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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE PRESBYTERIAN CHURCH OF SUDAN, REV. JOHN SUDAN GADUEL, NUER COMMUNITY DEVELOPMENT SERVICES IN U.S.A., STEPHEN KUINA, FATUMA NYAWANG GARBANG, and DANIEL WOUR CLUOL, on behalf of all others similarly situated,	
Plaintiffs,	01 Civ. 9882 (DLC)
- v. -	
TALISMAN ENERGY INC., REPUBLIC OF THE SUDAN,	
Defendants.	

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

The United States of America, by its attorney, David N. Kelley, United States Attorney for the Southern District of New York, respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517.[1] Specifically, by this submission the United States respectfully informs the Court (1) of concerns expressed by the United States Department of State as to the effect of the

[1] "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any . . . district in the United States . . . to attend to any [] interest of the United States." 28 U.S.C. § 517.

above-referenced matter on this Nation's foreign affairs, especially in light of the Government's understanding that Canada's judiciary is equipped to consider claims such as those raised here; and (2) of concerns expressed by the Government of Canada about the exercise of extraterritorial jurisdiction by this Court over the Canadian defendant Talisman Energy Inc. in this matter, which the Government of Canada states, among other things, frustrates its policies vis a vis Sudan.

The views of the United States Department of State are set forth in a letter from U.S. Department of State Legal Adviser William H. Taft, IV, to the Honorable Daniel Meron, Principal Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice, dated February 11, 2005, and annexed hereto as Exhibit A (along with that letter's enclosure, a diplomatic note from the Government of Canada to the United States Department of State dated January 14, 2005). As the Supreme Court has directed, it is appropriate for this Court to give these concerns great weight "as the considered judgment of the Executive on a particular question of foreign policy." Republic of Austria v. Altman, 124 S. Ct. 2240, 2255 (2004).

As the Supreme Court has noted, in cases, like this one, arising under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, a court must act cautiously and "with a restrained conception of its discretion" in both recognizing ATS claims and in extending liability. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2761-64, 2766 n.20 (2004). Thus, the Supreme Court has instructed federal courts to refrain from taking an "aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries," id. at 2762-63, and, in particular, has noted that "the potential implications for the foreign relations of the United States of recognizing such causes should make the Courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." Id. at 2763. The Court also

directed that federal courts consider the "practical consequences" of recognizing causes of action under the ATS; the Court also endorsed possible consideration of whether a claimant should be required to exhaust available remedies elsewhere before seeking relief in a United States federal district court. 124 S. Ct. 2766 & n. 21.

As noted in the State Department's letter, we understand that this suit raises the question, among other issues, of whether claims of "aider and abetter" liability may be brought under the ATS. Because we wish to provide the Court with the timeliest possible communication of the views of the State Department and the Government of Canada, we do not undertake a full briefing of "aider and abetter" liability herein. The United States has, however, recently briefed that issue in its "Supplemental Brief for the United States of America, as Amicus Curiae," dated August 25, 2004, in the case John Doe I v. Unocal Corp., Nos. 00-56603, 00-56628 (9th Cir.). That brief, which relies primarily on statutory, regulatory, and Supreme Court authority that is fully applicable in this Court, is respectfully annexed hereto as Exhibit B for the Court's convenience and reference to the extent the Court finds it helpful.

Dated: New York, New York
March 15, 2005

Respectfully submitted,

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THE LEGAL ADVISER
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WASHINGTON

February 11, 2005

Mr. Daniel Meron
Principal Deputy Assistant Attorney General
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W., Room 3137
Washington, D.C. 20530

Re: Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 02 CIV. 9882 (DLC) S.D.N.Y.)

Dear Mr. Meron:

I write to bring to your attention a diplomatic note recently submitted to the Department of State by the government of Canada in connection with the above-captioned case and to request your assistance in transmitting a copy of that note, together with a copy of this letter, under cover of an appropriate Statement of Interest, to the District Court.

