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INVESTMENT IN AN INTERNATIONAL
CONFLICT ZONE: SOUTHERN SUDAN

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**LEGAL ANALYSIS OF PETROLEUM INVESTMENT IN AN
INTERNATIONAL CONFLICT ZONE: SOUTHERN SUDAN**

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Legal Analysis of Petroleum Investment in Southern Sudan

It has been observed that investment by a multinational petroleum company in a conflict zone requires careful analysis for the following reasons:

“The first determinant of the oil industry structure is the inherent unpredictability of investments in foreign oil ventures which has always made them highly speculative. Probabilities of large losses have had to be weighed against the possibilities of large gains. The risks that the foreign oil company confronts are technical, economic and political.

The foreign oil company carries the ever-present political risks that the government of the host country may alter or terminate its concession, impose heavier royalties or taxes, or even nationalize all or part of its investment. Or war, civil disturbances, or economic crises may stop oil production or cause uncompensated loss of its property.”¹

The impact on shareholders of investment in certain conflict regions can be significant. As one example, Talisman Energy Corporation, the 53rd largest petroleum exploration and production company in the world², which at one time accounted for 12% of its global oil production from its fields in Sudan³, saw its share price plummet by more than 30% when investors became aware that it was being sued by a Sudanese activist group in the New York District Court for aiding and abetting genocide and crimes against humanity.⁴ The activist group alleged that Talisman had invested in an area noted for years of civil war⁵, and had actively assisted or directed the

¹ Jacoby, Neil H, *Multinational Oil: A Study in Industrial Dynamics* Macmillan Publishing, United States (1974) pp. 16-17

² Platts Top 250 Global Energy Company Ranking, Talisman Energy Ranking: 53rd, at 1 August 2010 <http://www.platts.com/Top250Home.aspx#>

³ Kobrin, Stephen J, *Oil And Politics: Talisman Energy and Sudan*, International Law and Politics, Volume 36-425 (2004) p. 426

⁴ *Presbyterian Church of Sudan v. Talisman Energy, Inc.* SDNY 2nd Ct. CA; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 641-61 (S.D.N.Y. 2006); *Presbyterian Church of Sudan v Talisman Energy Inc.*, [2005] A.J. No.1808 (Q.B.); *Presbyterian Church of Sudan v. Rybiak*, 2006 CanLII 32746 (ON C.A.)

⁵ Carlisle, Tamsin, *For Canadian Firm, an African Albatross—Oil Driller Talisman Energy Pays a Painful Price for Its Sudan Investment*, Wall Street Journal 17 August 2000 p. A19

government in the forced removal of civilians so the company could gain better access to certain prospective oil fields.

The author will endeavor to set out a template for analysis of the legal issues attendant to investment in a conflict zone using the four corners of the law as they apply to Southern Sudan to make recommendations and suggestions.

CIVIL WAR IN SUDAN

The legal analysis must of necessity be analyzed against the backdrop of the conflict that created the conflict zone. In this instance, the Sudan has had two civil wars since the British departed. The first civil war began one year before Sudan gained its independence from the British-Egyptian condominium in 1956.⁶ The first civil war lasted until a tenuous ceasefire in 1972. The second civil war began in 1983. The second civil war was in large measure a war for control of the south's oil fields but characterized in the Muslim world as a "holy jihad" against the Christians and Animists of the south. The second civil war has resulted in more than two million mostly civilian casualties and over four million displaced persons in southern Sudan.⁷ Sudan forms the part of the horn of Africa and has frequently been described as the cultural, racial and religious mosaic of Africa.⁸ The diverse nature of Sudan has evolved because the country is the bulwark between the principally Arab-Muslim north, and the Black Christian or Animist peoples south of the Sahara Desert. Southern Sudan is ethnically diverse, containing a multitude of tribes and linguistic groups⁹. Human Rights Watch estimates that in Sudan there is:

“... the diversity of over 600 ethnic groups. None is in the majority although those calling themselves Sudanese Arabs are over 40 percent, Dinka 11 percent,

⁶ Evans, Gareth, *God, Oil And Country: Changing The Logic Of War In Sudan* (2002) International Crisis Group

⁷ Martin, Randolph, *Sudan's Perfect War*, (2002) 81 Foreign Affairs 111, Council on Foreign Relations; Southern Sudan should not be confused with Darfur in Western Sudan. There are at least five conflict regions in Sudan, including Southern Sudan, Abyei, Darfur, Kordofan, and Blue Nile.

⁸ Idahosa, Pablo, *Business Ethics and Development in Conflict Zones: The Case of Talisman Oil*, 39 Journal of Business Ethics (2002) p.230

⁹ Ibid. pp. 230-231

and Nuba eight percent. Only 73 percent of the population is Sunni Muslim (mostly followers of Sufi sects) followed by traditional African religions (16 percent) and Christians (9 percent).”¹⁰

One of the key regions in the second civil war was previously known as the province of Upper Nile (Upper West Nile), but is now better known as Unity Province.¹¹ This is the region in which the public company, Talisman Energy Corporation, successfully operated for a number of years.¹²

British colonial policy is the wellspring of the conflict between the north and the south. The British proscribed teaching Arabic and Islam in the three southern provinces of Sudan, and encouraged the use of English and conversions to Christianity.¹³ The policy was designed to curtail the north’s influence, and the systems and influences that have been left in place by Egypt. The natural consequence of this policy was the isolation and marginalization of the south. Some argue that this policy is the primary cause of the civil wars in Sudan.¹⁴

Sudan’s independence was declared in January 1956, amidst another in a succession of attempted rebellions. The uprising reached a crescendo in 1958 when General

¹⁰ Africa Watch, *War In South Sudan: The Civilian Toll* Human Rights Watch, (2003) Vol. 5 Issue No. 14

¹¹ United Nations Office for the Coordination of Humanitarian Affairs, OCHA Map of Sudan by Region and Province 2009 at 1 August 2010 <http://ochaonline.un.org/>

¹² *Presbyterian Church of Sudan v. Talisman Energy, Inc.* SDNY 2nd Ct. CA; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 641-61 (S.D.N.Y. 2006); *Presbyterian Church of Sudan v Talisman Energy Inc.*, [2005] A.J. No.1808 (Q.B.); *Presbyterian Church of Sudan v. Rybiak*, 2006 CanLII 32746 (ON C.A.)

¹³ Evans, Gareth, et. al., *God, Oil And Country: Changing The Logic Of War In Sudan* (2002) International Crisis Group p. 8

¹⁴ Gagnon, Georgette, *Deconstructing Engagement: Corporate Self-Regulation In Conflict Zones Implications For Human Rights And Canadian Public Policy* (2003), Human Rights Watch, 385-437 (2003); Evans, Gareth, *God, Oil And Country: Changing The Logic Of War In Sudan* (2002) International Crisis Group pp. 6-13; Idahosa, Pablo, *Business Ethics and Development in Conflict Zones: The Case of Talisman Oil*, 39 Journal of Business Ethics (2002) p. 230

Ibrahim Abboud seized power and immediately began a campaign to push Islam south.¹⁵

General Jafaar Nimeiri ousted General Abboud thus becoming the second President of Sudan in 1969.²⁹ Nimeiri began peace negotiations which resulted in the *Addis Ababa Agreement* 1972, which for the first time since the departure of the British, provided a degree of political and economic autonomy to the south.¹⁶ The *Addis Ababa Agreement* ended Sudan's first civil war after seventeen years of bloody conflict. General Nimeiri came under increasing pressure from Muslim extremists in his government to re-exert control over the south in 1983. As a result, Nimeiri's regime imposed strict Islamism in late 1983.¹⁷

The situation in Sudan was complicated by the discovery of oil by Chevron during the 1970s. As is frequently the case, the discovery of oil provided a greater incentive and impetus for amplifying the conflict, in order to ensure a balance of economic power remained in the hands of the north.

