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A LEGAL OPINION TO:

Ministry of Petroleum

Office of the President,

Ministry of Justice & Constitutional Affairs

On PETRONAS -SAVANNAH ENERGY ACQUISITION OF SHARES

1. Introduction

This legal opinion is based on professionalism, integrity and experiences on investment law in Africa. The cause of actions in the facts as enumerated below relates to a potential dispute between the Government of South Sudan (Host state) and foreign investors (Petronas, with third party interest (Savannah) that is to shop a collateral in response to privity to EPSA.

There is a legal notice given to Government of South Sudan by Petronas which in filing an arbitration proceeding in USD at the International Centre for Settlement of Investment Disputes (ICSID) founded in 1966. Therefore, the legal opinion covers facts, procedural matters, Laws of South Sudan, International, and prominent cases on the subject matter. These include expropriations and measures tantamount to indirect expropriation.

2. FACTS cases

PETRONAS INTERNATIONAL CORPORATION LTD (PICL) owns PETRONAS CARIGALI NILE LTD (PCNL) that holds shares in the tune of 40% in Dar Petroleum Operating company Ltd 30% in Greater Pioneer Operating Company Ltd and 67.875% in Sudd Petroleum Operating company Ltd.

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(Collectively referred as the Joint Operating Companies). The Joint Operating companies operate oil fields in South Sudan in **Block 5A, blocks 1, 2 & 4 and Blocks 3 & 7.**

In September 2022, PETRONAS informed the Ministry of Petroleum of its intention to divest its asset in South Sudan. A subsequent letter was sent to the same Ministry by PICL, informing the said Ministry of its offer to transfer its shares in **PCNL to Savannah Energy WN Limited (SEWL)** for a consideration of **up to USD 1.25 Billion**. SEWL is a wholly owned subsidiary of Savannah Energy plc, a UK based corporation listed on the London stock exchange. All correspondence is hereafter attached.

3. Status of the transactions

- **On 9th September 2022**, PCNL asked the Ministry of Petroleum to disclose details and information relating to Block 5A, Blocks 1,2& 4 and Blocks 3 & 7 as required by **EPSA under Article 13.8, which provides that**, "*the government shall make available to contractor all technical data and information in its possession with respect to the contract area*".
- The government of South Sudan, through the Ministry of Petroleum, gave approval for the provision of Data to SEWL to have access to certain information before entering into a contract for acquisition of shares from PETRONAS (see annex No. 7). The letter granting this permission was signed on 7th, October, 2022. This procedure was an expressed indication that, PETRONAS has made an offer to Savannah as a potential buyer, should

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the National Petroleum and Gas corporation fail to exercise its pre-emption rights under petroleum Act, 2012 which provides under section 23 (1)that, *"Where a contractor decides to dispose of all or part of its interest under a petroleum agreement, the National Petroleum and Gas Corporation shall have the right of first option to acquire the interest* ***on the same terms as agreed to with the potential buyer.*** **The interpretation to this provision, means that, a contractor i.e. (PETRONAS in this matter) shall first look for a potential buyer, agrees the terms and subsequently notifies the Ministry of Petroleum of its intentions to assign the EPSA. This is exactly what PETRONAS did. In the event that the National Petroleum and Gas corporation exercises its right under this section, the contractor shall transfer the shares in the same terms agreed with potential buyer. And whereof, the said pre-emption right lapses under sub-section 23 (3) which provides that,** "the National Petroleum and Gas Corporation's right of pre-emption shall lapse unless exercised within sixty (60) days after receiving notice of the acquisition". In this case and in such circumstance, the government should give a consent for the parties to complete the contemplated transactions. In the case of the PETRONAS and Savannah Energy transaction, the government will receive and approval fees and taxes associated with the transaction.

- **On 12th December 2022**, PICL submitted a request for approval for the transfer of shares to SEWL by PCNL. This is a conditional precedent before the sale agreement. Section 22 (1) of Petroleum Act, 2012, provides that,

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- "*a contractor shall not directly or indirectly assign all or parts of the contractual rights and duties under a petroleum agreement to a third party, including an affiliate, without the prior written consent of the Ministry.*" It is by this virtue that, both the contractor and the interesting third party engaged the government for approval. This should have been granted or refused within 60 days under section 23 (3) of the Petroleum Act, 2012. This was not granted or refused within said stipulated time period. Instead a letter dated March 5 2024 (approximately 15 months following the initial approval request) was issued by the Undersecretary of the Ministry of Petroleum to PETRONAS purporting to reject the transaction.

