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VOLUME XIV, NO. 3, FALL 2002

World Trade Week: Minority Joint Ventures

By Bruce Birgbauer, Partner
Miller, Canfield, Paddock and Stone, P.L.C.

During World Trade Week in May, the International Law Section of the State Bar of Michigan sponsored a seminar entitled "Minority Joint Ventures with Foreign Automotive Suppliers." The theme of the seminar was the legal and business considerations in establishing a joint venture and the particular issues involved in establishing a joint venture between a minority business enterprise and a foreign owned company. Howard B. Hill, Chairman of the International Law Section, introduced Bruce D. Birgbauer who acted as moderator for the program. The speakers at the program included Glen Stafford, former minority procurement officer at General Motors Corporation, Louis James, Chief Operating Officer of James Group International, which has a minority joint venture with Summitomo America, Inc., Shailesh Doshi, President of Doshi Prettl International, LLC., a joint venture between Doshi Family Limited Liability Company and Prettl International Inc., a German company, and Carmen Munoz, the director of certification for the Michigan Minority Business Development Council, who spoke on the certification process and some special issues in terms of provisions which are permitted in minority joint venture documentation.

Howard B. Hill, Bruce D. Birgbauer and Saul A. Green spoke about some of the legal issues involved in establishing joint ventures and Franz Neumeyer of Summit Business Coaching spoke from the audience regarding the need for cross cultural training. The seminar was very well received and produced a lot of questions and comments.

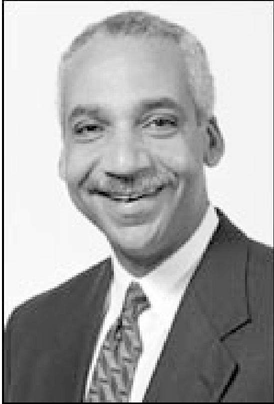
Three of the participants at that seminar have written articles regarding the seminar topic. Saul A. Green has written an article entitled "Minority Joint Ventures with Foreign Auto Suppliers," Glen Stafford has written an article entitled "Current State of Minority Joint Ventures" and Franz Neumeyer has written an article entitled "Multiple Cultures—Success Barrier or Competitive Advantage."

About the Author

Bruce D. Birgbauer is a principal in the Detroit office of Miller, Canfield, Paddock and Stone, P.L.C. His international business practice includes representation of small, medium, and large companies, mergers and acquisistions, cross-border transactions, licensing, joint ventures, business planning, and general representation of foreign companies in U.S. business activities. He also is a member of the Business and Finance Group, Intellectual Property Group, and the Automotive Industry Group. He received his law degree, cum laude, from Harvard Law School, and a B.A. in political science from Williams College, graduating with highest honors, and was elected to *Phi Beta Kappa*.

Minority Joint Ventures With Foreign Auto Suppliers

By Saul Green, Partner
Miller, Canfield, Paddock and Stone, P.L.C.



Foreign companies doing business in the United States, particularly in the automotive supply industry, need to recognize the importance of minority joint ventures and strategic alliances as they develop their business strategy.

The changing demographics of the U.S. have created awareness among U.S. businesses that special attention needs to be paid to the nation's growing minority population. The next 50 years will bring sweeping changes to the nation's racial and ethnic composition. The U.S. Department of Commerce, Minority Business Development Agency recently released these dramatic projections:

- The U.S. population is expected to grow from the current population of 281 million to 394 million in 2050. The minority population will account for nearly 90% of that growth.
- All racial and ethnic minority groups will increase faster than non-Hispanic whites. The white population will actually register negative growth rates after 2035.
- The minority population will likely surpass the white population after 2050.
- Racial and ethnic minority groups have a much younger median age than whites. By 2015, elderly whites will outnumber white youths, while the opposite is true for all minority groups.
- Minority purchasing power, pegged at $1 trillion in 1998, has been growing faster than the general population's during the last decade and is expected to increase to $1.6 trillion by 2005 – ballooning to $2.1 trillion by 2015.

In response to this expanding market, more and more industries are employing the key strategy of minority supplier programs. In 1999, automakers spent $10 billion on minority supplier programs. These expenditures have continued to grow each year. These initiatives create attractive opportunities for Minority Business Enterprise (MBE) participation, and come at a time when there's significant consolidation in the automotive supply industry. Savvy suppliers will recognize the importance of MBE joint ventures and strategic alliances to help them maintain market share.

With increased globalization foreign companies wishing to do business in the U.S., particularly in the Automotive sector during this period of consolidation, also need to recognize the importance of MBE joint ventures and strategic alliances. To be recognized as a MBE by the OEMs and tier one suppliers, certification by the appropriate National Minority Development Council ("NMSDS") regional council is essential.

I. CERTIFICATION PROCEDURES

The policies and procedures for the certification of bona fide MBEs were developed by the NMSDC. Regional councils have been formed to consolidate and provide a focal point for delivery of services and coordination of activities to assist businesses. The regional council in Michigan is the Michigan Minority Business Development Council ("MMBDC").

A MBE is a for profit enterprise, regardless of size, physically located in the U.S. or its trust territories, which is owned, operated and controlled by a minority group member. "Minority group members" are U.S. citizens who are African-American, Hispanic American, Native American, Asian-Pacific American and Asian-Indian American. "Ownership" by minority individuals means the business is at least 51% owned by such individuals or, in the case of a publicly owned business, at least one or more such individuals own 51% of the stock.

Any arrangement between a minority business concern and other party(ies) which involve apparent minority "fronts," or other circumstances which would tend to circumvent the certification process by placing any substantial control of the minority business concern with a non-minority individual (s) will be closely examined and may result in a denial or revocation of affiliate certification.

The process for certification involves an application for Affiliate Membership to the MMBDC. After the application and supporting papers are received, MMBDC will schedule an interview to meet with the minority person who owns a majority of the proposed MBE. They will interview this person very carefully to make sure that the person has the business experience, skills, and financial resources to become a successful owner-operator of a MBE. The staff will also review all contractual relationships between joint venture partners to make sure that the minority owner is a 51% owner with operating control. The matter will then be submitted to the Certification Committee of MMBDC.

The MMBDC will request financial statements for the last year of operation (or if the applicant is a new business, a copy of an opening balance sheet and projection of income), resumes of all partners, licenses to do business, proposed operating agreement, buy-out rights agreement, profit sharing agreement, documentation of capital investment, third-party agreements, and evidence of minority status. MMBDC will also require any articles of organization and amendments and any organizational minutes and proof of membership ownership.

A. Ownership And Control

An eligible MBE must be an indepen-

dent business. The ownership and control by minority must be real, substantial and continuing and must go beyond the pro forma ownership of a business. The minority owners must enjoy the customary incidence of ownership and share in the risks and profits. Recognition of the business as a separate entity for tax or corporate purposes is not necessarily sufficient for recognition as a MBE. In evaluating an application for certification, the MMBDC will consider the date the business was established, the adequacy of its resources, and the degree to which there is reliance for financial, equipment leasing or any other relationship with non-minority businesses.

The minority owners must possess the power to direct or to cause the direction of management and policies of the business and to make the day-to-day decisions as well as major decisions. The business should not be subject to any formal or informal restrictions or cumulative voting rights or other arrangements that prevent the minority owner from making a decision for the business without the cooperation or vote of any owner who is not a minority. If the owners of the business who are non-minorities are disproportionately responsible for the operation of the business, then the firm may not be considered controlled by minorities.

B. Joint Venture with Minority Business Enterprise

If an existing MBE enters into a joint venture with a non-minority company, the joint venture entity will qualify as an MBE if the MBE partner is owned 100% by a minority person and if that MBE controls 51% of the new MBE. However, if the existing MBE is owned less than 100%, the minority ownership will be determined by multiplying the percentage of minority ownership in the existing MBE times the percent of minority ownership in the new MBE. For this reason, it is usually recommended that a minority business person own 100% of a holding company which then owns 51% or more of the new MBE. It would also be possible for the new MBE to be owned 10% by one minority person, 45% by another minority person and 45% by a non-minority business.

C. Ownership Structures

The ownership structure may be a sole proprietorship, a partnership, a corporation, a limited partnership or a limited liability company. If there is a board of directors, a majority of the board members must be minority group members. A minority group member must be president, chief executive officer or an equivalent position with responsibility for the day-to-day management and control of the company. The applicant should have technical competence in the industry in which certification is being sought.

D. Managerial Control

Managerial control means that the applicant has the demonstrable ability to make independent and unilateral business decisions needed to guide the future and destiny of the business. Articles of incorporation, bylaws and partnership or operating agreements should be free of restrictive language, which would dilute the applicant's control. The applicant should be able to show clearly that he has authority and responsibility to sign payroll checks and letters of credit, authority to negotiate and sign for insurance and/or bonds, authority or control of all corporate bank accounts and authority to negotiate and sign contracts. Control is interpreted so as to insure that the MBE not only directs the management of the business, but also guides its operation. Characteristics of control include:

- Signing checks, bids and contracts
- Making decisions in price negotiations
- Incurring liabilities for the business
- Making staffing decisions
- Making policy
- Making general company management decisions

E. Debt Instruments

Any debt instruments issued by the MBE must provide for a reasonable rate of interest meaning that the rate of interest is not less than the rate established by the Internal Revenue Code and not more than the prime rate in effect at any local commercial bank. The debt instrument must contain a reasonable debt re-payment schedule. If a shareholder owns a debt instrument payable on demand by the corporation, the rate of interest must be paid on the instrument at a reasonable rate. If the debt instrument contains restrictions on the use of amounts advanced, the restrictions must not affect the control of the corporation by minority group members. Where the debt instrument does not meet the requirements outlined above, it will be considered to be stock. Where the debt-to-equity ratio of the corporation exceeds 20 to 1, a debt instrument issued by the corporation will be treated, as stock owned by the debt holder.

