OIL AND POLITICS: TALISMAN ENERGY AND SUDAN

STEPHEN J. KOBRIN*

I. INTRODUCTION

On March 9, 2003, Talisman Energy, a large Canadian independent,[1] sold its 25% share of the Greater Nile Petroleum Operating Company (GNPOC) in Sudan to a subsidiary of India's national oil company for about $771 million.[2] Talisman had been in Sudan for less than four years, purchasing its 25% stake from Arakis Energy, another Canadian independent, in October 1998.[3]

At first glance the project appears to have been a spectacular success. In August 2000, two years after signing the contract, Talisman announced that it expected its current year's income to be four times that of the previous year and that it now pumped more oil and gas than any other Canadian company.[4] Oil production was consistently described as exceeding expectations: Sudan's 2001 output was up 16% compared to the previous year, production was estimated to reach 300,000

---

* Stephen J. Kobrin is the William H. Wurster Professor of Multinational Management at the Wharton School of the University of Pennsylvania. The author would like to thank Stephen Bell of BHPBilliton for his considerable help with this project.

1. An independent oil company is distinguished from the vertically integrated "majors" in the industry in that it typically is both smaller and participates in only a limited portion of the value chain. *See, e.g.*, ALBERTO CLÔ, OIL ECONOMICS AND POLICY 44 (2000). Talisman Energy's operations involve exploration, development, and production of oil and natural gas—upstream operations—but not refining or retail distribution. *See* Talisman Energy, *Talisman Energy: About Us*, *at* http://www.talisman-energy.com/aboutus/aboutus.html (last visited Apr. 15, 2004).

2. Canadian Press, *Talisman Completes Sale of Sudan Oil Interest,* TORONTO STAR, Mar. 13, 2003, at C6.

3. Lily Nguyen, *As Talisman Cuts Sudan Ties, Some Weigh Wisdom of Foray,* GLOBE & MAIL, Mar. 13, 2003, at B1.

4. Tamsin Carlisle, *For Canadian Firm, an African Albatross—Oil Driller Talisman Energy Pays a Painful Price for Its Sudan Investment,* WALL ST. J., Aug. 17, 2000, at A19.

barrels per day (bbls/d) in 2003, and the project's pipeline to the Red Sea reached capacity in 2002.[5]

Talisman's stock price, however, did not reflect these "facts on the ground." While the company's shares sold at a 20% premium (to net asset value) before the investment, it was priced at a 10 to 20% *discount* during the period Talisman was in Sudan.[6] The share price recovered almost immediately upon announcement of the sale, trading very close to its all time high in June 2002.[7]

What accounts for this difference between investors' perceptions and the company's performance? The answer, in large part, is a sustained effort by activists to link Talisman to the massive violations of human rights that have occurred during Sudan's brutal civil war and the successful campaign by these groups to persuade institutional investors to divest the company's stock.

Talisman left Sudan to escape a political crisis over a subsidiary which never accounted for more than 12% of its operations; the company felt that the benefits gained from Sudanese production were not worth the considerable costs. Talisman CEO Jim Buckee's statement after the sale was announced is to the point: "Talisman's shares have continued to be discounted based on perceived political risk in-country and in North America . . . . Shareholders have told me that they were tired of continually having to monitor and analyze events relating to Sudan."[8]

Oil has always been a risky business in terms of both geology and politics. Crude oil deposits are often found in locations that are difficult to access, provide inhospitable operat-

---

5. *See* ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, COUNTRY ANALYSIS BRIEF: SUDAN, *at* http://www.eia.doe.gov/emeu/cabs/sudan.html (last modified Jan. 13, 2003); *Exploration Hums as Sudan's Oil Output Reaches Pipeline Capacity*, OIL & GAS J., Aug. 26, 2002, at 45; *Sudan*, OIL & GAS J., Mar. 18, 2002, at 51.

6. *See* Carlisle, *supra* note 4, at A19; David Olive, *Sudan's Misery Sure to Outlast Sudan*, TORONTO STAR, June 21, 2002, at E4.

7. Wojtek Dabrowski, *Out of Sudan: Talisman's Shares Climb After Reported Oil-Stake Sale*, GAZETTE (Montreal), June 14, 2003, at D10.

8. Press Release, Talisman Energy, Inc., Talisman to Sell Sudan Assets for C$1.2 Billion (Oct. 30, 2002), *available at* http://www2.ccnmatthews.com/3gCNRP/pdf/20021030131n.pdf.

ing environments, and are in politically unstable or violent countries.

> 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.[9]

Political risks have always been a factor in international operations: International oil companies were first nationalized in Russia after the Bolshevik revolution.[10] A total of ten countries nationalized oil production before 1970, and during that decade there was widespread nationalization of operations in producing countries.[11] There have been numerous instances of governments forcing renegotiation of contractual terms, and of oil production and pipeline operations—and oil company personnel—caught in the midst of violent conflicts.[12] Petroleum exploration, development, and production are not for the faint of heart.

Political risk, however, has normally been country-specific. Oil companies were concerned primarily with events

---

9. Neil H. Jacoby, Multinational Oil: A Study in Industrial Dynamics 16-17 (1974).

10. Stephen J. Kobrin, *Diffusion as an Explanation of Oil Nationalization: Or the Domino Effect Rides Again*, 29 J. Conflict Resol. 3, 13 (1985).

11. *Id.* at 13-14.

12. *See, e.g.*, Brian Ellsworth & Patricia I. Vasquez, *CVP to Displace PDV in Handling Private Contracts in Venezuela*, Oil Daily, Aug. 26, 2003 (LEXIS, Newsletter Database) (detailing recent contract renegotiations in Venezuela); Judy Greenwald, *Political Risk Insurers Owe Firm $162 Million*, N.Y. Times, Dec. 23, 1985, at A2 (reporting on suits following Peru's contract renegotiations); Richard Rubin, *U.S. Firms Cleared to Negotiate With Libya*, Platt's Oilgram News, Feb. 13, 2002, at 1 (LEXIS, Newsletter Database) (discussing Libya's contract renegotiations).

within the host country that could compromise ownership rights, operations, or the safety of employees.[13] The root cause of Talisman's difficulties was its operations in Sudan. However, the company was able to manage in-country political risk: Despite the fact that its concession was located in an active war zone and was the target of armed attacks, the oil production and transport business in that country was successful and profitable. The political risks that drove Talisman out of Sudan took form in North America and reflect the increasing complexity of the political environment in which the oil industry, and all multinational firms for that matter, now operate.

The Talisman case is emblematic of changes in the politics of the oil industry and, more generally, of significant changes in the international political system which have taken that system well beyond its state-centric Westphalian origins. The modern international political system was defined by geography (mutually exclusive territorial jurisdiction), state centrism (states as the only actors and the only subjects of public international law), and the absence of any central authority.[14] It was a world of discrete and meaningful borders and sovereign states. The political environment in which the oil industry now operates is changing rapidly and is becoming much more complex.

States are no longer the only significant actors in international politics. International organizations such as the United Nations and civil society advocacy groups or non-governmental organizations (NGOs) now play a major role. Borders and sovereignty are far from inviolate, and the once sharp distinction between domestic and international affairs is becoming blurred. The separate spheres once occupied by public and private authorities (and public and private actors) are becoming interwoven, overlapped, and confused.[15]

---

13. *See* JACOBY, *supra* note 9, at 17.

14. *See* Stephen J. Kobrin, *Back to the Future: Neomedievalism and the Postmodern Digital World Economy*, 51 J. INT'L AFF. 361, 363 (1998) [hereinafter Kobrin, *Back to the Future*].

15. *See generally* BRINGING TRANSNATIONAL RELATIONS BACK IN: NON-STATE ACTORS, DOMESTIC STRUCTURES AND INTERNATIONAL INSTITUTIONS (Thomas Risse-Kappen ed., 1995) (analyzing the impact of non-state actors on world politics and on the foreign policies of states); Virginia Haufler, *Crossing the Boundary Between Public and Private: International Regimes and Non-State Actors*, *in* REGIME THEORY AND INTERNATIONAL RELATIONS 94 (Volker

The Talisman case illustrates both these changes in international politics and the political risks faced by international firms. Talisman's problems stemmed only indirectly from the risks of doing business in Sudan; rather, they resulted from the interactions of a number of very different political actors located primarily in North America. First, sustained and well-organized efforts by Canadian and international civil society advocacy groups were able to inform a wide swath of the public about the brutal human rights violations in Sudan, link Talisman directly to them, and mobilize campaigns to convince investors to sell.[16] Second, while multinational firms have always gotten caught in jurisdictional disputes and inter-state politics, the web in which Talisman was ensnared is unusually complex, involving both U.S. and Canadian domestic politics and U.S.-Canadian relations.