- The approval is pending up to now contrary to Petroleum Act, 2012. After the passage of the aforesaid time frame, the government should have given its consent for transaction to take effect. An official notification was served on the government by PETRONAS on the 12th December 2022, enumerating the need to grant approval or rejection within 60 days as a procedural and legal matter under the Laws of South Sudan and EPSA (See attachment No. 10). In response to the said notification, the Government requested for extension of time for 30 days, effective from the date in which 60 days expired. The grounds for extension was to give time for due diligence (see attachment No. 12). With acknowledgment,

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- PETRONAS accepted the extension on the 2nd February, 2023 with hope that approval shall be granted.

4. Due diligence, capacity and experience of Savannah Energy

- A due diligence trip was undertaken by an official delegation of the Government of South Sudan from 25th - 27th January 2023, to the company's oil and gas field and office locations in Nigeria. In the records, there is no government report on the technical capacity of Savannah. However, there are herein attached the photos of government officials having access to, and inspections of, Savannah's facility.

- Furthermore, a tri-partite workshop was conducted in Dubai that brought together the Ministry of Petroleum, PETRONAS and SEWN. approved by the government on the 30th January, 2023 and workshop was held in Dubai.

- As regards the financial capability of Savannah, Eco Bank has issued an assurance on Savannah financial capacity and the Bank of South Sudan has received the confirmation (see an attachment 29). The wording of this message asserts that the company is financially capable to acquire the shares of PETRONAS. This conditional precedent is a provisional requirement under section 22 of Petroleum Act, 2012 which states that, *"the assignee shall be a person with the requisite technical competence, sufficient experience, history of compliance and ethical conduct and financial capacity to adequately fulfil all obligations of the petroleum agreement and any other requirements stipulated by the Ministry".*
- Savannah Energy is a public listed company on the London stock exchange and is currently implementing similar projects in Africa, E.g. Nigeria, Niger and Cameroon.

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- Savannah has 212 registered shareholders in different cities in Europe and USA. This is confirmed by J.P. Morgan Securities PLC, an expertise on shareholders analyst services providers.

- Kirk Lovegrove and company is an international Savannah's financial advisor which confirmed the financial capacity of Savannah. Kirk has a world reputation in energy advisory services whereof, it has rendered

- services to major transactions e.g. Apex Energy in Egypt, Carlyle International and Conoco phillips worth 2.675 billion.

- The GOSS should have requested for financial auditing through a third party since Kirk Lovegrove is a financial advisor to Savannah.

- The UK Embassy has expressed its support to Savannah. On the 2nd November,2023, British Embassy, Juba highlighted very important points that should remind the government of South Sudan of the danger for future working relationship and legal issues that will arise out of it.

Points to note from Ambassador letter:

- First, the Ambassador has guaranteed their commitment to support Savannah, a UK based company to operate in the oilfields of South Sudan;
- That, the UK supports the rule of law and it is concerned about the time the matter has taken;
- That, the matter in which diligence process was conducted and the factual inaccuracy that the process has generated which installed the

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transactions and That the UK government reminds the Government that the matter was discussed in presence of the President of the Republic, in which has guaranteed the transparency of the process and that there was

no objection from the government in a transaction that involves two private companies.

To interpret this document of His Majesty's Ambassador to South Sudan, Savannah Energy is a British an incorporated body that has sought diplomatic protection from Embassy as an international way of

settlement of disputes and that can be sought from a diplomatic mission by aggrieved national of a given state. This was so because Savannah Energy has a legal personality of Britain. The involvement of the Embassy in support of the transaction is a clear indication of legitimate expectation from the government and failure to accord that will be tantamount breach of commitment.

5. Guarantee against expropriation

The transaction between Savannah Energy and PETRONAS is purely private, which the consent is needed for the purposes of formality within the timeframe. Failure by the government to conform with this legal provision, amounts to expropriation.

Section 34 of Investment Promotion Act, 2009 states that: -

(a) no enterprise shall be nationalized or expropriated by the Government;

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(b) no person who owns, whether wholly or in part, the capital of any enterprise shall be compelled by law to cede his or her interest in the capital to any other person.

Subsection 2 provide that, "there shall be no expropriation of any enterprise, to which this Act applies, by the Government *unless the expropriation is in the national interest for a public purpose, which is the least burdensome means available to satisfy that overriding public purpose, is made on a non-discriminatory basis, in accordance with due process of law, and is under a law which makes provisions for –*

(a) payment of fair and adequate compensation; and

(b) a right of access to the courts for the determination of the investor's interest or right and the amount compensation tot which he or she is entitled.

