GOING GLOBAL
LEGAL TRENDS IN UNIVERSITY INTERNATIONAL PROGRAMS

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I. INTRODUCTION

Higher education institutions are global enterprises. Like most industries in the 21st century, the higher education sector views "internationalization" as a fundamental business strategy. At one time, university "internationalization" meant successful study abroad programs, and to have such programs was something of a luxury. Today, study abroad is one facet of the university's global aspiration, which now includes foreign campuses; international degree programs; overseas scientific and medical research; cross-border consulting; student internships and work programs; regional alumni and fundraising centers; international student recruitment; partnerships with multinational corporations; service and experiential learning opportunities; distance education, and several variations of each of these, among other initiatives. While many of these programs often used to be limited to the so-called "safety" of Western Europe, today these programs span the earth, attracted to new locations by many different motivators.

As the global university evolves, one thing is clear: international initiatives take no conventional shape. The diversity and variety of transnational initiatives give rise to numerous and complex legal issues. Long experience notwithstanding, universities, like any global enterprise, are prone to stumble, often on the same U.S. and foreign legal issues that multinational conglomerates find challenging. Nevertheless, universities are distinct, having interests and fiduciaries unlike any other organization, and demanding solutions that account for the institution's unique mission.

This paper provides examples of legal trends that university counsel increasingly encounter in regard to international programs. The observations expressed are based on the author's experience working on many international initiatives for higher education institutions. The trends identified are broad, in the sense that assorted issues are discussed within each trend. However, the trends are just that: trends. They do not exhaust, even remotely, the legal particulars and peculiarities that arise in international transactions. A topic as vast as legal trends is not susceptible to comprehensive discussion, and several important subjects are beyond the scope of this paper.[1]

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[1] Issues beyond the scope of this paper include contract drafting techniques, accreditation standards, scientific and medical regulation regimes, bilateral treaties that cover tax and labor, human rights conventions, environmental agreements, customs regulations, and many other issues. The author notes that several issues presented in this paper apply to study abroad programs; however, a companion presentation at this NACUA workshop focuses squarely on legal issues pertinent to study abroad.

By its nature, this paper comes into contact with myriad subjects, but provides only "nutshell" treatment of each. Every subject identified here warrants further consideration in the context of particular programs. The author designed the paper to serve as a reminder of principles and concepts that prompt day-to-day professional judgment in transnational ventures.

II. LEGAL TRENDS IN INTERNATIONAL PROGRAMMING

Foreign Legal Presence and Corporate Structure

The past decade has seen a noticeable shift in institutional attitudes toward foreign "legal presence"—licenses, registrations, or other permissions to conduct programs in a host country—and corporate operating models to achieve the same. In years past, many universities operated projects overseas without an official legal presence in the host country. For example, it was not uncommon to offer educational programs abroad, even degree programs, employ foreign nationals abroad, post U.S. individuals to foreign positions, conduct scientific research, collect revenue, and pursue various other activities in foreign countries, without application to foreign regulatory authorities for official legal presence or other permission to conduct these activities. This approach took hold for various reasons.

However, to operate without legal presence is not a viable strategy in modern times. Foreign governments, and particularly developing countries, have become more sophisticated; they are no longer receptive to U.S. organizations that enter, "set up shop", or carry on any level of work without some degree of legal presence. Institutional officials gradually have become sensitized to this, and to the legal, practical, business, reputational, and other implications of the omission to obtain proper legal presence in a host country.

Consider this scenario, modified to protect confidentiality: Recently a U.S. institution encountered a dispute in a foreign country with an employee based there. The dispute focused on terms and conditions of employment, and under normal circumstances, would have been resolved quickly. However, the disgruntled employee developed substantial leverage over the institution when the employee threatened to reveal to host country authorities that the institution omitted to register a formal legal presence, or obtain any official permission to operate in the host country, despite long educational programs in the country. Such scenarios have prompted many institutions to address diligently legal presence abroad.

A. Foreign Registrations, Licenses, or other Permissions to Conduct Activity

Requirements for registration, licenses, permissions, and other forms of official legal presence abroad, often are triggered when the organization crosses the "doing business threshold" in the host country. Though somewhat different for every country, the following items, among others, are examples of common triggers:

- Providing direct educational or consulting services in the host country, regardless of whether a host country institution or "partner" is involved in the program.
- Opening an institutional bank account in the host country.
- Employing local nationals or third country nationals in the foreign country, or posting U.S. employees to positions in the country.
- Enrolling subjects into a clinical trial, or conducting scientific or medical research programs.

- Executing a lease for host country office space, or owning land and other real property.
- Dispensing medications or other controlled substances.
- Purchasing equipment or motor vehicles in the host country, titling these assets in the name of the institution, or buying insurance for these assets in the host country.

A foreign legal presence often is achieved through a formal registration process in the host country. However, registration is not always a formal process or even a process at all. In some countries, it is legally permissible to operate by virtue of a single collaboration or affiliation agreement with a local entity, or a memorandum of understanding with the appropriate government ministry. Some countries permit research institutions to "piggyback" on research sponsors' and other entities' legal presence. In still other countries, the institution could be subject to civil or criminal penalties for operation of a program without formal registration and licensure of a specific type of business entity, such as a branch office, representative office, nongovernmental organization ("NGO"), company limited by guarantee, or educational provider. Certain countries are notoriously slow to approve a registration, and it is not uncommon for several months or even a year to pass before the registration process is completed.[2]

Foreign legal presence can take various forms. Ideally, organizations that intend to have one or more operations abroad should undertake a form of legal presence that is consistent with an overall programmatic and legal strategy for international operations. To develop such a strategy helps to define a clear approach in individual countries. The following questions, among others, may be relevant to an underlying strategy toward foreign legal presence:

1. Does the university's mission include foreign establishments such that a long term and sustained presence in various countries is foreseeable?
2. Are the university's domestic operations adequate to supervise and control legal presence in overseas locations?
3. Is the university prepared to keep track of legal obligations in foreign countries, and comply with reporting and disclosure requirements abroad?
4. Is the university concerned about particular legal liability associated with programs overseas?

These questions are not intended to elicit clear yes or no answers for all institutions, but the issues identified in these and other important questions are critical to formulation of an underlying strategy. Based on these questions, one institution may implement a minimalist approach towards foreign legal presence, to wit, avoidance of registration where possible in favor of dependence on foreign partner organizations. Another institution may take an aggressive approach towards foreign legal presence, to wit, incorporation of a new legal entity overseas in order to maximize independence and authority in the host country. Regardless of the approach, it is critical to consult foreign counsel on the implications of various forms of legal presence abroad, which includes exposure to foreign tax obligations, audit and disclosure requirements, funds flow restrictions, and other foreign law.

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[2] Because registration may entail several levels of protracted bureaucratic scrutiny by foreign authorities, institutions often explore some form of "interim" authorization to begin activities while a registration application is pending.

