



**JOINT VENTURES IN SUB-SAHARAN AFRICA:  
A NEW FCPA MINEFIELD**  
(Published in *The African Counsel* Newsletter, September 2011)

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**Introduction**

A Joint Venture (JV) business relationship sometimes appears deceptively simple when it is seen as merely a contract between at least two parties that choose to embark on a project together.<sup>2</sup> JVs, however, take on a complex posture, if they are the chosen method of entry into Sub-Saharan Africa (SSA) by foreign multi-national or corporate business entities. SSA is one of the only regions in the world, which U.S. companies have barely explored and do not quite understand. In fact, of all the continents, Africa is said to be the most fascinating and promising; but she also poses the greatest challenges. With twenty percent (20%) of the world's total landmass, a population of nearly one billion (14% of world total), and a plethora of mineral resources, SSA countries have long generated some of the highest returns on deployed capital.

**Benefits and Pitfalls of Joint Ventures**

***Benefits***

JVs appear to provide a convenient way for Western multi-national companies to enter SSA markets and gain instant familiarity with its economic, political, and cultural structures. At

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<sup>2</sup> Black's Law Dictionary, Eighth Edition, defines "Joint Ventures" as, "A business undertaking by two or more persons engaged in a single defined project. The necessary elements are: (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) each member's equal voice in controlling the project."

their core, JVs are a way to tap into emerging markets. As Doug McPhee, a partner with KPMG's Corporate Finance practice in the United Kingdom, explains:

In these post-credit-crunch days, *you have to ask whether corporates will hunker down and concentrate solely on their existing markets or will they still pursue growth from new products and markets in spite of difficult conditions?* I believe it will be the latter, in which case - with new debt so much harder to come by - the joint venture will suddenly find itself back in vogue. (emphasis added).<sup>3</sup>

Indeed, JVs are back in vogue, especially in connection with SSA related transnational business ventures. JVs with local SSA partners present numerous benefits to companies desiring to develop their core competencies in this exciting emerging market. Entering a new market can be expensive, complicated, and labor intensive. Through the participation of the local SSA partner, the Western company will easily compensate for its scant knowledge of the local institutional and legal environment. It will have immediate access to local borrowing power, resources, and tax breaks. The SSA partner will also likely bring to the JV the goodwill of the local government and/or the powers that be, especially in this era where many SSA countries require significant "local content" or participation in any business venture/investment in their nation state to encourage economic empowerment of its people.

Political considerations in SSA sometimes make JVs the only feasible mode of entry into the area. Many SSA nations are still considered less developed, which often means that their political environments and business systems are unpredictable. The SSA partner in a JV can insulate the other partners from this instability because of its understanding of the nation's problems and its ability to navigate through them. In fact, in some developing nations, as much as 80% of the total foreign capital may be in the form of JVs.<sup>4</sup>

Therefore, it is no surprise that powerful multi-national corporations decide to enter the SSA market through JVs. British Petroleum's (BP) relationship with Africa mainly consists of JVs with national oil companies. Presently, BP has established JVs with entities in Algeria, Angola, and Egypt.<sup>5</sup> The JVs allow BP to provide management support, technical expertise, and training to its African partners, in exchange for utilizing Africa's amazing resources.

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<sup>3</sup> Nelly Nyagah, Getting it Right with Joint Ventures, TradeInvest Africa, August 10, 2010, [http://www.tradeinvestafrica.com/feature\\_articles/683869.htm](http://www.tradeinvestafrica.com/feature_articles/683869.htm).

<sup>4</sup> Korbin, Stephen J., *"Trends in Ownerships of American Manufacturing Subsidiaries in Developing Countries: An Inter-Industry Analysis."* Management International Review, Special Issue, 1988.

<sup>5</sup> British Petroleum, "Where We Operate," <http://www.bp.com/sectiongenericarticle.do?categoryId=6&contentId=7019358>  
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One of the best examples of JVs at play in SSA is Nigeria. Nigeria's entire petroleum production and exploration is under the form of JVs between multi-national corporations and the state owned Nigerian National Petroleum Corporation (NNPC). NNPC, through its subsidiary, the Nigerian Petroleum Development Company (NPDC), is in charge of four oil and gas fields in the country with a total production of 15, 000 barrels per day (bpd).<sup>6</sup> Currently, the NNPC is a partner in six JVs. The JVs operate on the basis of Joint Operating Agreements (JOA), which dictate that partners will share the cost of operations, but one party will be designated as the "operator."<sup>7</sup> The NNPC has the right to become an operator.