Third, the concept of state sovereignty is undergoing change, and by the late 1990s there was no question whatsoever that human rights abuses would not be protected by national borders. Kofi Annan, the Secretary-General of the United Nations, stated, "Nothing in the U.N. charter pre-

---

Rittberger ed., 1993) (dicussing the interactions between state and non-state actors); Peter J. Spiro, *Globalization, International Law, and the Academy*, 32 N.Y.U. J. INT'L L. & POL. 567, 569-72 (2000) (discussing the reconstruction of international society to recognize non-state institutions).

16. *See, e.g.*, AM. ANTI-SLAVERY GROUP, WESTERN CAPITAL AIDS GENOCIDAL WAR EFFORT IN SUDAN (1999) (documenting the links between Talisman and human rights abuses), *at* http://www.iabolish.com/act/camp/divestment/about/AASGdivestmentreport.htm; AMNESTY INT'L, SUDAN: OIL IN SUDAN: DETERIORATING HUMAN RIGHTS (2000) (documenting the links between human rights violations in Sudan and foreign oil companies, including Talisman), *at* http://web.amnesty.org/library/indexENGAFR542001200?open&of=ENG-SDN; Press Release, Am. Anti-Slavery Group, Anti-Slavery Group Hails Texas Teachers for Divesting from "Slave Stock" (Oct. 30, 1999), *at* http://www.iabolish.com/news/global/old/austin10-30-99.htm (announcing the first victory in the Anti-Slavery Group's divestment campaign aimed at Talisman); Press Release, Amnesty International, Sudan: Talisman Energy Must Do More to Protect Human Rights (May 1, 2001), *at* http://web.amnesty.org/library/index/ENGAFR540102001; Press Release, Inter-Church Coalition on Africa, Sudan Urgent Action Updates and Bulletin 1999 #3: Sudan, Oil, Crimes Against Humanity . . . and Canada (Sept. 20, 1999), *at* http://www.web.net/~iccaf/humanrights/sudaninfo/urgact3sudan.htm (calling on citizens to write the Canadian Minister of Foreign Affairs expressing concern about Talisman's actions in the Sudan).

cludes a recognition that there are rights beyond borders."[17] While the war in Sudan is a domestic affair, albeit with some external involvement, there is a clear recognition that the human rights abuses which occur there, including the slave trade, are an international problem subject to international remediation.[18]

Last, Talisman Energy is a private actor that found itself in a no-man's land between a public and private role. There were a number of attempts to hold Talisman "responsible" for human rights violations in Sudan, including its failure to use its leverage with the government to effect change in that regime's policy.[19] Thus Talisman, a Canadian company, found itself being sued in a court in New York for actions it was accused of taking in an African country.[20]

This Essay will proceed by first reviewing the troubled and violent post-colonial history of Sudan and then discussing Talisman's entry into that country's oil industry. It then turns to the allegations against Talisman and the efforts mounted by NGOs to attempt to force both the Canadian government and investors to sanction the company for its role in exacerbating human rights violations in Sudan. The Essay next deals with U.S. domestic politics and U.S. attempts to sanction Sudan, U.S.-Canadian interactions, and the Canadian government's position vis-à-vis Talisman. It then looks briefly at the question of public authority and the court case against the company. The Essay concludes with a discussion of the implications of the case for the politics of the oil industry.

---

17. Kofi Annan, *Two Concepts of Sovereignty*, ECONOMIST, Sept. 18, 1999, at 49.

18. *See, e.g.*, G.A. Res. 51/112, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/112 (1997); *Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World: Situation of Human Rights in Sudan*, Comm'n on Human Rights, Report of the Special Rappoteur, U.N. ESCOR, 59th Sess., U.N. Doc. E/CN.4/2003/42 (2003).

19. *See, e.g.*, GEORGETTE GAGNON ET AL., DECONSTRUCTING ENGAGEMENT: CORPORATE SELF-REGULATION IN CONFLICT ZONES—IMPLICATIONS FOR HUMAN RIGHTS AND CANADIAN PUBLIC POLICY 3 *passim* (2003), *available at* http://www.law.utoronto.ca/documents/Mackin/DeconstructingEngagement.pdf; HUMAN RIGHTS WATCH, SUDAN, OIL, AND HUMAN RIGHTS 385-437 (2003), *available at* http://www.hrw.org/reports/2003/sudan1103/sudanprint.pdf.

20. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 303 (S.D.N.Y. 2003).

II. Civil War in Sudan

Sudan has been racked by civil war for all but eleven of the years since its independence from Great Britain in 1956 (the war actually started in 1955).[21] The "second civil war," which began in 1983, has been characterized by a vicious brutality resulting in two million deaths—the majority civilian—and over four million displaced persons.[22] Sudan, which has been described as a microcosm of the African continent,[23] sits on the divide between primarily Arab and Muslim North Africa and the primarily Black, Christian, and "Animist" area south of the Sahara. The southern provinces are ethnically diverse, containing a large number of tribes and linguistic groups.[24] As will be seen, a focal point of the war has been the Upper West Nile region in which Talisman's operations were located.

The origins of the conflict go back to the "Southern Policy" established under British Colonial rule after World War I, which proscribed the teaching of Arabic and Islam in the three southern provinces and encouraged the use of English and conversions to Christianity.[25] The policy was designed to curtail the north's influence and resulted in the isolation and political and economic marginalization of the three southern provinces. That isolation has continued to this day and is a primary cause of the current civil war in Sudan.[26]

Sudan's independence, in January 1956, found the country in the midst of a rebellion; that rebellion intensified in 1958 when General Abboud seized power and began a campaign to forcibly extend Islam to the south.[27] By 1963, it had taken the form of a "full-fledged civil war."[28] Another coup

21. Int'l Crisis Group, God, Oil and Country: Changing the Logic of War in Sudan 3 (2002).

22. *Id.*; Randolph Martin, *Sudan's Perfect War*, 81 Foreign Aff. 111, 111 (2002).

23. Pablo Idahosa, *Business Ethics and Development in Conflict (Zones): The Case of Talisman Oil*, 39 J. Bus. Ethics 227, 230 (2002).

24. *Id.* at 230-31.

25. Int'l Crisis Group, *supra* note 21, at 8.

26. *See* Gagnon et al., *supra* note 19, at 15; Int'l Crisis Group, *supra* note 21, at 6, 8, 13; Idahosa, *supra* note 23, at 230.

27. Int'l Crisis Group, *supra* note 21, at 9.

28. *Id.*

resulted in General Nimeiri becoming President in 1969.[29] After a foray into Cold War politics and a failed communist coup, Nimeiri began negotiations resulting in the Addis Ababa agreement of 1972, which provided security guarantees and some degree of political and economic autonomy to the south.[30] The agreement ended Sudan's first civil war after seventeen years.[31] While the Addis Ababa agreement held for eleven years, by the late 1970s Nimeiri was under increasing pressure from hardliners to again exert control over the south, and his regime turned from left-authoritarianism to strict Islamism.[32]

The situation in Sudan was complicated by the discovery of oil in the southern provinces during the 1970s, which eventually dramatically altered the balance of power in the country and provided an additional motivation for conflict. Chevron was granted a concession in 1975, started drilling in 1977, and discovered significant reserves of oil in the early 1980s.[33] Stability and peace in Sudan then quickly deteriorated into a resumption of an even more brutal civil war. In 1980, Nimeiri attempted to redraw the boundaries of the Upper Nile province to include the areas where oil had been discovered,[34] and in 1983 he issued an order abrogating the Addis Ababa agreement, returning powers to the central government, eliminating the south's autonomy, and dividing it into three administrative provinces.[35] A few months later, he transformed Sudan into an Islamic state, declaring that *sharia* was to be the law

29. *Id.* at 10.

30. *Id.* at 10-11.

31. GEORGETTE GAGNON & JOHN RYLE, REPORT OF AN INVESTIGATION INTO OIL DEVELOPMENT, CONFLICT AND DISPLACEMENT IN WESTERN UPPER NILE, SUDAN 18 (Canadian Auto Workers Union et al., 2001), *available at* http://www.iabolish.com/act/camp/divestment/Rylefinal.pdf; INT'L CRISIS GROUP, *supra* note 21, at 11; SUDAN UPDATE, RAISING THE STAKES: OIL AND CONFLICT IN SUDAN 75 (1999), *available at* http://www.sudanupdate.org/REPORTS/Oil/Oil.pdf (last visited Apr. 11, 2004).