The above-captioned litigation is a class action brought by current and former residents of Sudan against a Canadian company, Talisman Energy ("Talisman"), and the Republic of the Sudan.[1] Plaintiffs allege serious human rights abuses related to or arising from Talisman's oil exploration and extraction activities in Sudan and the involvement of the government of the Sudan in those activities. Jurisdiction is premised on 28 U.S.C. §§ 1330, 1331 and 1350 (the Alien Tort Statute or "ATS") as well as "principles of universal jurisdiction." On August 27, 2004, District Judge Cote denied Talisman's motion to dismiss for lack of personal jurisdiction. Presbyterian Church of Sudan v. Talisman Energy, Inc., 2004 WL 1920978 (S.D.N.Y. 2004). A prior motion to dismiss was denied in March 2003 on a number of grounds. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F.Supp.2d 289 (S.D.N.Y. 2003).

[1] It is our understanding that the Republic of the Sudan has never appeared in this litigation.

In its diplomatic note, presented to the Department of State on January 14, 2005, the government of Canada formally conveyed its view that the exercise of jurisdiction in this suit "constitutes an infringement in the conduct of foreign relations by the Government of Canada" and "creates a 'chilling effect' on Canadian firms engaging in Sudan and the ability of the Canadian government to implement its foreign policy initiatives through the granting and denial of trade support services." In this regard, the note expressed the concerns of the government of Canada over the possible impact of this litigation on Canadian efforts to promote "the peaceful resolution of Sudan's internal disputes." The government of Canada also objected to the exercise of jurisdiction under the Alien Tort Statute to "activities of Canadian corporations that take place entirely outside the US."

The United States shares with the government of Canada a profound abhorrence of the numerous and intolerable human rights violations and other atrocities that have taken place in Sudan over many years. This Administration has been working actively and directly with the government of Sudan and with the international community for several years to bring an end to the decades-old conflict in southern Sudan and to bring relief to the many thousands of victims of that conflict. Most recently, the United States led the humanitarian relief effort for the displaced in Darfur and refugees in Chad, as well as provided support to the African Union ceasefire-monitoring mission. In both of these efforts, Canada has also played a prominent role. In January 2005, the Sudan People's Liberation Movement/Army and the government of Sudan, parties to the conflict in southern Sudan, signed a comprehensive peace agreement ending 22 years of civil war. The international community is now focused on helping the parties implement that agreement and bring an end to the violence and atrocities in Darfur.

The Department of State takes no position on the merits of the pending litigation but shares the government of Canada's concern about the difficulties that can arise from an expansive exercise of jurisdiction by the federal courts under the ATS. As explained by the U.S. Government in its brief to the U.S. Supreme Court in Sosa v. Alvarez-Machain, 542 U.S. ---, 124 S.Ct. 2739 (2004), nothing in the ATS or its history suggests that it was intended to

open U.S. courts to suits between aliens arising from conduct taking place entirely in other countries. Under prevailing concepts of sovereignty at the time the ATS was originally adopted in 1789, foreign states would have considered it an intolerable interference in their internal affairs for U.S. courts to adjudicate the rights and obligations of their own nationals with respect to conduct occurring wholly within their own boundaries, and relating to persons with no connection to the United States, just as the United States would have balked at similar efforts by foreign courts to adjudicate the rights and obligations of U.S. citizens with respect to conduct occurring wholly within the United States and relating to persons with no connection to the adjudicating state.

There is good reason to believe that in enacting the ATS Congress intended to empower U.S. courts to address and resolve only a limited class of disputes affecting the rights of aliens *within the United States* for acts taking place *within the United States*, and for the specific purpose of *avoiding*, rather than provoking, conflicts with foreign nations. Cf. the so-called Marbois incident of May 1784, discussed in the Sosa opinion at 124 S.Ct. 2757. We believe the statute should be interpreted and applied today in a manner consistent with what the Supreme Court in Sosa described as the "restrained conception" reflected in the original statute (id. at 2744).

These concerns about the proper scope of the statute's application are particularly salient when, as here, a foreign government has interposed a specific and strong objection to a civil proceeding brought in U.S. court against its nationals by third country nationals regarding conduct that took place entirely outside the United States. When the subject matter of the proceeding has little or no nexus with the United States, when the government in question claims regulatory and jurisdictional competence over its nationals and the conduct in question,[2] and when that government's legal system warrants U.S. respect (as Canada's does), these concerns may be even stronger.