Chevron was granted a concession in 1975, started drilling in 1977, and discovered significant reserves of oil in the early 1980s,¹⁸ described in the British Columbia Supreme Court by Burnyeat J. as being a multi-billion dollar field.¹⁹

In 1980, President Nimeiri redrew the boundaries of the Upper Nile in order to expressly include Chevron's 1983 oil discovery. President Nimeiri issued a decree which, 1. dissolved the *Addis Ababa Agreement*; restored power to the Khartoum

¹⁵ Evans, Gareth, *God, Oil And Country: Changing The Logic Of War In Sudan* (2002) International Crisis Group p.9

¹⁶ Evans, Gareth, *God, Oil And Country: Changing The Logic Of War In Sudan* (2002) International Crisis Group pp.8-9

¹⁷ Idahosa, Pablo, *Business Ethics and Development in Conflict Zones: The Case of Talisman Oil*, 39 *Journal of Business Ethics* (2002) p. 231

¹⁸ *Imam Daud Malik, Deceased, Ad Litem, Hasina Ranee Shabazz v. State Petroleum Corporation and Arakis Energy Corporation* [2008] BCSC 1600 at 3; John Harker, *Human Security In Sudan: The Report Of A Canadian Assessment Mission*, Canadian Department of Foreign Affairs and International Trade, 12 (2000)

¹⁹ *Imam Daud Malik, Deceased, Ad Litem, Hasina Ranee Shabazz v. State Petroleum Corporation and Arakis Energy Corporation* [2008] BCSC 1600 at 4

government; 2. eliminated any autonomy for the south; and, 3. subdivided the south into three administrative provinces. Southern Sudan quickly dissolved into a brutal civil war steeped in Islamic Jihadist rhetoric. To garner support within the Middle East for his attack on the south, Nimeiri declared Sudan to be an Islamic state under Sharia Law.

Throughout the country southern Sudanese mobilized²⁰ into the Sudan People's Liberation Army (SPLA), and the war resumed with greater intensity than before.²¹

President Nimeiri ruled Sudan until early 1985, when his party was overthrown by the northern army, who conscripted Sadiq al Mahdi as Prime Minister.²² After a short flirtation with peace, General Omar al-Bashir seized power in military coup d'etat in June of 1989.²³ Now President Omar al-Bashir adopted a fundamentalist Islamist perspective and imposed "God's law" throughout the country.²⁴

A United Nations observer characterized the fighting as accomplishing very little militarily:

"The government controls only key garrison towns in the south; the rest of the region is ruled by the SPLM [Sudan People's Liberation Army] or one of the many other factions that have evolved over the years."²⁵

By 1998 and 1999, the civil war in Sudan could no longer be characterized as a conflict between the Islamic/Arab north and Christian/Animist/Tribal south. It is true that Khartoum continued to attempt to impose Islam and Islamic law on the south until

²⁰ Evans, Gareth, *God, Oil And Country: Changing The Logic Of War In Sudan* (2002) International Crisis Group p.13

²¹ Ibid. p.14

²² Ibid p.14

²³ Ibid. p.14

²⁴ Martin, Randolph, *Sudan's Perfect War* (2002) 81 Foreign Affairs 111 p.113

²⁵ Martin, Randolph, *Sudan's Perfect War* (2002) 81 Foreign Affairs 111 p.113; The Sudan People's Liberation Movement ("SPLM") is the political arm of the Sudan People's Liberation Army ("SPLA") Burr, Millard, Collins, Robert O., *Requiem For The Sudan: War, Drought, And Disaster Relief On The Nile* 13 (1995)

2005, the marginalization of the southern provinces, was a veiled effort by the northern Government to exert control over the disputed areas, many of which contain large reserves of oil. Those southern regions without oil are abundant in water or other minerals, and finally, those regions that are not rich in some kind of resource, are abundant in ideology.²⁶

During the latter half of the 90's a largely north-south conflict devolved into a multi-region conflict that spans the four corners of Sudan. This includes Darfur, Kordofan, Blue Nile, Abyei, and Southern Sudan.²⁷ In addition the conventional army controlled by the northern government in Khartoum, and the SPLA controlled by the Government of Southern Sudan in Juba, the net widened to include dozens of independent guerrilla groups, inter-tribal militias and religious factions, some of whom support the Khartoum and some of whom support Juba, depending on the advantage that can be drawn at the time.²⁸ Randolph Martin, Senior Director of Operations at the International Rescue Committee describes the conflict in the following way:

“Sudan’s low intensity conflict little resembles a war in the traditional sense, with national armies fighting over a contested border. The vast majority of Sudan’s casualties are not combatants killed in battle but southern civilians who fall victim to famine and disease . . .”²⁹

The second civil war displaced in the order of four million civilians; resulted in attacks on civilians by a number of different groups; and re-ignited the practice human slavery of southern blacks by Khartoum-supported *mujahedeen* militias.³⁰ While both the north and the south are guilty of atrocities, including attacks on civilian non-combatants,

²⁶ Talisman Energy, *[Sudan] Roots In Tribalism, With Elements Of Religion, Marxism, Regional Conflicts, Colonialism And Uneven Economic Development* (1998) Talisman Energy: The Greater Nile Oil Project: Notes to Financial Statements: Background Paper #10

²⁷ Gagnon, Georgette, *Deconstructing Engagement: Corporate Self-Regulation In Conflict Zones Implications For Human Rights And Canadian Public Policy* (2003), Human Rights Watch, 385-437 (2003) p.15

²⁸ Africa Watch, *War In South Sudan: The Civilian Toll*

Human Rights Watch, (2003) Vol. 5 Issue No. 14 pp. 116-19, 133-36, 143-53, 178-86

²⁹ Martin, Randolph, *Sudan’s Perfect War*, (2002) 81 Foreign Affairs 111, Council on Foreign Relations p.117

³⁰ *Ibid.* pp.117-118

there is absolute agreement that responsibility for the destitution, death, and destruction in the south lies with the government of Khartoum in northern Sudan.³¹ This view has recently been supported by the unprecedented indictment of a sitting leader of a nation, namely the indictment of President Omar al-Bashir by the International Criminal Court for war crimes, crimes against humanity, and recently for genocide.³²

It is against this historical, political and religious background that a legal analysis must be undertaken. The law is a creature of policy and in the case of international petroleum investment in conflict zones, geo-political politics will have to be factored in to the legal decision making matrix.

LEGAL ANALYSIS

There can be little doubt that the analysis of petroleum negotiations in a conflict zone must go further than the geo-political issues.³³ This is because a prospective petroleum asset in a conflict zone may be overborne by the potential legal barriers to entry which are greater in scope and cost than the return from even the largest discovery of oil or gas. This is evidenced by the fact that Chevron exited from Sudan after it “invested in excess of \$1,000,000,000.00 (U.S.) before

³¹ Africa Watch, *War In South Sudan: The Civilian Toll* Human Rights Watch, (2003) Vol. 5 Issue No. 14; Human Rights Watch, *Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World* (2003) Vol. 5 Issue No. 14

³² *The Prosecutor v Omar Hassan Ahmad Al Bashir* (“Omar Al Bashir”) Case n° ICC-02/05-01/09 International Criminal Court Indictment No. One; *The Prosecutor v Omar Hassan Ahmad Al Bashir* (“Omar Al Bashir”) Case n° ICC-02/05-01/09 International Criminal Court Indictment No. Two (The warrant of arrest for Al Bashir lists seven counts on the basis of his individual criminal responsibility under Article 25(3)(a) of the *Rome Statute* as an indirect (co) perpetrator including: • five counts of crimes against humanity: murder – Article 7(1)(a); extermination - Article 7(1)(b); forcible transfer - Article 7(1)(d); torture - Article 7(1)(f); and rape - Article 7(1)(g); • two counts of war crimes: intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities -Article 8(2)(e)(i); and pillaging - Article 8(2)(e)(v). The second indictment was issued on 12 July 2010 by the International Criminal Court on the grounds of genocide.

³³ Jacoby, Neil H, *Multinational Oil: A Study in Industrial Dynamics* Macmillan Publishing, United States (1974) p.18

abandoning its southern Sudan Petroleum Concessions in 1984 as a result of civil unrest in Sudan.”³⁴

The legal impediments to investment may include: 1) potential human rights claims; 2) national, trans-national, and international trade and investment sanctions; 3) the legal standing of the ruling regional government (which bears on the enforceability of the various contractual instruments); and, 4) the nature and level of government corruption.

If a formal legal analysis determines that these issues do not bar the petroleum investor from making an investment in the conflict zone, only then may the analysis turn to the construction and enforceability of the exploration, production, and transportation contracts which are required to explore, extract, and transport, petroleum to market.