F. Other Issues Relating to Certification Process

The MMBDC also has difficulty with the direct borrowing from the non-minority joint venture partner. They prefer to see direct borrowing from a bank guaranteed by the non-minority joint venture partner. Furthermore, the MMBDC does not like to see ownership of land or buildings in the non-minority joint venture partner. Supply arrangements from the non-minority joint venture partner will also be scrutinized. The licensing of technology is permitted, but provisions which allow the non-minority partner to "pull the plug" are not acceptable.

II. ADVANTAGES

The advantages of entering into a joint venture creating a minority business enterprise are as follows:

- Some tier one suppliers are only taking on new suppliers who are MBEs.

Continued on page 24

Current State of Minority Joint Ventures

By Glenn Stafford
VAS Consulting Services

Introduction

This article will discuss the current environment of minority joint ventures and present some innovative concepts to take it to the next plateau. While there are some challenges to overcome, the synergy of major OEMs working together on major minority joint ventures and developing creative approaches for mentoring these ventures can turn these challenges into opportunities.

Current State

Since the first major minority joint venture was formed in 1995 between Johnson Controls and Chivas Products, currently known as Bridgewater, several minority joint ventures have been created. The idea of utilizing minority joint ventures was developed in the automotive industry as a means to address the issues of minority suppliers not being awarded major components/systems contracts. At the time, most minority suppliers did not have the technical or manufacturing expertise to qualify for consideration of major components/systems contracts.

The concept of joint ventures is to bring two or more companies together for generating synergy between the companies, thus creating more value than the individual companies have separately. In addition, the concept of minority joint venturing is to strengthen weaknesses of the minority partner and allow the minority supplier to assume more responsibilities while increasing its value added activities over time. Is this happening in the marketplace? Probably not, due to the following reasons:

- ❖ In most cases, the joint venture obtains the initial business but struggles to obtain future opportunities due to lack of strategic plans to grow the business. It has become a one-time event.
- ❖ All too often, the joint venture is competing with the non-minority partner for the same business opportunities. As a result, the non-minority partner is not committed to growing the business due to the risk of losing business opportunities to the joint venture.

More recently, joint ventures have been vehicles that significantly increase minority Tier 1 purchases while minimizing its sourcing risk. The benefits to OEMs for creating joint ventures are:

- ❖ Instant credibility – Due to having a major Tier 1 supplier involved that has the capabilities to meet OEM's expectations.
- ❖ Elimination of concerns – Relative to lack of experience, insufficient capital and technical resources due to major Tier 1 involvement.
- ❖ Comfort level – This strategy provides a comfort level for customers when sourcing major components/systems to a minority joint venture.

Joint venturing can be a powerful tool to enhance minority supplier capabilities over time if properly utilized with a strong strategic plan to support its growth while transferring more responsibilities to the minority partner. Now is the time to perform benchmarking of existing joint ventures and to utilize this data to develop 'best practices' that existing joint ventures can incorporate while establishing a template for future joint ventures.

Future State

The state of minority joint ventures should be examined, and the issue of incorporating strategies that adds more value to minority supplier partners should be addressed. With most of the joint ventures formed, the minority supplier is supplying or controlling few value added activities. This is because the minority partner is bringing limited capabilities to the venture; therefore, creating a dependency on the non-minority partner for design, engineering, and purchasing of components, which accounts for the majority of the total purchase value.

Going forward, before a joint venture is formulated, the partners should perform a self-check to ensure that they are compatible. Conducting a self-check analysis can improve the joint venture's chances for success. Once this self-check is performed and the decision is made to move forward, the next step in the process should be to develop "steps to success" which outline the process necessary to successfully execute a joint venture.

OEMs can play a critical role in enhancing the success of joint ventures. Currently, each OEM develops their minority sourcing activities in isolation. The concept proposed is to develop a market need analysis across the industry to ensure that if an opportunity is identified in a high growth area that there is support within the industry to grow this minority joint venture. For example, a decision is made to develop a minority joint venture for electronic modules. There should be a meeting organized among the major OEMs to determine the market need for such a venture. If the consensus is positive, the next step is to define the key success factors that are required to create a successful venture to meet the requirements of the customer. In defining the success factors, it is important to include engineering and manufacturing as well as purchasing. This information should be shared with the potential joint venture partners. A strategic plan should be developed to create a significantly large entity and show how each OEM will support and contribute to the success of the venture. This concept is a proactive approach that will involve upfront strategic planning with the synergy of the OEMs working together to ensure the success of the venture.

In today's environment, a major joint venture is created and, in most cases, the OEM responsible for creating the venture is also responsible for growing it. This "out of the box" thinking will give future major minority joint ventures access to

all major OEMs with a long-range vision for growth. Can you imagine the response and support that this venture will receive from the financial community? This will create true minority supplier development by creating a triangular relationship between OEMs, minority suppliers and financial partners with a solid strategic plan to grow the venture.

Additionally, when forming a joint venture, the minority partner should bring something to the table to create a "WIN-WIN" situation. Using the example for developing a venture for electronic modules, a minority supplier should be selected that has electronics manufacturing as its core business. The minority supplier does not have the capability to manufacture the modules but has the capabilities of doing some of the components. This strategy will increase its core business sales while bringing some understanding and manufacturing capabilities to the venture. In addition, OEMs must become more involved with joint ventures to ensure that the value chain is providing opportunities for minority suppliers to participate at greater levels. The opportunities for sourcing more business to minority suppliers for joint ventures is not at the Tier 1 level but at the Tier II level which accounts for the greater value of the purchase price.

Conclusion

With increased emphasis on diversity initiatives and corporate pressures to boost minority supplier purchases, it is now time to identify and implement new concepts to accelerate minority supplier development to the next plateau. Historically, the auto industry has been a leader in minority supplier development, and the opportunity exists now for the auto industry to take minority joint ventures to the next level. Minority joint ventures can be a powerful tool for providing significant revenues for the minority entity when properly executed. Too many joint ventures are formed without a plan for supporting and growing them in the long-term. It is not enough to source business to a minority joint venture, but it is necessary to put them in a position to succeed in the long term with a solid strategic plan for growth.

About the Author

As a former purchasing manager and minority coordinator at General Motors, Glenn Stafford's responsibilities involved developing and implementing strategies for growing minority suppliers. In addition, he has extensive expertise in facilitating and creating several joint ventures. With his vast experience and knowledge and his understanding of future trends of the industry, he developed this article to suggest ways to take minority joint ventures to the next level.

Currently, Mr. Stafford is the owner of VAS Consulting Services, specializing in assisting automotive suppliers in the area of strategic planning as well as developing joint ventures and strategic alliances.

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Multiple Cultures—Success Barrier or Competitive Advantage

By Franz Neumeyer
Summit Business Coaching

The globalization of business is entering a new era. After mega mergers and key tier one supplier globalization, it is now the lower tier suppliers who are teaming up globally with established local partners in their fields. For foreign companies, Minority Joint Ventures seem especially attractive because of a perceived additional competitive advantage. However, the high-level of cultural complexity of these structures are overlooked most of the time. This article describes some typical cultural problems, the need to "manage" culture, and a relatively new way to increase the intercultural competencies of the parties involved.

Culture

"Culture is the collective programming of the mind, which distinguishes the members of one category of people from another" (S. Hofstede). Not the more obvious symbols and practices like food, language or social customs, are most often derailing international business dealings but the deep seeded cultural core values which we learn as young children and are very resistant to change. They are largely unconscious, invisible and reflect a part of people's personalities of who they are. When an action violates these core values, for example the belief in individual accountability, people react very emotionally and strongly believe the other side is wrong. A key to establishing lasting international business relationships is therefore to accept that all cultural core values are relative and that there is no absolute right or wrong. This takes time and requires an open mind.

Multiple Cultures—A Success Barrier

The success rate of international joint ventures is very low. More than 70% fail in the first three years or don't create any value for their shareholders. While of course not every failure is based upon intercultural aspects alone, they certainly play a key role in nearly all of them. International minority joint ventures have to deal with an even higher level of cultural complexities, which increases the risk for failure. Beside the two national cultures of the joint venture partners, for example USA and Germany, the minority culture, for example Hispanic or Asian, has an impact also. Additional challenges can be expected from the different business cultures in minority companies with other companies especially since the legal concept of "minorities" and all aspects in dealing with it is completely foreign to most people from other countries.

While the United States as a country is ranked second in global competitiveness (World Economic Forum 99), because of the huge domestic market, most of their people are less prepared for multicultural experiences than people in any other country around the world. All these aspects combined lead to a situation where international minority joint ventures very often are not using their full potential or effectiveness and business results are often not according to expectations of the joint venture partners. Typical situations are a lack of trust between people from the joint venture parties, people feeling frustrated, misunderstood, or even personally attacked but in reality different cultural core values are the reason and not personal animosity. Joint venture leaders and their advisors often have little global experience themselves, which reduces their ability to lead by example and inspire individuals and teams following into this challenging adventure. While these factors are hard to measure, intercultural difficulties are typically reflected in postponed deadlines, budgets not met, a low customer satisfaction rating and of course unsatisfying net profit margins. However, there are some very successful international joint ventures in the marketplace. What are they doing differently?