32. INT'L CRISIS GROUP, *supra* note 21, at 12; Idahosa, *supra* note 23, at 231.

33. JOHN HARKER, CAN. DEP'T OF FOREIGN AFF. AND INT'L TRADE, HUMAN SECURITY IN SUDAN: THE REPORT OF A CANADIAN ASSESSMENT MISSION 12 (2000). A Lebanese newspaper claimed Chevron's discoveries were larger than reserves in Saudi Arabia. SUDAN UPDATE, *supra* note 31, at 15-16.

34. HUMAN RIGHTS WATCH, *supra* note 19, at 96-97.

35. INT'L CRISIS GROUP, *supra* note 21, at 13.

throughout the country.[36] Southerners mobilized around the Sudan People's Liberation Army (SPLA) to rebel, and the war resumed in all its fury.[37]

General Nimeiri's regime lasted until 1985, when it was overthrown by the army after a general strike and popular uprising.[38] Sadiq al Mahdi became Prime Minister,[39] and for a time it appeared that peace was once again possible. But General Umar al-Bashir, who took power in a 1989 coup,[40] resumed the war with a vengeance, pursuing the "imposition of God's law" throughout the country.[41] While a settlement now appears possible, during the time Talisman operated in Sudan the country was still in the midst of a very violent and brutal civil war. One 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 or one of the many other factions that have evolved over the years."[42] I will return to the state of the war in the late 1990s as part of the story of Talisman's operations in Sudan.

It is important to note that the civil war in Sudan is complex, and, by the late 1990s, it could no longer be characterized as a straight-forward conflict between the Islamic north and Christian, "Animist," and tribal south. While the government's attempt to impose Islam and Islamic law on the entire country continues to fuel the conflict, the longstanding marginalization of the southern provinces, an attempt by the Government to extend its control over the disputed areas, and a struggle among several groups for control over Sudan's terri-

36. *Id.*

37. *See* GAGNON & RYLE, *supra* note 31, at 18; HARKER, *supra* note 33, at 53; INT'L CRISIS GROUP, *supra* note 21, at 13.

38. INT'L CRISIS GROUP, *supra* note 21, at 14.

39. *Id.*

40. *Id.*

41. *Id.* at 14-15. *See* SUDAN UPDATE, *supra* note 31, at 78; Martin, *supra* note 22, at 113.

42. *See* Martin, *supra* note 22, at 111. The SPLM (Sudan People's Liberation Movement) is the political arm of the SPLA. *See* J. MILLARD BURR & ROBERT O. COLLINS, REQUIEM FOR THE SUDAN: WAR, DROUGHT, AND DISASTER RELIEF ON THE NILE 13 (1995).

tory and resources are all important reasons for the continued fighting.[43]

During the 1990s, the war evolved from its roots as a largely north-south conflict "into a contest for power that involves groups from across the nation."[44] In addition to the forces of the government in Khartoum and the SPLA, it involves a relatively large number of militias and inter-tribal factions, some of whom change sides as it is advantageous.[45] As Randolph Martin describes it,

> 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 . . . .[46]

The war involves a massive displacement of civilians, attacks on civilians by a number of different groups, and human slavery as a result of raids by Khartoum-supported *murahaleen* militias on southern tribes.[47] While both sides are guilty of atrocities and attacks on civilian non-combatants, there is general agreement that the primary responsibility for the destitution, death, and destruction in the south lies with the government of Sudan.[48]

III. OIL AND THE ENTRY OF TALISMAN

Oil exploration and development in Sudan began in the early 1960s and accelerated in 1974 when Chevron was granted a concession in which Shell later took a 25% inter-

---

43. In a background paper, Talisman Energy attributed the conflict to "[R]oots in tribalism, with elements of religion, Marxism, regional conflicts, colonialism and uneven economic development." TALISMAN ENERGY, SUDAN—THE GREATER NILE OIL PROJECT: BACKGROUND PAPER 10 (1998).

44. GAGNON ET AL., *supra* note 19, at 15.

45. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 19, at 8, 116-19, 133-36, 143-53, 178-86 (2003) (detailing the activities of various militias operating in Sudan throughout the 1990s).

46. *See* Martin, *supra* note 22, at 117.

47. GAGNON ET AL., *supra* note 19, at 15-16; *see also* Martin, *supra* note 22, at 117-18.

48. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 19, at 36, 50-59 (2003); *Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World*, *supra* note 18.

est.[49] Chevron and Shell eventually spent $1 billion in Sudan, drilling 52 wells, including 34 "suspended wells" capable of completion at a later date.[50] By 1982, Chevron had made a number of significant discoveries, and operations in Sudan appeared to have considerable potential.[51]

However, in February 1984, a rebel group kidnapped and killed three expatriate Chevron employees, and the company suspended its operations and withdrew from Sudan.[52] Chevron attempted to resume its activities in 1988, but finally left the country in 1990, relinquishing its concessions.[53] State Petroleum then entered into a production-sharing agreement with the government of Sudan in 1993, acquiring a large part of what had been Chevron's concession.[54] One year later, Arakis Energy Corporation, a Canadian independent oil company, undertook a "reverse takeover" of State, becoming the overall owner of the concession.[55] At this point, the project involved exploration, development, and production, and the construction of a pipeline to transport oil to Port Sudan on the Red Sea.

Arakis found it was not able to finance exploration, development, and construction of the pipeline on its own, and in December 1996 it entered into a consortium, the Greater Nile Petroleum Operating Company (GNPOC), in which it held a 25% share and was the field operator.[56] The China National Petroleum Company held 40%, Petronas of Malaysia held 30%, and Sudapet, the Sudanese national firm, held 5%.[57] Arakis' concessions were in the conflict area, and the SPLA

---

49. *Talisman Focuses Growth Strategy on E&P Outside Canadian Core*, OIL & GAS J., May 31, 1999, at 21.

50. TALISMAN ENERGY, *supra* note 43, at 4.

51. HARKER, *supra* note 33, at 53; SUDAN UPDATE, *supra* note 31, at 16.

52. GAGNON ET AL., *supra* note 19, at 18-19.

53. SUDAN UPDATE, *supra* note 31, at 18-19.

54. *See Industry Briefs*, OIL & GAS J., Sept. 20, 1993, at 32; *Plans for First Oil Exploration Revived in Two Sudanese Fields*, OIL & GAS J., May 3, 1993, at 48.

55. *See* Arakis Energy Corp., Notice of Special Meeting of Securityholders To Be Held October 7, 1998, Notice of Petition, and Management Information Circular, Concerning an Arrangement Involving Arakis Energy Corporation and Talisman Energy Inc. 31 (Sept. 3, 1998); SUDAN UPDATE, *supra* note 31, at 84; Stephen Chase, *Talisman Bids for Arakis Energy* (Aug. 18, 1998), *at* http://www.vitrade.com/talisman/980818_globe_and_mail.htm.

56. SUDAN UPDATE, *supra* note 31, at 87-88.

57. *Id.*

threatened to attack their operations.[58] It was alleged that Arakis hired the South African mercenary firm Executive Outcomes to protect its fields.[59]

Arakis encountered significant political and business problems in its struggle to develop its Sudanese operations. During 1997, the Canadian government, concerned about the situation in Sudan, asked Arakis to reconsider its participation in the project.[60] In November, President Clinton signed an executive order freezing all Sudanese assets in the United States and imposing a ban on all financial and trade relations with Sudan.[61] The sanctions prevented any U.S. citizen from doing business in Sudan and ruled out American participation in Sudanese oil.[62]

The major problem, however, was that Arakis was not able to raise the $200 million or more necessary to fund its share of the $1.4 billion project. The project was too large an undertaking for Arakis, which was a relatively small Canadian independent.[63] The company was also hampered by American sanctions, which prevented it from attempting to raise funds in the U.S. bond market.[64] Last, the company went to the markets in the midst of an eight quarter decline in oil prices, from $23 per barrel to a low of $13 in the summer of 1998. As a result of its difficulties, Arakis encouraged offers from other companies.[65]

Talisman Energy originated as a spin-off of the Canadian subsidiary of British Petroleum.[66] In 1998 it was the second largest Canadian independent oil company;[67] that is, it had only "upstream" operations (exploration, development, and production) and did not refine petroleum or own retail out-

---

58. *See id.* at 86.

59. *Id.* at 87.

60. *Id.* at 89.