ALIEN TORTS CLAIMS

The first significant legal issue to consider is the potential for human rights civil claims against the company and its officer and directors for intentional or reckless investment in a conflict zone. American petroleum companies must recognize that human rights issues will almost certainly arise in a conflict zone; and these issues are potentially more censorious and therefore costly because of the *Alien Tort Claims Act 1789*,³⁵ along with its international and common law analogs.

Human rights issues are described by Weinstein J. in the dispute cited as *In re Agent Orange Product Liability Litigation*³⁶. Weinstein J. considered the implications of the United States *Alien Tort Claims Act*³⁷ and ruled as follows:

³⁴ *Imam Daud Malik, Deceased, Ad Litem, Hasina Ranesh Shabazz v. State Petroleum Corporation and Arakis Energy Corporation* [2008] BCSC 1600 at 4

³⁵ *Alien Tort Statute* is also known as the *Alien Tort Claims Act* and refers to United States Code (28 U.S.C. § 1350), granting jurisdiction to federal district courts "of all causes where an alien sues for a tort only in violation of the law of nation or of a treaty of the United States." Generally, the statute serves as an American statutory instrument for gaining universal jurisdiction over violations of international law. The law was enacted by the United States Congress in 1789 as part of the *Judiciary Act 1789*.

³⁶ *In re Agent Orange* 373 F. Supp. 2d 7 (E.D.N.Y. 2005)

³⁷ *Alien Tort Claims Act*, 28 U.S.C. § 1350

Under an aiding and abetting theory, civil liability may be established under international law. . . . U.S. courts have repeatedly determined that the ATS [Alien Tort Statute] encompasses aiding and abetting liability, in a variety of different circumstances. For example, *Presbyterian Church of the Sudan v Talisman Energy, Inc*, 244 F. Supp. 2d [289,] 320-24 [(S.D.N.Y. 2003)], held that allegations that a Canadian oil company aided and abetted war crimes and other gross human rights violations were actionable.³⁸

The United States Supreme Court decided in *Sosa v Alvarez-Machain*³⁹ that the claimants were able to bring a claim in the US for a broad range of torts. This aspect of the law must be given serious consideration when making a substantial investment in oil concessions in conflict zones. The interpretation of the *Alien Tort Claims Act* in *Sosa* (supra.) has been the impetus for many ‘aiding and abetting humans rights abuse’ claims against US oil companies⁴⁰; claims against foreign oil companies that do business in the United States⁴¹; and, claims against foreign oil companies that have raised, or must raise, capital from US financial markets or institutions, including US pension funds⁴².

The *Talisman* case⁴³ illustrates the cost of litigating this kind of action. It puts one in mind of the old adage, “when in doubt, don’t”. If there is any doubt that your investment may be subject to an Alien Torts claim, then the aggrieved group must either be co-opted before any investment can proceed, or the regional government body must indemnify the investor and make such written warranties about respecting the safety and security of civilians (non-combatants) that a material breach by the government would not sound in damages against the petroleum investor. This is because the common law would determine that if there was no intention by the

³⁸ *In re Agent Orange Product Liability* 373 F. Supp. 2d 7 (E.D.N.Y. 2005)

³⁹ *Sosa v Alvarez-Machain* (03-339) 542 U.S. 692 (2004) 331 F.3d 604

⁴⁰ *Bowoto v Chevron Corp.*, No. C99-02506SI, 2006 WL 2455752 (N.D. Cal. Aug. 22, 2006); *Bowoto v Chevron Corp.*, No. C99-02506SI, 2007 WL 800940 (N.D. Cal. Mar. 14, 2007); *Doe v Unocal Corp*, [248 F.3d 915 \(9th Cir.](#) 2001); *Doe I v Unocal Corp.* 395 F.3d 932 C.A.9 (Cal.),2002; *Wiwa v Royal Dutch Petroleum Co.*, 226 F.3d 88, 102 (2d Cir.2000)

⁴¹ *Presbyterian Church of Sudan v. Talisman Energy, Inc.* SDNY 2nd Ct. CA; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 641-61 (S.D.N.Y. 2006); *Presbyterian Church of Sudan v Talisman Energy Inc.*, [2005] A.J. No.1808 (Q.B.); *Presbyterian Church of Sudan v. Rybiak*, 2006 CanLII 32746 (ON C.A.)

⁴² *Ibid.*

⁴³ *Ibid.*

government to honour this arrangement from the outset, the contract would have been induced by deceit and fraudulent misrepresentation thereby voiding the contract ab initio, should the petroleum investor so elect.⁴⁴

To wit, this kind of warranty language in the contract documents will serve to extinguish an *Alien Torts* claim filed in the United States,⁴⁵ or its analog filed in an international court or in any common law court. If the government agency with legal control over the conflict zone will not provide this warranty, the petroleum investor should defer the investment to a later date.

As a practical matter, any contract that pre-dates sovereignty may not bind southern Sudan if it is recognized as an independent sovereign state.⁴⁶

SANCTIONS

The second legal issue to be reviewed when investing in a region like Sudan, even in Southern Sudan which has enjoyed the support of the United States government,⁴⁷ is potential for censure from sanctions that have been enacted and restrict doing business with the government in question, in this case the Republic of Sudan⁴⁸, without the consent of the United States Office for Control of Foreign Assets.⁴⁹ US sanctions against the Sudan are described as follows:

“After 1989, when a coup deposed the elected government and imposed a military-Islamist junta on Sudan that committed gross human rights abuses, the U.S. administration was legislatively mandated to vote against such a government in international lending institutions, and it did so. Under President Bill Clinton (1993-2001), the U.S. government gradually adopted a policy of isolating the Sudanese government; Sudan was placed on the State Department’s list of

⁴⁴ *Marshall v Hubbard* [1886] USSC 99; 6 S.Ct. 80; *Twycross v Grant* [1877] 2 C.P.D 469; *Derry v. Peek* (1889), 14 A.C. 337 (H.L.) at 374

⁴⁵ *Presbyterian Church of Sudan v. Talisman Energy, Inc.* SDNY 2nd Ct. CA

⁴⁶ *Ibid.*

⁴⁷ Kobrin, Stephen J, *Oil And Politics: Talisman Energy and Sudan*, International Law and Politics, Volume 36 p. 426

⁴⁸ Office of Foreign Assets Control, United States Department of the Treasury, *An Overview of the Sudanese Sanctions Regulations*, Title 31 Part 538 of the U.S. Code of Federal Regulation

<http://www.treas.gov/offices/enforcement/ofac/programs/ascii/sudan.txt>

⁴⁹ *Ibid.*

countries supporting terrorism in 1993. In 1997, U.S. sanctions were escalated through an executive order barring any U.S. person from doing business with the government of Sudan or its entities. The only exception was for the import of gum arabic from Sudan.⁵⁰

Additionally, the sanctions were either continued, enhanced, or amended after George W. Bush was elected to office, as follows:

“Under the George W. Bush administration starting in January 2001, two domestic U.S. lobbies flexed their muscles in seeking to influence U.S. policy toward Sudan: one extremely powerful—the oil industry—and one just beginning to test its foreign policy strength, on Sudan—a conservative religious grouping concerned about treatment of Christians. This conservative religious lobby scored a victory over the oil and business community when the Sudan Peace Act passed the U.S. House of Representatives by 422-2 on June 13, 2001. This act contained an amendment imposing capital market sanctions on foreign companies doing oil business in Sudan, prohibiting them from any access to U.S. capital markets.⁵¹

The sanctions are still in place in respect of any oil and banking that is under some form of control by the Omar al-Bashir Khartoum government in the north.⁵² Unfortunately for the

⁵⁰ U.S. President William J. Clinton, Executive Order 13067, *Blocking Sudanese Government Property and Prohibiting Transactions with Sudan* Washington, D.C., November 4, 1997, <http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1997/11/5/2.text.2> at 24 February 2000 (The sanctions were renewed by the Bush administration in November 2001 and 2002.)