The Shell Petroleum Development Company of Nigeria Limited (Shell Nigeria) operates a JV of which it holds 30%. The rest of the JV partnership is split as follows: NNPC (55%), Elf (10%), and Agip (5%). Shell's JV is responsible for 40% of Nigeria's total oil production, amounting to 899,000 bpd.<sup>8</sup> The U.S. company Chevron has established a presence in Nigeria through a JV with the second largest oil-production in Nigeria, amounting to about 400,000 bpd. The JV has the following structure: NNPC (60%) and Chevron Nigeria Limited (40%). Another U.S. company, Exxon-Mobil, participates in a JV of which it holds 40%, with the remaining 60% being held by NNPC.

The Italian corporation Agip is part of a JV in Nigeria consisting of NNPC (60%), Nigerian Agip Oil Company Limited (20%), and Phillips Petroleum (20%). The French-owned Total (formerly known as Elf) is a 40% holder of a JV with NNPC. Texaco, which has merged with Chevron, is also participating in a JV: Texaco (20%), Chevron (20%), and NNPC (60%). The fact that multi-national corporations have chosen JVs as the main method to explore Nigeria's oil industry means that a JV is a respected business model through which companies can enter and learn about emerging markets.

Many other multi-national companies are realizing that they have a lot to gain from investing in SSA's resources. In June 2011, the global logistics company, Avram International, based in Indianapolis, Indiana, U.S., entered into a JV with the South African based Concargo (Pty) Ltd. The JV was driven by the desire of Avram's U.S. based clients to expand their business in SSA and explore its profitable mining industry.<sup>9</sup>

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<sup>6</sup> Nigerian National Petroleum Corporation, Oil Production, <http://www.nnpcgroup.com/NNPCBusiness/UpstreamVentures/OilProduction.aspx>

<sup>7</sup> Nigerian National Petroleum Corporation, Joint Venture Operations, <http://www.nnpcgroup.com/NNPCBusiness/UpstreamVentures.aspx>

<sup>8</sup> This statistic was produced in the year 1997. See, Nigerian National Petroleum Corporation, Joint Venture Operations, <http://www.nnpcgroup.com/NNPCBusiness/UpstreamVentures.aspx>

<sup>9</sup> Business Wire, *Avram International Strikes Partnership and JV with South African Companies; Focus on Mining Logistics in Africa*, July 21, 2011, <http://www.businesswire.com/news/home/20110621006448/en/Avram-International-Strikes-Partnership-JV-South-African>

JVs are also evolving into a form of social entrepreneurship that allows multi-national corporations to partner with SSA nations and potentially improve the quality of life for millions of people. A hopeful example of this is the Solar Village Institute (SVI) in Ahakishaka, Tanzania. SVI is the product of a JV between the Tucson Transatlantic Trade Holding Group (TTT), based in Phoenix, Arizona, U.S., the World Institute for Leadership and Management in Africa (WILMA), based in Washington, D.C., and several partners in Africa and Tanzania who came together to create a sustainable, community based organization in the remote rural village of Ahakishaka, in northwest Tanzania near the Rwanda border.<sup>10</sup>

The foreign and local JV partners worked together to construct a solar-powered camp for visitors and solar home systems in village leaders' huts. SVI further consists of a solar-powered radio communications network and improved feeder roads. The JV also developed Ahakishaka Waterworks, which pumps pure water into the village from a natural mountain spring. SVI is an example of good corporate social responsibility and what is possible when JVs are a force for good in SSA.

### ***Pitfalls***

While a JV with an SSA partner is attractive for many reasons, it also brings a set of unique challenges. As much as there are phenomenal benefits, the baggage or downside is not too far behind. From the plethora of legal provisions that the U.S. JV partner must comply with, the Foreign Corrupt Practices Act (FCPA) is arguably one of the most important, complex, and confusing.