Multiple Cultures—Competitive Advantages

These companies turn cultural diversity into a competitive advantage by leveraging and synergizing complementing cultural core values and related practices. This requires a new type of leader and/or advisor — people who complement their existing capacities with intercultural competencies. They are called "Global Literate Leaders" (R. Rosen) or "Intercultural Professionals" and are characterized as:

- ☒ Making conscious decisions not driven by social or cultural conditioning
- ☒ Interacting effectively with people from different cultures
- ☒ Synergizing the diversity of people, national realities and business practices

A good example is Dieter Zetsche, CEO of Daimler Chrysler whose intercultural competence enabled him to quickly establish trust and acceptance with German and American stakeholders. He was able to bring the company back to profitability faster than anyone expected. It shows that the additional competence of intercultural professionalism can be worth millions if not billions in today's global environment and can turn a failing international joint venture into a success story.

Development of Intercultural Professionalism

Most leaders of international joint ventures today learn some aspects of intercultural competence through the slow and expensive way of "learning by mistake." However, there is not enough time for trial and error strategies into today's fast paced environment. A new concept to develop global leaders—Intercultural Business Coaching - has surfaced during the past few years. First implemented by big multinationals, it promises to overcome typical difficulties and help people to comple-

ment their current capabilities with intercultural competencies in a very effective and efficient way. To build the capacities mentioned above, while working on real world challenges. Intercultural Coaching is focusing on an understanding and acceptance of different cultural values, skills to develop lasting intercultural relationships, and experiences in synergizing different business practices.

Conclusion

International joint ventures, especially minority joint ventures are in danger to fail twice as often as they succeed unless their key people recognize that "culture must be managed just like any other business phenomenon" (P. Drucker). This requires additional competencies. Because of the nature of culture as an integral part of our individual personality, it takes more time and effort to adopt new behaviors in order to succeed in this challenge. Intercultural Business Coaching seems to be an effective way to develop the necessary competencies to provide the international business community with what it wants - a global network of efficient and competent manufacturers, suppliers and service providers.

About the Author

Franz Neumeyer is founder, president and owner of Summit Business Coaching. He is a native of Germany and has been an intercultural professional throughout his entire career. For ten years he worked in Germany for a leading automotive supplier in several global management responsibilities in the areas of technical sales, marketing and business unit management. In 1995 he relocated to Michigan/USA and took over the role as CEO for Webasto's US and Canadian subsidiaries. He gained psychological literacy in nearly 10 years and finished the two-year BIB Coach Program in 1995.

Submissions Guidelines

The *Michigan International Lawyer*, which is published three times per year by the International Law Section of the State Bar of Michigan, is Michigan's premiere international law journal. Our mission is to enhance and contribute to the public's knowledge of world law and trade by publishing articles on contemporary international law topics and issues of general interest.

The *Michigan International Lawyer* invites unsolicited manuscripts in all areas of international interest. Manuscripts should be available in hard copy and electronic format. Manuscripts submitted for consideration cannot be returned unless accompanied by a $5 check or money order made payable to **Wayne State University Law School** for shipping and handling.

All submissions may be forwarded to the editor at the following address:

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State Bar of Michigan
67th Annual Meeting

International Law Section
Thursday, September 26, 2002
See additional information about the business meeting and program on page 21!

International Law Section
State Bar of Michigan
Report of the Nominations Committee

Pursuant to Article IV, Section 1 of the By-Laws of the Section, Howard B. Hill, the Section Chair, appointed Jan Rewers McMillan, Clara DeMatteis Mager, and Randolph M. Wright as members of the Nominations Committee for the 2002 Annual Meeting.

In concluding its deliberations, the Nominations Committee has recommended that the following members of the Section be nominated for election as officers at the Annual Meeting:

Chair—Clara DeMatteis Mager
Chair-Elect— Jan Rewers McMillan
Secretary— Randolph M. Wright
Treasurer— Bruce D. Birgbauer

As to the Council, the Nominations Committee recommends that the following members of the Section be nominated for election to the Council of the Section for the following terms:

For 3-year terms to expire as of the annual meeting in September 2005:

Narinder J. S. Kathuria
Andrew Segovia
Marc C. McGuire
James S. Serocki
Lois Elizabeth Bingham

To fill a vacancy in a term expiring as of the annual meeting in September 2004:

William H. Dance

Respectfully submitted,
Clara DeMatteis Mager
Chair-Elect, International Law Section
Dated: August 1, 2002

Calendar of Meetings

Dates & Locations of Council Meetings

2002

September 26	Annual Meeting—Grand Rapids
November 5	Doing Business in India— Narinder J.S. Kathuria—Location TBA

2003

January 21	Butzel Long—Detroit
February	SAE
April 29	Univ. of Mich Law School—Ann Arbor
May	World Trade Week/International Dispute Resolution Panel – Randolph Wright
June 10	Planning/Section Outing
September 17	Annual Meeting—Cobo Hall, Detroit
November 4	Berry Moorman—Birmingham

2004

January 20	Butzel Long—Detroit
April 20	U of D Mercy Law School
June 15	Planning/Section Outing
September	Annual Meeting—Lansing
November 9	Miller Canfield—Troy

Publication Deadline Dates
Michigan International Lawyer

Fall Issue	Sept. 1 (Articles due August 1)
Winter issue	January 15 (Articles due December 15)
Spring Issue	May 1 (Articles due April 1)

If you know of any upcoming event, please let us know.
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Negotiating a Public Private Partnership: The Polish Toll Motorway Example

By Peter Swiecicki, Baker & McKenzie
Warsaw, Poland

Governments strapped for cash have embraced Public Private Partnerships (PPP's) as an appropriate solution for building and operating needed infrastructure. Starting from their development in the United Kingdom, PPP's have spread globally. However, given the variations in local laws, practices and infrastructure needs, many countries have only recently implemented their first PPP projects. For instance, despite its proximity to England, Ireland has only embraced PPP's relatively recently, but is doing so with a model that attempts to avoid the pitfalls of the English system.[1]

Poland also provides a current example of the issues facing PPP's. The first PPP project was recently closed in Poland, a •875 million project for 149 kilometers of the first phase of the A2 toll motorway around the major western Polish city of Poznan. The A2 motorway is to connect Warsaw to Berlin and forms part of the Trans European Network—the TEN—the crucial European highway infrastructure project, which is analogous to the Interstate Highway System in the United States. Through the use of a PPP project for a toll motorway as an example, this article will discuss some of the major issues involved in the tender procedure, negotiation process and concession agreement.

Tender procedure

The tender procedure for a toll motorway is essentially a three-stage process consisting of the initial invitation, a limited tender and finally negotiation of the concession agreement.[2] At the stage of the initial invitation, first the Polish cabinet (Council of Ministers) must review proposed tender terms and accept principles of financial support from the National Motorway Fund. Following such acceptance, the Motorway Agency publishes the invitation in the national press and in the EC Official Journal. Responses are limited to Polish companies with a share capital of at least euro 5 million, or entities that would form such a company.

Invitations that are submitted are graded by a tender committee on the basis of either (i) maximum points for selected criteria, in which case the minimum total number of points required must be established before opening of the bid envelopes; or (ii) minimum criteria for qualification, which is followed by determinations as to whether the minimal criteria have been satisfied.

The criteria include experience in building or operating at least two similar toll motorways; the general proposal for financing construction and operation, including the expected need to utilise financing from the National Motorway Fund and suretyships or guarantees of the State Treasury, together with documents supporting the probability of receiving financing; and experience in financing and ability to finance from own funds and bank credits and loans. For a valid initial tender procedure at least three responses must be filed and one entity can only participate in one consortium filing a response.[3] Those bidders that pass through the initial invitation stage are then invited to participate in a limited tender. At the start of the process, upon payment of a fee and execution of the agreement not to pass on information to third parties, they will receive relevant information that includes the anticipated basic terms of the concession and the concession agreement.

The bidder is required to pay a substantial deposit when submitting its offer. Offers will be evaluated based on the financial ability to complete the investment, the validity of the bidder's estimates and the traffic study, construction cost and operating cost, the proposed term, technical solutions and acceptance of the material terms of the concession agreement.

In defining the terms of the tender, the need to ensure the bidder's ability to obtain financing must be taken into account. Financing banks want a clear and realistic allocation of risk that is objectively measurable, equitable and manageable. Financing is difficult to obtain at the start of a tender competition when these criteria are not fully defined. The banks will also insist on direct agreements with the government and other relevant parties. Therefore, the successful concessionaire ideally would like to organise a funding competition once it has received the concession. However, the government wants greater certainty of financing. It can be expected that the government will request delivery of financing commitments and that the government will need to assess the ability to achieve the conditions precedent for financing as part of the evaluation of bids submitted.

Negotiation process and the concession agreement

The Motorway Agency will negotiate through a designated negotiating team. As required, this team can request specific negotiating instructions from the Minister of Infrastructure. The team will negotiate a concession agreement that must include material terms such as the beginning and end date of construction, the level of tolls, the level and form of financing from the National Motorway Fund, sharing of profits, lease terms, operating obligations and dispute resolution mechanism. The concession will start when a concession agreement is ready to be signed.