⁵¹ Human Rights Watch, Sudan, Oil and Human Rights (2003) www.hrw.org at 3 August 2010

⁵² *Trade Reform and Export Enhancement Act of 2000 (TSRA); Darfur Peace and Accountability Act of 2006; The Antiterrorism and Effective Death Penalty Act of 1996; International Emergency Economic Powers Act of 1977*; as well as the Sudanese Sanctions Regulations including the following: 31 C.F.R. Part 538 (Exempt Licence Application) US Sanctions include: 1. [Amendment to Sudanese Sanctions Regulations permitting a General Licence for publishing activities \(31 CFR 538.529\)](#) ; 2. [Amendment to Sudanese sanctions regulations permitting general licence for expanding the scope of an existing authorization of certain imports for diplomatic or official personnel \(31 CFR 538\)](#) ; 3. [Amendment to Sudanese Sanctions Regulations authorizing TSRA-related articles including agricultural products, medicine and medical devices in respect of Southern Sudan, Kordofan/Nuba Mountains State, Blue Nile State, Abyei, Darfur, and marginalized areas in and around Khartoum i, and certain other specific areas \(31 CFR 538\)](#); 4. Prohibitions under s.1 of Executive Order 13412 maintains the countrywide blocking of the property and interests in property of the Government of Sudan imposed by E.O. 13067; however, section 6(d) of E.O. 13412 excludes the regional government of Southern Sudan from the definition of the Government of Sudan. Section 2 of E.O. 13412 prohibits all transactions by

Government of southern Sudan, 98% of their operating revenues are derived from oil, which means that with few exceptions it is not possible to do business in southern Sudan from a US base or with US investment, without an exemption from the Office of Foreign Assets Control. The Sudanese sanctions that are in place in the United States have not been repeated in most other jurisdictions, but the petroleum investor must be aware of a spectrum of United Nations sanctions.⁵³ So long as one is not a US-centric oil company, or there is no need to secure funding in US Capital Markets, one could risk proceeding with an investment; however, if the petroleum investor will eventually need to do business with or in the United States, or will need to access capital in the United States, the US sanctions against Sudan are a real impediment to making a petroleum investment in southern Sudan. As one example, the largest refineries outside of China that can process Sudan's Dar high acid and arsenic content crude oil are located in the United States, thus making access to this market is pivotal.⁵⁴

The complexity of the decision making process in the case of southern Sudan is amplified because the region has semi-autonomous status,⁵⁵ with its own army, its own President, and Judiciary,⁵⁶ but with a role on the national stage as well. Moreover, there are power sharing laws

U.S. persons relating to Sudan's petroleum or petrochemical industries, including, but not limited to, oilfield services and oil or gas pipelines. Sections 1 and 2 of E.O. 13412 apply to the entire territory of Sudan. Exempt Areas of Sudan under s.4(b) of E.O. 13412 exempts from the prohibitions in section 2 of E.O. 13067 specific areas of Sudan: Southern Sudan, Southern Kordofan/Nuba Mountains State, Blue Nile State, Abyei, Darfur, and marginalized areas in and around Khartoum. Thus, trade and humanitarian assistance are no longer prohibited in the exempt areas, provided that these activities do not involve Sudan's petroleum or petrochemical industries or any property or interests in property of the Government of Sudan. The non-exempt areas of Sudan continue to be subject to the comprehensive sanctions set forth in E.O. 13067; 5. United States Code Annotated, Title 50. War and National Defense, Chapter 35. International Emergency Economic Powers; [31 CFR Part 538](#); [TSRA Amendments to 31 CFR](#) ; [Amendment to SSR \(31 CFR 538.529\)](#); [70 FR 34060-05](#) - Reporting, Procedures and Penalties Regulations and Sudanese Sanctions Regulations; [71 FR 29251-06](#) - Revisions to IEEPA made by the Combating Terrorism Financing Act of 2005; [72 FR 12980-07](#) - Clarification of Policy with Respect to the Process for Issuing Certain TSRA Licences; [72 FR 61513-07](#) - Amendment to the Sudanese Sanctions Regulations to implement Executive Order 13412; [74 FR 25430-09](#) - Darfur Sanctions Regulations; [74 FR 61030-09](#) - an interim final rule which makes technical changes to certain sections of the Sudanese Sanctions Regulations and the Iranian Transactions Regulations, 31 CFR parts 538 and 5606. [Criminal Code, 18 USCS Sec 1001](#) and [18 USC Sec. 3571](#)

⁵³ **United Nations Security Council Resolutions (Sanctions): No's:** 1044 (January 31, 1996) , [1054](#) (April 26, 1996); [1070](#) (August 16, 1996); [1591](#) (March 29, 2005); [1672](#) (April 25, 2006)

⁵⁴ Mees Research, *Energy and Geopolitical Risk*, Middle Eastern Economic Survey Research Special Report 23 December 2009 p.5

⁵⁵ The *Comprehensive Peace Agreement 2005*; *The Interim National Constitution of The Republic Of The Sudan 2005*; *Interim Constitution of Southern Sudan 2005*; *Machakos Protocol 2002*

⁵⁶ *Comprehensive Peace Agreement 2005* pp.52-57

and administrative structures to administer the shared power⁵⁷ between the northern and southern Sudan governments,⁵⁸ making it difficult to undertake petroleum investment directly with the Government of Southern Sudan at this time, unless there is a willingness to enter in to petroleum contracts that are subject to the approval of the Office of Foreign Assets Control.⁵⁹

As a practical matter, in the case of a petroleum investment in southern Sudan it would be inadvisable for the Government of Southern Sudan, or the Sudan People's Liberation Movement (ruling party) to enter into a contract for a petroleum concession outside the framework of the CPA at this time. To do so could give the regime in Khartoum an excuse not to honour the terms of the CPA. In this circumstance the best course for the petroleum investor is to enter into an agreement that is subject to ratification in the event that the 9 January 2011 referendum on self-determination is successful, or if the referendum is blocked by Khartoum, subject to ratification in the event of a unilateral declaration of independence.

SOVEREIGN STANDING

The third issue to be considered is the matrix of decision makers and their legal standing in the contract negotiation and execution process. In Sudan this is made more difficult because the *Comprehensive Peace Agreement 2005* ("CPA"), executed on 9 January 2005 by representatives from northern Sudan and southern Sudan, (signatories included the African Union, Kenya, Uganda, Egypt, and the peace negotiation team members from the United States, United Kingdom, Italy, Norway and the Netherlands)⁶⁰ creates a 6 year interim period and a potential post-interim/transitional period. The CPA at ss. 2, 2.1 defines the "Pre-interim Period"⁶¹ as the period after the signing of the *Machakos Protocol 2002* on 22 July 2002 but commencing not before 6 months prior to signing the *Comprehensive Peace Agreement 2005* on 9 January 2005;

⁵⁷ Ibid. In particular the *Comprehensive Peace Agreement 2005* and the *Interim National Constitution of The Republic of the Sudan 2005* stipulate the formation and operation of a National Petroleum Commission which has ultimate authority over the disposition of exploration rights throughout the oil producing regions of Southern Sudan.

⁵⁸ Ibid.

⁵⁹ *Trade Reform and Export Enhancement Act of 2000* (TSRA), the Sudanese Sanctions Regulations, 31 C.F.R. Part 538 (Exempt Licence Application)

⁶⁰ *Comprehensive Peace Agreement 2005* pp. xiv - xvi

⁶¹ *Comprehensive Peace Agreement 2005* p. 1

at s2.2 of the CPA defines the “Interim Period”⁶² as running from the signing of the CPA on 9 January 2005 until a date 6 years hence at which time southern Sudan is entitled to hold a self-determination referendum;

The CPA stipulates that the people of southern Sudan have the right to conduct an independence referendum as follows:

2.4.2 The Parties shall work with the [Assessment and Evaluation] Commission during the Interim Period with a view to improving the institutions and arrangements created under the Agreement and making the unity of Sudan attractive to the people of South Sudan.