The FCPA instructs that it is unlawful to:

“corruptly [do an act] in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value” to “any foreign official...to assist...in obtaining or retaining business.”<sup>11</sup>

The above “legalese” can be boiled down to one simple lesson: All that is necessary to violate the FCPA is to (1) corruptly (2) pay (3) a foreign official (4) to assist in obtaining or retaining business. Importantly, the FCPA applies to a JV, *even if the U.S. partner is not the majority holder of the venture*. In a JV, regardless of whether the U.S. company lacks control of business operations, it may still face FCPA liability if it knows of corrupt practices or has reason to suspect corrupt practices.<sup>12</sup> This is a critical point because the U.S. JV partner cannot claim

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<sup>10</sup> World Institute for Leadership and Management in Africa, <http://wilma.us/>; Tucson Transatlantic Trade Holding Group, “Success Stories,” <http://www.tthg.com/main/success.html>

<sup>11</sup> 15 U.S.C. §§ 78dd-1 (a, g), 78dd-2 (a, i), 78dd-3(a).

<sup>12</sup> Justin F. Marceau, *A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt*  
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innocence or avoid criminal and/or civil liability from FCPA violations, even if it controls less than 50% of the venture.

Violations of the FCPA can occur quite easily in a JV, if proper attention is not paid. The SSA JV partner may bring corporate culture and operation styles that conflict with those of the U.S. partner. Differing philosophies, expectations and goals of the JV partners can serve as a downside, which can affect FCPA risk. The combination of cultural, historical, economic, and social factors in SSA could mean that one JV partner might inherit weak internal controls and accounting practices. The U.S. JV partner may also feel commercial pressure to limit diligence to prevent finding itself at a competitive disadvantage to entities that are not subject to the same laws or do not experience strict enforcement of those laws like the Indian and Chinese related JVs or businesses entities.

### **Is It Business Or Is It Entertainment?**

A specific issue that can trigger FCPA liability is SSA's rich history and culture of gift giving and gratuities. In a JV, the SSA partner may view providing entertainment and gifts as a natural part of the business culture. However, the FCPA statute defines bribery to include acts:

“in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving *of anything of value...*”(emphasis added).<sup>13</sup>

Therefore, on its face, the FCPA seems to prohibit gift giving in the course of business. Yet, there is an exception which permits only those expenses that are:

“reasonable and bona fide expenditures, such as travel and lodging expenses, incurred by or on behalf of a foreign official...directly related to...the promotion, demonstration, or explanation of products or services.”<sup>14</sup>

Because the FCPA does not define “reasonable and bona fide expenditures,” before agreeing to pay for any entertainment related business expenses, the JV partners should seek advice from their legal and compliance departments. Further, the FCPA actually details an exception to liability for payments that are, “lawful under the written laws or regulations” in the recipient's country.<sup>15</sup> It is critical to note that this exception does not encompass customary business practices, which are those practices that are traditionally employed by a specific culture,

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*Practices Act*, 12 Fordham J. Corp. & Fin. L. 285, 304 (2007) (“The plain text of the FCPA does not distinguish between a controlling and non-controlling affiliation.”)

<sup>13</sup> 15 U.S.C. §§ 78dd-2(a) (domestic concerns); §§ 78dd-1(a) (issuers).

<sup>14</sup> 15 U.S.C. § 78dd-1(c).

<sup>15</sup> 15 U.S.C. §§ 78dd-1(c)(2)-78dd-2(c)(2).

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without being legally codified. For example, gift giving is a largely customary practice that many SSA nations engage in based on their traditional business practices.

### **Who is a Foreign Official?**

Another challenge a U.S. partner in a transnational JV can face pertains to the FCPA's broad definition of a "Foreign Official:"

any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.<sup>16</sup>

The FCPA prohibits corrupt payments to foreign officials. Transnational JVs, by their very nature, involve close contact with foreign officials. This is particularly true when a JV includes a *state owned entity*, otherwise referred to as a State Owned Enterprise (SOE). First, a foreign official may have recommended the prospective SSA JV partner. Such a recommendation could lead to an FCPA violation, unless the prospective partner was only one entity on an official list of pre-approved local partners. Second, the SSA JV partner is usually charged with facilitating communication with local government officials. Third, the SSA JV partner, who may or may not be labeled as a "foreign official" under the FCPA, could receive a "sponsor" or "management" fee that may be used for purposes that could lead to FCPA liability.