B. Corporate Structure and Special Purpose Vehicles

A significant number of public and private institutions have structured overseas activity through the incorporation of a new wholly controlled entity in the U.S. or abroad. This new entity functions as a "special purpose vehicle" for the university's international operations. Many considerations inform such a decision, and creation of a separate entity is neither advisable nor workable for every situation. However, a few examples of considerations that may prompt creation of a special purpose vehicle for international activity include the following:

- Legal considerations: As a matter of foreign law, sometimes the only available approach to proper legal presence in the host country is to incorporate a new organization there. Many universities prefer to do this through the U.S. incorporation of a separate entity to serve as the parent, or a member, of the foreign entity. A separate corporate entity also may act as a corporate veil, potentially to provide insulation from exposure to uninsured legal liability abroad, which may be a concern in certain types of projects, such as foreign clinical research.
- Practical considerations: To attempt to operate directly in a host country can be uncomfortable and unworkable. For example, a direct registration of the institution in a foreign country may involve disclosure of highly personal information about an institution's trustees and executive officers, inflict foreign tax and other legal requirements on the institution's officers, and cause submission of reports on the institution's worldwide activities to the host country. A number of institutions have avoided these requirements through the U.S. incorporation of a special purpose vehicle, and use of that vehicle to obtain legal presence—such as registration—abroad. The special purpose vehicle also has been used, if and when appropriate, to streamline certain home institution procedures that may make it difficult to operate abroad efficiently (e.g., policies on procurement).
- Foreign social, cultural, and diplomatic considerations: An entity incorporated and registered in the host country often finds it easier to obtain certain in-country privileges and exemptions, such as tax relief, import-export privileges, and relaxed entry-exit conditions for personnel, and easier to attract funds from in-country or regional sources. Also, a separate entity incorporated in the host country may help to signal the institution's commitment to the host country, and help to avoid the pervasive suspicion in certain countries of American and western organizations.

The operating model should reflect an institution's overall programmatic and legal strategy for international operations, and counsel must be familiar with the U.S. and foreign implications of the establishment of a new corporate entity, when establishment of such an entity makes sense.

Interaction with Foreign Government Officials and Representatives

The rapid growth in international projects has brought U.S. universities into much more contact with foreign governments. On one level, foreign governments now make substantial investments in higher education and research capability, capacity, and infrastructure. These foreign governments frequently call on U.S. institutions to advise and collaborate on everything from curriculum development and faculty recruitment, to laboratory design and research agendas, sometimes

offering "top dollar" to entice these collaborations.[3] On another level, academic faculty and staff increasingly work closely with foreign government representatives, or with employees of government-owned entities, as part of the scope of work on sponsored research, development, and other projects abroad. For instance, many U.S. institutions that operate across Africa have long relationships with public African entities, such as hospitals, community centers, and higher education institutions.

These interactions, however, are not without risk. Discussed below are two examples of many issues that arise when institutional personnel, or their agents, interact closely with foreign government officials, foreign government representatives, or employees of government or public entities.

A. Foreign Corrupt Practices Act

Few laws in the last decade have seen an uptick in enforcement action as much as the Foreign Corrupt Practices Act ("FCPA")[4]. The enforcement trend has snared large multinational corporations as well as small domestic companies. Nothing suggests that the Department of Justice will target universities and nonprofit organizations for FCPA enforcement, and the author is not aware of an FPCA enforcement action that involves a higher education institution. However, consider the following activities that recently triggered FCPA concerns among U.S. institutions:

- Paying a South Asian bureaucrat to fast-track an application for business registration and trade license.
- Supplementing or "topping up" the salary of African government employees working on a large clinical project.
- Hosting eastern European officials for a seminar on civil society, at which free lunch was served and transportation reimbursed.
- Compensating an African customs official to facilitate quick passage through port of various HIV/AIDS medicines.
- Doubling the fee schedule payment in order to ensure that an official in Asia would promptly review a tax exemption application.
- Direct funding to a West African cocoa regulatory board to assist in the government's efforts to license and monitor cocoa farms.

The antibribery provisions of the FCPA broadly prohibit giving, offering, or promising anything of value to any foreign official for the purpose of obtaining or retaining business or any other advantage. Prohibited items include cash or other monetary payments, gifts, travel, hospitality, lodging, entertainment, and anything else of value, such as payments to an official's favored charity, a scholarship for an official's relative, a loan at a favorable rate. A "foreign official" is defined expansively to encompass any officer or employee of a foreign government of any rank, employees of government owned or controlled businesses, foreign political parties or party officials or

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[3] Along these lines, the United Arab Emirates, Qatar, and Saudi Arabia, as well as countries in Asia, have secured alliances with prominent U.S. institutions.

[4] 15 U.S.C. §§ 78dd-1 *et seq*.

candidates for political office, and employees of public international organizations, such as the United Nations or World Bank. Unacceptable advantages under the FCPA include favors or preferential treatment, such as award of a contract, a reduction in taxes, or a favorable change in regulations.[5]

The FCPA forbids direct payments as well as payments made through an intermediary while knowing, or acting with conscious disregard or willful blindness, that some or all of the payment will be given, offered, or promised to a foreign official. As a result, an individual or company can be held responsible for making payments to a foreign representative or agent in circumstances that suggest that he or she is likely to pass on a bribe to a covered foreign official.

The FCPA contains a narrow exception for facilitating payments or "grease" payments meant to expedite routine governmental actions, such as actions to which individuals are generally entitled by law, like mail and telephone service, customs documentation, and police protection. There is no clear test in regard to the validity of a facilitating payment, but such payments generally must be small, recorded in the organization's books, and permitted under local law. In many countries, "expediting" payments and other "good will" payments are common local practice, despite proscription under local law. Institutions should take precautionary measures to avoid a situation in which it or one of its intermediaries engages in such transactions.

Two affirmative defenses apply under the FCPA. One is for payments that are explicitly lawful under the written laws of the country, not merely an accepted practice in the country. The other is for reasonable and bona fide expenditures, such as travel and lodging expenses, directly related to the promotion of products and services, or the execution or performance of a contract. Both defenses are narrowly construed, and they demand significant legal analysis to offer any advance comfort.

In addition to U.S. antibribery laws, new antibribery and corruption legislation has emerged across Europe and beyond. As one illustration, the UK's new Bribery Act was passed in 2010.[6] It overhauls the UK's outdated corruption legislation and introduces a new regime, which in many respects is tougher and more stringent than the FCPA. The Bribery Act provides that anyone who carries on

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[5] Counsel should be alert to these, among other, red flags:

- Unusual payment arrangements, such as requests for payments in cash, in a third country, to a third party, or to an off-book account.
- Expenses that are lavish or out of line with established guidelines or local customs.
- Reimbursement of expenses or other things of value that are given to a foreign official personally or would benefit the spouse, children, or other family members of a foreign official.
- Unnecessary third parties or multiple intermediaries, including multiple agents for the same scope of work, subcontractors or consultants that add little value, and customer-recommended agents.
- Lack of standard invoices or excessive invoices, large or frequent billing adjustments, unusual credits granted to new customers, and unusual bonuses to managers of foreign operations.
- Family or business ties with foreign officials or other covered persons.
- Business purposes that appear incidental to entertainment or other purpose.
- Industries in which corruption is common (e.g. oil, aircraft) or countries with a reputation for corruption and bribery (e.g. Cambodia, India, Iraq, Kazakhstan, Nigeria, Congo, Pakistan, Venezuela).