(3) Any compensation payable under this section shall be paid without undue delay and authorization shall be given for its repatriation in freely convertible currency, where applicable.

(4) The Government and the person whose property has been expropriated may determine fair market value of the expropriated property by other agreed means.

Looking at this point of law and in comparison, with following government measures evidenced by the following documents: -

a. *Letter by the Former Minister in the office of President, Dr. Marial Benjamin, dated on 24th October 2023, which clearly stated that the transaction should not proceed on the grounds that Savannah was not in compliance and it does not have financial capacity to acquire this project.*

b. *A second letter from the current Minister in the office of President, dated 23rd January 2024, addressed to Minister of Petroleum to deny the approval, direct PETRONAS to hand over all assets and shares to the*

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Government and not to allow PETRONAS to leave unless the issue of liabilities is addressed.

c. *A third letter from the same Minister in the office, dated 1st of March 2024, addressed to Undersecretary, Ministry of Petroleum, directing him to disapprove the transaction immediately.*

d. *A final disapproval document by Ministry of Petroleum was sent to PETRONAS on the 5th March 2024, which clearly stated that the transaction was rejection for non-compliance by Savannah Energy Ltd and that the government was not given first option of pre-emption rights and that PETRONAS shall not leave before decommissioning and environmental auditing.*

6. The position of International law in these government measures

a. Forced sales of property

The directive to PETRONAS to handover all assets to government amounts to taking of investment property, and force sales of property in particular.

A distinction must be drawn between DIVESTMENT when the EPSA has expired in which the asset shall be taken over/remain with the government and DIVESTMENT before the expiry of EPSA, in which the foreign investor shall have right to transfer its shares and assets to any interested investors if the pre-emption right is not exercised in 60 days.

These government measures are brought about without conformity with EPSA and domestic laws of South Sudan nor do they conform with principle of international investment law. It is not also a government policy or economic downturns and those brought about by a state policy such as the indigenisation of the economy in general.

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In tis situation, the investor is confronted with difficulties of losing the business as whole or abandon its property altogether.

The matter of PETRONAS and Savannah shall Definity amount to state responsibility unless the Government allows this transaction There are authorities in this area and cases where the conduct of the state was motivated by different power users in the government institutions. This motivates conduct gives rise to a separate head of liability since a clear illegality is established in terms of international law. Illegality flows from the fact that the presence EPSA and Petroleum Act,2012 provide negate what the government claims to be pre-emption right for a lawful taking.

The ELSI Case (United States Vs Italy) contemplates some similar scenario with this matter which could amount to forced sales.

This similar case happened as follows:

On 6th February 1987, the United States instituted proceedings against Italy in respect of a dispute arising out of the requisition by the Government of Italy of the plant and related assets of Raytheon-ElSI S.p.A., an Italian company producing electronic components and previously known as Elettronica Sicula S.p.A. (ELSI), which was stated to have been 100 per cent owned by two United States corporations. The Court, by an Order dated 2 March 1987, formed a Chamber of five judges to deal with the case, as requested by the Parties. Italy, in its Counter-Memorial, raised an objection to the admissibility of the Application on the grounds of a failure to exhaust local remedies, and the Parties agreed that that objection should "be heard and determined within the framework of the merits". On 20th July 1989, the Chamber delivered a Judgment in which it rejected the objection raised by Italy and said that the latter had not committed any of the breaches alleged by the United States of the bilateral Treaty of Friendship, Commerce and Navigation of 1948, or of the Agreement Supplementing that Treaty. The United States principally reproached the Respondent *(a)* with having

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effected an unlawful requisition of the ELSI plant, thus depriving the shareholders of their direct right to proceed to the liquidation of the company's assets under normal

conditions; *(b)* with having been incapable of preventing the occupation of the plant by the employees; *(c)* with having failed to reach any decision as to the legality of the requisition during a period of sixteen months; and *(d)* with having intervened in the bankruptcy proceedings, with the result that it had purchased ELSI at a price well below its true market value. After a detailed consideration of the facts alleged and the relevant conventional provisions, the Chamber found that the Respondent had not breached the 1948 Treaty and the Agreement supplementing that Treaty in the manner claimed by the Applicant, and rejected the claim for reparation made by the United States.

b. Forced sales of shares

The letter by Dr. William Anyak, stating that the shares be given to NilePet, amounts to force sale of shares which could attract diplomatic protection and state

responsibility, where this wholly foreign-owned company's investment is taken over by the Government is totally clouded by problems relating to breach of international agreement.