*2.5 At the end of the six (6) year Interim Period there shall be an internationally monitored referendum, organized jointly by the GOS and the SPLM/A, for the people of South Sudan to: confirm the unity of the Sudan by voting to adopt the system of government established under the Peace Agreement; or to vote for secession.*⁶³

The CPA implies that there is a “secession period”⁶⁴ which would necessarily be from one day following a successful independence vote on 9 January 2011, to a date when the north and south may resolve the issues attendant to southern Sudan seceding from the Republic of Sudan. The secession period only comes about if 75% of southern Sudanese vote for independence. The NGO consortium, Global Witness, has remarked that the independence referendum is scheduled to be conducted on 9 January 2011 but Sudan has not properly prepared.⁶⁵ The UNDP recently

⁶² *Comprehensive Peace Agreement 2005* p. 2

⁶³ *Comprehensive Peace Agreement 2005* pp. 3-4

⁶⁴ *Ibid.*

⁶⁵ Mortensen, Gemma, *Renewing the Pledge: Re-Engaging the Guarantors to the Sudanese Comprehensive Peace Agreement*, Crisis Action Group on behalf of Aegis Trust, African Centre for Justice and Peace Studies, Arab Coalition for Darfur, Cairo Institute for Human Rights Studies, Collaborative for Peace in Sudan, Community Empowerment for Progress Organization (Sudan), Cordaid, Darfur Consortium, The Enough Project at the Center for American Progress, Global Centre for the Responsibility to Protect, Global Witness, Human Rights First, ICCO, IKV Pax Christi, International Federation for Human rights (FIDH), International Refugee Rights Initiative. Italians for Darfur, KACE Al-Khatim Adlan Centre for Enlightenment and Human Development (Sudan), Refugees International, Standard Action Liaison Focus (Sudan), Save Darfur, Sudan Democracy First Group, Sudan Forum Global Campaign Members (Norway), Sudan Human Rights Monitor, Sudanese Network for Democratic Elections, Waging Peace, July 2010 at 2 August 2010 www.crisisaction.org

announced that Japan had agreed to provide funding for the conduct of the referendum.⁶⁶ The transitional period is the time from the date of an independence referendum through to formal sovereignty of Southern Sudan. The Pre-interim period is the period from 2002 through the must establish a National Petroleum Commission during an “Interim Period”⁶⁷. At section 3 of the CPA it states:

CHAPTER III WEALTH SHARING (Sub-title: Equitable principles for sharing wealth)

3. Oil Resources

A. Guiding Principles for management & development of the petroleum sector

3.1 The Parties agree that the basis for an agreed and definitive framework for the management of the development of the petroleum sector during the Interim Period shall include the following:

3.1.1 Sustainable utilization of oil as a non-renewable natural resource consistent with:

- a) the national interest and the public good;*
- b) the interest of the affected states/regions;*
- c) the interests of the local population in affected areas;*
- d) national environmental policies, biodiversity conservation guidelines, and cultural heritage protection principles.*

3.1.2 Empowerment of the appropriate levels of government to develop and manage, in consultation with the relevant communities, the various stages of oil production within the overall framework for the management of petroleum development during the Interim Period.

3.1.3 Give due attention to enabling policy environment for the flow of foreign direct investment by reducing risks associated with uncertainties regarding the outcome of the referendum on self-determination at the end of the Interim Period.

⁶⁶ Ministry of Foreign Affairs of Japan, *Emergency Grant for the Referenda in Sudan* Press Release 30 July 2010 at 2 August 2010 http://www.mofa.go.jp/announce/announce/2010/7/0730_01.html

⁶⁷ ‘Interim Period’ is a defined term taken from the *Comprehensive Peace Agreement 2005*. The Interim Period is defined as the period from the time of expiry of the Pre-interim Period on 9 January 2005 through to the date of the internationally monitored independence referendum six years hence.

3.1.4 A stable macroeconomic environment that emphasizes stability of the petroleum sector.

3.1.5 Persons enjoying rights in land shall be consulted and their views shall duly be taken into account in respect of decisions to develop subterranean natural resources from the area in which they have rights, and shall share in the benefits of that development.

3.1.6 Persons enjoying rights in land are entitled to compensation on just terms arising from acquisition or development of land for the extraction of subterranean natural resources from the area in respect of which they have rights.

3.1.7 The communities in whose areas development of subterranean natural resources occurs have the right to participate, through their respective states/regions, in the negotiation of contracts for the development of those resources.

3.1.8 Regardless of the contention over the ownership of land and associated natural resources, the Parties agree on a framework for the regulation and management of petroleum development in Sudan during the Interim Period.

B. National Petroleum Commission (NPC)

3.2 The Parties agree that an independent National Petroleum Commission (NPC) shall be established during the Pre-Interim Period and its decisions shall be by consensus.

3.3 Taking into account the provisions elsewhere in this Agreement, the NPC shall be constituted as follows:

- a) The President of the Republic and President of the GOSS as Co-chairs and permanent members;*
- b) four (4) permanent members representing the National Government;*
- c) four (4) permanent members representing the GOSS; and*

- d) *not more than three (3) representatives of an oil producing State/Region in which petroleum development is being considered, non-permanent members.*

3.4 The NPC shall have the following functions:

3.4.1 Formulate public policies and guidelines in relation to the development and management of the petroleum sector consistent with paragraph 3.1.1.

3.4.2 Monitor and assess the implementation of those policies to ensure that they work in the best interests of the people of Sudan.

3.4.3 Develop strategies and programs for the petroleum sector.

3.4.4 Negotiate and approve all oil contracts for the exploration and development of oil in the Sudan, and ensure they are consistent with the NPC's principles, policies and guidelines.

3.4.5 Develop its internal regulations and procedures.

3.5 In performing the functions referred to in paragraph 3.4 above, the NPC shall take into account relevant considerations, including the following:

3.5.1 The extent to which the contract provides benefits to local communities affected by the development.

3.5.2 The extent to which the views of the state/region and the affected groups are incorporated in the proposed contracts.

3.5.3 If the NPC decides to approve the contract, persons holding rights in land who are aggrieved by the decision shall seek relief through arbitration or in a court of law.

3.5.4 If the non-permanent members of the NPC representing the oil producing State/Region collectively disagree with the decision of the NPC to approve the contract related to their State/Region, the National Minister of Petroleum shall not sign the contract and shall refer the matter to the Council of States/Regions. If the Council of States/Regions rejects the objection by two-thirds (2/3) majority, the National Minister of Petroleum shall sign the contract. If the Council of States/Regions does not reject the objection by two-thirds (2/3) majority within 24 sitting days of receiving it, the Council of States/Regions shall remit the objection within that period and by two-thirds (2/3) majority to a mechanism established by the Council to arbitrate on

the objection. The arbitration decision shall be made within six calendar months of referral to arbitration. The arbitration decision shall be binding.

3.5.5. If the NPC approves the contract the National Minister of Petroleum shall sign the contract on behalf of the Government of the Sudan.

3.5.6 In performing functions 3.4.1, 3.4.2, 3.4.3, and 3.4.5 of paragraph 3.4, the NPC shall include only its permanent members.

3.5.7 In performing function 3.4.4 of paragraph 3.4, the NPC shall include its permanent members and representatives of oil producing State/Region in which contracts for the exploration and development of the petroleum are being negotiated and considered for approval.

4. Existing Oil Contracts

4.1 The SPLM shall appoint a limited number of representatives to have access to all existing oil contracts. The representatives shall have the right to engage technical experts. All those who have access to the contracts will sign confidentiality agreements.

4.2 Contracts shall not be subject to re-negotiation.

4.3 If contracts are deemed to have fundamental social and environmental problems the Government of Sudan will implement necessary remedial measures.

4.4 The Parties agree that "existing oil contracts" mean contracts signed before the date of signature of the Comprehensive Peace Agreement.

4.5 Persons whose rights have been violated by oil contracts are entitled to compensation. On the establishment obligations through due legal process the Parties to the oil contracts shall be liable to compensate the affected persons to the extent of the damage caused.

5. Guiding Principles for Sharing Oil Revenue

5.1 The Parties agree that the basis for an agreed and definitive framework for the sharing of the wealth emanating from oil resources of Southern Sudan shall include the following:

5.1.1 The framework for sharing wealth from the extraction of natural resources should balance the needs for national development and reconstruction of Southern Sudan.

52 The Parties agree that a formula for sharing the revenue from oil resources shall be as set forth in this Agreement.

53 For the purposes of this Agreement. 'Net revenue from oil' shall be the sum of the net revenue (i) from exports of government oil and (ii) from deliveries of government oil to the refineries. Exports shall be valued at the actual Free on Board (FOB) export prices less the charges to deliver the oil to any export destination including pipeline and management charges. Oil delivered to the refinery shall be valued at the average FOB export prices during the last calendar month in which there was an export sale less the charges that would have been incurred to deliver the oil to any export destination including pipeline and management charges.

54 An Oil Revenue Stabilization Account shall be established from government oil net revenue derived from actual export sales above an agreed benchmark price. The benchmark price will be established annually as part of the national budget reflecting changing economic circumstances.

55 The Parties agree that at least two percent (2%) of oil revenue shall be allocated to the oil producing states/regions in proportion to output produced in such states/regions.