[6] *See* http://www.justice.gov.uk/publications/bribery-bill.htm.

business in the UK will be strictly liable for bribes paid anywhere in the world on their behalf, including by agents, employees, subsidiaries, and other third parties, unless they can prove that they had in place “adequate procedures” to prevent such action. The Bribery Act targets individuals as well as organizations, and allows prosecutors to hold individual organizational officials liable, even where they themselves were not involved in illicit conduct.

B. Foreign Agents Registration Act

Institutions must consider whether specific types of collaborations with foreign governments and foreign entities would make the institution or its employees “agents” under the Foreign Agents Registration Act of 1938 (“FARA”)[7]. FARA applies to any nonexempt person who, for or on behalf of a foreign principal, undertakes or agrees to undertake any covered activities within the U.S. FARA does not preclude foreign principals or their agents from such activities; it merely imposes registration and reporting requirements. A basic and general overview follows.

FARA requires registration of an agent of a foreign principal who engages or agrees to engage in covered activities when no exemption from registration is available. Whether the agent is remunerated for the activities is not relevant for FARA registration purposes. FARA defines a foreign principal to include a government of a foreign country; a foreign political party; an individual outside the U.S. who is not a U.S. citizen and who is not domiciled in the U.S.; a partnership, association, corporation, organization or other combination of persons organized under the laws of, or having their principal place of business in, a foreign country; or a person or combination of persons whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized, in whole or in major part, by a foreign principal (as defined in the foregoing description).[8]

The following covered activities trigger FARA registration, unless an exemption applies: engaging, directly or indirectly, in “political activities” in the U.S. for or in the interest of a foreign principal; acting, directly or indirectly, as a “public relations counsel”, “publicity agent”, “information-service employee”, or “political consultant” for or in the interest of a foreign principal; soliciting, collecting, disbursing, or dispensing contributions, loans, money or other things of value for or in the interest of a foreign principal; or representing the interests of a foreign principal before any agency or official of the U.S. government.[9]

Even when an agent of a foreign principal is engaged in a covered activity, registration under FARA is not required if an exemption applies. FARA contains a number of exemptions, which include, among others: (1) the “commercial exemption” – when the agent engages only in “private and nonpolitical activities in furtherance of the bona fide trade or commerce” of the foreign principal; and (2) the “academic exemption” – when the agent engages only in activities in furtherance of bona fide religious, scholastic, academic, or scientific pursuits, or of the fine arts. However, the academic exemption is not available if the agent engages in “political activities” in the U.S.

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[7] 22 U.S.C. §§ 611 et seq.

[8] 22 U.S.C. § 611(b).

[9] 22 U.S.C. § 613.

Courts have interpreted the academic exemption broadly, provided that the scholastic, academic, or scientific pursuit at issue bears at most only an "attenuated relationship to foreign policy and national security." *See Attorney General of the United States v. The Irish People, Inc.*, 684 F.2d 928, 938 (D.C. Cir. 1982) ("it is clear that all the exemptions are rooted in either foreign policy concerns or can be explained by the fact that Congress was interested in monitoring public and political activities, rather than private, nonpolitical, religious, scholastic, scientific, or similar activities which have only an attenuated relationship to foreign policy and national security… The lack of interest which Congress had in 'nonpolitical' and 'private' matters is restated in the legislative history of this section.").

FARA, when applicable, requires the agent of the foreign principal to register with the Department of Justice, submit and update semiannual statements that describe activities and otherwise publicly disclose specified information related to covered activities, file copies of disseminated materials with the Department of Justice, and maintain certain books and records for audit.[10]

As a practical matter, even when a university engages in activities that trigger FARA, the academic exemption often arguably applies. However, certain recent collaborations with foreign governments and entities have been on the margin of the academic exemption, and more than one institution has considered seeking an advisory opinion from the Department of Justice's FARA Registration Unit.

International Employment

Consider this scenario that a higher education institution recently encountered, modified for confidentiality: It engaged the services of two employees to work full time overseas on a development project. The employees were foreign nationals and hired in the host country. The program was small, without a need for a large staff or office, and so the institution stationed the two employees at the site of its foreign "partner", an educational institution. After one year of service, the two employees received a standard salary raise in accordance with the U.S. institution's policy. The partner's workers received a much larger raise, to keep up with host country inflation. The U.S. institution could not match that raise for its two employees, in part because it exceeded the U.S. institution's budget and institutional policies. The workers claimed unfair discrimination on the basis that the foreign partner's workers, who they considered to be co-workers, received much larger raises. To file an employment claim in this host country cost less than $100, and gave the workers substantial leverage over the U.S. institution.

Consider a second scenario, also modified: An institution had a large research program overseas. A principal investigator from the institution spent substantial time in the host country and opened a personal checking account with an in-country bank. The institution had explored the establishment of a formal legal presence in the host country via a formal registration there. However, the institution declined that approach because, under this country's law, registration would have required the incorporation of a new legal entity there, but this institution had no authority under state law to create a new legal entity. Without a registration, the institution could not open a bank account in the country. Therefore, it settled into the routine of depositing program funds in the personal bank account of the PI in order to cover in-country program expenses. After a large tranche of funds were

[10] 22 U.S.C. § 614.

transferred to the PI's bank account, the PI became incapacitated and had to leave the institution. The funds were not immediately recoverable.

A. Employment of Workers Overseas

To university counsel, the foregoing scenarios may be familiar. International programs often require university staff to live and work overseas. Study abroad programs and large scientific and medical research initiatives may involve university personnel sent or hired overseas to manage and administer operations. In the current economic environment, some institutions are poised to review, reduce, or eliminate positions overseas, or undertake reductions in pay or benefits. Attention to local employment law is critical in any of these activities, and a few illustrations follow.

1. Host country employment law.

As a general rule, host country employment law applies to the employment of foreign nationals and U.S. expatriates assigned to positions overseas. Unless an exception applies, the core employment relationship—compensation, minimum wages, benefits, work hours, income tax withholding, vacation, workplace health/safety, dismissal, severance pay—is subject to foreign law. Some countries, such as China, allow in certain circumstances different employment standards to apply to local nationals versus foreigners. A few countries will exempt expatriates from the application of local labor laws—the so-called "expat" exemption—but only under specific conditions. Temporary business visits typically do not result in application of foreign law.

In general, foreign law is substantially more protective of employee rights than U.S. employment law. Some examples include the following:

- Foreign workers often enjoy certain automatic and inherent rights that make it very difficult for employers to make substantive changes to the employment relationship.
- Reductions in salary/wages often must be justified and subject to employee consultation and consent; pay cuts or a reduction in workload may permit an employee to sue for "constructive termination". Pay cuts are practically illegal in some countries.
- Procedural requirements, such as a right to a hearing, often apply to the termination of any employee, even in cases of suspected misconduct.

Note that a U.S. governing law clause in the employment contract can be unavailing, regardless of whether the worker is a foreign national or a U.S. expatriate. The mandatory application of local employment law in the place of employment may be a matter of public policy, and foreign labor courts have ignored choice of law clauses set out in employment contracts.