61. Exec. Order No. 13,067, 62 Fed. Reg. 59989 (Nov. 5, 1997).

62. *Id.*; GAGNON ET AL., *supra* note 19, at 19; SUDAN UPDATE, *supra* note 31, at 89-90.

63. *See* Chris Varcoe & Stephen Ewart, *Talisman Buys Arakis*, CALGARY HERALD, Aug. 18, 1998, at D1.

64. Jeffrey Jones, *Cash Crunch May Force Sale of Canada's Arakis Energy*, J. COM., July 9, 1998, at 9A.

65. *See* Claudia Cattaneo, *Talisman Has Resources, Experience to Tackle Sudan*, FIN. POST, Aug. 26, 1998, at 25; Jones, *supra* note 64, at 9A.

66. *Canada: The Human Factor*, 66 PETROLEUM ECONOMIST 48, 48 (1999).

67. Cattaneo, *supra* note 65, at 25.

lets. On August 17, 1998, Talisman and Arakis agreed to a friendly take-over: Talisman acquired the outstanding shares of Arakis, and in doing so it acquired the latter's 25% interest in the GNPOC in Sudan.[68] The deal, which was to be completed on October 8, provided a 10-1 exchange of Talisman for Arakis shares and a loan of up to $54 million to Arakis to fund State Petroleum's share of the project's capital requirements.[69]

Only a few days later, Talisman received a rude jolt about the realities of doing business in Sudan when the United States launched a missile attack on the al-Shifa plant in Khartoum, claming it was producing chemical weapons.[70] Talisman CEO Buckee noted that "[c]ertainly, not one of the things we had contemplated was a bombing of Khartoum by the Americans."[71] Nevertheless, the takeover took place as planned in October.[72]

Talisman acquired a 25% share of five oil fields under development, with estimated production of 150,000 bbls/day starting in late 1999 (37,500 to Talisman), and the 932 mile pipeline to Port Sudan which had an initial capacity of 150,000 bbls/day.[73] The pipeline and a marine oil terminal were expected to be completed by the third quarter of 1999.[74]

Talisman took over Arakis on what were regarded as favorable terms for a number of reasons. First, Arakis was in obvious difficulty, unable to either fund the project satisfactorily or meet its obligations to its partners. Second, the dramatic fall in oil prices reduced the value of all oil companies' stocks. (The slide reversed in the same quarter the takeover was announced.) Third, American sanctions reduced potential competition, as U.S. firms could not participate in the Sudanese oil industry. Last, the fact that Talisman participated only in upstream operations—it did not own refineries or gas

68. *Id.*

69. TALISMAN ENERGY, *supra* note 43, at 2; *see also* SUDAN UPDATE, *supra* note 31, at 91-92; Cattaneo, *supra* note 65, at 25.

70. SUDAN UPDATE, *supra* note 31, at 58, 91.

71. Jeffrey Jones, *Talisman Chief Gets Quick Lesson in Risks of Sudan Oil*, J. COM., Aug. 26, 1998, at 7A.

72. HUMAN RIGHTS WATCH, *supra* note 19, at 168.

73. TALISMAN ENERGY, *supra* note 43, at 2-3; Cattaneo, *supra* note 65, at 25; *see also* SUDAN UPDATE, *supra* note 31, at 41, 45, 55.

74. TALISMAN ENERGY, *supra* note 43, at 8.

stations—appeared to reduce the potential impact of consumer boycotts or other protests related to the human rights situation in Sudan.

Nonetheless, Talisman's share price fell after the agreement, slipping 11% in the first few weeks after the deal was announced.[75] Investors were concerned about dilution of the stock resulting from the additional shares issued to Arakis investors, as well as the very real political risks in Sudan and the controversy surrounding operations in that country because of the brutality of government operations and American sanctions.[76]

Some analysts, however, saw the project as a high risk-high return operation with a great deal of upside potential that made sense for Talisman. Robert Hinkley of Merrill Lynch, for example, discounted the political risk and noted that Talisman's development of Sudan is "going to generate a lot of cash flow, and its going to be a very economic project, with a lot of exploratory upside."[77] There was general agreement that oil exploration was a risky business and that the Sudanese fields and pipeline, which were scheduled to come on-stream within a year, were a good investment for Talisman.[78]

Talisman's CEO, Buckee, discounted the risk and argued that the share price would recover as investors realized the long-term potential in the project.[79] He characterized the security situation as satisfactory, with the site protected by the Sudanese government, and argued that media coverage had overplayed the dangers in that country—that "[A] lot of the stories have been made lurid and exaggerated."[80]

IV. A Tidal Wave of Protest

While Buckee may well have been correct to discount the in-country risk to his operations, the very negative media coverage of the war in Sudan was but a harbinger of things to come. Within a few months of Talisman's takeover of Arakis, a

75. Cattaneo, *supra* note 65, at 25.

76. Edward Alden, *Talisman in $196m Purchase of Arakis*, Fin. Times, Aug. 18, 1998, at 21; Cattaneo, *supra* note 65, at 25.

77. Cattaneo, *supra* note 65, at 25.

78. *Id.*

79. *See* Alden, *supra* note 76, at 21; Chase, *supra* note 55.

80. Alden, *supra* note 76, at 21; *see also* Chase, *supra* note 55.

coalition of civil society advocacy groups launched a massive campaign aimed at Canadian and American political authorities, Talisman's shareholders, and institutional investors holding or contemplating purchase of the company's stock.

NGOs such as Amnesty International, the American Anti-Slavery Group, the Canadian Inter-Church Coalition, and many others used the internet very effectively to publicize both the brutal human rights violations occurring as a result of the war in Sudan and what they felt was Talisman's complicity in the process.[81] Using both electronic and more conventional methods, they lobbied the executives and legislatures in both the U.S. and Canada to take action against both Sudan in general and Talisman in particular, attempted to convince the company's shareholders to force the company to withdraw from the GNPOC, and perhaps most effectively, waged what has been called one of the largest divestment campaigns since the efforts against the apartheid regime in South Africa.[82]

The divestment campaign, which was spearheaded by the American Anti-Slavery Group, was aimed directly at the major institutional investors holding Talisman stock.[83] That organization, and many others, mobilized activists who brought pressure on investors directly by linking them publicly to the brutality and slave trade in Sudan through their ownership of Talisman stock. They also lobbied legislators in both the U.S. and Canada to bring pressure on investors through their respective regulatory authorities.

At least one financial journalist was sympathetic to these activists' claims. SmartMoney.com ran a story asking if the mu-

---

81. *See, e.g.*, AM. ANTI-SLAVERY GROUP, *supra* note 16; AMNESTY INT'L, *supra* note 16; Press Release, Inter-Church Coalition on Africa, Sudan Urgent Action Updates and Bulletin 1999 #3: Sudan, Oil, Crimes Against Humanity . . . and Canada (Sept. 20, 1999), *at* http://www.web.net/~iccaf/humanrights/sudaninfo/urgact3sudan.htm.

82. Michael Scherer, *Gas War* (June 21, 2001), *at* http://www.motherjones.com/news/feature/2001/06/sudan.html.

83. *See, e.g.*, AM. ANTI-SLAVERY GROUP, *supra* note 16; Press Release, Am. Anti-Slavery Group, American Anti-Slavery Group Urges Fidelity and Vanguard to Dump Talisman Stock (Jul. 23, 1999) *available at* http://www.sudanupdate.org/REPORTS/Oil/19sum.html; Associated Press, *Group Calls for Stock Boycott to Prevent Slavery* (July 28, 1999), *available at* http://www.anti-slavery.org/pages/updates/ap-oil.html.

tual funds owning Talisman were supporting genocide.[84] The article detailed the charges against the company, noted that most of the mutual funds contacted either would not talk to the reporter or argued that divestment would not be productive, and then provided a list of the ten funds holding the largest amounts of Talisman stock, suggesting that rather than wait for the funds to move readers might want to adjust their own portfolios.[85]

The campaign was successful. During 1999 and 2000, at least six U.S. pension funds sold millions of Talisman shares as a result of activist pressure.[86] TIAA-CREF, the Texas Teachers Retirement Fund, CALPERS (California), the New Jersey Employees Retirement Fund, and the New York City Pension Fund were among those divesting.[87] Advocacy groups also mounted coordinated campaigns against mutual funds holding Talisman stock. For example, a "Fidelity Awareness Week" was declared in March, 2001, during which a large number of protest letters were sent to Fidelity Investments asking them to divest.[88] Similar efforts were directed against Vanguard and other mutual funds.[89] It is difficult to gauge their success: While Fidelity did sell a large block of its Talisman stock, it appears to have bought most of it back.[90] It is reasonable to assume that the activists' campaigns had some discernable effect on purchases and sales of Talisman stock.[91]

As noted above, legislatures in both Canada and the U.S. were also targets of the NGOs' campaign. Their efforts were successful in the United States as the House of Representatives

84. Lewis Braham, *Are These Funds Bankrolling Genocide?*, *at* http://smartmoney.com/fundwatch/index.cfm?story=19990722 (July 22, 1999).