CASE ANALYSIS ON CHARZOW FACTORY CASE (GERMANY v. POLAND) **is similar to what happens to PETRONAS.**

The Chorzow Factory case is a first of its kind dispute that arose between Germany and Poland before the erstwhile Permanent Court of International Justice that involved the issue of paying reparation by Poland to Germany for having breached an agreement entered between them. After the first world war, a bipartite agreement was entered wherein the control of Upper Silesia area was transferred by Germany to Poland on the condition that

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Poland would not forfeit any property of Germany. However, Poland in breach of the agreement sold two German factories located in that area.

Therefore, by government directing PETRONAS to handover all assets to government amounts to breach of international obligation which shall cost the government financial compensation.

a. Protection of commitments

Under investment law, parties are required to keep commitments that are made to each other. The EPSA agreement between the government and PETRONAS contains the clauses that: Each Contracting Party shall observe their obligations. The reference to 'particular commitment[s]' made to the foreign investor may mean that guarantees such as the guarantee against expropriation without compensation or guarantees as to repatriation of profits made in investment codes, which are general commitments, are covered under section 34 of Investment Promotion Act, 2009. It may, however, be possible to argue that these general commitments are addressed in both the law and EPSA as well and hence fall within the protection of foreign investment under international.

The purposes of guarantee against appropriation in South Sudanese investment laws do refer more specifically to the contractual commitments that a state or a public entity like the investment board screening permitting the investor's entering to the country prior to establishment. It is also a guideline to the government to keep investment climate attractive.

It is imminent that the liability will arise where these commitments are not met. Restrict on sale of shares, force transfer to a national company and failure to maintain legitimate expectation by the government are radically and directly measures in violation of EPSA and domestics laws of South Sudan. And as such, results into liability should PETRONAS file a case.

The meeting of President with British Ambassador was a green flag for Diplomatic protection. Thus, the records show that the President stated that, *"the government has no objection in transactions that is between private entity"*

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Vivacell case is a very example in which this case takes its path. ***When South Sudan's government switched off Vivacell's services overnight in March 2018. The government argued that Vivacell had not obtained a licence after South Sudan gained independence, and was instead using a licence issued by Sudan which enabled it to circumvent taxes and licence fees totalling US$66 million legally and therefore owed no taxes. It launched a case against South Sudan in the International Court of Arbitration for restitution of US$3 billion, of which it was eventually awarded US$1 billion. The decision was based on the breach of international agreement and law and legitimate expectation***

In a recent case of Qatar National Bank vs South Sudan, The Republic of South Sudan has been ordered to pay more than one billion dollars in an International Centre for Settlement of Investment Disputes (ICSID) award ruled in favour of Qatar National Bank (QNB). The case stems from a $700 million loan the Qatar bank gave South Sudan in 2012. QNB filed the case against South Sudan and the Bank of South Sudan on October 7, 2020 (ICSID/Arb/20/40) for breach of Internationalized contract and the tribunal were fully constituted in March 2021.

Under international law on foreign investment, breach of commitment normally constitutes a contractual liability. It is important that a younger nation should observe international obligations, otherwise, decisions by a person clothed with legal authorities shall put government into state responsibility of nationalization.

The measures that Government of South Sudan are similar to the description given in ***LIAMCO CASE (Libyan American Oil Company (LIAMCO) v The Libyan Arab Republic).*** **In this case,** the Claimant, Libyan American Oil Company ('LIAMCO'), was an American corporation established for the purposes of research, exploration and exploitation of Petroleum and natural gas, particularly within the country of Libya.

In summer of 1973, the Libyan Government asked the oil producers to accept a 51% participation by the State in oil concessions. It set the end of August as a deadline for their acceptance, under threat of taking **'appropriate measures'.** After unsuccessful attempts to

resolve the disputes with the Libyan government through negotiation, in November 1973 LIAMCO initiated arbitral proceedings pursuant to Clause No 28 of the Concession Agreements and Libyan Government became liable.

7. Political engagement

PETRONAS engaged with the Ministry of Petroleum and President.

The PETRONAS engaged with the Ministry of Petroleum and President. The president stated that the Government has no objection in private transactions.

8. Benefits to South Sudan

The benefits listed below were submitted by Savannah and do not form part of legal point of view, however, they are in support of the interest of South Sudan.

- South Sudan's oil sector has performed very poorly since independence. Even before the recent pipeline shut-down, production had reduced by over 65% since independence. This has reduced the Government's revenue by billions of dollars.
- The current shareholders are not investing (CNPC, PETRONAS, ONGC, Sinopec): in the last four years, investment has fallen by over 70% and the number of wells drilled has more than halved by close to 50%.
- The oil fields are not important to the current shareholders, it is less than 2% of their global production.