In general, the goals of the tender process are to maintain flexibility while keeping transparency and non-discrimination. A pre-tender dialogue may occur in order to formulate tender terms that will

meet with general interest and acceptance. A short list of qualified tenderers is used to create reasonable and manageable competition. The law provides that the negotiation of the concession agreement may take up to 9 months, which is a recognition of the complexities involved. To date, such negotiations have taken far longer. Flexibility is important because the parties must recognise that laws may change, perceptions of risk will change and interested parties may evolve their organizational structure. These events will occur between the initial announcement of the tender and final agreement on the terms of the concession agreement.

Another issue that arises is the risk of change in the members of the consortium in a long negotiation process. This arises principally due to outside factors such as mergers or a change to a corporate strategy that is unrelated to the specific project at issues. Therefore, the tender procedure must provide flexibility to consortium members. The government may insist on maintaining a certain stability of the shareholding of the special purpose vehicle created for a specific project. This stability will enable management roles to be clarified and ensure fairness and competition in the process. However, justified changes to shareholding or management must be permitted. The clarification of the management roles and shareholding is also normally done by creating separate legal entities for the concessionaire, the developer and the operator. The concession agreement can then introduce contractual restrictions on changes to this structure.

It should be apparent that the bidding process with the requirement that the bidder demonstrate experience on prior projects, together with the desire for certainty of funding and costs to be included in a bid, means that the concessionaire will normally not be in a position to tender for a prime contractor or operator following award of the concession, as these roles will have been pre-determined at the start of the concession process. The concessionaire will have the duty to design, build and operate the project. There will be an inherent conflict between the preliminary design included in the tender process and the final design for the project required to obtain building permits. The government will need to monitor the building of the project.

With respect to operation the government will need to establish the rights of the operator, the standards to be followed, the monitoring procedure and a system of incentives for improvement in operation. The government will also wish to monitor leakage of funds, which can occur through consulting agreements, agreement with affiliates, non-competitive aspects of contracts, and arrangements for distributions following repayment of senior debt financing.

The concession agreement will also need to cover potential termination issues. These include a material adverse event, where the negotiation will focus on the definition of such term and the period over which such events must continue for a party to have rights arising under this clause. A change of legal requirements is also a potential termination event that will be discussed in the context of whether it is discriminatory and whether it was foreseeable. Further, the lenders' step-in rights are an important issue relating to the bankability of the agreement. Direct step-in rights are generally restricted due to administrative law. However, even if direct step-in is restricted, lenders will seek notice and cure rights.

The PPP challenge

Proponents of the PPP process may sometimes oversimplify it to a formula with the elements of the government providing the land, the private investor providing the capital, the company is formed and the result is that the project is successfully completed. The reality is that a successful PPP involves a moving constellation of interested parties and ongoing negotiation of their respective rights and obligations. These interested parties include the equity sponsors, the special purpose vehicle, the contractor, the operator, the senior lenders, the mezzanine lenders, other funding institutions such as multilaterals, the motorway agency, the Ministry of Infrastructure and Ministry of Finance and the local governmental entities with jurisdiction over the project site. Interface is required with a complicated process of land acquisition and development approvals. The government must weigh the potential loss of control versus the potential benefits of off-balance sheet financing through the PPP process. The result is complicated but if the required political, financial and sponsor support can be obtained, the process can provide enhanced infrastructure that otherwise could not be built.

Endnotes

1 For more details see the website of Ireland's Central PPP Unit at www.ppp.gov.ie. The website defines a PPP as "a partnership between the public and private sector for the purposes of delivering a project or service traditionally provided by the public sector."

2 The governing law is the Toll Motorway Act of 27 October 1994, Official Journal of Laws No. 127, item. 627, as amended.

3 Given the requirement that a bidder has experienced in building or operating at least 2 similar toll motorways and the lack of such motorways in Poland, it is clear that successful bidders will need to be organized in the form of a consortium that includes a non-Polish party with the relevant experience.

Development of the Government Procurement Regime in the Slovak Republic

By Paul J. Carrier, Lovells, Prague Office and Edward M. Zelenak, Honorary Consul to the Slovak Republic

Paul J. Carrier

In 1993, the newly established Slovak Republic[1] was the first Central European country to pass a new, post-Communist era law on government procurement.[2] This law was loosely based on the UNCITRAL draft Model Law on Government Procurement, but Slovakia's reform in this area was still in the fledgling stages, and the lack of a comprehensive statute made the process difficult to understand and left much to obscure, internal regulation. All of the former Soviet satellites experienced a similar void following the decline of the Soviet Union's centralized control. More important in the short term were Slovakia's efforts in the area of privatization, which was a requisite step to properly defining the "government" portion of the term "government procurement." Finalizing the government/private sector distinction in the context of formerly State-controlled enterprises was necessary to make clear the distinction between government procurements and private sector ones. For this reason, a discussion of government procurement merits some background on the privatization process.

Privatization Process

The first wave of privatization (1993-1994) involved the selling of small- and medium-sized enterprises to individuals or groups and is typified by sale of such concerns as restaurants and small services businesses. In the second wave of privatization (1995-1998), larger-scale businesses were privatized, often by direct sale to management groups of a formerly State-owned enterprise.[3] During this phase, larger businesses such as Slovnaft (oil refinery), VSZ (steel manufacturer) and Skloplast (glass fiber manufacturer) were converted into joint stock companies by the Ministry of Privatization pursuant to request of individuals or by whichever Ministry was charged with supervision of that particular industry in the past. The shares were then turned over to the National Property Fund, and soon thereafter, an agreed percentage of shares were then transferred to private individuals or enterprises, typically for some cash, a commitment to pay additional funds over a period of years, and set-off for investments into the business.[4] The final stage (now nearing its conclusion) is large-scale privatization, whereby many of the largest of the State-controlled enterprises are either being privatized, re-organized as sub-State governmental units, or in a few cases, left unchanged.

In 1997, the Act on Large Scale Privatization[5] was amended to make privatization of large-scale enterprises, including some of the larger State-controlled banks and the State telephony company (Slovak Telecom), possible. In certain cases, however, private ownership has been limited to 49%, representing a minority stake and ensuring government control by way of the retained 51% shareholding.[6] At present, plans are underway for privatizing, at least partially, the major electricity generating company (Slovenske elektrarne) and the three power distribution companies. It is also expected in 2002 that that ownership of the first of five State-controlled water authorities will be transferred to a regional group made up primarily of effected municipalities, with the other regions to follow. Moreover, the former national railroad was split into a government-owned joint stock company (Zeleznicna spolocnost, a.s.) and a retained portion in ZSR (the previous and continuing State monopoly)[7] whereby the former would assume the transport aspects (persons and goods) and the latter would remain as provider of the routes. The approved project includes the creation of conditions for denationalization and privatization of servicing and supplementary activities that were formerly handled by ZSR. It is expected that ZRS will continue to own and maintain the infrastructure and that ultimately, shares in Zeleznicna spolocnost, a.s. could be sold to private investors.

Government Procurement

Due in large part to the completion or near completion of privatization efforts, Slovakia has recently focused on a major revamping of its government procurement laws. These laws regulate the purchase of goods, services and works by State entities, regional governments, municipal entities, and enterprises owned or controlled by them. Because in certain cases ownership or majority ownership will remain with the State along the lines of their position as natural monopolies, government procurement rules will continue to apply. Further, the re-organization of several of the former State monoliths indicates a structural shift opening up new opportunities for international law and business: project finance in the context of government procurement. What is meant by project finance are projects whereby the infrastructure remains with the State or sub-national regional or municipal authority (or will be turned over to the relevant authority after a period of years), but developments and improvements are made and paid for by private

enterprises that are compensated over a period of years by charging fees. Often called turnkey or BOT (Build-Operate-Transfer) contracts, representative examples include the building of toll roads or the construction of electricity generating equipment by private enterprise.

Now that funds from privatization are on the wane, it is expected that the State and its subdivisions will turn ever more to private sector sources of funding for the purpose of undertaking much-needed infrastructure development. Furthermore, the de-centralization of State authority in favor of transfer to regional authorities and to municipalities, a process which began in the mid-1990s, may speed the process by removing certain complications that accompany a single, national decision-making process, including political wrangling and national, rather than regional or municipal, prioritization. Whether national or sub-national, whether dyed-in-the-wool government purchases (for goods, works or services paid for with State funds) or project finance, Slovakia now has a solid new law to regulate the process.

Effective from 1 January 2000, Slovakia's new law on government procurement[8] was aimed at harmonizing Slovakia's laws with those of the European Union in the hope of acceding to the EU in the "first wave," which may be as early as 2004.[9] The following is a thumbnail sketch of some of the more important features of the Act.

Currently, there are four methods of above-threshold government procurements: open tender, restricted tender, negotiated procedure with prior notification, and negotiated procedures without prior negotiation.[10] For supply of goods, depending on the nature of the procuring entity, the threshold values of covered procurements range from EUR 130,000 to EUR 600,000.[11] The same limits apply to procurement of services.[12] The financial threshold for works is EUR 5 million.[13] Further, those entities that must adhere to the procurement regime are broadly defined in Article 3 of the Act, with a host of exceptions for certain types of procurements such as those involving State secrets, national defense, stationing of foreign troops, and legal services of an adjudicatory or arbitration nature carved out by Art. 2(3)(a) - (u).

The Act also sets out a comprehensive set of procedures for covered procurements involving bidder notification requirements, the contents of notices and tender documentation, award procedures, reasons for objections and objection procedures, qualification of bidders, and qualifications of those responsible for procurements within government offices, departments or subdivisions that are subject to the Act. While compliance with some of these rules may appear tedious, the benefits include a much more transparent system and, once procuring entities and bidders become accustomed to the procedures, an understandable, fair, and streamlined mechanism for procurements in the Slovak Republic.