85. *Id.*

86. *See, e.g.*, Charles Gillis, *U.S. Pension Fund Dumps Its Stake in Talisman*, FIN. POST, Dec. 9, 1999, *available at* http://www.vitrade.com/talisman/991209_right_time_to_sell.htm; David B. Ottaway, *Chinese Fought on NYSE Listing: Groups Cite Oil Firm's Role in Sudan*, WASH. POST, Jan. 27, 2000, at E1.

87. *Canada: The Human Factor*, *supra* note 66, at 48; Gillis, *supra* note 86; Ottaway, *supra* note 86, at E1.

88. Elizabeth Neuffer, *Critics Decry Oil Investors' Link to Sudan War*, BOSTON GLOBE, Mar. 26, 2001, at A1.

89. Associated Press, *Group Calls for Stock Boycott to Prevent Slavery*, *supra* note 83.

90. Scherer, *supra* note 82.

91. *Id.*

and the Senate passed the Sudan Peace Act in 2002.[92] The original House version would have prevented firms investing in Sudanese oil from raising money in U.S. capital markets or trading on American exchanges absent public disclosure about the nature and extent of its commercial activity in Sudan, the relationship of the commercial activity to any violations of religious freedom and other human rights in Sudan, and the contribution that the proceeds raised in the capital markets in the U.S. would make to the entity's commercial activity in Sudan. That provision was dropped in the final version of the legislation.[93] I will return to the question of American sanctions and U.S.-Canadian interaction below.

While my purpose here is to use the Talisman case to inform a discussion of the dramatic changes in the politics of the oil industry rather than to undertake a detailed analysis of the situation in Sudan, it is important to note that a wide spectrum of observers agree that oil discoveries and production by the GNPOC, combined with the opening of the pipeline, have had a direct effect on the war and have exacerbated human rights violations. The Harker Report, prepared at the request of the Canadian Minister of Foreign Affairs, concluded that oil has become a key factor in the war: "[T]he evidence we gathered, including the testimony of those directly involved directs us to conclude that oil is exacerbating the conflict in Sudan."[94] Similarly, Martin argues that "[N]othing has contributed as much to the conflict's sustainability as the opening of Sudan's oil pipeline."[95]

A Center for Strategic and International Studies report on U.S. efforts to end the war concluded that "[o]il is fundamentally changing Sudan's war."[96] It argued that oil shifted the balance of military power to the government in Khartoum and prompted the regime to focus its military efforts on oil operations, resulting in the "forced mass displacement of civilians."[97]

---

92. Sudan Peace Act, Pub. L. No. 107-245, 116 Stat. 1504 (2002).
93. *See id.*; H.R. 2052, 107th Cong. (1st Sess. 2001), Sec. 8.
94. HARKER, *supra* note 33, at 15.
95. *See* Martin, *supra* note 22, at 118.
96. FRANCIS M. DENG & J. STEPHEN MORRISON, CENTER FOR STRATEGIC AND INT'L STUDIES, U.S. POLICY TO END SUDAN'S WAR 4 (2001), *available at* http://csis.org/africa/sudan.pdf.
97. *Id.*

Petroleum operations affect the war and the civilians caught in the war zone in a number of ways. First, the motivations of the contending parties have been transformed by the discovery of oil. To a significant extent, the war is no longer simply about control of territory, but rather about control of a valuable resource.[98] Second, and perhaps more important, oil has provided a steady stream of significant revenues to a country that was among the poorest in Africa, an "economic basket case."[99]

The start of significant oil production in late 1999 transformed Sudan from a poor oil-importing country to a significant exporter, and both revenues and economic growth have been up sharply since that time. Oil revenues increased by almost 900% in three years, from $61 million in 1999 to almost $600 million in 2001.[100] The dramatic increase in resources available to the government in Khartoum resulted in a very significant increase in military expenditure[101] and the purchase of modern weapons, including helicopter gunships. Sudan can now manufacture its own light arms and munitions and is planning to build its own tanks and artillery.[102]

Third, given the revenues they produce and the impact of those revenues on the balance of power in the country, oil operations including the pipeline are a natural target of rebel groups. The SPLA's operations against Talisman's facilities have resulted in increased government efforts to protect oil production, which includes attacks upon and displacement of civilian groups. As the *Economist* notes, prior to the end of 1999 much of the war effort involved the government in Khartoum arming Arab militia groups and encouraging them to raid the tribes in the south for cattle and slaves.[103] The government now takes direct action to protect oil operations, including displacement of civilians: "Now the government wants the southerners out."[104] Last, there is agreement, including

---

98. INT'L CRISIS GROUP, *supra* note 21, at 99-106.

99. *Id.* at 101.

100. GAGNON & RYLE, *supra* note 31, at 35; *see also* ENERGY INFO. ADMIN., *supra* note 5.

101. The cost of war per day in 2001 was more than $1 million. INT'L CRISIS GROUP, *supra* note 21, at 102.

102. *See* Martin, *supra* note 22, at 118-19.

103. *War, Famine and Oil in Sudan*, ECONOMIST, Apr. 15, 2001, at 41.

104. *Id.*

that of the company itself, that Talisman's facilities have been used as a base for military operations against rebel groups and civilians in the south.[105]

The last issue aside, there is disagreement about whether Talisman was directly complicit in human rights violations; there is, however, widespread agreement that its involvement was, at least in part, responsible for an exacerbation of the conflict and an increase in the violations of the rights of civilians in the area, including their displacement.[106] Arguably, Talisman's direct complicity stems from its decision to request protection from a regime with the Khartoum government's history.[107] While Talisman Energy was only one of four partners in the GNPOC, it is clear that its participation was critical to the project's success. It provided funding and, more importantly, technical know-how and a great deal of expertise and experience in exploration and development.[108]

Needless to say, the company disagrees with this assessment. Aside from the issue of whether the intensity and nature of the conflict has been exaggerated by the press, it argues that in the longer run constructive engagement is the best course of action in Sudan.[109] In the company's 2001 Social Responsibility Report, CEO Buckee noted that some people argue that Talisman should leave Sudan. His response was that "many people we speak to believe that the appropriate moral response is to stay and use our corporate resources in a broad and responsible manner to encourage peace, provide economic opportunities and support the communities in which we operate. We share this view . . . ."[110]

---

105. GAGNON & RYLE, *supra* note 31, at 42; HARKER, *supra* note 33, at 16. In its 2000 Social Responsibility report, Talisman noted that despite their stated position and advocacy efforts there were at least four instances of non-defensive use of their Heglig airstrip in 2000. TALISMAN ENERGY, CORPORATE SOCIAL RESPONSIBILITY 2000 16, *available at* http://www.talisman-energy.com/pdfs/csr2000_report.pdf (last visited Apr. 15, 2004).

106. *See, e.g.*, GAGNON ET AL., *supra* note 19, at 3 *passim*; HARKER, *supra* note 33, at 12-16, 26, 60-66; HUMAN RIGHTS WATCH, *supra* note 19, at 385-437.

107. *See* HUMAN RIGHTS WATCH, *supra* note 19, at 388-397.

108. *See* GAGNON & RYLE, *supra* note 31, at 6, 27, 40.

109. TALISMAN ENERGY INC., CORPORATE SOCIAL RESPONSIBILITY 2001 5, *available at* http://www.talisman-energy.com/pdfs/csr2001_report.pdf (last visited Apr. 15, 2004).

110. *Id.*

A second prong of Talisman's response was to add the International Code of Ethics for Canadian Business to its business code and engage PriceWaterhouse Coopers to help verify compliance.[111] Last, the company engaged in extensive community development efforts, including building hospitals, clinics, schools, and wells in their area of operations.[112]

All of that said, it is clear that the activities of the advocacy groups had a significant effect on Talisman's share price and enterprise value. While it is impossible to disentangle the impact of the risk within Sudan, American sanctions, shareholder activism, and the divestment campaign, it is reasonable to assume that the impact of the latter has been significant.

