CARLTON FIELDS

# Rules of the (International) Road

March 08, 2017

**An Overview** Going international is a complicated undertaking. Your specific situation and concerns will determine the steps required. The following outlines, very generally, some issues you must consider as you contemplate international operations. **Bilateral Investment Treaties** Whenever possible, choose projects in countries that have a bilateral investment treaty (BIT) with the United States. BITs protect you if you are discriminated against in procurement. They also provide an arbitration mechanism if you enter into a contract with a government entity or enterprise and have a dispute. **Corruption** Transparency International (TI), a non-profit, non-governmental organization dedicated to fighting corruption, provides a corruption perceptions index that measures perceived corruption in countries around the world. The Securities and Exchange Commission uses TI's index as one indicator that a country should be treated with extreme caution. You too should use the index to investigate the places in which you plan to do business — and approach each accordingly. **Anti-Bribery Compliance Programs** If you plan to bid on government contracts, develop an anti-bribery compliance program from the start. The United States has strict rules against corruption in the procurement or retention of business. The Foreign Corrupt Practices Act (FCPA) governs you and everyone who works for you, whether they are employees, agents, or partners. The FCPA prohibits giving anything of value to a governmental official or anyone else who might give something to government officials to influence them to award, or allow you to retain, business. You are also required to maintain accurate books and records under the FCPA, which also guards against improper expenditures. A proper compliance program requires training for everyone in your business plus regular compliance checks. If, in hindsight, you are deemed to have ignored warning signs, you can be guilty of violating the FCPA. Violations bring substantial fines as well as possible jail time. **Entity Structure** When creating an entity to carry out local projects, structure it with your protection in mind. If possible, your people should control the entity's financial aspects. You must remain involved, vigilant, and aware of contracts with entities related to your local partner. Ensure you do not overpay for goods or services. If overpaid funds wind up in the pockets of government officials, you will face problems. If possible, control the local entity from outside the foreign country. For example, have a U.S. entity that you control own the local entity, and have the local partner own a part of the U.S. entity. Placing control in the United States (or elsewhere with predictable law) may keep you out of foreign court if there's a dispute over shareholder's rights and prerogatives under the shareholder or operating agreement. **Funding** Structure the funding of your project in the foreign location. If there will be central bank requirements for registering your investment, ensure you comply. That way, you will be able to repatriate your invested funds. Unofficial investments can cause repatriation of capital problems. Determine how your banks will fund your foreign operations. They may be unable to fund projects in countries they deem risky. If you need the financing, you may not be unable to proceed. Check out U.S. government sources of loans for your project as well as U.S. government insurance protections. The Overseas Private Investment Corporation (OPIC), the Inter-American Investment Corporation, and the International Finance Corporation have lending capabilities. OPIC also provides insurance against expropriation and inconvertibility of currency. **Tax Considerations** Structure your operations efficiently from the start from a U.S. tax perspective. Withholding taxes on distributions can be as high as 30 percent unless you take advantage of reduced withholding under double tax treaty regimes. Moving money between locations takes planning. **Local Agents** If you plan to work with a local agent, you will need a written understanding with that person that addresses their compensation and the conditions under which it is received, requirements that they comply with the FCPA and other laws, and termination provisions. Agents often receive severance payments under local laws. That is a matter of the public policy of their place of operation, so choosing Florida law, for instance, will not avoid the obligation. You will also want to determine whether the agent can bind you to contracts. **Employment Law** Employment law generally protects employees, so be cautious when hiring. It may be costly to terminate underperforming employees. **Intellectual Property** Protect your intellectual property before you venture abroad by registering trademarks and logos. In many countries it does not matter who used a trademark or logo first, it matters who registered it first. Many big U.S. businesses have paid to liberate their trademarks from others who registered them first. Regarding trade secrets and know-how, you will need written protection effective under the law of the place in which you will operate. **Legal Assistance** Use U.S. lawyers familiar with conducting business internationally. It is important that they, in turn, use local counsel who have the required understanding of local law, language, and customs.

## Authored By

Andrew J. Markus

## Related Practices

International