Perhaps the most important feature of the Act is the creation of the Office for Public Procurement (the "Office"), which is now responsible for supervising procurements, listing of qualified procurement experts and qualified bidders, publishing an official journal which among other things announces procurements and awards, consideration of objections, and even training of procurers. The Office also plays an advisory role both with respect to procuring entities that need assistance and to the Government regarding new laws and further required amendments to the law. The Office is further empowered to represent the Slovak Republic *vis-à-vis* international procurement bodies such as the WTO (via the GPA *see below*), the OECD, CEFTA, and institutions such as the World Bank.

It is yet too early to fully assess the effectiveness of the Act, and on many of the major issues, there is the potential for good and for bad. For example, objections to procurement procedures on the basis of conditions stated in notices, invitations and competition documentation, to exclusion of bidders, or to the ranking of bidders or performances, may only be filed with the Office,[14] which could pose the danger of improprieties by concentrating review authority in a single body. However, the potential benefits include the assurance of supervision and review by a properly trained set of professionals, the potential removal of favoritism if the Office is far enough removed from national politics, and it is very possible that Slovakia will be able to deal with objections in a more time-effective manner than would be true were objections to be handled by the courts. Time frames for the filing of objections, the Office's response, and discretionary suspension of procurement proceedings in appropriate cases are squarely defined. Properly administered, the new review procedures will constitute an "effective remedy" that is a fundamental goal of developing international standardization efforts such as EU Directives[15] and the GPA.[16] In addition, notices, invitations and awards will now be published in an official Journal (albeit in the Slovak language), and for above-threshold procurements, notices of procurement will be published in the foreign media.[17]

While professional requirements placed on procuring agents and the requirement of special training or experience, as well as success on an examination would appear to have only positive consequences, there is the possibility that the list of qualified procuring agents could be restricted in such a way as to permit influence peddling. It is therefore important to ensure that listing process is fairly administered and not subjugated to personal interests and political connections. In the balance, however, trained and qualified procuring agents are essential for an efficient system and arguably, more problems arise from the lack of qualified and knowledgeable personnel than from procuring agents' personal motivations.

Similarly, the requirement of bidder qualification criteria, including professionally trained persons responsible for bidding on behalf of a bidding enterprise, requisite experience requirements, proof of full payment of health, sickness, income and social taxes, etc., could have a po-

tential frustrating effect on bidders, especially foreign bidders.[18] However, the Act now provides for the submission of substitute documentation from foreign authorities,[19] and there is a procedure whereby likely bidders may qualify for entry onto a list that replaces the need to qualify for each and every procurement.[20]

Currently, a further draft amendment to the Act is under consideration. In addition to clarifications, minor revisions, and other improvements, the draft proposes a comprehensive definition of enterprises that operate in sectors including drinking water, waste water, electricity, telecommunications, postal, natural gas, oil extraction or transport, dock, and airport services. This clearly underscores the application of government procurement rules to some of the more important industries that, at least in the foreseeable future, will remain State entities or quasi-governmental entities even if they are in the process of being privatized or re-organized. The draft amendment is currently under consideration, although it is too soon to say whether it will be passed prior to the elections scheduled for September 2002.

Conclusion

It is expected that a handful of central, eastern, and southern European countries will be admitted into the European Union in 2004.[21] Membership will be granted at such time as an applicant country has closed the 31 chapters of negotiation,[22] which means that each country must have negotiated and agreed with the EU on the adoption of the *acquis communitaire* (laws and rules adopted on the basis of the founding treaties of the European Union, primarily the Treaty of Rome, the Maastricht Treaty, and the Amsterdam Treaty) related to each chapter. Currently, Slovakia has closed 26 of 30 opened chapters, behind only Cyprus, Estonia, Slovenia, Latvia, and Lithuania.[23] In light of its position in the race to EU membership, and its track record of opening and concluding chapters for EU accession, there is every indication that Slovakia will have a fully functional legal regime in the area of public procurement. Although institutional understanding and enforcement always lag behind enactments of new law, Slovakia has roughly two years to bring its practices and policies in line with EU standards, and received EU funding and assistance to reach this goal.

It is important to point out that although Slovakia's current efforts are aimed primarily at EU accession, the transparency and liberalization of procurement processes and the opportunity to foreign interests that this would entail will also benefit non-EU enterprises. The theory behind permitting GATT Article XXIV customs unions and free trade areas (e.g., the EU and the U.S./Canada/Mexico FTA or "free trade area") is to permit regional arrangements that allow intra-group preferences in the expectation that any market liberalization is valuable and that, over time, any gains in liberalization will ultimately be extended to the entire group of trading nations. Although it is expected that EU-based procurement bidders will enjoy certain advantages over non-EU bidders, open, transparent and binding laws and regulations alone will be of benefit to all potential bidders.

Further, the EU member states are members of the WTO's GPA, which means that for listed procuring entities in its Appendix I, bidders from other GPA member states (including the U.S.) are to be afforded basically equal treatment in government procurements, and newly admitted members will be expected to accede to the GPA.[24] An interesting distinction is that Slovakia's definition of what is covered by its procurement law is very broad (to which exceptions are made), whereas the systems in the EU and the GPA entail the addition of new areas of government procurement following negotiations. How this will ultimately be reconciled is uncertain, but it does indicate a significant good-faith effort on the part of the Slovak Republic to open up its procurements to international competition. Finally, the U.S. has entered into trade relations and bilateral investment treaties with Czechoslovakia (which continue to apply to the successor states: the Czech Republic and the Slovak Republic),[25] both of which have a standard array of non-discrimination, most-favored nation, and national treatment principles (with exceptions of course) that can be used if necessary to enforce fair treatment in the public procurement area by U.S. - based bidders.

It should not be forgotten that insider knowledge and political connections will continue to play a significant role in the process of securing government contracts in the Slovak Republic, but the rules have now been made that much more even-handed, and at a time when major infrastructure projects funded by private sector participation are just reaching the initial planning stages. Moreover, parallels from the situation in the Slovak Republic may be drawn to other nations in Central and Eastern Europe.

About the Authors

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Endnotes

1 From 1 January 1993, the Slovak Republic split from the Czech and Slovak Federative Republics (formerly, Czechoslovakia) in what is known as the "Velvet Divorce."

2 Act No. 263/1993 Coll., as amended (effective 1 January 1994). Poland and the Czech Republic followed in 1994, and Hungary passed its first post-Communist era procurement law in 1995.

3 *See generally* K. Connor and P. Carrier, *Slovak Republic: The first decade of market reform*, Privatisation International Yearbook 1999, pp 69-71; K. Connor and P. Carrier, *Slovak Republic: Privatisation Heats Up*, Privatisation International Yearbook 2000, pp. 80-81. For a brief analysis of "reprivatization," whereby companies that were privatized by direct sale to Slovak persons or enterprises have been resold to foreign investors, *see, e.g.*, K. Connor and P. Carrier, *The Second Time Around for Slovakia's Privatized Companies*, Russia/Central Europe Executive Guide pp. 2, 19 (Vol. 9, No. 9, May 15, 1999).

4 It was common for the National Property Fund ("NPF") to maintain a level of ownership in these companies, as well as the statutorily mandated 3% share transferred to the Restitution Fund. Sale of shares in an enterprise was done by contract with the NPF, and failure to honor conditions of the contract, such as re-investment, maintenance of employee levels, payment of further instalments on the purchase price, etc., would entitle the NPF to cancel the contract and take back the shares. Retention of shares by the NPF, or sale of these shares to another State-controlled company such as a State bank (eg. Slovenska sporitelna or "Slovak Savings") or the State insurer (Slovenska poistovna or "Slovak Insurance"), ensured State involvement in the newly privatized companies and was sometimes used to further political ends. The small percentage of shares given to the Restitution Fund were used to fund the process of restitution of State property to individuals who had special claims against the State for wrongful expropriation of property during the Communist era.

5 Act No. 92/1991 Coll., Act on Large-Scale Privatization, as amended.

6 *Id*., Section 10(4). Section 10(5) required some level of ownership by the State or the NPF in the case of Slovak Telecom, Slovak Savings, General Credit Bank, and Slovak Insurance, but the exact level was not specified and was likely the result of the need to ensure interest of foreign investors. Deutsche Telekom ultimately purchased a majority stake in Slovak Telecom in excess of 49%. Austrian Erste Bank bought a controlling stake of Slovak Savings in 2001.

7 The extract from the Commercial Register, now available from website www.orsr.sk, indicates that Zeleznicna spolocnost, a.s. (the services rather than infrastructure portion of the split business) was registered on 21 December 2001. This is in line with the project for transforming and restructuring the railways of the Slovak Republic approved by Government Resolution 830 of 18 October 2000.

8 Act No. 263/1999 Coll., Act on Public Purchasing, as amended and supplemented (the "Act").

9 Consideration of other international rules and guidelines has also been instrumental in the development of the Act. These include the UNCITRAL Model Law on Procurement of Goods, Construction and Services adopted 1994 (a draft was available as early as 1993) and the regulations and guidelines of international institutions such as the OECD and the World Bank. In fact, Slovakia's agreement with the European Communities for pre-accession steps to membership specifically directs the Slovak Republic to open up awards of public contracts on the basis of non-discrimination and reciprocity, "… in particular in the GATT [General Agreement on Tariffs and Trade] context…." *Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part*, OJ L 359, 31/12/1994, pp. 2-210, Art. 68(1) (hereafter the "Association Agreement"). What is being referred to is the GATT's (GATT was the predecessor to the World Trade Organization or WTO) plurilateral Government Procurement Agreement (the "GPA"). Even the Central European Free Trade Agreement signed by Slovakia, Poland, Hungary and the Czech Republic in December 1992, Art. 24 (2), calls for the harmonization of national laws to those of the GPA.