In Table 1,[113] Talisman Energy's enterprise valuation is compared with that of four other comparable Canadian independents: Alberta Energy Corporation (AEC), Canadian Natural Resources, Nexen, and PanCanadian Petroleum. Two metrics are shown, enterprise value/operational cash flow and enterprise value/earnings before interest, taxes, depreciation, amortization, and exploration (ev/ebitdax). The comparisons of the five-company averages are of interest. Talisman outperforms its competition on both metrics in both 1997 and 1998. (The agreement with Arakis was announced in August 1998.[114]) During 1999 and 2000, the years when the protests and divestment campaigns were in full swing, Talisman underperformed compared to its competition. On the other hand, AEC, one of its primary competitors which had avoided involvement in Sudan, outperformed competitive firms on both metrics in 1999 and 2000. Again, while it is impossible to link the decline in valuation to the divestment campaign with any degree of certainty, it is clear that Talisman's stock price fell despite the success of its oil operations in Sudan. It is reasonable to assume that the decline in valuation of the company reflected the negative publicity and pressure on investors to sell resulting from the efforts of the advocacy groups.

---

111. Jacqueline Sheppard & Reg Manhas, *Sudan Experience Offers Corporate-Responsibility Lessons, Opportunities*, OIL & GAS J., Nov. 13, 2000, at 70.

112. *Id.* at 72-73.

113. Located at the end of the Essay. Compiled by the author, with permission, from data supplied by Evaluate Energy, a research company providing proprietary data to the oil industry.

114. Cattaneo, *supra* note 65, at 25.

V. American and Canadian Politics

In a message to a summit on Sudan on November 9, 1999, U.S. Secretary of State Madeleine Albright articulated the Clinton Administration's stance toward the regime in that country: "[O]ur policy is to isolate the Government of Sudan; to counter the threat it poses to the United States, its neighbors and its own people; and to press for fundamental change in its policies."[115] She noted that the National Islamic Front had seized power from a democratically elected government, actively supported terrorist organizations, compiled an appalling human rights record, and prolonged a vicious and inhumane war.[116]

The United Nations first condemned Sudan for gross violations of human rights in 1992, and in 1996 the Security Council imposed diplomatic sanctions on the government in Khartoum for its involvement in terrorism.[117] U.S. actions against Sudan began in 1993, when that country was added to the list of states sponsoring terrorism.[118] In April 1996, President Clinton signed the Anti-Terrorism Act, which barred Americans from engaging in financial transactions with governments on the list, including Sudan.[119]

More comprehensive sanctions were enacted in November 1997, when President Clinton's executive order (under the International Emergency Powers Act) froze all Sudanese assets in the United States and imposed a ban on all bank loans, investments, and trade with that country.[120] Clinton cited Sudan's sponsorship of terror, its efforts to destabilize neighboring countries, and its human rights violations in announcing the sanctions.[121] As noted above, the U.S. sanctions

---

115. Secretary of State Madeleine K. Albright, Message from Secretary Albright to the Sudan Summit (Nov. 9, 1999), *available at* http://secretary.state.gov/www/statements/1999/991109.html.

116. *Id.*

117. *See* S.C. Res. 1054, U.N. SCOR, 51st Sess., 3660th mtg. at 2, U.N. Doc. S/RES/1054 (1996); Sudan Update, *supra* note 31, at 79-80, 86.

118. Ted Dagne, Cong. Res. Serv., Order Code IB98043, Issue Brief for Congress, Sudan: Humanitarian Crisis, Peace Talks, Terrorism, and U.S. Policy at CRS-9 (2003).

119. Sudan Update, *supra* note 31, at 86.

120. Dagne, *supra* note 118, at CRS-13; Sudan Update, *supra* note 31, at 89-90.

121. Dagne, *supra* note 118, at CRS-13.

in place in 1997 and 1998 both made it difficult, if not impossible, for Arakis to raise funds in U.S. markets and limited Talisman's competition in bidding for that company as U.S. oil firms were barred from operations in Sudan.

Secretary Albright had very strong feelings about the regime in Sudan; when she was the American ambassador to the United Nations she called the country a "viper's nest of terrorism."[122] During a trip to Africa in October 1999, she met with Sudanese rebels and then, in Nairobi, announced that she planned to talk to the Canadian government about Talisman's involvement in Sudan.[123] She did so shortly thereafter in an apparently strong letter to the Canadian Foreign Affairs Minister, Lloyd Axworthy, urging him to force Talisman to withdraw from Sudan.[124]

As the *Financial Times* noted, "Canadians are not used to such bad publicity."[125] While Mr. Axworthy's initial response was apparently some degree of anger over U.S. interference in Canadian affairs, within days he had expressed strong reservations about Talisman's involvement in Sudan, called CEO Jim Buckee in for consultations, and launched a very high-profile investigation of the role of oil operations in the civil war.[126] He quickly sent a fact-finding team to Sudan headed by John Harker, a former director of affairs for the Canadian Labor Congress, to investigate Talisman's involvement in the conflict.[127] Axworthy threatened sanctions if the investigation

---

122. *Id.*

123. Madelaine Drohan, *Sudan Play Bad Timing for Talisman*, GLOBE & MAIL, Oct. 27, 1999, at B2.

124. Steven Frank, *Crude Pressures: A Canadian Oil Company Operating in Sudan Gets Targeted by Rebels, the U.S. State Department and Its Own Foreign Affairs Ministry*, TIME CANADA, Nov. 22, 1999, at 36 (LEXIS, Magazine Stories, Combined Library); *cf.* HUMAN RIGHTS WATCH, *supra* note 19, at 414 (discussing U.S. criticism of Canada for not sanctioning Talisman); Gary Park, *Canada Appoints Envoy to Investigate Talisman's E&P Project in Sudan*, PLATT'S OILGRAM NEWS, Oct. 27, 1999, at 1 (LEXIS, Newsletter Database) (noting that Albright requested Canada match U.S. trade and investment sanctions against Sudan).

125. Graham Bowley, *Talisman May Not Find Good Fortune from Sudan Oil*, FIN. TIMES, Nov. 19, 1999, at 14.

126. *Id.*; Peter Foster, Editorial, *Talisman in Ethical No Man's Land*, FIN. POST, Nov. 12, 1999, at C1; Drohan, *supra* note 123, at B2.

127. Sheldon Alberts, *Ottawa Not Ready to Put Sanctions On Talisman: Axworthy*, NAT'L POST (Toronto), Nov. 23, 1999, *available at* www.vitrade.com/talisman/991123_ottawa_not_ready_to_put_sanction.htm; Frank, *supra*

found that oil money was either perpetuating the conflict or contributing to human rights abuses.[128]

The Harker Report concluded that while the war in Sudan was not fundamentally about oil, it had become a key factor—that "oil is exacerbating the conflict in Sudan."[129] It argued that it "is difficult to imagine a cease-fire while oil extraction continues, and almost impossible to do so if revenues keep flowing to GNPOC partners and the GOS [government of Sudan] as currently arranged."[130] Last, while noting that there are limits to the ability of a government to compel ethical behavior on the part of a corporation, it argued that Talisman's owners had both the opportunity and the responsibility to do so.[131]

The Report stopped short of explicitly recommending that Talisman be sanctioned, and the Canadian government eventually decided not to take action.[132] However, the open nature of the Albright-Axworthy interchange and the very public scolding of Talisman by Mr. Axworthy certainly increased awareness of the issue among the Canadian public at large and provided at least moral support to the advocacy groups opposing Talisman's operations in Sudan. It may also have supported, at least indirectly, some of the shareholder actions regarding operations in Sudan.

Toward the end of its term, the Clinton Administration attempted to move away from its policy of strict isolation of Sudan and attempted to engage the government in Khartoum in an effort to find a negotiated end to the civil war.[133] Rela-

---

note 124, at 36; Andrew Nikiforuk, *Oil Patch Pariah*, CANADIAN BUS., Dec. 10, 1999, at 69.

128. *See* Alberts, *supra* note 127; *Canada: The Human Factor*, *supra* note 66, at 48; Foster, *supra* note 126, at C1; Frank, *supra* note 124, at 36; Nikiforuk, *supra* note 127, at 69.

129. HARKER, *supra* note 33, at 15.

130. *Id.* at 17.

131. *Id.* at 18.

132. *Canada Opts Not to Sanction Talisman Operations in Sudan*, OIL & GAS J., Feb. 21, 2000, at 22. At least one journalist argued that Axworthy wanted to sanction Talisman but was prevented from doing so by business pressure on his ministry, which dealt with both foreign affairs and trade. Aileen McCabe, *Canadian Business Interests Trump Human Rights*, OTTAWA CITIZEN, Oct. 26, 2000, at A5.