### **The Bonny Island and TSKJ Fiasco**

The FCPA's provisions would carry no weight without strict enforcement. To the surprise and discomfort of many, *FCPA enforcement now trails only terrorism as an enforcement priority of the DOJ* [Department of Justice].<sup>17</sup> This is exemplified by the increased prosecution of FCPA violations, as evidenced by the Bonny Island and the so-called "TSKJ" cases. TSKJ was a JV in Nigeria comprised of four business entities: Technip, S.A.; Snamprogetti Netherlands B.V.; KBR (Kellogg Brown & Root, Inc.); and JGC.

KBR is incorporated in Delaware and headquartered in Houston, Texas. It focuses on providing international engineering, procurement, and construction (EPC) services, including designing and building liquefied natural gas (LNG) production plants. Snamprogetti Netherlands

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<sup>16</sup> 15 U.S.C. §§ 78dd-1(f)(1)(A); 78dd-2(h)(2)(A); 78dd-3(f)(2)(A).

<sup>17</sup> As noted by Charles McKenna, Chief, Criminal Division, U.S. Attorney's Office for the District of New Jersey, at a panel in the American Bar Association's Program, "Current Issues in Medical Device and Pharmaceutical Litigation," held at the Schering-Plough Corporation in Kenilworth, New Jersey.

B.V. is a Dutch company; JGC is a Japanese company headquartered in Yokohama; and Technip S.A. is a global engineering, construction and services company based in Paris

The four-company JV was formed in 1991 with the directive to bid on and perform contracts to construct LNG plants on Bonny Island, Nigeria.<sup>18</sup> The four companies equally shared profits, revenues, and expenses. Between 1995 and 2004, the joint JV was awarded four EPC contracts to build LNG production plants by Nigeria LNG Ltd (NLNG). The largest shareholder of NLNG was the *government owned* NNPC, which owned 49% of the company. The remaining owners of NLNG were multinational oil companies.

The Department of Justice (DOJ) alleges that the JV was tantamount to a conspiracy with the unholy purpose and goal of bribing local Nigerian officials:

The purpose and object of the conspiracy was to secure the officials of NNPC, officials of NLNG, and others in obtaining and retaining billions of dollars in contracts related to the Bonny Island Project through the promise and payment of tens of millions of dollars in bribes to those officials.<sup>19</sup>

Before the EPC contracts were awarded, KBR's former CEO, Albert Stanley, met with individuals who had held high-level positions in the Nigerian executive branch. Mr. Stanley and others asked the Nigerian officials to appoint a point-person with whom the JV should negotiate bribes with Nigerian officials. The JV agreed to hire two agents to pay the bribes. The venture paid about \$132 million to the first agent, a consulting company incorporated in Gibraltar. The second agent, a global trading company headquartered in Tokyo, was paid over \$50 million. During the plea negotiations, KBR admitted that the purpose of the agents' fees was partly to finance bribes to Nigerian officials. On September 3, 2008, Mr. Stanley pled guilty to conspiring to violate the FCPA.<sup>20</sup> KBR also suffered enforcement actions by DOJ and the Securities and Exchange Commission (SEC) of up to \$579 million, arising out of its FCPA anti-bribery charges.<sup>21</sup>

The DOJ charged Snamprogetti Netherlands with one count of conspiracy and one count of aiding and abetting violations of the FCPA. On July 7, 2010, Snamprogetti agreed to pay a \$240 million criminal penalty to resolve charges related to the FCPA for its participation in the

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<sup>18</sup> Criminal Information, U.S. Department of Justice, February 6, 2009, <http://www.justice.gov/criminal/fraud/fcpa/cases/kelloggb/02-06-09kbr-info.pdf>

<sup>19</sup> *Id.* at 10.