In some circumstances, U.S. law may apply as well as the foreign country's law. Some U.S. antidiscrimination statutes, such as Title VII, protect American citizens (and certain others) who work abroad for U.S. employers, and the host country's antidiscrimination laws are equally applicable. Indeed, some U.S. organizations have had to defend dual foreign and stateside discrimination claims for years. State laws such as those on workers compensation also may apply overseas in certain circumstances, such as when an employee typically based in the U.S. is on assignment to a foreign country. In recent years, U.S. institutions have had to contend with tricky issues that arise when foreign law compels action that allegedly violates U.S. antidiscrimination or other law.

2. Independent contractors?

It may seem convenient to hire overseas staff, especially foreign nationals, as "independent contractors" or "consultants" as opposed to employees, in order to avoid involvement with host country employment laws, overseas payroll, and foreign income tax withholding. However, most countries will look to substance rather than form and disregard the independent contractor or consultant designation if the arrangement between the parties suggests that an employment relationship exists. Generally, the analysis used to distinguish between employees and independent contractors is similar to the well-known U.S. analysis. Independent contractor arrangements under which the contractor receives employee-like benefits, such as paid vacation, or under which the contractor must adhere to a personnel manual or similar policies are suspect. To misclassify employees as contractors exposes an institution to host country liabilities such as payment of back taxes and social security withholdings, retroactive local benefits, vacation and holidays, and penalties.

3. Overseas employment and legal presence.

To engage staff overseas, or to send U.S. expatriates abroad for extended periods, commonly triggers a foreign law requirement for the institution to undertake some form of official legal presence in the host country. Establishment of even one position in the host country may trigger the requirement. When a legal presence is required, the type and structure of the presence may influence employment arrangements. For example, legal presence may involve registration of the institution as a local branch or representative office, incorporation of a new local entity, such as a subsidiary, or establishment of a memorandum of understanding or other agreement with the host government. Issues include:

- Should U.S. expatriates based overseas be "seconded" to a new in-country entity, for local compliance or other reasons?
- Should overseas employees be on the U.S. payroll system, or a separate locally compliant payroll system?
- Can a host country partner organization hire and employ all foreign nationals on behalf of the university?
- Can the institution bypass local compliance requirements through an MOU with the foreign government?

In many countries, such as Bangladesh, institutions need to register and apply for various local business licenses before being permitted to employ individuals. Moreover, in many African nations, such as Kenya, an organization may be subject to penalties for employment of individuals on charitable or research activity without formal registration with the government. Some countries are very slow to approve a registration. Therefore, it is critical to explore the registration requirements at an early juncture if the university expects to establish positions overseas.

4. Overseas employment tax issues.

As a general principle, an institution that has employees that perform services in a jurisdiction overseas is required to withhold taxes for the jurisdiction in which the services are performed. The U.S. is one of the few countries that tax its citizens on worldwide income; therefore, for U.S. citizens and U.S. permanent residents, the U.S. employer is obligated to withhold U.S. income taxes unless the country in which the services are performed has a tax code that requires local tax withholding for that country's taxes. Normally, a U.S. citizen or U.S. permanent resident should be able to credit

any income taxes paid to the foreign country against his or her U.S. income tax liability. U.S. citizen employees also may be eligible for the "foreign earned income exclusion", under section 911 of the Internal Revenue Code, which allows an amount of foreign earnings to be excluded from an individual's taxable income in the U.S.

The author claims no specialty in tax law. However, based on advice of knowledgeable tax colleagues, the following is apparent: to determine foreign income taxes for both U.S. expatriates and foreign nationals, to file foreign tax returns, to calculate tax credits, and to pay into local social security regimes, is a complicated task for any international employer. Tax treaties and social security conventions also must be considered. Among other matters, social security conventions may allow employees to continue on U.S. social security and to be exempt from host country social security contribution.

5. Entry permits and work permits.

In many jurisdictions, U.S. expatriates may lawfully enter a country and stay for up to ninety days before a special visa is required. However, the fact that a person's entry is lawful does not necessarily mean that the person may work in the country. Proper work authorization, such as a work permit or other nonimmigrant visa, often is required, and both developed and developing countries take assertive approaches to immigration-related requirements, through imposition of fines (Kenya), airport detention (Iraq), local office raids (India), deportation bonds (Cyprus), and no re-entry conditions for immigration violations (Mozambique). Many faculty and staff find these immigration-related requirements especially difficult to accept when, over the course of many years, no immigration-related difficulties have arisen in the host country. Recently, however, a nonprofit organization that operated "as it always had" was fined and nearly barred from reentrance to a foreign country because local staff did not hold appropriate work permits.

6. Other issues.

The foregoing items, and the discussions of each, are not exhaustive of overseas employment issues. Examples of other issues in international employment include:

- Dual employer relationships.
- Secondment agreements.
- Payor and affiliate entities.
- Local accounting and employment agencies.
- International safety and security.
- Continued participation in U.S.-based retirement and welfare plans.

International employment demands careful attention. Until advice of local counsel is secured, institutions normally should avoid these activities: registration for a foreign employer identification number; offers of employment to overseas staff, and particularly to foreign nationals; implementation of a pay cut or elimination of positions; reprimands, dismissal, or threats to dismiss an overseas employee; and issuance of a local personnel manual.

B. Employing Foreign Nationals in the United States

Various international research, educational, and other programs entail colleges and universities bringing foreign nationals to the U.S. on a temporary basis. Many of these activities may constitute "fundamental research" under U.S. export control regulations and therefore do not require export licenses. However, certain activities will trigger export license requirements.

Export control enforcement is increasing at a time when the Obama Administration is poised to implement certain export control reforms.[11] Recently a Government Accountability Office ("GAO") report found that from fiscal years 2004 to 2009, the U.S. government issued about 1.05 million specialty occupation visas in high-technology fields to foreign nationals from "13 countries of concern" to work in the U.S., but the Department of Commerce issued "deemed export" licenses that authorize transfers of technology to only 3,200 foreign nationals from these countries.[12] This imbalance, in GAO's view, is a cause for concern about the prevalence of unlicensed deemed exports.[13]

A "deemed export" occurs when technology is released to a foreign national in the U.S., and this release is considered an export of the technology to the foreign national's country of citizenship and, in some instances, to his or her country of birth. Depending on the technology at issue and the foreign national's country of birth or citizenship, such an export may require a license from the Department of Commerce under the Export Administration Regulations ("EAR"), the Department of State under the International Traffic in Arms Regulations ("ITAR") or the Department of Energy for certain nuclear-related information.