- We need a change of ownership that will properly invest in the assets ASAP. It is critical for the economy that better equipped new companies are brought in.
- Savannah was introduced to the Government of South Sudan by the British Embassy in Juba in a meeting with HE President Kiir on October 2022. The UK Government has been clear that they see this deal as critical for UK - South Sudan relations.
- At the meeting, HE President Kiir clearly stated that Savannah should proceed with PETRONAS and that the Government had "no problem with a transaction between two private companies"
- South Sudan needs to re-strengthen its ties with the UK and other Troika members.
- As a British company they have access to vast amounts of money to invest in South Sudan.
- Savannah shareholders include some of the largest financial institutions in the world including:

• BlackRock
• Capital
• Standard Life and Savannah have a very strong relationship with the World Bank.

- The UK Embassy has provided the Government with a copy of the company's shareholder register.
- A British Company being involved in the oil fields means that the projects will not be sanctioned.
- A British Company involved in the oil fields means that the British Government (and TROIKA) will be able to assist in mediation with the

warring parties in Sudan to securing a permanent safety zone for the pipeline in Sudan.

- South Sudan will need British aid support to deal with the impact of the pipeline shutdown, they are important allies and Savannah will assign its considerable social capital towards lobbying the British government agencies like DFID to increase aid to South Sudan.
- If one British company comes and is successful in South Sudan then it will encourage others and we need foreign investments to create jobs and train our people.
- A new investor will raise oil production by drilling new wells.
- Every 10,000 Barrel Per Day (kb/d) increase is about US$150m increase in government revenues.
- So even a modest targeted increase of 100,000 Barrels per day in the long run is an extra $1.5 Billion Dollars into the government treasury.
- The power projects will raise power generation in the country by over 400% while reducing the average power cost in South Sudan by over 50%.
- Building 4 refineries
- The refinery project would reduce South Sudan's dependency on the Sudan pipeline and also remove the expensive transportation cost and need to import refined products.
- All can be financed with western money
- British company that has accessed US$1.8bn in capital for energy projects in Africa
- Shareholders are some of the largest and most famous financial institutions in the world (Blackrock, Fidelity, Capital, Vitol, etc).
- Active in many African countries with a strong track record of delivery.

- Recommended and supported by the UK Government, the UK Government attended the meeting on October, 2023.

9. Transaction

- UK Government, PETRONAS, Ecobank and KLC have all confirmed Savannah's finances.
- UK Government, MOP have both attested to Savannah's technical capabilities. Website also covers this.
- UK Government has provided a list of Savannah's beneficial owners

10. Law

a. **Petroleum Act, 2012** which allows a contractor to transfer its shares partially or wholly (section 22 (1)) and section 23(3)
b. **EPSA article 22.1**
c. **Investment Promotion Act, 2009,** states that foreign investors have unrestricted rights to use their investment including sales of interest.

11. Liabilities.

The Savannah Energy will take all the liabilities of PETRONAS after the transaction, whether the liabilities occurred prior to this agreement or after.

12. Conclusion

PRINCIPLE OF LAW: It is a general conception of international law that every violation of an investment agreement between an independent state and foreign investor ensue an obligation to make reparation. The principle that there is an internationally wrongful act of a state when conduct consisting of an action or omission is attributable to the state under international law and

constitutes a breach of an international obligation of the state has been affirmed in ***CHARZOW FACTORY CASE (GERMANY v. POLAND*** and *Vivacell Vs South Sudan.* It is international law that determines what constitutes an internationally unlawful act, irrespective of any provisions of international law, irrespective of any provisions of municipal law.

However, with the procedures taken by PETRONAS, GOSS is in breach of agreement and laws.

ANALYSIS

- **When the notice was served on GOSS by PETRONAS, expressing its intention to divest in South Sudan, South Sudan should have opted for acquisition of shares in 60 days Section 23 (3) of the Petroleum Act, 2012. After the lapsed of 60 days with several request for extension, the Government should have granted a consent for transactions.**
- If the government refuses to allow this transfer of shares, it shall amount to direct nationalization in violation of South Sudanese laws and international laws and therefore, the government will be liable for arbitrary refusal and as such, Government should give consent.

Possible outcome:

a. **1.25 billion of the share's values against GOSS for expropriations**
b. **Cost of litigations;**
c. **Interest.**

Drawn and Filed by

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