10 The Act, *supra* n. 6, Art. 12(1)(a)-(d). The specifics of each procedure are further set out in subsequent Articles of the Act. Incidentally, one of the primary amendments to the Act was establishment of simplified procedures for below-threshold procurements, broken down into two further categories of below-threshold procurements of both higher value and of lower value, respectively. *See specifically* Act No. 557/2000 Coll., Modifying and Amending Act No 263/1999 Coll. on Public Procurement and on Modification and Amendment of Some Acts. Although full explanation of the differences is not within the purview of this article, it may be said that the required procedures, including the number of bidders invited, the existence and nature of any pre-tender publication of notice, and other matters are de-emphasized or removed as the values of the procurements decrease below the thresholds.

11 The Act, *supra* n. 8, Art. 18(a) - (d).

12 *Id*., Art. 19(1)(a) - (d). In the case of services, provisions are made for valuing services and for exclusion of a certain level of distinct procurement phases of multi-stage procurements. *Id*., Art. 19(2) - 19(3) (exclusion for performances worth up to EUR 80,000, the value of such exclusions not to exceed 20% of the total value of the contract).

13 *Id*., Art. 20(1). Provision is also made for exclusion of a certain level of distinct procurement phases of multi-stage procurements. *Id*., Art. 20(2) (exclusion for performances worth up to EUR 1 million, the value of such exclusions not to exceed 20% of the total value of the contract).

14 *Id*., Art. 86(1)(a) - (d). The courts retain jurisdiction over the contents of a signed procurement contract. *Id*., Art. 89(1).

15 Directive 89/665 on the co-ordination of the laws, regulations and administrative procedures relating to the application of review procedures to the award of public supply and public works contracts, O.J. L395/33 (known as the "Compliance Directive" or the "Remedies Directive"); Directive 92/13 coordinating the laws, regulations and administrative provisions relating to the application of Community law on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, O.J. L76/14 (known as the "Utilities Remedies Directive" or the "Utilities Compliance Directive"). These two directives supplement the following: Dir. 93/37 of June 14, 1993, O.J. L199/54, 8.9.1993 (the "Works Directive"); Dir. 93/36 of June 14, 1993, O.J. L199/1, 9.8.1993 (the "Supplies Directive"); and Dir. 92/50 of June 18, 1992, O.J. L209/1, 24.7.1992 (the "Services Directive").

16 The full text of the GPA is available at website http://www.wto.org/english/tratop_e/gproc_e/agrmnt_e.htm.

17 *See generally* the Act, *supra* n. 8, Art. 21-23.

18 For a list of requirements imposed upon potential bidders, *see, e.g., id*. Art. 24.

19 *See id.* Art. 24(2).

20 *See id*., Art. 70-76.

21 The thirteen countries that have been invited to negotiate accession to the European Union are Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, Hungary, Slovenia, Romania, Bulgaria, Malta, Cyprus and Turkey.

22 A listing of the chapters and the current status of negotiations with the countries set out in the previous note (with the exception of Turkey) as of 28 June 2002 is available at website http://www.europa.eu.int/comm/enlargement/negotiations/pdf/stateofplay_28june2002.pdf.

23 *Id*.

24 *Cf. supra* n. 9 (commitments to join the GPA).

25 *Agreement on Trade Relations Between the Government of the United States of America and the Government of the Czechoslovak Federative Republic*, signed April 12, 1990, and the *Treaty with the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment*, signed October 22, 1991.

Michigan International Lawyer Report from West Michigan

By William H. Heritage, Jr.
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The first half of 2002 provided West Michigan practitioners and others interested in international affairs with numerous opportunities to benefit from international guests and lecturers. Not surprisingly, a disproportionate area of emphasis was the Middle East and the Indian subcontinent. These geographic regions not only capture the evening news headlines, but also seem to enjoy prominent popularity among lecturers, scholars, and their audiences during this period of heightened concern.

Pakistan was a prominent country of emphasis. Earlier this year, Zamir Akram, deputy Pakistani ambassador to the United States, visited Grand Rapids as part of the Great Decisions Series presented by the West Michigan World Affairs Council. The senior Pakistani diplomat addressed the shared common bonds between the United States and Pakistan which have enjoyed a "historical and friendly" state of diplomatic relations nearly 55 years. He noted that Pakistan had become a U.S. ally against Al-Qaida almost immediately following the September 11 events for one main reason: "Security. It's the primary goal of our (Pakistan) foreign policy." He also noted that Pakistan had a preference for a free capitalistic economy and during the Cold War had been an adversary to the Soviet expansion into their region. Ambassador Akram praised Pakistan's present leader, President General Pervez Musharraf for his bold, hard line on terrorism within Pakistan. In closing, he prophetically warned:

"Unless we can get to the root causes of problems in Central Asia, we will never be able to distinguish between terrorism and justifiable freedom fighting."

Pakistan was the subject of keynote speech at the Grand Rapids Economic Club's annual banquet. In addition to recognizing local businessmen and community leaders, the Economic Club membership enjoyed an address by former Pakistani Prime Minister Benazir Bhutto. When she became Prime Minister of Pakistan in 1988, she was the first woman to lead a country with a Muslim majority. Prime Minister Bhutto holds diametrically opposite opinions to Ambassador Akram. She accused President Musharraf of siding with the United States in its war on terrorism only out of cynical political calculation. It was her opinion that President Musharraf sided with the United States as the lesser evil to strengthen Pakistan's position against India which is considered to be a greater evil by her country. She accused President Musharraf of being a principal architect of policies that empowered Osama bin Laden and strengthened the Taliban regime in neighboring Afghanistan. Noting that she is a political opponent to President Musharraf, Prime Minister Bhutto acknowledged that currently she is running for the Prime Minister job and pointed to polls to show that she will win in an election scheduled to take place in October.

As mentioned above, she was the first woman Prime Minister of an Islamic country but was deposed in 1990. She was re-elected Prime Minister in 1993 only to be ousted in 1996. She hopes in the upcoming elections to be returned to power where she will pursue a campaign of anti-corruption and moderation of Islamic dogma on everyday life in her homeland.

Neighboring Afghanistan was also the subject of an address in Saugatuck, Michigan. Former State Department official Curtis Kamman briefed attendees on the past 30 year political history of Afghanistan focusing on problems encountered by the Soviet Union after invading that Asian country in 1979. Mr. Kamman has previously served as an advisor on Soviet affairs to the United States Secretary of State. Since retiring two years ago, he has been teaching courses in international affairs at the University of Notre Dame.

One of Pakistan's other neighbors was also the subject of an address in Grand Rapids. Mahatma Gandhi's grandson spoke at Grand Valley State University as part of their Peace Week during February, 2002. Arun Gandhi is the grandson of spiritual leader and freedom fighter Mahatma Gandhi. He was born in Durban, South Africa, and grew up as an Indian under South Africa's apartheid system. He later returned to India to pursue a career as a journalist with the Times of India. His address centered around the importance of pursuing nonviolence in all areas of social behavior. During his life, he has striven to pursue the tenets of nonviolence, which were the hallmark of his grandfather's career as India's spiritual leader from 1919 until his death in 1948.

In February, former U.S. Ambassador to Bahrain, David Ransom, gave an address at Grand Valley State University for the Michigan Model Arab League. His comments were harbingers of events which have unfolded in subsequent months. He predicted that the U.S. would continue its course of action in pursuing the Saddam Hussein regime in Iraq. He cautioned that creating a coalition of nations to attack Iraq will be a difficult task for the Bush administration. He noted a concern that the Bush administration was overemphasizing the need to eliminate the possibility of terrorist attacks and secure a regime change in Iraq rather than furthering the Israeli peace process. He also opined that unsettled relations with a few Arab countries should not be of great concern. It was Ambassador Ransom's opinion that most Arab nations see the United States as an indispensable long-term partner.

The Palestinian concern was also the subject to an address by Lenore VanderZee

at Calvin College. She has recently returned from living in Ramallah, West Bank, where she was working with a Palestinian human rights organization. She recounted her personal experiences with the difficult situations being created by the ongoing conflict in that area.

Other geographic areas were addressed by presentations during the first half of this year. Michael Shifter, vice president for policy at Inter-American Dialogue, a Washington-based think tank, presented an address on Columbia as part of the Great Decisions Lecture Series. He noted that the tendency by many in Washington to consider Columbia and other nations of Latin America as being unimportant. According to Shifter, this indifference would be the worst thing the United States could do. Among other reasons, he noted that isolation or indifference to Columbia could create serious security problems for the region, damage the economics of our oil and coffee interest, set back the progress in our drug war and create severe humanitarian problems. While he admitted that Columbia presently has a failed regime, he believes that the government is making progress and deserves our support not abandonment.

The Croatian Ambassador to the United States visited Grand Rapids as a guest of the VanAndel Global Trade Center. Ambassador Ivan Grdesic indicated that Croatia is now ready to accept investment or expanding trade particularly with the manufacturing sector. His mission visit to the U.S. is designed to educate people on investment and trade opportunities with Croatia. He indicated that trade associated with the energy sector was of particular interest, but also small and medium-sized manufacturing, electronics and ship building endeavors were being promoted. He reminded his audience that Croatia had created free trade zones which would provide the opportunity for foreign manufacturers to utilize facilities in Croatia without being subject to the political, legal or taxation authorities of his country.