Notably, the U.S. Citizenship and Immigration Services ("USCIS") now collects information on deemed export compliance from U.S. employers that seek to hire non-U.S. workers in a subset of temporary visa categories (i.e., H-1B, L-1, and O-1 status). Petitioning employers are now required to make a certification about compliance with applicable export control regulations in contemplated employment of the foreign national. The petitioning employer needs to state whether the foreign

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[11] The President's export control reform initiative ultimately aims to create a single control list, licensing agency, information technology system, and enforcement coordination agency. On November 9, 2010, the President signed Executive Order 13558, which establishes an Export Enforcement Coordination Center (EECC) among the Departments of State, Treasury, Defense, Justice, Commerce, Energy, and Homeland Security as well as elements of the Intelligence Community. (Available at http://www.whitehouse.gov/the-press-office/2010/11/09/executive-order-export-coordination-enforcement-center.) The reform initiative is expected to continue through 2011, with proposed rewrites of USML categories, publication of proposed harmonized definitions, and a proposed common form that exporters can use to apply for export licenses from the Departments of State, Commerce, and Treasury, all of which may have considerable effect on the export compliance functions at every institution.

[12] "Improvements Needed to Prevent Unauthorized Technology Releases to Foreign Nationals in the United States", GAO-11-354 (February 2011).

[13] Note that the Court of Appeals for the Sixth Circuit recently upheld the conviction of University of Tennessee Professor Dr. J. Reese Roth for deemed export violations, among others. The decision reflects the view that ignorance of specific laws and regulations is no defense to an export control violation when there is general knowledge that activity may be export controlled. *United States v. Roth*, 628 F.3d 827 (6th Cir. 2011).

national will have access to technology or technical data controlled under the EAR or the ITAR and certify whether: (i) an export license is not required for the release of petitioner's technology to the beneficiary; or (ii) if an export license is required, that the beneficiary will not have access to such technology until the petitioner obtains the required license. The certifications are collected on revised Form I-129, petition for nonimmigrant worker.[14]

These new certification requirements have prompted numerous institutions to review and assess communications between human resources, export and research compliance, and academic departments in regard to export compliance requirements. One special concern is the government's recent, unprecedented use of the False Claims Act ("FCA")[15] against a government contractor that was found to be in violation of ITAR. Apparently, the government's theory was that the contractor effectively certified compliance with U.S. export control law in the context of a federal contract, and the false certification influenced the government's decision to pay the contractor.[16] Accordingly, FCA whistleblowers would seem to have strong incentives to report to the government potential violations of export control law, and the new Form I-129 may provide additional ammunition to these whistleblowers.

Obligations to Report Information to Regulators

The global university is subject to robust requirements to report special kinds of information to U.S. regulators. These requirements range from educational regulatory reports to tax and boycott-related reports. To keep track of these requirements is difficult in a time when overseas activity is on the

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[14] Part 6 of the new Form I-129 reads as follows:

> Check Box 1 or Box 2 as appropriate:
>
> With respect to the technology or technical data the petitioner will release or otherwise provide access to the beneficiary, the petitioner certifies that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that:
>
> 1. A license is not required from either U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or
> 2. A license is required from the U.S. Department of Commerce and/or the U.S. Department of State to release such technology or technical data to the beneficiary and the petitioner will prevent access to the controlled technology or technical data by the beneficiary until and unless the petitioner has received the required license or other authorization to release it to the beneficiary.

[15] The FCA prohibits the submission of false or fraudulent claims to the government. The statute imposes civil liability on any person who, among other things, knowingly (1) submits a false or fraudulent claim for payment, (2) causes such a claim to be submitted for payment, (3) makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim, (4) conspires to get such a claim paid or approved, or (5) makes a false record or statement to conceal or avoid an obligation to pay money to the government. Under 31 U.S.C. 3730(b)-(d), a person (a "relator") may bring a civil action on behalf of the United States under the whistleblower, or *qui tam,* provisions of the FCA. The relator may receive anywhere from 15 to 30 percent of the government's recovery.

[16] http://www.justice.gov/opa/pr/2010/October/10-civ-1233.html.

rise and resources are constrained. Three illustrations of the many obligations to report are considered below.

A. Foreign Gift and Contract Reports

In April 2010, the U.S. Department of Education ("ED") published online for the first time a spreadsheet of foreign gifts and contracts reported by U.S. educational institutions pursuant to Section 1011f of the Higher Education Act.[17] Section 1011f of the Higher Education Act of 1965, as amended ("HEA"), requires U.S. educational institutions that receive federal student financial assistance (Title IV) to report gifts and contracts received from foreign entities, individuals, or governments. Specifically, institutions must report gifts received from, or contracts entered into with, the same foreign source that, considered alone or in combination with all other gifts from or contracts entered into with that foreign source within a calendar year, have a value of $250,000 or more.[18] Reports must be submitted by January 31 or July 31, whichever is sooner, after the gift is received or the contract has been entered into.[19]

The institution's report must contain the following elements:

- For gifts received from or contracts entered into with a foreign source other than a foreign government, the institution must report the name of the country and the aggregate dollar amount of the gifts and contracts attributable to the particular country. For a foreign source who is a natural person, the gift or contract is attributable to the country of citizenship, or, if unknown, the principal residence of the foreign source. For a foreign source that is a legal entity, the gift or contract is attributable to the country of incorporation, or, if unknown, the principal place of business of the entity.[20]
- For gifts received from or contracts entered into with foreign governments, the institution must report the aggregate amount of such gifts and contracts and the name of the country.[21]
- Additional disclosure requirements apply to restricted and conditional gifts. The institution must disclose the conditions or restrictions.[22]

All reports filed with ED are considered public records, open for inspection.[23]

As an alternative to the reports specified above, an institution may submit to ED a copy of a disclosure report filed with the state in which the institution is located. This alternative is available

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[17] The list is available at http://federalstudentaid.ed.gov/datacenter/schooldata.html.

[18] 20 U.S.C. § 1011f(a).

[19] Federal Student Financial Aid Handbook 2-48 to 2-49 (2009-2010) ("FSA Handbook"), available at http://ifap.ed.gov/fsahandbook/attachments/0910FSAHbkVol2Ch4Other.pdf.

[20] 20 U.S.C. § 1011f(b)(1). *See also* FSA Handbook.

[21] 20 U.S.C. § 1011f(b)(2). *See also* FSA Handbook.

[22] 20 U.S.C. § 1011f(c). *See also* FSA Handbook.

[23] 20 U.S.C. § 1011f(e).

only if (a) the state has "substantially similar" laws that require public disclosure of gifts received from or contracts entered into with a foreign source; and (b) an appropriate state official provides to ED a statement establishing that the institution has met the applicable state requirement.[24] In addition, if another federal agency has substantially similar requirements for the institution to report gifts received from, or contracts entered into with, a foreign source, a copy of that report may be filed with ED in lieu of the reports specified above.[25]

The requirement to report gifts and contracts raises several questions, including the following:

- The obligation to report applies to "institutions", defined in Section 1011f as any public or private institution that: 1) is legally authorized within the State where it operates to provide a program of higher education; 2) confers a bachelor's degree (or provides not less than a 2-year program which is acceptable for full credit toward such a degree) or more advanced degrees; and 3) is accredited.[26] To what extent does "institution" include branch campuses and wholly-owned affiliates?[27]
- What triggers the requirement to report? Would a pledge, or a nonbinding letter of intent, trigger a report?
- Does the definition of "contract" include the institution's purchases/procurements from foreign sources?[28]
- Does "foreign source" include the U.S. subsidiary of a foreign legal entity?[29]
- What kinds of enforcement mechanisms and penalties are available to ED if the institution omits to file required reports?
- If the institution failed to file a report when due, how does it remedy that failure?