<sup>20</sup> Plea Agreement, September 3, 2008, <http://www.justice.gov/criminal/fraud/fcpa/cases/stanleya/09-03-08stanley-plea-agree.pdf>

<sup>21</sup> Press Release, U.S. Department of Justice, <http://www.justice.gov/opa/pr/2009/February/09-crm-112.html>

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decade-long scheme to bribe Nigerian government officials to obtain the EPC contracts in a deferred prosecution agreement.<sup>22</sup>

Under the terms of the deferred prosecution agreement, the DOJ agreed to defer prosecution of Snamprogetti for two years. Snamprogetti, its current parent company, Saipem S.p.A., and its former parent company, ENI S.p.A. (ENI), agreed to ensure that their compliance programs satisfied certain standards and to cooperate with the Department in ongoing investigations. Snamprogetti and ENI also reached a settlement of a related civil complaint filed by the SEC, charging Snamprogetti with violating the FCPA's anti-bribery provisions, falsifying books and records, and circumventing internal controls and charging ENI with violating the FCPA's books and records and internal controls provisions. As part of that settlement, Snamprogetti and ENI agreed jointly to pay \$125 million in disgorgement of profits relating to those violations.

The DOJ charged Technip with one count of conspiracy and one count of violating the FCPA. On January 28, 2010, Technip agreed to pay a \$240 million criminal penalty to resolve the charges.<sup>23</sup> On April 6, 2011, JGC entered into a deferred prosecution agreement with the DOJ and agreed to pay a criminal penalty of \$218.8 million.<sup>24</sup>

If JVs in SSA thought they were immune from FCPA prosecution, the TSKJ prosecution quickly changed their mindset and the landscape. Perhaps the four companies naively believed that if they worked in concert and supported each other, they would be safe. They were wrong. "Safety in Numbers" does not exist when it comes to FCPA prosecution and liability, both criminal and civil. JVs must understand that they are just as vulnerable and likely to be prosecuted as any other business entities.

### **Tips to Reduce Risks and Exposure Under The FCPA for Joint Ventures in SSA**

Ensuring FCPA compliance for a JV requires the establishment of an effective due diligence program. Any business entities that are seriously considering forming and operating a JV with an SSA partner must utilize experienced local compliance counsel in order to avoid running afoul of FCPA and similar applicable local and international laws.

The list below is designed to provide a general overview of an effective due diligence program:

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<sup>22</sup> Press Release, U.S. Department of Justice, <http://www.justice.gov/opa/pr/2010/July/10-crm-780.html>

<sup>23</sup> Press Release, U.S. Department of Justice, <http://www.justice.gov/opa/pr/2010/June/10-crm-751.html>

<sup>24</sup> Deferred Prosecution Agreement, April 6, 2011, <http://www.justice.gov/criminal/fraud/fcpa/cases/jgc-corp/04-6-11jgc-corp-dpa.pdf>

- Find out who recommended the prospective JV partner, if the companies have not worked together before.
- Communicate FCPA compliance expectations to all JV partners.
- Include FCPA and anti-corruption clauses in JV contracts and agreements. Require each JV partner to certify those clauses.
- Create and regularly update a due diligence file, which includes FCPA due diligence questionnaires, written reports on a JV's activities, and records of all payments made by and to the JV.
- Train local agents and partners in native languages on FCPA compliance.
- Always use a reputable auditor to audit operations in the country.
- The JV partners must agree to and implement guidelines that establish a clear protocol on what persons should do if they suspect a FCPA violation has occurred. Use hotlines, surveys, and other anonymous reporting mechanisms to ensure candid responses.
- Conduct an internal investigation of the JV *immediately* after an FCPA violation occurs or is suspected.

## **Conclusion**

JVs are a uniquely efficient and effective way for companies to enter the emerging markets of SSA. At their very best, JVs between U.S. companies and SSA partners can actually enhance cultural understanding and lead to a more productive and stable business environment. In order for JVs to realize their true potential, however, they must acknowledge the changing business morals landscape and realize that international and local anti-corruption laws, including the FCPA, are no longer a toothless bulldog or an afterthought. They are the new business reality in this globalization era that facilitates classic long-arm jurisdiction, which can be used to easily reach and effectively punish offenders in multiple jurisdictions around the world.