John Bufton, international investment officer for the Canadian consulate general, emphatically reminded his audience that Michigan remains as Canada's leading trade partner. Addressing a group at the VanAndel Global Trade Center seminar on Canadian trade, Mr. Bufton noted that the Michigan/Canadian trade constituted $69.7 billion in goods in 2000 which represented more than 14% of all trade between Canada and the United States. Others on the seminar panel echoed Mr. Bufton's acknowledgment of the significance and viability of U.S./Canadian trade.

World Trade Week in Grand Rapids emphasized China/U.S. trade. The annual international business emphasis was sponsored by a variety of West Michigan companies and organizations ranging from Alticor, Inc. to X-Rite, Inc. Numerous experts and distinguished speakers took part in the week long event. These included John Holden, president of the National Committee on U.S.–China Relations and Craig Meurlin, of Grand Rapids based Warner, Norcross & Judd, who is special counsel to Alticor and has extensive experience in their Asian business operations.

With a somewhat different emphasis, William E. Swing, an Episcopal bishop from California, gave an address in Grand Rapids sponsored by the Interfaith Dialogue Association. Bishop Swing presented a message of world peace based on his extensive work with United Religions Initiative which is composed of 310 groups across the world committed to end religious motivated violence. He urged a pursuit of peace among religions and the facilitation of justice, human rights, and religious freedom.

Retired General H. Norman Schwarzkopf also visited Grand Rapids at a private dinner hosted by Standard Federal Bank. In a humorous aside, General Schwarzkopf noted that many people expect him to appear at his speaking engagements attired in his army camouflage seen so often during Desert Storm briefings. A dark suit is his current "uniform of the day." He offered general remarks about world events and then answered a series of questions many of which emphasized Israeli Palestinian tensions. Schwarzkopf is of the opinion that successful negotiations for long-term solutions can only begin when a cease fire is established and adhered to by both sides. Equally essential is the recognition by Arab states of Israel's right to exist and the establishment of a Palestinian homeland.

The Fall 2002 should offer continuing opportunities for learning and intellectual pursuit in the arena of foreign affairs ideas. West Michigan practitioners, businessmen, and others are encouraged to participate in these valuable sessions.

R. L. Polk & Company

By Wendy Thompson
Wayne State University Law School, 2L

William Murray, Vice President of Polk Canada, Inc., in Toronto, Ontario, and former Global Business Development Director responsible for establishing new business opportunities in Mexico, Argentina, Brazil, and China, was the guest speaker following the planning session of the International Law Section Council meeting of the State Bar of Michigan on June 11, 2002. Mr. Murray took the time to describe Polk's operations in the United States and Canada, as well as its successes and challenges in setting up operations in Mexico, Argentina, Brazil, and China.

R.L. Polk & Co. was founded by Ralph Lane Polk in 1870, making it the oldest consumer marketing information company in the United States. Polk employs about 1,600 people in offices and production facilities in the United States, Australia, Brazil, Canada, China, France, Germany, Italy, Japan, Mexico, the Netherlands, Spain, and the United Kingdom, with its base in Southfield, Michigan.

After Polk sold the Consumer Information Solutions Group to Equitax on May 1, 2000, Polk has focused exclusively on the automotive industry. Automotive Intelligence is Polk's method of collecting, compiling, and interpreting state vehicle registrations and title information, as well as demographic, lifestyle, and other information about automobile consumers. Polk's customers — automobile manufacturers, dealers, the aftermarket, and auto finance and insurance companies — use this information to market their products to potential consumers — how, when, and where these consumers want to make their next purchase.

In the United States and Canada, Polk compiles information from motor vehicle registrations, sales and manufacturing data, state records, VINs, self-reporting data (warranties), and fleet reports. However, there are restrictions, such as the restricted release of commercial names to anyone in Quebec and Alberta, and also possible restrictions for VIN numbers in those provinces. Polk also faces various restrictions and privacy issues in Western Europe, where they mainly collect their information from sales data from manufacturers.

Mr. Murray explained what happened when Polk tried to enter markets in different countries, particularly his own personal experiences with Argentina, Brazil, China, and Mexico. He stressed how one must know about the culture of a country when trying to negotiate business. He differentiated how in the United States, business tends to be "strictly" business, while in foreign countries businesspeople frequently want to develop personal relationships before entering into a business agreement. Mr. Murray also mentioned other factors that need to be considered before entering into business in foreign countries, such as the use of other languages, the stability of governments, technology — or lack of — and access to information — what people have, are willing to give, and what has been previously done, whether legally or illegally. An additional concern when entering into business in foreign countries is the Foreign Corrupt Practices Act — practices that may be usual and legal in other countries might violate this Act in the United States.

Polk had difficulty establishing new business ventures in Latin America for a variety of reasons. In Brazil, automobile manufacturers did not want to share information. In Argentina, Polk encountered some dealings that it avoided because of possible recourse from the Foreign Corrupt Practices Act. In Mexico, there were many problems, including the accuracy of the data — unregistered vehicles from the United States referred to as cholotes would not be included in the data; privacy law — the information could not be shared for commercial purposes; access to information; and overall timing.

Polk's major success story for an international venture is in China. However, it was not an easy process. In 1997, there were many barriers to entering China. China was on a five-year plan for its economy, and there were regional powers that would or would not listen to the central government, a control on information, and factors of culture to consider. At that time, there was a yearly forecast and manufacturers built what was forecast, whether it was needed or not by the market. Sales data was not tied to manufacturers, and there was no validated dealer network. There were regional controls and an illegal gray market. The government controlled all registration information, and while there was the potential for some access, the government had the final say in whether that information would be released. However, China has since changed some of its economic policies. In particular, manufacturers now produce what they believe is needed, and General Motors became the first company to have control of their dealer network.

In 1999, Polk made its first attempt at a joint venture in China. However, after investing a substantial amount of money, along with time and effort, this venture fell through. Despite many challenges, Polk did not give up. After enlisting the help of a naturalized Chinese-American contact, Polk finally was able to fully legally establish a joint venture earlier this year in China.

In conclusion, Mr. Murray's presentation on Polk's international ventures emphasized numerous key elements in the target country that must be thoroughly researched and understand before considering a business venture in that foreign land. To summarize, those factors to be considered in the country include: culture, language, government stability, state of technology, and level of access to information. Polk has proven that it is possible to overcome many barriers presented by these factors.

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*Subject to results of election
at the Annual Meeting

Disclaimer

The opinions expressed herein are solely those of the authors and do not necessarily reflect those of the International Law Section or the Editors.

INTERNATIONAL LAW SECTION

State Bar of Michigan

ANNUAL MEETING AGENDA

Thursday, September 26, 2002
Amway Grand Plaza
Grand Rapids

2:00 – 2:30 p.m.—Business Meeting

Howard B. Hill, Section Chair: Introductions

Approval of Minutes—2001 Annual Meeting
—Jan Rewers McMillan

Treasurer's Report—Randolph M. Wright

Michigan International Lawyer—John E. Mogk

Status of Electronic Publication—Jan Rewers McMillan

Chair's Report—Howard B. Hill

Section Award for Outstanding Contribution—Howard B. Hill

New Business

Report of Nominating Committee

Election of 2002-2003 Officers & Executive Council

Introduction of Clara D. Mager, New Chair—Howard B. Hill

2:30 – 4:30 p.m. – Program

"Protecting the Homeland While Safeguarding Civil Rights"

Moderator: Clara DeMatteis Mager, Butzel Long, P.C.

Speakers:

Jeffrey G. Collins, United States Attorney for the Eastern District of Michigan. Mr. Collins was appointed to the post of United States Attorney by President George W. Bush and confirmed by unanimous vote of the Senate on November 6, 2001. The President signed his commission on November 12, 2001 and he was sworn in November 19, 2001.

Nasser M. Beydoun, Executive Director, of American Arab Chamber of Commerce of Dearborn, Michigan. Mr. Beydoun has overall responsibility for financial, legislative and public affairs as well as member development, retention and services. In December 2001, he was appointed by Secretary General Amre Moussa as the first Arab American Representative to the League of Arab States.

Letter from the Chair

Howard B. Hill

Summer breaks are a great time to recharge one's batteries and reflect on the events that have passed and the plans for the future. This is as true for organizations as it is for individuals.

The year began in the immediate aftermath of the tragic events of 9/11. General attendance at the Annual Meeting in Lansing was the lowest ever seen. Over this past year, due to the efforts of a dedicated and diverse group of individuals, the Section has witnessed a rebirth of new ideas and activity.