133. *See* Martin, *supra* note 22, at 123.

tions between the United States and Sudan became much more complex under President Bush, for a number of reasons.

Sudan became more salient in the United States because of pressure from Christian groups who formed some of the administration's core support.[134] These groups tend to see the conflict in straightforward terms—as the oppression of Christians in the south by the Islamic government in the North—and their actions both raised the profile of the Sudanese civil war in the United States and increased pressure on the administration and Congress to further sanction Sudan.[135] Ultimately, both the Senate and the House passed the Sudan Peace Act in 2002, which threatens further sanctions against the Sudanese government if it does not negotiate in good faith to end the conflict.[136] A very controversial provision that would have prevented foreign oil companies with operations in Sudan from accessing U.S. capital markets was dropped as a result of administration pressure.[137]

The situation was further complicated by the September 11, 2001, attacks on the World Trade Center and the advent of the War on Terrorism. Although Sudan was under U.N. and U.S. sanctions because of its support for terrorist organizations (indeed, it provided a haven for Osama bin Laden for a period),[138] it immediately condemned the 9/11 attacks and offered to cooperate in the fight against terrorism, provide unrestricted access to its records, and even hand over some wanted terrorists to American authorities.[139] As a result, U.S.-Sudan relations improved considerably, and the U.S. did not object to the lifting of United Nations sanctions later that year.[140]

Coincidentally, the Administration began an effort to bring a negotiated end to the conflict in Sudan, appointing

---

134. *See* Mark Turner, *U.S. Evangelists Focus on Sudan to Declare a Holy War of Words*, FIN. TIMES (U.S. ed.), Apr. 11, 2001, at 18.

135. *See id.*

136. Sudan Peace Act, *supra* note 92, at 1507-08.

137. *See* DAGNE, *supra* note 118, at CRS-10; ENERGY INFO. ADMIN., *supra* note 5; Martin, *supra* note 22, at 124.

138. *See* Ruth West, *The Price of a Barrel of Oil? A Few Lives: In Sudan, Western Companies Are Bankrolling a Vicious Civil War*, NEW STATESMAN, Jan. 14, 2002, at 36.

139. DAGNE, *supra* note 118, at CRS-4 to -5.

140. West, *supra* note 138, at 36; *see* ENERGY INFO. ADMIN., *supra* note 5.

former Senator John Danforth as an "envoy for peace" in early September 2001.[141] (It is of interest that President Bush specifically mentioned that Danforth was "an ordained minister" in his announcement.[142]) While there were considerable setbacks during 2002, including helicopter gunship attacks on a U.N. food distribution center,[143] rebel military successes in the south,[144] and the Khartoum government's negative reaction to passage of the Sudan Peace Act,[145] the Danforth initiative concluded that it was clear that the war was not winnable by either side and that "this is the time for a major push for a compromise settlement."[146] Danforth negotiated a number of agreements between the government and the SPLA/M in the months following his appointment in September 2001.[147]

The Machhakos protocol, negotiated during 2002, provided for the continuation of Islamic law in the north for an additional six years by the SPLA/M in exchange for six years of southern autonomy ending with a referendum on the south's independence.[148] By early 2004, the conflict in southern Sudan had eased to a much lower level of intensity, and a final accord between the warring parties appeared possible.[149]

VI. Talisman in Court

In November 2001, an attorney who is a board member of the American Anti-Slavery Group filed a $1 billion class-action lawsuit against Talisman, on behalf of the Presbyterian Church

141. *See* Press Release, Office of the Press Secretary, Danforth to Lead Search for Peace as Special Envoy (Sept. 6, 2001), *at* http://www.whitehouse.gov/news/releases/2001/09/20010906-9; Alan Sipress, *Danforth Tapped for Sudan*, Wash. Post, Sept. 7, 2001, at A18.

142. *See* Office of the Press Secretary, *supra* note 141.

143. John C. Danforth, Special Envoy for Peace, *Report to the President of the United States on the Outlook for Peace in Sudan*, at 8 (Apr. 26, 2002), *available at* http://www.state.gov/p/af/rls/rpt/10150.htm.

144. *See* Human Rights Watch, *supra* note 19, at 292-95, 506.

145. *Id.* at 506-07.

146. Danforth, *supra* note 143, at 19.

147. Press Release, Human Rights Watch, Sudan: Danforth Peace Intiative Process (May 15, 2002), *at* http://www.hrw.org/press/2002/05/sudan0515.htm.

148. William Wallis, *Sudan Peace Talks Reach Critical Point*, Fin. Times, Aug. 8, 2003, at 9.

149. *Id.*; Mark Lacey, *Rebels, Many in Teens, Disarm in Sudan's South*, N.Y. Times, Jan. 27, 2004, at A10.

of Sudan and a number of individual plaintiffs, in the U.S. District Court for the Southern District of New York.[150] The suit, which was amended in February 2002 to add the Islamic Government of Sudan as a co-defendant,[151] charges Talisman with violating the human rights of Christian and other non-Muslim minorities in Sudan by conducting a campaign of ethnic cleansing to clear the land for oil exploration.[152]

The case was brought under the Alien Tort Claims Act,[153] which allows foreigners to sue in U.S. courts for acts committed in other countries that violate "the law of nations."[154] In cases to date, courts have held that gross violations of human rights such as summary execution, torture, cruel, inhuman, or degrading treatment, genocide, war crimes, and forced labor, among others, violate the "law of nations."[155] The Talisman case is one of a number of recent suits brought against multinational firms for alleged violations of human rights abroad. The increased use of the Alien Tort Claims Act in American courts is a reflection of the difficulty of sanctioning multinational firms for human rights violations. In this case, as is true generally, the home country (Canada) was unwilling to sanction Talisman for acts committed outside of its jurisdiction, the host country (Sudan) had little interest in doing so, and the reach of international organizations and/or international law does not encompass the acts of a private firm.[156]

Although Talisman sought to have the case dismissed on several grounds, including that it was improperly brought in the United States, in March 2003 a federal district judge ruled that the case was properly brought in the Manhattan federal

150. *See Presbyterian Church of Sudan*, 244 F. Supp. 2d 289.

151. *See* Press Release, iAbolish, Amended Complaint Filed in Talisman Suit (Feb. 25, 2002), *at* http://www.iabolish.com/news/global/2002/talisman02-25-02.htm.

152. *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 296, 299; Press Release, iAbolish, *supra* note 151.

153. 28 U.S.C. § 1350 (2000); *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 303; *see also* Filartiga v. Pena-Irala, 630 F. 2d 876 (2d Cir. 1980).

154. 28 U.S.C. § 1350 (2000).

155. *Developments in the Law—International Criminal Law: Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2037 (2001).

156. *See id.* at 2025.

court.[157] The judge rejected arguments that the case might hinder the foreign relations of the United States, noting that the American government had declared Sudan a sponsor of state terrorism and that President Bush had signed the Sudan Peace Act.[158]

VII. Oil and Politics

I have argued elsewhere that the modern interstate political system is in the throes of change. It is evolving from a system rooted in territorial sovereignty—characterized by discrete and meaningful borders, a clear separation between domestic and international affairs, a marked distinction between the public and private spheres, and states as the only meaningful actors (and only subjects of international law)—to one in which sovereignty and geographic jurisdiction are compromised, borders are less meaningful, the sharp separation between domestic and foreign is diffuse and blurred, multiple actors are politically significant, and the public-private distinction is confused.[159]

All of these changes directly affect the political environment of the oil industry and the political risks faced by oil firms. More generally, we are in the midst of a period of major systemic change and transformation—characterized by very high levels of uncertainty and turmoil—which in itself affects the magnitude and nature of risks faced by multinational firms.

Talisman's CEO, Jim Buckee, has a reputation as a risk-taker. As discussed earlier, upstream oil operations are inherently risky in terms of geology, politics, and security. The irony of this case is that Talisman handled what would conven-

157. *See Presbyterian Church of Sudan*, 244 F. Supp. 2d at 335-41 (seeking dismissal on the basis of "lack of subject matter jurisdiction, lack of personal jurisdiction, lack of plaintiffs' standing, *forum non conveniens*, international comity, act of state doctrine, political question doctrine, failure to join necessary and indispensable parties, and because equity does not require a useless act").