A few of these questions have reasonably straightforward answers. Others do not.

B. U.S. Tax Reports

A subject as complicated and specialized as tax deserves attention from a tax lawyer. The author is not one. Consistent with guidance from knowledgeable tax colleagues on various university

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[24] 20 U.S.C. § 1011f(d)(1). *See also* FSA Handbook.

[25] 20 U.S.C. § 1011f(d)(2). *See also* FSA Handbook.

[26] 20 U.S.C. § 1011f(h)(4).

[27] This statutory definition is similar to the definitions of "institution of higher education" in other sections of the HEA and implementing regulations related to federal student financial assistance. ED has not issued implementing regulations under Section 1011f.

[28] Section 1011f defines "contract" as "any agreement for the acquisition by purchase, lease, or barter of property or services by the foreign source, for the direct benefit or use of either of the parties". 20 U.S.C. § 1011f(h)(1).

[29] Section 1011f defines "foreign source" to include "an agent, including a subsidiary or affiliate of a foreign legal entity, acting on behalf of a foreign source". 20 U.S.C. § 1011f(h)(2).

international programs, U.S. tax reports are a maze and a trap for the unwary. The level of tax reporting typically depends on the facts entailed. With the qualification that tax expertise should be sought, the author offers these points as illustrations only.

1. Foreign Bank Account Reports.

Under the Bank Secrecy Act and applicable Treasury Regulations, U.S. persons generally must file Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts (commonly referred to as an "FBAR") by June 30 of the year following any year in which they possessed signature or other authority over, or had a financial interest in, foreign financial accounts whose aggregate value exceeded $10,000 at any time during such calendar year. In October 2008, the Internal Revenue Service ("IRS") revised the FBAR instructions and, among other changes, significantly broadened the definition of "U.S. persons" required to file the FBAR. These changes resulted in many questions and comments from taxpayers and tax advisors. In response, the IRS issued guidance in 2009 that (1) suspended the applicability of the broader definition of U.S. persons set forth in the October 2008 revised FBAR instructions, and (2) extended the filing deadlines with respect to other types of U.S. persons.

On February 24, 2011, the Treasury Department issued widely anticipated final regulations on the FBAR, which affect universities and university personnel that have signature or other authority over, or a financial interest in, foreign financial accounts. The final regulations clarified the following:

- Whether an account is foreign and therefore reportable.
- Whether persons that have signature authority over, but no financial interest in, foreign financial accounts must file FBARs, and whether recordkeeping obligations apply to those persons.
- Which officers and employees with signature authority are excluded from the FBAR filing and recordkeeping requirements.

In March 2011, the IRS released revised FBAR instructions that generally implemented the guidance issued by the Treasury Department's final regulations. The IRS subsequently provided guidance and revised FBAR instructions, in Notice 2011-31.

The FBAR is not a tax return, but for various reasons, including reasons of national security and criminal enforcement, the IRS is keen to collect the FBAR information, and failure to make requisite filings carries penalties.

It is important to be generally aware that operations overseas through foreign entities and transfers of funds overseas to fund such operations may require information reports apart from FBARs, whether the activities are taxable or not. These rules are complex, and tax counsel is critical.

2. Form 990.

For institutions that file Form 990 (Return of Organization Exempt from Income Tax), foreign activity generates various tax reports, and knowledgeable tax counsel should be consulted.

For example, Schedule F of Form 990 requires the organization to provide information on activities conducted outside the U.S. at any time during the tax year. Activities conducted outside the U.S.

include grantmaking, fundraising activities, trade or business, program services, investments, or maintaining offices, employees, or agents for the purpose of such activities outside the U.S. The term "grantmaking" includes awards, stipends, research grants and similar payments to foreign organizations, foreign governments, and foreign individuals. It does not include salaries or other compensation to employees or payments to independent contractors. Information that must be reported on Schedule F by geographic region includes the number of offices, number of employees, agents, and independent contractors, type of activity, and total expenditures and investments.

To the extent the institution establishes special purpose vehicles, such as separate legal entities, in the U.S. or elsewhere to facilitate foreign activity, Schedule R of Form 990 may require a report of such entities as "related organizations", and a report of transactions between such entities and the institution. Again, tax counsel should be consulted.

C. Antiboycott Reports

The U.S. government maintains a complex set of "antiboycott" laws designed to discourage, and in some circumstances prohibit, U.S. organizations from supporting or participating in boycotts of friendly countries, or furthering or supporting the boycott of Israel as sponsored by the Arab League and certain other countries. Under these laws, the receipt of a request, whether verbal or written, to further a boycott may need to be reported under both EAR and IRS regulations. The range of boycott related activity that may be penalized or prohibited includes the following, all of which should be referred to knowledgeable international trade counsel:

- Agreements to refuse or actual refusal to do business with or in Israel or with blacklisted companies.
- Agreements to discriminate or actual discrimination against other persons based on race, religion, sex, national origin or nationality.
- Agreements to furnish or actual furnishing of information about business relationships with or in Israel or with blacklisted companies.
- Agreements to furnish or actual furnishing of information about the race, religion, sex, or national origin of another person.
- Letters of credit that contain prohibited boycott terms or conditions.

The Department of Commerce, under EAR, requires U.S. persons to report requests they have received to take certain actions to comply with, further, or support an unsanctioned foreign boycott. The receipt of a request, whether verbal or written, to further a boycott may need to be reported. The Department of Treasury, under the Ribicoff Amendment to the 1976 Tax Reform Act, also implements antiboycott laws through section 999 of the Internal Revenue Code, which requires U.S. taxpayers to report operations in boycotting countries and requests to participate in or cooperate with an international boycott. As of November 2010, the list of boycotting countries included Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, United Arab Emirates, and the Republic of Yemen. The omission to file required reports carries penalties, some of which are steep.[30]

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[30] See IRS instructions at http://www.irs.gov/instructions/i5713/ch01.html#d0e252 and see Department of Commerce Guidance at http://www.bis.doc.gov/complianceandenforcement/antiboycottcompliance.htm.

Growth in Foreign Regulatory Regimes

In recent years, governments in various countries have taken steps to bolster regulation of activities of foreign organizations that operate there. Not every situation involves a systematic attempt to target foreign nonprofit organizations, but many of the regulations nonetheless apply to U.S. university operations. A confluence of factors has sparked this trend, including "(1) international pressure on governments to protect against terrorist financing and money laundering; (2) a desire to coordinate and increase the effectiveness of foreign aid; and (3) concerns about national sovereignty."[31] In particular, organizations that operate in the Middle East, the former Soviet Union, and parts of Asia and Africa "have encountered a range of obstacles including the outright seizure of assets and facilities, dissolution, de-licensing, restrictions or bans on the use of foreign funding and intimidation."[32]

A few illustrations follow, which are based on the author's collaboration with foreign counsel.