56 After the payment to the Oil Revenue Stabilization Account and to the oil producing states/regions, fifty percent (50%) of net oil revenue derived from oil producing wells in Southern Sudan shall be allocated to the Government of Southern Sudan (GOSS) as of the beginning of the Pre-Interim Period and the remaining fifty percent (50%) to the National Government and States in Northern Sudan.

57 A Future Generation Fund shall be established once national oil production reaches two (2) million barrels per day. This production criterion may, as part of the National Government's normal budget process, be reduced down to one (1) million barrels per day.

58 *The Parties agree that all funds/special accounts referred to in this Agreement and future accounts shall be on-budget operations.*

It should be apparent from the structure of the CPA as described herein that there are four possible outcomes for the people of southern Sudan one day following the 9 January 2011 independence referendum.

The first scenario (i.e., outcome) is that the referendum is held on 9 January 2011 but fewer than 60% of residents of southern Sudan register to vote, or less than 50% who register vote for secession. This is an unlikely outcome. It has been reported that there is overwhelming support for independence:

“Support for secession is thought to be overwhelming among a population embittered by decades of civil war, underdevelopment and perceived exploitation by the northern Muslim elite.”⁶⁸

In this scenario the Government of Southern Sudan continues as a semi-autonomous government under the ultimate authority of the Republic of Sudan. The governance of southern Sudan under this scenario is not expressly articulated in the CPA, and would therefore prove too uncertain for a petroleum investor.

The second scenario is that the referendum is not held but is deferred to a later date by consent of the governments in both the north and the south. Under this scenario, the status quo will likely be maintained in the interim, and the legal planning exercise would be the same as set out in scenario three and four; however, undertaken at the later date.

The third scenario is that the referendum proceeds and the citizens of southern Sudan vote to secede from the Republic of Sudan. This will lead to a secession process under international law,⁶⁹ but will likely have certain security repercussions.⁷⁰ The legal implications of this

⁶⁸ AlertNet for Journalists, *Southern Sudan's independence referendum*, Reuters for Thomson Reuters Foundation, 08 Jan 2010

⁶⁹ The Security Council, by its [Resolution 1590 \(2005\)](#) unanimously passed on 24 March 2005, established the United Nations Mission in the Sudan (UNMIS) to support implementation of the

scenario are relatively straight forward based on the history of the United Nations in Sudan. It is clear that under this path, the peoples of southern Sudan will have exercised the right to self-determination.⁷¹ The principle of self-determination allows a people to choose its own political status and to determine its own form of economic, cultural and social development. Exercise of this right can result in a variety of different outcomes ranging from political independence through to full integration within a state. Frequently, claims of cultural autonomy are readily recognized by other sovereign states, but claims to independence may be rejected unless the weight of the historical oppression has been heavy. Nevertheless, the right to self-determination is recognized in international law as a right of process belonging to peoples, and not to states or governments.

The principle of self-determination can be found in Article I of the *Charter of the United Nations*, which evolved from the 1941 *Atlantic Charter* and the Dumbarton Oaks proposals. It is also recognized as a right of all peoples, no matter the location, in the first article of the *International Covenant on Civil and Political Rights* 1976, and the *International Covenant on Economic, Social and Cultural Rights* 1976. The first paragraph of both covenants state:

“All peoples have the right to self-determination. By virtue of that right they freely determine the political status and freely pursue their economic, social and cultural development.”⁷²

Comprehensive Peace Agreement signed by the Government of Sudan and the Sudan People's Liberation Movement/Army on 9 January 2005; and to perform certain functions relating to humanitarian assistance, and protection and promotion of human rights, including the implementation of the Comprehensive Peace Agreement. It is implied that this includes all aspects of the CPA..

⁷⁰ International Institute for Strategic Studies, *The IISS Regional Security Summit Memorandum*, East Africa (2009)

⁷¹ [UN Security Council](#) passed [Resolution 1590](#) on 24 March 2005, in response to the signing of the [Comprehensive Peace Agreement 2005](#) signed by the government of the Republic of [Sudan](#) (the Islamist north) and the [Sudan People's Liberation Movement](#) (the south) on January 9, 2005 in Nairobi, Kenya. Resolution 1590 established the United Nations Mission in the Sudan (UNMIS) whose mission is to support the implementation of the Comprehensive Peace Agreement, to perform certain functions relating to humanitarian assistance, security of civilians in the south, promotion of human rights, and to support [African Union Mission in Sudan](#). The UNMIS mission ends on April 30, 2011, in accordance with [Security Council Resolution 1919](#).

⁷² *International Covenant on Civil and Political Rights* 1976; *International Covenant on Economic, Social and Cultural Rights* 1976.

The right to self-determination of peoples is recognized in many other international legal instruments, including the *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States*⁷³ and the *African Charter of Human and Peoples' Rights*⁷⁴ of 1981. The principle of self-determination has also been affirmed by the International Court of Justice in applications made by, Namibia;⁷⁵ Western Sahara;⁷⁶ East Timor;⁷⁷ and Kosovo.⁷⁸ In each of these cases the ICJ confirmed that the right to self-determination is erga omnes.⁷⁹

The principle and fundamental right to self-determination of all peoples is firmly established in international law.⁸⁰ Thus the probable outcome of this scenario is that the Government of Southern Sudan would become the sovereign nation of Southern Sudan.⁸¹

The fourth scenario is that the Government of Southern Sudan will be prevented by the Government of National Unity in northern Sudan from holding an independence referendum: This will likely result in a unilateral declaration of independence by the Government of Southern Sudan.⁸² The Government of Southern Sudan will then be required to file an application to the

⁷³ *Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States 1970 United Nations General Assembly*

⁷⁴ African Charter of Human Rights 1981 African Union

⁷⁵ *Namibia (South West Africa 1971, Advisory Opinion of 21 June 1971 respecting South African occupation notwithstanding Security Council Resolution 276 (1970) International Court of Justice General List No. 53 (1970–1971)*

⁷⁶ [Western Sahara ICJ 1975](#) This was an Advisory Opinion on request of the United Nations General Assembly, dated 16 October 1975 from the International Court of Justice General List No. 61 (1974–1975)

⁷⁷ *East Timor (Portugal v. Australia) 1995 Judgment rendered in favour of Australia dated 30 June 1995, International Court of Justice General List No. 84 (1991–1995)*

⁷⁸ *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Advisory Opinion, I.C.J. Rep. [2010]* The International Court of Justice (ICJ), in a 10-4 decision, answered this question in the affirmative in an advisory opinion to the General Assembly of the United Nations

⁷⁹ *Erga omnes* is a right that exists outside any national, trans-national, or international law. It is a right that is taken as universal.

⁸⁰ de Weichs de Wenne, Veronique, *Conference Report on Unrepresented Nations and Peoples*, United Nations, Geneva, UNPA 1996

⁸¹ The author has advocated to the senior leadership of southern Sudan a new name for the nation. The better view is that the current name will continue to be attached to the atrocities perpetrated by the Republic of Sudan. The historic name “Nubaland”, named for the Nuba forests surrounding the Nuba mountains, reputed to have been the home of Adam and Eve.

⁸² Ibid.

General Assembly of the United Nations for recognition under International Law.⁸³ The threshold test for unilateral self-determination was set out by the Supreme Court of Canada where the court unanimously qualified the aforesaid right to self-determination as follows:

“...a right to secession only arises under the principle of self-determination of people at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to **alien subjugation, domination or exploitation**; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a **colonial people** or an **oppressed people**, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the "National Assembly, the legislature or the government of Quebec" do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.”⁸⁴ [emphasis added]

The International Court of Justice have relied on the tests set out by the Supreme Court of Canada where the threshold question for self-determination becomes, can it be concluded under international law that the peoples of southern Sudan have been subject to alien subjugation, domination, exploitation, colonization, or oppression, and without meaningful access to pursue

⁸³ *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Advisory Opinion*, I.C.J. Rep. [2010] The International Court of Justice (ICJ), in a 10-4 decision, answered this question in the affirmative in an advisory opinion to the General Assembly of the United Nations

⁸⁴ *Reference by the Governor-General concerning Certain Questions relating to the Secession of Quebec from Canada* [1998] 2 S.C.R. 217; 161 D.L.R. (4th) 385; 115 Int. Law Reps. 536

political, economic, cultural and social development?⁸⁵ The answer prior to 2005 would have been an unequivocal yes; however, in the wake of the CPA, the peoples of southern Sudan are represented in the national government, and have been given a high degree of autonomy. Therefore the answer to this question requires further analysis.