158. Larry Neumeister, *Talisman Can Be Held Liable for Genocide: Judge*, Gazette (Montreal), Mar. 20, 2003, at A14.

159. *See generally* Stephen J. Kobrin, *The Architecture of Globalization: State Sovereignty in a Networked Global Economy*, *in* Governments, Globalization and International Business 146, 148 *passim* (John H. Dunning ed., 1997); Kobrin, *Back to the Future*, *supra* note 14, at 362 *passim*.

tionally be assumed to be the political risks of its operations well. It operated very successfully in a politically unstable and war-torn environment, increasing output and delivering crude oil through the pipeline in the midst of a violent civil war. While the "political risks" that drove it out of Sudan are a consequence of its operations in that country, they did not arise within its borders.

U.N. Secretary-General Kofi Annan, in the context of Kosovo, argued that strictly traditional notions of sovereignty could no longer do justice to people's aspirations to fundamental freedom.[160] As noted earlier, he said that nothing in the U.N. Charter "precludes a recognition that there are rights beyond borders."[161] It is of interest that none of the actors in the Talisman case argued that Sudan's civil war was a domestic affair or that events within that country's borders should not be subject to outside intervention. While Sudan's support for terrorism certainly played a role in the U.S. sanctions, so did the regime's gross violations of human rights. Sovereignty is no longer an acceptable defense. Human rights have become a significant international issue, and human rights violations within countries are now deemed to be the responsibility of the international community.

The advocacy groups that played a major role in this case are political actors who command significant political power in the international system. In a traditional state-centric international system, all of Talisman's significant political interactions would have been limited to the host and home governments—Sudan and Canada. While I will return to the issue of interstate politics shortly, in this case the company was forced to deal with a third country—the United States—as well as the NGOs.

Talisman was a means rather than an end for the NGOs. Their objective was to effect change in Sudan—to end the slave trade and protect the human rights of the people in the south. It is of interest here to note how much of the responsibility for human rights—for monitoring, advocating, publicizing violations, and even enforcement—has shifted to civil society groups. They, rather than governments, are the significant

160. Michael Littlejohns & David Buchan, *Annan Backs 'Rights Beyond Borders,'* FIN. TIMES, Sept. 21, 1999, at 5.
161. *Id.*

political actors in this case. While there is no doubt that many of the groups involved were concerned about the morality of Talisman's entry into Sudan, their primary objective was to bring about change in that country's policies. While American sanctions and Canadian pressure certainly played a role, at the end of the day it was the civil society organizations that forced Talisman's withdrawal from Sudan.

Talisman was an attractive target both because of its presumed leverage over the National Islamic Front and because of its vulnerability in North America. While the NGOs had little direct leverage with the Sudanese government, they were able to exert considerable pressure on the company through shareholders and investors. It is also clear that the ability of advocacy groups to coordinate their activities, inform and mobilize public opinion, and bring pressure to bear on target groups has been exponentially increased by the emergence of the internet.

Multinational firms have been caught in interstate politics for a long time, and there is nothing startlingly new about Talisman's problems in that regard. However, the situation in which Talisman found itself was unusually complex and reflects the internationalization and increased salience of human rights. While Talisman is a Canadian company, events in the United States were crucial to the outcome of this case. Arakis' inability to tap into American capital markets because of the sanctions in place certainly played a role in its demise. Similarly, Talisman's entry was facilitated by the absence of competition from U.S. oil firms.

The complex domestic politics in the United States vis-à-vis Sudan certainly affected the company. The increased power of Christian groups after the Bush Administration took power and the response of the Sudanese government to the 9/11 attacks led in opposite directions and created a climate of uncertainty in American-Sudanese relations. The very high degree of economic integration between the U.S. and Canada was a major factor in Axworthy's rapid decision to respond to Albright's concerns. It is clear that it was the expressed concern of the U.S. government that led ultimately to the Canadian government's decision to mount an investigation of Talisman's operations in Sudan and bring pressure to bear on the company.

One of the characteristics of a system in transition is the presence of asymmetries or incongruities. In the current state of affairs, there is a geographic incongruity between an economy which is global and political authority which is still primarily national and local.[162] One result is incomplete governance: international phenomena and international actors subject to fragmented, geographically-rooted political and regulatory authority.[163]

Thus, while human rights violations have become an international issue, and the monitoring and enforcement of human rights standards a responsibility of the "international community," in practice effective governance is a problem. Sanctions which are imposed unilaterally by one or more national authorities are unlikely to be effective, as compliance will always be an issue.[164] Leaving aside the question of Talisman's culpability for the moment, the company was unlikely to be sanctioned for its role—direct or indirect—in human rights violations by either host or home country. Sudan did not have any interest whatsoever in doing so, and while Talisman is a corporate citizen of Canada, the actions in question occurred far beyond that country's borders. Even if there were agreement on a standard or code of behavior for multinational firms relative to human rights, it is far from clear who would enforce it.

At this point many of the actions of multinational firms are beyond the reach of either international institutions or public international law. The United Nations Global Compact attempts to bring together companies, U.N. agencies, and civil society groups to support a set of principles dealing with human rights, labor, and the environment, but participation is voluntary and the Compact does not have enforcement capabilities.[165] Even though human rights may be an international problem, there are no international institutions with the power to monitor and enforce corporate violations.

---

162. *See* Kobrin, *Back to the Future*, *supra* note 14, at 361 *passim.*

163. *See id.* at 369-75.

164. *See id.* at 382.

165. United Nations Global Compact, *What is the Global Compact*, *at* http://www.unglobalcompact.org/content/aboutthegc/overview_about.htm (last visited Feb. 9, 2004).

In this case, the incomplete and fragmented governance structures increased both the uncertainty of the political environment in which Talisman operated and the political risks faced by that company. Attempts at "international governance" took the form of the campaign by civil society groups and the court case brought in New York under the Alien Tort Claims Act. While the NGO campaign was successful in terms of its objective of forcing Talisman to withdraw from Sudan, it and the court case are poor substitutes for effective and legitimate international governance. The international oil industry, and multinational firms in general, are left without any clear set of standards or any agreed upon monitoring and enforcement mechanism.

Regardless of what one thinks of Talisman's entry into and operations in Sudan, it is hard to disagree with Buckee's observation that "[c]orporations . . . are increasingly being asked to step into roles that were once the domain of governments or international bodies such as the United Nations. Defining what is properly expected of a company needs to be more clearly articulated and more rigorously debated."[166] Governance is incomplete, and the line separating private actors from public responsibilities has become blurred and diffuse.

During the late 1990s, Sudan was a very difficult and risky operating environment. However, the problems that Talisman faced in Sudan were well within the bounds of the industry's, and that company's, experience and expectations. They were well within the parameters established by an international political system rooted in mutually exclusive territorial jurisdiction, a system—from a multinational company's point of view—comprised of sovereign home and host countries with discrete and meaningful borders.

The political problems that drove Talisman from Sudan reflect a much more uncertain, rapidly evolving, and complex global political system—a system characterized by multiple actors, a lack of fixed geographic coordinates, deep transnational integration, complex networked interconnectedness, and incomplete systems of governance. The evolution of the system has affected the magnitude and quality of the political

166. TALISMAN ENERGY INC., CORPORATE SOCIAL RESPONSIBILITY 2001, *supra* note 109, at 5.

risks faced by oil firms. In a very real sense they are more systemic and less determinate than in the past; they are certainly more difficult to forecast and manage than ever before.

TABLE 1: CORPORATE VALUATION COMPARISONS[167]

	1997	1998	1999	2000
AEC				
ev/op.cash flow	8.7	13.7	13.5	7.6
ev/EBITDAX	5.7	10.5	8.6	5.7
Talisman				
ev/op.cash flow	8.5	9	8.5	3.5
ev/EBITDAX	8.4	14.1	6.7	3.6
CNR				
ev/op.cash flow	7.8	8.3	9.3	3.2
ev/EBITDAX	7.6	6.9	7.6	2.8
Nexen				
ev/op.cash flow	7.3	6.1	8.6	5
ev/EBITDAX	6.6	5.5	6.7	3.7
PanCanadian				
ev/op.cash flow	5.8	7.6	6.9	5.4
ev/EBITDAX	6.4	6.3	6	4.7
avg. ev/op.cash fl.	7.6	8.9	9.4	4.9
avg. ev/EDITDAX	6.9	8.7	7.1	4.1
Talisman				
vs. av ev/op cash fl.	112	101	91	71
vs. av. Ev/EDITDAX	121	163	94	88
AEC				
vs. av ev/op cash fl.	114	153	144	154
vs. av. Ev/EDITDAX	82	121	121	139

167. Compiled by the author from data supplied by Evaluate Energy, a research company providing proprietary data to the oil industry.