Moreover, when the government in question protests that the U.S. proceeding interferes with the conduct of its foreign policy in pursuit of goals that the United States

[2] It is our understanding that Canadian courts would have jurisdiction over the claims at issue here, and that the parties to this litigation have not contended that access to U.S. courts provides the only means of recourse for the victims of the alleged abuses.

shares, we believe that considerations of international comity and judicial abstention may properly come into play.

In Sosa, the Supreme Court interpreted the statute to encompass a "narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs" if they remained unremedied. Id. at 2756. In articulating general standards for this purpose, the Court said that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted" (id. at 2765). In this connection, the Court specifically referred to the statute's historical antecedents (the "violation of safe conducts, infringement of the rights of ambassadors, and piracy") and cautioned courts to exercise "an element of judgment about the practical consequences of making [a specific] cause available to litigants in the federal courts" (id. at 2766).

We understand that there is currently pending before the District Court a motion by defendant Talisman for judgment on the pleadings, inter alia on the basis that allegations of 'aiding and abetting' do not constitute a cognizable cause of action under the statute. As you know, the United States has taken a similar position in the supplemental brief amicus curiae which your Department submitted last August to the Ninth Circuit Court of Appeals in John Doe I, et al. v. Unocal Corp. et al., Nos. 00-56603 and 00-56628. We believe it might be helpful to the District Court in the present case if a copy of that brief were made available to it.

We would be pleased to provide any additional information the court may require.

Sincerely,

William H. Taft, IV

Enclosures:
As stated.

Canadian Embassy Ambassade du Canada

UNGR0023

The Embassy of Canada presents its compliments to the United States Department of State and has the honour to refer to the Embassy's diplomatic note UNGR-0216 dated July 9, 2004, regarding the Alien Tort Claims Act.

Canada reiterates its overriding concerns regarding the extraterritorial application of the Alien Tort Claims Act to activities of Canadian corporations that take place entirely outside the US and in particular, the current application of the Alien Tort Claims Act against a Canadian corporation, Talisman Energy brought by the Presbyterian Church of Sudan in the US District Court, Southern District of New York ("Talisman case").

As stated in its earlier diplomatic note, Canada is opposed, in principle, to broad assertions of extraterritorial jurisdiction over Canadian individuals and entities arising out of activities that take place entirely outside of the state asserting jurisdiction. Under international law, the limitations on the extent to which any single nation can extend its own jurisdiction are generally recognized as flowing from the sovereignty and equality of nations. Territoriality is universally recognized in international law as a primary ground for asserting jurisdiction. International law has developed a number of additional grounds for asserting jurisdiction that are based on the need for a "substantial and genuine" connection to the nation asserting jurisdiction. In the Talisman case, there is no

connection with the US either through the plaintiffs or the defendants or the location where the alleged actions took place.

Consistent with international rules on extraterritorial jurisdiction, Canada passed the Foreign Extraterritorial Measures Act which authorizes the Attorney General of Canada to, inter alia, prohibit anyone in Canada from complying with measures from a foreign state or tribunal affecting international trade or commerce.

Most constitutions, including those of Canada and the US, vest the power to conduct foreign affairs in the executive. The "Talisman case" is problematic because it involves a US court acting with respect to the foreign policy power of the executive authority of the Canadian government, an area of prerogative where courts are normally expected to defer. This assumption of extraterritorial jurisdiction by a US court constitutes an infringement in the conduct of foreign relations by the Government of Canada.

In addition to this overriding concern, the Canadian Government would like to draw to the attention of the US Department of State the foreign policy ramifications of this proposed lawsuit. Canada has taken the foreign policy decision to use access to trade support services as an incentive in support of the Sudan peace process. Canada has devoted considerable diplomatic and financial resources to promoting a peaceful resolution of the disputes wracking Sudan. The Prime Minister has visited Sudan, as have other ministers and senior officials with the objective

of constructive engagement with the Sudanese to address short and long term problems in Sudan. Canada has provided $69 million dollars in humanitarian assistance to Sudan over the past five years and has recently offered a further $20 million dollars to assist the deployment of the expanded African Union observer mission in Darfur.