The Section has hosted for its members an impressive array of speakers in a variety of contexts:

- **Bill Vlasic**, **Business Reporter** of the **Detroit News** and co-author of "Taken for a Ride—the Daimler-Chrysler Merger" (Organized by Randy Wright, Partner Berry Moorman, Birmingham)
- **Nasser Beydoun**, **Executive Director of the Arab American Chamber of Commerce** (Organized by Clara Mager, Partner, Butzel Long, Detroit)
- **Honorable Jeffrey Collins**, **U.S. Attorney for the Southern District of Michigan** (Organized by Professor John Mogk, Wayne State Law School)
- **Honorable Francis Jacobs**, **Advocate General of the European Court of Justice**, Brussels, Belgium (Organized and Sponsored by Professors Virginia Gordon and Daniel Halberstram, University of Michigan Law School)
- **Judge Jane Restani** of the **United States Customs Court**, Washington, D.C. (Organized by Susan Gasparian and Paul Vandevert, Ford Motor Company)
- **William Murray, Vice President—OEM Canada**, **RL Polk**, Southfield (Organized by Lois Bingham, Assistant General Counsel International, RL Polk)

The Section has also presented, as a public service, 3 panels on topics of general interest:

- **"Doing Business in Michigan for Foreign Corporations" -** March 10, 2002 Detroit **Annual Meeting** of the **Society of Automotive Engineers** (Organized by Fred Frank, Partner Honigman, Miller, Schwartz & Cohn, Detroit and James Serocki, Tax Partner, KPMG, Detroit. Panelists included Lois Bingham, Assistant General Counsel of RL Polk, James Serocki and his colleagues from KPMG and Clara Mager, Butzel Long)
- **"Foreign Companies' Use of Minority Joint Ventures"** May 22, 2002, Troy **World Trade Week, Detroit Regional Chamber of Commerce and U.S. Department of Commerce** (Organized by Bruce Birgbauer, Partner, Miller Canfield, Detroit. Speakers included Carmen Munoz, Executive Director, Michigan Minority Business Development Council, Howard Hill of the Law Offices of Howard B. Hill, Glenn Stafford, former Director of Minority Procurement, General Motors, Saul Green, former US Attorney for Southern District of Michigan, and Shailesh N. Doshi, President of Doshi Prettl International, Inc.)
- **"Protecting the Homeland While Safeguarding Civil Rights"** September 26, 2002, Grand Rapids **Annual Meeting of the State Bar of Michigan** (Organized by Clara Mager, Chair Elect. Speakers will include Nasser Beydoun, Executive Director of the Arab American Chamber of Commerce and Honorable Jeffrey Collins, U.S. Attorney for the Southern District of Michigan)

The Section has also published two print editions of the ***Michigan International Lawyer***, due in large part to the efforts of Professors John Mogk and Julia Qin of Wayne State Law School and their student editors, Jodie Giles and Alex Fedynsky. For the first time ever, these journals were posted on the Section's Web Site with the State Bar of Michigan so that they are available electronically to all Section members. While some debugging is still required, the electronic versions will allow the Section to transmit Section news and information instantaneously, while saving the Section considerable money.

As reported in my April letter, the ***Michigan Bar Journal*** is dedicating an issue next year to International Law. Further details will be provided. The Officers have set the requirement that all potential contributors must have also written for the *Michigan International Lawyer* in the last 2 years as a precondition to writing for the State Bar Journal.

For the first time ever, Officers and members of the Executive Council became accountable for contributing and supporting the Journal as well as attending meetings. Everyone is now responsible for attending at least 80% of the meetings in person or by phone and either writing an article for the Journal or organizing a seminar at least once every 2 years. Election to these posts is an honor, but also a responsibility. To underline this point, one member was formally removed for failing to attend any meeting in 2 ½ years.

For the first time ever, the Officers met last August and set dates and locations for the Executive Council Meetings for the next 3 years, deadlines for publication of the Journal and notices and agendas of meetings were circulated in advance. I believe a large measure of the success of this year was due to such planning and I am pleased to report that the Officers have already met to plan events for the coming year.

For the first time ever, Executive Council meetings were opened to all members and the Section paid for dinner afterwards to promote an informal interchange of ideas. While this can't be a practice for every meeting, it has promoted a fellowship unseen before. Average attendance at these Executive Council meetings has tripled from past years; some of us old timers remember when only 3-4 people would turn out.

What I may be most proud of is the involvement of new members in Section activities. The invitation has been issued and reissued and the members have responded positively. 11 of 16 Officers and members of the Executive Council were not active 2 years ago.

The caliber of people involved as Officers, Executive Council members, Committee Chairs and attendees is unprecedented. Besides the names already mentioned, at one of our events, we had Logan Robinson, Vice President and General Counsel of Delphi, the 4th largest company in Michigan and Bill Kohler, General Counsel of Johnson Controls Automotive debating practical issues with Francis Jacobs of the European Court.

The core of talent who will be heading the Section next year is equally impressive.

The following have been nominated as **Officers** for 2002-2003:

CHAIR: Clara Mager, Partner, Butzel Long;

CHAIR-ELECT: Jan McMillan, Solo Practitioner;

SECRETARY: Randy Wright, Partner, Berry Moorman;

TREASURER: Bruce Birgbauer, Partner, Miller Canfield.

Clara went to law school at nights while holding a full time job and is now Head of the Immigration Practice of Butzel Long. Jan has established a unique niche in international family law cases and has argued a custody case before the European Court. Randy practices corporate law and has been active in a group, Search for a Common Ground, which among other things has lead to his firm establishing an office in Russia. Bruce is a former Chair of the Business Law Section of the State Bar and is head of the International Practice for Miller Canfield.

The proposed slate of the one third of Executive Council members up for election every year is equally vaunting. This year, as permitted by the By-Laws, we have nominated 5 members for a 3 year term ending September, 2005 and one member to fill the unexpired term ending September, 2004 of Bruce Birgbauer, who has been nominated for Treasurer.

TERM EXPIRING 9/2005:

Narinder J.S. Kathuria, is a member of the Indian and Michigan bars and former General Counsel for ANR.

James S. Serocki is the International Tax Partner at KPMG, Detroit.

Lois E. Bingham is Assistant General Counsel, R. L. Polk, Southfield.

Marc C. McGuire is Assistant General Counsel, International for Delphi Corporation, Troy.

Andrew Segovia is Assistant General Counsel, Latin America for General Motors, Detroit.

VACANCY FOR TERM EXPIRING 9/2004:

William H. Dance has practiced immigration law for over 40 years and is a partner at Fragomen, Del Rey, Bernsen & Loewy, Troy.

These nominees will be proposed for election at the Section's business meeting held in conjunction with the Annual Meeting of the State Bar of Michigan scheduled for 2 PM on Thursday, September 26, 2002 at the Amway Grand Plaza Hotel in Grand Rapids, Michigan. The panel discussion described earlier will follow immediately.

Another aspect of the Annual Meeting is the **Section Award** established last year to those who have made outstanding contributions to the Section. The inaugural award was given to Professor John Mogk, long time editor of the Michigan International Lawyer. I am pleased to announce that the Executive Council has selected **Stuart H. Deming**, Partner of Inman Deming, Jackson, Michigan and Washington, DC and former Chair of the Section to receive this year's award.

Finally, to encourage attendance at the Grand Rapids meeting, the Section will rent a passenger van for the day to transport those members from SE Michigan, where most of our members are located, to and from the meeting. If you are interested, please contact Lois Bingham at (248) 728-7791 or email her at lois_bingham@polk.com to reserve a space.

As always, if you have ideas or want to become involved before the Annual Meeting, simply email me at howardbhill@cs.com or call me at (248) 258-7879. Everyone who has contacted me to date has been put to work. Indeed, as I was writing this letter, Andrew Doornaert, formerly with the Customs Practice at Arthur Anderson and now with Miller Canfield, emailed asking to become involved and he has been charged with organizing the Customs Law Committee for next year.

So as you can see, the Section has been active and innovative and with a budget surplus. If you enjoyed this year, wait until you see what next year's leadership does—hang on for the ride.

Thank you for the unique privilege of serving as your Chair.

Respectfully,
Howard B. Hill

Minority Joint Ventures With Foreign Auto Suppliers
Continued from page 3

- The amount of required MBE business has been increased by Ford, General Motors and DaimlerChrysler from 5 percent to 10 percent, a very large amount.
- Being an MBE may help a little bit on price but will help a lot on selection.
- MBEs have special networking opportunities with OEMs, suppliers, and other MBEs, and there may be special funding sources available.
- 49% of a 1,000 is better than 100% of 400.

III. DISADVANTAGES

The disadvantages to forming a joint venture with a minority business enterprise are as follows:

- Joint ventures are difficult to form and also difficult to operate.
- The foreign company will not be in operational control.
- The certification process can be lengthy.
- The creation of the MBE creates a potential competitor for the future.
- The joint venture entity may have less flexibility than a typical joint venture because of the requirements of MMBDC, and the non-minority partner will only receive 49% of the profits or some lesser percentage.
- There is a risk of de-certification.

IV. CONCLUSION

The dynamics of successful entry, and business expansion in the automotive supply industry have changed dramatically during the past decade. Foreign companies cannot successfully compete in this sector without an awareness of the importance being placed on MBE sourcing by OEMS and tier one suppliers, and factoring MBE participation into their business strategy.

About the Author

Saul Green is senior counsel and director of Miller Canfield's Minority Business Practice Group that focuses on minority-owned businesses, particularly in the automotive industry. He is a member of the firm's Litigation and Dispute Resolution Practice Group, with a speciality in alternative dispute resolution, white-collar crime and high profile litigation. He also coordinates the firm's anti-racial profiling education and training programs for public law enforcement agencies and private sector retailers.

Mr. Green was appointed United States Attorney for the Eastern District of Michigan by former president William J. Clinton, and served in that capacity from May 1994 to May 2001. During his many years of public service, he has held the positions of Wayne County Corporation Counsel; Chief Counsel, United States Department of Housing and Urban Development, Detroit Field Office; and Assistant United States Attorney. He received his law degree in 1972 from the University of Michigan Law School, and a B.A. in prelegal studies in 1969, also from the University of Michigan.

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