The starting point for this enquiry must be “what are is the Government of Southern Sudan likely to do in this scenario.” The author believes, based on many discussions with senior leaders from southern Sudan that they will argue that the application of the principles of the CPA has not been properly applied under equity and the common law. They will further stipulate that under international law, the CPA has been fraudulently administered by the north, and the south is therefore entitled to make such a declaration. The principles for distribution of power and wealth are set out in the CPA, and mirrored in the *Interim National Constitution of the Republic of the Sudan* (the north) where at *Chapter I section 185* it states:

“Guiding Principles for Equitable Sharing of Resources and Common Wealth
S185 (1) Resources and common wealth of the Sudan shall be shared equitably to enable each level of government to discharge its legal and constitutional responsibilities and duties and to ensure that the quality of life, dignity and living conditions of all citizens are promoted without discrimination on grounds of gender, race, religion, political affiliation, ethnicity, language or region.
(2) The sharing and allocation of the resources and common wealth of the Sudan shall be based on the premise that all parts of the country are entitled to development.
(3) The National Government shall fulfil its obligations to provide financial transfers to the Government of Southern Sudan, and shall, except as otherwise provided herein, apportion revenues equitably among other states;...”⁸⁶

The CPA expressly requires that the north deal with the south in an equitable manner, which is to say with “good faith and fidelity”.⁸⁷ The language of the CPA requires that 50% of all royalties

⁸⁵ *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Advisory Opinion*, I.C.J. Rep. [2010] The International Court of Justice (ICJ) p.

⁸⁶ *Interim National Constitution of the Republic of Sudan 2005* CHAPTER I, ss185(1)-(11)

or revenues accrued from the production of oil be shared with the southern Sudan (“GOSS”).⁸⁸
The CPA sets out the terms of a Wealth Sharing Agreement as follows:

“Implementation Modalities of Wealth Sharing Agreement

Definition and Calculation of Net Oil Revenue

1. General Definitions:

(a) Cost Oil: It is a percentage from the daily production to cover the production cost (exploration, development and operating cost). Exploration and development costs are classified as capital cost amortized within four years. The operating cost is paid annually. If the cost oil is greater than the recoverable cost (actual cost) the difference (Excess Oil) will be added to the government share. If recoverable cost is greater than the cost oil then the difference shall be carried over for the next year. However the Division of Excess Oil between the Government and Contractors is subject to the variables of each agreement.

(b) Profit Oil: It is the remaining balance from the daily production after deducting the cost oil.

(c) Government Share: It is the percentage share of the government from the profit oil after deducting the contractor's share that is subject to contract agreements. It increases with the increase in production.

(d) Government Entitlement: It consists, at Intake Point, of (Government Share plus excess oil plus under lifting less over lifting). Part of the Government Entitlement is either used for local refineries or for export.

(e) Intake Point: is the injection point between the pipeline network operated by contractor under the Agreement and the transportation system operated by or under the control of the transporter.

2. Calculation of Government Net Oil Revenue:

Government Entitlement X

*Export price*⁸⁹

⁸⁷ Meagher, R., Heydon, D., Leeming, M., *Meagher Gummow & Lehane’s Equity Doctrines & Remedies* 4th ed. Butterworths 2002 at 5-020 (Equity dictates that the monies that were agreed to be the property of the southern Sudanese, were deemed to have been held on trust for southern Sudan.)

⁸⁸ GOSS is an acronym for the “Government of Southern Sudan”

Less Tariff (transport/pipeline fee)

Less Management fee [undefined]

Equal Government net oil revenue

3. Calculation of Oil Revenue Stabilization Fund:

Government Net Oil Revenue from export

Less Actual Export Quantities X

benchmark price

Equal Total Oil Revenue Stabilization Fund

4. Government Net Oil Revenue Available for Allocation:

Government net oil revenue

Less oil revenue stabilization fund

Equal Total government net oil revenue available for allocation

5. *Producing States Share of Net Oil Revenue:*

Two Percent (2%) Percent of the total government net oil revenue available for allocation as per WSA.

6. *GOSS⁹⁰ Share: Fifty Percent (50%) Percent of (percentage of the oil produced in the South from the total production multiply by net oil revenue available for allocation after deducting States share) [emphasis added]*

In a conventional case of breach of contract, the remedy would only sound in compensatory damages.⁹¹ However, if the Government of Southern Sudan can show that the northern Sudanese Government has purported to implement the terms of the CPA in good faith and fidelity, but have not done so; and never intended so to do, the south would have a strong argument that the execution of the CPA by Omar al-Bashir-Khartoum government was a sham. Alternatively, the Government of Southern Sudan may assert that the breach is of such a magnitude that it has been defrauded by the northern Sudanese government. Either of these arguments are important to the

⁸⁹ Definition taken from the CPA: *Export shall be valued at the actual Free On Board (FOB) export price and oil delivered to the refineries shall be valued at the average FOB export price of the last calendar month*

⁹⁰ GOSS is a reference to the “Government of Southern Sudan” under the ruling party, the Sudan People’s Liberation Movement (SPLM)

⁹¹ *Addis v Gramophone Co. Ltd* [1909] AC 488 per Lord Atkinson where he states, “...but if he should choose to seek redress in the form of an action for breach of contract, he lets in all the consequences of that form of action: *Thorpe v Thorpe* (1832) 3 B & Ad 580. One of these consequences is, I think this: that he be paid adequate compensation in money for the loss of that which he would have received had his contract been kept, and no more.”

petroleum investor because under this scenario these arguments by the Government of Southern Sudan will determine the time that the Government of Southern Sudan is required by the United Nations to wait before being recognized as a sovereign nation.

The leading common law authority for what constitutes a ‘sham transaction’ is *Snook v London & West Riding Investments* where Lord Diplock states:

“It is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create".⁹²

The leading case in the US on what constitutes a ‘sham transaction’ is the Supreme Court’s decision in *Gregory v. Helvering*, a case of setting up a company, and shifting assets from one company to another, to avoid federal income tax.⁹³ The authorities on ‘sham transactions’ in the US are almost entirely tax decisions, however, Lord Diplock helpfully informs us that a ‘sham transaction’ is not merely a concept of tax law, or trust law, but is a concept of the general law.⁹⁴ Lord Diplock states:

"But one thing, I think, is clear in legal principle, morality and the authorities ... that for acts or documents to be a "sham," with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a "shammer" affect the rights of a party whom he deceived."⁹⁵

⁹² *Snook v London & West Riding Investments* [1967] 2 QB at 801 per Diplock LJ

⁹³ *Gregory v Helvering* 293 U.S. 465 (1935), 69 F.2d 809 (2d Cir. 1934)

⁹⁴ *Snook v London & West Riding Investments* [1967] 2 QB at 801

⁹⁵ *Ibid.* at 802

If it can be shown on the facts that the northern Sudanese government have purported to adhere to the terms of the CPA, but have not in fact adhered to the terms of the CPA, they may be declared a “shammer” as defined under the common law, and the legal position of GOSS under international law would likely be determined by the ICJ at the date of the commencement of the sham, namely 9 January 2005.

The facts about whether the northern government has perpetrated a sham have been studied by Global Witness in Europe.⁹⁶ Global Witness posed the question, “has the north been sharing anything close to the 50% of the oil revenue stipulated under the terms of the contract?”⁹⁷ The evidence of breaches of the CPA perpetrated by the north, as proffered by Global Witness, include, but are not limited to, the following:

- “1. the volume of oil that the Khartoum government states was produced in blocks 1, 2 and 4 in 2007 is 9% less than that stated in the annual report of the company operating these blocks, the Chinese National Petroleum Corporation (“CNPC”);
2. the volume of oil that the Khartoum government states was produced in blocks 3 and 7 in 2007 is 14% less than that stated in the annual report of the company operating these blocks, CNPC.
3. the volume of oil that the Khartoum government and other sources state was produced in blocks 1, 2 and 4 and block 6 in 2005 is 26% less than that stated in the annual report of the company operating these blocks, CNPC.
4. the volume of oil that the Khartoum government states was produced in the only oil block which is located entirely in the north and therefore not subject to revenue sharing between north and south, is approximately the same as that stated by the operator of the block, CNPC.
5. the oil prices published by the Ministry of Finance in Khartoum and those published in the oil industry press for sales in the same month do not match [significantly different].