At a practical level, Canada is working hard, in the company of the US, other countries and international organizations, in particular the Security Council, to influence the Government of Sudan to resolve its internal disputes peacefully. As part of Canada's effort to encourage peaceful solutions in Sudan, the decision was taken to: withhold trade support, the federal assistance most valued by Canadian exporters and investors; withhold assistance from the Canadian Trade Commissioner Service (TCS); deny export credits and insurance to firms for the purpose of doing business in Sudan. Recognizing the important role of the trade service globally in bringing business opportunities to the attention of the Canadian private sector and helping them enter markets, the Government of Sudan has repeatedly asked for service to be re-instated. They have however been advised that the peaceful resolution of Sudan's internal disputes is a prerequisite. Canada has thus taken the foreign policy decision to use trade support services as both a stick and carrot in support of peace.

The inducement for Sudan if they achieve peaceful resolution of their internal disputes will be the reinstatement of trade support services. However, the impending US court action removes that inducement. Should the suit proceed, Canadian firms will likely absent themselves from

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Sudan and therefore not contribute to its economic revitalization out of fear of US courts. The inducement for Sudan to achieve peaceful resolution, reinstatement of trade support services, will no longer be relevant to them as Canadian exporters and investors will no longer be operating in Sudan. Our ability to promise 'peace dividends' to the Sudanese, using the trade support services carrot and stick approach would thus be effectively eliminated by the US Courts.

Through the extraterritorial application of the Alien Tort Claims Act, US courts assumption of jurisdiction creates a "chilling effect" on Canadian firms engaging in Sudan and the ability of the Canadian government to implement its foreign policy initiatives through the granting and denial of trade support services. This action infringes on Canada's conduct of foreign policy and its relations with other states.

Canada notes that the US Supreme Court (USSC) in *Sosa v. Alvarez-Machain*, has stated that in determining whether a norm is sufficiently definite to support a cause of action, courts must exercise an element of judgment about the practical consequences of making the cause available to litigation in the federal courts. Using the example of the Alien Tort Claims Act litigation respecting apartheid in South Africa and its potential for interfering with South Africa's own approach to the crime of apartheid, the Supreme Court states that in such cases there is strong argument that the federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy.[1] The US District Court Southern District of New York in *re:*

[1] Sosa v. Alvarez-Machain, 542 US (2004), fn21.

South African Apartheid Litigation, dismissed the complaints for lack of subject matter jurisdiction relying heavily on the USSC decision in Sosa.[2]

The Alien Tort Claims Act should be construed consistently with principles of international law embodied in US jurisprudence. The US Supreme Court has long held that international considerations are an essential element of statutory construction when determining whether or not a US statute applies beyond the territorial limits of the US.[3] The *Restatement (Third) of the Foreign Relations Law of the United* States 403 (1987), commentary confirms the "rule of construction" that statutes must be construed whenever possible to avoid unreasonableness or "conflict with the law of another state."

These principles area also firmly established in Canadian jurisprudence. The Supreme Court of Canada has stated that comity is the recognition which one nation allows within its territory to legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the

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[2]Re: South African Apartheid Litigation, US District Court Souther District of New York, Sprizzo J., November 29, 2004, page 15, "courts must consider the foreign relations consequences of finding that conduct is encompassed by the ATCA, since entertaining such suits can impinge on the discretion of the legislative and executive branches of this country as well as those of other nations".

[3]Chief Justice Marshall articulated what has become a fundamental canon of US statutory construction, namely, that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Murray v. Schooner Charming Betsy, 6 US (2 Cranch) 64, 118 (1804) (Marshall, C.J.)

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protection of its laws.[4]

For all the reasons noted above, the Government of Canada considers the assumption of jurisdiction by US courts over Talisman, on the basis of the Alien Tort Claims Act raises serious foreign policy issues.

Canada reiterates its earlier request that the Department of State bring the concerns of the Canadian government to the attention of the U.S District Court, Southern District of New York either through filing a Statement of Interest or other appropriate manner in the proceeding against Talisman Energy.

Washington, D.C.
January 14, 2005

[4]Morguard Invs., Ltd. V. De Savoue, [1990] S.C.R. 1077, 1096

FACSIMILE COVER SHEET

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Re Presbyterian Church of Sudan v. Talisman Energy Inc., 01 Civ. 9882 (DLC) - As requested, I attach the Government's Statement of Interest (without exhibit B, a copy of the Government's brief in the 9th Circuit's Unocal litigation). A hard copy is being served by mail.

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