- India has engaged in selective enforcement of its Foreign Contribution Regulation Act[33] against nonprofit associations that operate in country, including U.S. universities that undertake research and educational activity, in an attempt to prohibit foreign funds flow into India unless the nonprofit agrees to certain unsavory stipulations. Violations are a criminally punishable offense. India also has started to deny tax-exempt status to nonprofit organizations that cannot demonstrate a concrete history of nonprofit operation in India.[34]
- Bangladesh has taken a stern approach to NGO operations in-country by requiring them to: (a) register for 5 year terms, after which renewal is necessary; (b) secure permission to receive foreign funds and disburse in-country funds; (c) maintain two separate bank accounts—one as a "mother account" to receive funds from abroad and another as an "operation account" for local expenses; (d) request permission from authorities to incur expenses that exceed 10% of budgeted expense; (e) submit annual audited accounts to the NGO Bureau in prescribed formats; and (f) agree to random government audits of NGO books. More generally, foreign exchange controls—the regulation of in-coming foreign currency and sometime outgoing currency—has become a compliance concern in several foreign countries. South Africa, for instance, requires local branches and subsidiaries of foreign organizations to obtain approval from South Africa's Reserve Bank to receive funds from foreign organizations, including a foreign parent organization, and regulators requires conversion of such funds to local currency within a specified period of time.
- Kenya has started to regulate human subjects research conducted by foreign institutions through written guidelines issued by its National Council of Science and Technology

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[31] Global Trends in NGO Law, Volume 1, Issue 1 - March 2009, available at http://www.icnl.org/knowledge/globaltrends/index.htm.

[32] Luke Eric Peterson and Nick Gallus, *International Investment Treaty Protections for Not-for-Profit Organizations*, International Journal of Not-for-Profit Law, vol.10, no.1 (December 2007).

[33] *See* http://www.fcraforngos.org/intro.htm.

[34] These observations are separate from the pending legislation in India's Parliament, which if passed, would permit foreign educational institutions to establish degree granting campuses in India. The legislation is controversial, both within and outside India.

(“NCST”). The written guidelines are similar in some respects to the U.S. common rule on protection of human subjects (45 CFR Part 46), and international ethical standards, but it also specifies requirements that may not be familiar to U.S. research institutions. Transportation of biological samples into and out of the country also is regulated, and requires a permit from the Kenya Ministry of Medical Services (“MoMS”) and a special material transfer agreement.

- In Iraq and Afghanistan, where a surprising number of U.S. higher education institutions operate development and local assistance projects, recent changes to the entry-exit process for individuals that operate under U.S. government awards (Iraq), and changes in tax policy (Afghanistan), have multiplied the burdens on nonprofits that try to assist in the reconstruction efforts.[35]

These and other similar country-by-country regulatory requirements place unique demands on university counsel. To track assorted requirements in multiple countries can be daunting. Some institutions have resorted to lengthy spreadsheets, databases, and checklists to supervise compliance and others rely heavily on local counsel to provide regular updates and reminders. Increasingly evident is the ability of foreign regulators to discover, sometimes through mysterious means, a foreign organization’s noncompliance.

U.S. Government Scrutiny of Federally Sponsored Projects Overseas

Notwithstanding the challenges associated with operation and management of a sponsored project overseas, federal grantor agencies now scrutinize these federal projects with greater frequency. Institutions have poured significant resources into federal research compliance programs in the U.S., but compliance obligations are no less important when the project occurs overseas. Among the challenges are implementation of the pre-award and post-award administrative and financial requirements of Office of Management and Budget (“OMB”) Circular A-110 (2 CFR § 215), the cost principles in OMB Circular A-21 (2 CFR § 230), as well as agency-specific and other public policy conditions to federally funded initiatives.[36] A few illustrations follow.

A. Cost Allowability Challenges

Difficult cost allowability questions often arise on overseas federal projects. Take for example foreign value added taxes (“VAT”), which are as common and routine as U.S. sales tax, but which can be as high 35% of the value of goods or services purchased in the host country. Some federal sponsors do not consider foreign VAT payments to be reimbursable under their awards. This forces grantee universities to pursue time-consuming and uncertain applications for foreign VAT

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[35] *See, e.g.*, “Afghanistan's push to tax U.S. contractors could renew tensions”, January 17, 2011, available at http://www.washingtonpost.com/wp-dyn/content/article/2011/01/16/AR2011011603645.html.

[36] For example, USAID’s “Mandatory Standard Provisions for U.S. Nongovernmental Recipients” includes dozens of additional award terms in regard to international air travel, ocean shipments, reporting of foreign taxes, marking and stamping requirements, local publication and media release rules, local procurement restrictions, population planning restrictions, and special project reports.

exemption.[37] Similarly, currency exchange losses are unallowable costs to federal awards, but these losses can add up, and some institutions have had to request permission to modify projects in order to account for steep currency losses.

Federally funded subawards to foreign organizations present thorny issues. Not only are VAT and currency exchange sometimes points of contention, but the assortment of federal "flowdown" obligations usually are incomprehensible to foreign entities. A prime grantee's obligation to engage in "subrecipient monitoring" counsels in favor of a very carefully drafted subaward agreement, designed to protect the prime grantee to the maximum extent feasible.[38]

B. Separate Entity Challenges

As discussed at the beginning of this paper, U.S. research institutions increasingly operate projects overseas through a separate wholly controlled entity that undertakes some form of legal registration abroad in order to conduct programs there. In the context of federally sponsored research, implementation of this arrangement leads to a very important question: How does the grantee institution define and characterize its relationship with its separate or "subsidiary" entity, and what are the implications of that relationship? The precise relationship can have a significant effect on cost recovery, including recovery of indirect costs, and federal research compliance. In this regard, two observations are important.

First, there does not appear to be written agency guidance for a situation in which a grantee operates through a wholly controlled separate entity. USAID, HHS, and NIH often award grants and cooperative agreements that involve substantial work overseas, and special terms and conditions may apply to such work, but no apparent guidelines address the operation or involvement of a grantee's wholly controlled entity. In the context of HHS and NIH grants, the HHS and NIH Grants Policy Statement contain a section titled "Services Provided by an Affiliated Organization", and although the section is broadly titled, HHS and NIH in practice have interpreted the section much more narrowly, to apply primarily to state research foundations that many universities form to carry out their sponsored research. The section essentially says that the affiliated foundation may act as the grantee and charge and receive reimbursement for costs incurred by the university, as long as there is an affiliation agreement that permits such an arrangement, or the arrangement is sanctioned by state law. It would be difficult to cite this policy as general approval for the operation of a grant through a grantee's separate controlled entity, but it may lend support to the concept.

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[37] Note, however, that OMB Circular A-21 suggests that such taxes are reimbursable if no exemption from them can be obtained. *See* OMB Circular A-21 § J.49 (2 C.F.R. § 220 App. A, § J.49). *But see* NIH Grants Policy Statement, Pg. IIb-240 (October 1, 2010); HHS Grants Policy Statement II-118 (Oct. 1, 2006) ("*Customs and import duties.* These costs, which include consular fees, customs surtax, value-added taxes, and other related charges, are unallowable under foreign grants and domestic grants with foreign components.").

