign institutions to sign an MOU with the ministry of health. MOUs basically are contracts designed to formalize the institution's scope of work and put each party on notice of certain rights and obligations within the country. Most importantly, MOUs are the vehicle by which institutions obtain certain privileges and immunities within the country—such as liability protections, import rights, and traveling permits. But MOUs come in different shapes and sizes depending on the country. In some locations they are the primary operational document; in others, they are largely symbolic. A practical and effective MOU typically is the result of a “back and forth” negotiation between the institution and the ministry of health, sometimes with the help of local lawyers.
- **Tax Exemptions:** Every country in Africa applies a value added tax (VAT) to goods and supplies imported into the country and to purchases made within the country, and not-for-profit institutions are not automatically exempt. The VAT rate can be as high 25 percent of the value of the purchases—a significant drain on an institution's funding, and one that some institutions fail to budget for. To make matters worse, U.S. federal sponsors generally do not consider tax payments to be reimbursable under their awards, although the federal grant cost principles make it clear that such taxes are reimbursable if no exemption from them can be obtained. In countries where VAT exemptions are available, an application for exemption may require months of negotiations. Even when the exemption is granted, it is usually effected only through after-the-fact applications for reimbursement—a cumbersome and time-consuming process in itself.
- **Bank Accounts:** No matter how prestigious an institution may be, it is almost impossible for one of its representatives to walk into a bank in Africa and open an account in its own name. In Ethiopia, for example, a foreign entity must produce a fairly daunting package of corporate documents before the bank manager will entertain the idea of opening an account. This package may include the entity's formation documents (e.g., charters or incorporations), by-laws, board of trustee resolution authorizing the account, and specific agents to control the account.
- **Assets:** Once an institution finally has equipment and supplies inside the country, there will be a question of who takes title to those assets when the institution ceases operations in the country. Many African countries require such materials to be transferred to “other organizations with similar objectives within the country.” This requirement sometimes conflicts with the terms of federal spon-

sored agreements, which typically require that government-funded equipment that is no longer needed must be disposed of at the direction of the sponsoring agency.

- **Work/Immigration Permits:** Almost every institution will assign U.S. citizens (U.S. expatriates) to travel abroad and serve as project leaders or employees in the African country. Sometimes these “expats” cannot even begin to draw a salary for their work in the country before obtaining permission from the country to work there. Lodging an application for a work permit sometimes cannot occur until the registration process is complete, and even then, obtaining a work permit can be difficult and time-consuming.
- **Defense Base Act (DBA):** The DBA may require institutions to purchase workers' compensation protection for their employees working in Africa. 42 U.S.C. § 1651-54. Originally, Congress enacted the DBA in 1941 to provide workers' compensation protection to employees of government contractors working at U.S. defense bases overseas. Over time, the DBA has been extended to cover civilians (including foreign nationals—i.e., local hires) working on overseas construction projects for the U.S. government or its allies, and to employees fulfilling service contracts tied to such projects. By its terms the DBA applies to “contracts” for “public works,” which includes “construction or repair.” Several sponsored projects in Africa include funds for construction and repair; however, there is an open question as to whether a cooperative agreement or certain types of grants would be considered a “contract” for these purposes.
- **Liability and Form of Entity:** Every institution involved in a major research or treatment program affecting large numbers of people must in some way come to grips with the problem of liability to third parties for program-related illness or injury. It often will be advisable for liability and other reasons to operate through a corporation separate from the institution itself. The form of entity that the institution chooses may have an effect on its ability to operate in an African country. For example, a limited liability corporation (LLC) may have difficulty registering in some African countries because most LLCs are for-profit and as such are not eligible for registration as non-governmental entities (NGOs).
- **Engaging Local Counsel.** It is essential that effective local counsel be engaged, and competent English-speaking lawyers are available throughout the region. Local counsel, however, generally function as on-the-ground foot soldiers who are experienced in implementing what clients specifically ask them to do. They are less helpful in developing an overall strategy and form of operation, identifying legal issues, assembling submissions to local agencies and ministries, or drafting important documents such as memoranda of understanding.

As the issues identified above suggest, establishing and operating a major program in Africa can present a number of challenges to U.S. institutions. The challenge in addressing these issues is not the particular difficulty of any one of them, but the difficulty of learning what the rules are for all of them and threading the necessary paths through the local regulatory process. Several pieces of the puzzle must fit together before work can begin, and orchestrating the necessary actions efficiently, so that they come together in a reasonable and timely manner, is much more difficult than one might reasonably expect.