⁹⁶ Global Witness, *Fueling Mistrust: The Need for Transparency in Sudan’s Oil Industry* (2009) Global Witness Limited 2009

⁹⁷ *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Advisory Opinion*, I.C.J. Rep. [2010] The International Court of Justice (ICJ), pp.23-25

6. there is no Auditor General⁹⁸ auditing any of the revenues or costs, despite this being a constitutionally required post.”⁹⁹

The comparison of the volumes of oil that is being purchased by the Chinese state oil companies and what is being represented by the northern Sudanese government to the southern Sudanese government are consistently different beyond the probability of an accidental mistake.¹⁰⁰ The probable outcome of this scenario, as has been set out above, is that southern Sudan would have grounds to declare the CPA void ab initio or void for being a sham.¹⁰¹ The conclusion is that this would give rise to a right by the Government of Southern Sudan to unilaterally declare independence. This outcome will however create a longer delay in securing legally ratified and binding petroleum contracts with the new Republic of Southern Sudan. The Kosovo example tells us the delay could be between 12 and 24 months.¹⁰²

THE METAPHORICAL ROAD TO DAMASCUS

According to the Acts of the Apostles, Paul had a profound life-changing experience on the road to Damascus. The road to sovereignty for the Government of Southern Sudan is likely to be such a road; however, the two most likely outcomes are that the Government of Southern Sudan will become an independent nation during the early part of 2011, either by way of a bona fide referendum of the people of southern Sudan, or by a unilateral declaration of independence by the Government of Southern Sudan. A referendum will result in an almost automatic recognition of the new sovereign nation because the CPA has already been recognized by the United Nations (supra.), whereas the a unilateral declaration will be a more time consuming process, but with the same outcome in the end.

⁹⁸ Global Witness, *Fueling Mistrust: The Need for Transparency in Sudan's Oil Industry* (2009) Global Witness Limited 2009

⁹⁹ Ibid.

¹⁰⁰ *Hynix Semiconductor America, Inc. v. United States*, 414 F. Supp. 2d 1317 (C.I.T. 2006). This US Supreme Court decision is the leading authority for what constitutes a material error such that the contract should be voided under law.

¹⁰¹ Sham is also synonymous with deceit in this context. The leading authority for the tests of deceit and the remedy for deceit is: *Derry v Peek* [1889] UKHL 1 14 App Cas 337. Sham is also used in the context of fraudulent misrepresentation. The leading authority for fraudulent misrepresentation is: *Twycross v Grant* (1877) 2 C.P.D. 469

¹⁰² ¹⁰² *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Advisory Opinion*, I.C.J. Rep. [2010]

In either of these scenarios, the petroleum investor should consider exploring the possibility of structuring his contracts so that they are ratified automatically upon either independence events occurring. Alternatively, the contracts may be left for a ratification process, but this leaves the petroleum investor open to limited issues for renegotiation; however, it successfully avoids any reputational risk that may be attached to the sanction issues as they apply to Northern Sudan and parenthetically to the Southern Sudan until it is a fully independent nation.

CONCLUSION

This study has focused on a structured approach to the legal issues involved in securing petroleum contracts in a conflict zone, and in particular, the autonomous region of Southern Sudan, which currently produces more than two hundred thousand barrels per day¹⁰³ of low paraffin, low sulphur, crude oil, and another more than two hundred thousand barrels per day of high paraffin, high acid, and high arsenic, crude oil.¹⁰⁴

Currently, the decision to award exploration and production rights and licences¹⁰⁵ is vested in the National Petroleum Commission, and is subject to a joint decision and veto rights (supra.) by stakeholders throughout the affected region.¹⁰⁶ This path is difficult for a petroleum investor with ties to the US for the reasons set out herein, and is only worth pursuing if the petroleum investor includes language in the contract documents which make it clear that the petroleum investor can not proceed with the investment in the event that an exemption is not secured from the United States State Department, or a scenario where the Government of Southern Sudan secedes from the Republic of Sudan,¹⁰⁷ thereby becoming an independent sovereign nation.

In either event, subject to the provisos set out above, the petroleum investor should consider entering into an agreement which is automatically ratified, or is ratified de novo, when southern

¹⁰³ Boswell, Alan, Mazen, Maram, *Businessweek Magazine* 1 August 2010 Bloomberg Publications

¹⁰⁴ *Ibid.* This is known as Dar crude oil.

¹⁰⁵ Throughout this paper the author has used the English customary spelling of “licence” for a noun, and “license” for a verb. In cases where materials have been extracted from US law the spelling employed was “license” for both noun and verb, but the American practice of spelling both noun and verb as “license” has been amended in accordance with English grammatical rules.

¹⁰⁶ *Comprehensive Peace Agreement* 2005 (supra.)

¹⁰⁷ Scenarios 1 and 2 (supra.)

Sudan becomes a sovereign nation. This is the most judicious path for a petroleum investor. The petroleum contracts, must further set out clear warranties and undertakings which permit the investor to avoid any liability under the *Alien Torts Statute*¹⁰⁸ or its international or common law analogs.

The author has not plumbed the depths of the corruption question because the Government of Southern Sudan is an unknown entity. There are statistics compiled by different agencies on corruption in the Khartoum government (north), but one would have to draw a very long bow to reach conclusions about the peoples of southern Sudan based on the behavior of the al-Bashir regime. For the sake of completeness, however, I have included the following information taken from the Mo Ibrahim Foundation of South Africa:

- “1. In 2007/08, Sudan scored 33.5 out of 100, and was ranked 49th out of 53 African countries;
2. Within the East African region, Sudan was ranked 11th.
3. Sudan scored well below the East African regional average [corruption level], which was 46.9.
4. Sudan also scored below the overall continental average [corruption level], which was 51.2.
5. At category level, Sudan scored well below the continental average in the categories of safety and rule of law, participation and human rights and sustainable economic opportunity.”¹⁰⁹

A full analysis would include a review of actions undertaken in respect of Sudan under the law of the jurisdiction of the petroleum investor, which may in part (supra.) be determined by corruption issues which overlap with sanctions and questions of financing.¹¹⁰ It is suggested that the corruption issue be

¹⁰⁸ *Alien Tort Statute* is also known as the *Alien Tort Claims Act* and refers to United States Code (28 U.S.C. § 1350),

¹⁰⁹ Mo Ibrahim Foundation, *2009 Ibrahim Index of African Governance shows that half of Africa's 10 best performing countries are in Southern Africa*, October 2009 Pretoria Press Release

¹¹⁰ Australia Criminal Code Act 1995, s 70.2.1.c ‘with the intention of influencing’; New Zealand – Crimes Act 1961, ss 101-105 ‘with intent to influence’; Canada: Corruption of Foreign Public Officials Act 1998, s. 3(1) ‘in order to obtain or retain an advantage in business’; US- Foreign Corrupt Practices Act 1977/1998 ‘corruptly’ requires intention to induce recipient to misuse his/her official position. UK current law is less explicit- 1906 Act: ‘purposely doing an act that the law forbids as tending to corrupt.

neutralized by offering all southern Sudanese the opportunity for a low or no-cost subscription to a tranche of shares in the Special Purpose Vehicle established for investment in southern Sudan.

EPILOGUE

Hilde Johnson, former Norwegian Minister of Foreign Affairs, in an address to the United Nations, stated:

“We want oil to be a blessing in developing countries –
not, as has often been the case – a curse.”¹¹¹

The author considers that oil can be a curse for the nation or territory under which the petroleum reservoirs reside, but can also be a curse for the petroleum investor if there is not careful analysis of the legal impediments to entering into petroleum contracts in a conflict zone. As has been set out herein, the analysis includes claims in tort for human rights abuses, government sanctions, legal standing of the conflict zone government, and the potential for corruption. What follows are notional contracts where the author has endeavored to draft the documents in accordance with the principles set out herein.

¹¹¹ Johnson, Hilde F., Then International Development Minister of Norway, Norwegian Ministry of Foreign Affairs press release, 2 September 2007, At 7 August 2010
http://www.regjeringen.no/en/archive/Bondeviks%2nd%20Government/Utenriksdepartementet/233243/234464/oil_for_development%20new_initiative.html?id=258200