[38] Collaborations with international partners are formalized through contracts, MOUs, or other consortium agreements. International agreements are the subject of several complex contract issues beyond the scope of this paper, such as contractual clauses on payment, insurance, liability and indemnification, choice of law, foreign sovereign immunity, and diplomatic immunity.

Second, federal sponsor agencies lately have been more "curious" about U.S. grantees' separate entities that are formed to carry out federal projects abroad. Based on reports from many institutions, the government's questions on this subject often come from agency officials who may be less familiar with the legal and practical limitations that affect U.S. grantees overseas. For example, grant officers may not recognize the potential legal obligation for the grantee to register a formal legal presence in the host country. It is clear that this is a subject that will continue to come up, and the government's acceptance of arrangements that involve separate wholly controlled entities may depend on the form of arrangement that the grantee selects.

C. Other Challenges in Sponsored Research

Federal and nonfederal research abroad entails many other challenges, and this paper does not delve deeply into them. A primary example is export control, which is not covered in any detail here, but which is immensely important and increasingly consumes the time of university counsel and program administrators. For purpose of export compliance, particularly significant is the subject matter of the research abroad, and whether and to what extent the activities constitute "fundamental research", or are not otherwise restricted. Another challenge is scientific regulation regimes, such as human subject protections, animal research, and international transportation and handling of specimens. It can be tricky to (a) ensure compliance with these standards in overseas ventures, and (b) comply with both U.S. and foreign standards, as applicable.

Other Legal Trends

Deterioration of Attorney-Client Privilege: Various attorney-client privilege regimes exist overseas, and respect for the privilege is not uniform. In a recent decision, the Court of Justice of the European Union affirmed that communications with in-house lawyers are not protected by attorney-client privilege under EU law. The Court observed that: (1) an in-house lawyer is "less able to deal effectively with any conflicts between his professional obligations and the aims of this client"; (2) an in-house lawyer "occupies the position of an employee, which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence"; and (3) an in-house lawyer does not have professional independence comparable to a lawyer in private practice, even considering the ethical obligations of an EU Member State's bar. Thus, as a matter of EU law, the Court concluded that one cannot evoke the protection of attorney-client privilege to protect communications with an in-house lawyer.[39] In other contexts, particularly in developing countries, auditors and government regulators have regularly ignored the attorney-client privilege, and local counsel has been slow to object.

Aggressive International Data Privacy Laws: Many institutions are only beginning to come to terms with international data privacy regimes, particularly in Europe and Asia. Unlike the U.S., which tends to protect data only in certain industry sectors, such as FERPA for education, HIPAA for healthcare, and Gramm–Leach–Bliley for financial institutions, foreign data privacy laws tend to

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[39] *Akzo Nobel Chemicals Ltd. And Akcros Chemical Ltd. v. Commission* (C-550/07 P). Note that the decision applies only to matters of EU law, and does not change the individual privilege regimes in EU Member states.

apply broadly to all personal data.[40] Strict collection, processing, and use standards may apply to personal data, including student data in study abroad and foreign degree programs, and research subject data in clinical research. The definitions of "processing" and "use" normally are broad and cover nearly anything one can do with information that relates to an identified or identifiable natural person, including the transfer of data to third parties. Special categories of personal data, such as data on racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and data on health or sexuality, are subject to special protection, particularly in Europe. The often cited European Union ("EU") Data Protection Directive (95/46/EC) influences data protection law across EU member states, and generally prohibits the transfer of protected data from the EU to a country outside the EU unless the country outside the EU safeguards an "adequate level of data protection" within the meaning of EU data protection legislation. The day may come when the U.S. is viewed as providing "adequate protection"; for now, it is not viewed as such under EU law, and organizations doing business with the EU have resorted to various tools and other maneuvers to justify the cross-border transfer of data.[41]

Crisis Management: Operation around the world means that global crises affect the global university. Political upheavals and natural disasters are only a few of these types of crises, and recent events in the Middle East, Japan, New Zealand, and Haiti are good examples. It is not that more of these kinds of events are happening than usual, but when institutions are active in more foreign places, it can seem that way. Contingency preparations and crises management has become a task for university counsel as involvement in more and more physical places becomes the norm. Participant health, safety, and security abroad, evacuation, and emergency management, has taken center stage in recent months, and the legal consequences of error or omission are evident. Though this paragraph hardly does justice to the topic, to sort out and keep up with the risk management aspects of global ventures requires collaboration, communication, and systems to share information between program administrators and university counsel.

Due Diligence: At the top of most international project checklists today is legal and other due diligence on foreign counterparts, whether foreign institutions, foreign governments, foreign individuals, or other "middlemen". Thorough but discreet vetting of foreign partners through publicly available searches, reference checks, or special investigative firms, is not necessarily expensive or time-consuming. It often yields precious information on the counterpart's reputation, motivations, business experience, finances, and litigation outlook. The due diligence process also serves to challenge assumptions about the suitability of a foreign partner.

Additional Legal Trends: A discussion of legal trends in university international programs would be incomplete without mention of the points that follow. Nevertheless, bullet point treatment of these issues should not imply that they have secondary importance, nor do these points, or the discussion of each, exhaust the legal and operational issues that garner attention from university counsel. In no particular order:

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[40] The question of whether and to what extent laws like FERPA (34 CFR § 99), HIPAA (45 CFR §§160, 162, 164), and Gramm-Leach-Bliley (16 CFR § 313), and corresponding state law, apply to overseas programs, also deserves attention from universities, as does the question of whether laws like the Clery Act have extraterritorial application.

[41] See, for example, the Department of Commerce's Safe Harbor Program, *http://www.export.gov/ safeharbor/*.

- Dispute Resolution: Including in international agreements dispute resolution provisions that are not “boilerplate”, but instead tailored to the program at hand and truly effective in view of potential or likely points of friction.
- Internal Infrastructure: Creating, reviewing, and renewing the basic internal building blocks of international programs: internal infrastructure such as policies, procedures, handbooks, guidelines, forms, waivers, and management and oversight structure.
- Foreign Taxation: Exploring foreign tax exemptions, such as exemption from value added taxes, and agreements with foreign governments to secure the same.
- Foreign Educational Regulation: Increasing foreign regulation of joint degrees, dual degrees, and other educational programs delivered in-country through distance learning or live instruction.
- Procurement Overseas: Implementing a compliant and efficient procurement function for goods and services overseas.
- Foreign Intellectual Property: Growing university expertise on foreign intellectual property law and protection of university inventions and trademarks abroad.
- Foreign Recruitment: Scrutinizing relationships with foreign recruitment agents.

III. CONCLUSION

At a time when many university budgets are under pressure, the zeal to go overseas has not abated. Transnational compacts are on the rise, and counsel is called upon, sometimes daily, to divert attention from domestic matters and evaluate international ventures. Collectively, the legal trends identified here suggest that to nourish and expand international programs is a delicate endeavor. This is not meant to imply, however, that such programs always should be approached with skepticism and pessimism. Rather, globalization is imperative in the modern higher education environment. Though the legal issues are many and outcomes are not perfect, alertness to the weighty matters entailed is today a permanent endeavor.

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