

## South Sudan: ready for business?

### Introduction

On July 9, 2011, Africa witnessed the birth of the world's newest nation: the Republic of South Sudan. It became Africa's 54th nation. It comprises the southern portion of what is now the Republic of Sudan<sup>1</sup>, which until the South's secession was the largest country on the African continent.

### Overview of South Sudan

Southern Sudan has been almost continually at war since before independence from the Anglo-Egyptian condominium on January 1, 1956. The most recent conflict lasted twenty-three years and was the longest-running civil war in Africa. It ended with the signing of the Comprehensive Peace Agreement (the "CPA") on January 9, 2005.

In accordance with the CPA, a referendum for independence was held January, 9–16, 2011. There were polling stations in Canada, Australia, Kenya, the US, the UK, and other countries. The final results were released shortly afterwards on February 7th. Over 98% voted in favor of independence with over 90% of registered voters voting. Independence occurred as expected on July 9, 2011, which was the end of the transition period contemplated by the CPA.

The conflict in the South is to be distinguished from the ongoing conflicts in Darfur, another part of Sudan as well as in Blue Nile and the Nuba Mountains. According to the latest census held in 2008, the Republic of South Sudan has a population of 8.26 million but estimates put it at over 10 Million. Most of the inhabitants are black African and either Christian or animist. Only about 10% of the population is Muslim, with most of those people living in the northern part of South Sudan.

### The challenges

The Government of the Republic of South Sudan ("GoSS") is dependent upon oil for 98% of its budget. Last year it experienced a -55% growth due to shutting down the oil fields in response to its ongoing feud with the North regarding transmission fees through the North's oil pipelines. The great bulk of what is consumed, invested, and spent by the GoSS is imported. The average annual income is less than \$1 per day and is about twice that in Juba. Literacy is less than 50%.

### Doing business in the Republic of South Sudan

The legal and institutional environment supporting private sector development does not truly exist, but that has not been a fatal flaw in attracting business. Although all sanctions (other than a continuing arms embargo from the European Union) have now completely been lifted against the Republic of South Sudan, there is still often some confusion with Sudan. Companies registered in the Republic of South Sudan are still struggling to be recognised abroad as many institutions (such as banks) have not yet updated their system to reflect the new state.

Continued uncertainty about the future, however, has probably prevented a lot of potential foreign investment. GoSS has been primarily focused on establishing itself and stabilizing the security situation in the run-up to the recent elections and referendum. It is only just now starting to pay attention on developing and promoting private sector activity.

The business enabling environment of transparent laws, processes, and institutions that facilitate the private sector is practically non-existent in Southern Sudan. But this cuts both ways: the lack of an institutional framework means a lack of protections and certainty for investors. It also means no stifling bureaucracy attempting to enforce a confusing set of rules and laws that could neutralize the positive effect of any such institutional framework. Entrepreneurs who have come to South Sudan have done so



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<sup>1</sup> Although the final boundaries are yet to be determined

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primarily because of this latter reason. Put simply, an entrepreneur can do what he wants, when he wants, and how he wants.

The dangers of an unregulated environment are manifold: exploitation of workers, health and safety issues, lack of shareholder protections, unprotected property rights, and relationships reigning over contracts and the rule of law.

That being said, the situation in Southern Sudan is still an open book. There is no deep history or regime that must be unwound. Business activity has been mostly non-existent in what is still a pre-industrial society.

### **Starting a business<sup>2</sup>**

The Fundamental pieces of legislation supporting company start-up and basic corporate governance are in place. The registration process is relatively straight-forward. There is no explicit requirement in laws or regulations that there be Southern Sudanese ownership in any company owned by foreigners. Yet this requirement does informally exist. Native ownership levels vary between 1% and 30% based on agreements between shareholders.

There is no paid-up capital requirement in the new **Companies Act, 2012**, and Art 102 clearly states that all shares shall be of No Par Value. However most foreign companies are informally required to have an issued share capital of \$500,000, whereas the share capital of domestic companies only need to be \$100,000.

The **Companies Act, 2012** still permits the archaic Company Limited by Guarantee as well as Unlimited Company and notes a distinction between a “private company” (which requires a minimum of 2 shareholders) and a “public company” which requires a minimum of 7 shareholders.

A foreign company registering as a branch in Southern Sudan does not face many hurdles. There is an unwritten rule that a foreign company must get a letter saying that the company is in good standing from its consulate in South Sudan to then send to the Ministry of Foreign Affairs, which then sends the letter to the Ministry of Justice confirming that registration may proceed.

### **Closing a business**

There is no real practice of closing down businesses, either through voluntary or involuntary liquidation. And most certainly, the courts have no experience hearing any kind of bankruptcy cases. However a modern **Insolvency Act** was passed in late 2011, which provides for both personal and corporate bankruptcies.

A distinction is made between preferential, secured and unsecured creditors yet there are no secured transaction laws in South Sudan<sup>3</sup>. All creditors' claims rank behind Preferential Debts which include fees of the insolvency and arrears to GoSS and the labor force.

The law provides for the appointment of a Receiver and recognises “Insolvency Practitioners.”

### **Registering immovable property**

Investment in areas outside of the major cities have over-burdened and confused land registries through the lack of clarity in rights to land governed by customary law and the frequent lack of a cadastre or other registry of real property rights.

The **Land Act, 2009** (the drafting of which was rushed through the then Ministry of Legal Affairs and Constitutional Affairs (now the Ministry of Justice) under pressure from the Southern Sudan Legislative Assembly) has been criticised because it preceded the land policy and because it was not developed in conjunction with judiciary, who until the passage of the Land Act were responsible for land registration. The responsibility for land titling had been shifted to the Ministry of Housing and Physical Planning which had not established the land registration infrastructure, and, as a result, no real property was being registered in South Sudan for a few years. It however seems that, recently, the judiciary has regained its previous role and land is once again being registered.

Foreigners may only hold leasehold interest in land. Further, only domestic individuals and corporations may own land, which includes the right of exclusive possession, use, and alienation. The Land Registry Office in Juba is currently not issuing title certificates, but is able to do title searches.

### **Enforcing contracts**

The legal system provides for the basic rights and protections for freedom of contract and the enforcement of judgments. The judiciary relies on the Court Police (a branch of Southern Sudan Police Service) to enforce claims. Public auctions of seized goods are held monthly. Indeed, the car park at the courthouse was littered with seized automobiles, generators, and other items.

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<sup>2</sup> Documents cited in this article may be found at either [www.goss.org](http://www.goss.org) and [www.moiss.org](http://www.moiss.org)

<sup>3</sup> Debentures are permitted under the Companies Act but there is no current provision for secured consumer credit nor a registry for same

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On a positive note, the judicial system is functioning and able to hear and decide on civil and commercial claims, including disputes over real property contract disputes and labor disputes.

More advanced forms of contracts laws, such as leasing or franchising, have not yet been adopted, nor are they needed at this stage. There is no specific law regarding alternative dispute resolution ("ADR") (although one drafted by this writer is in the queue), nor are there administrative bodies that would handle ADR. The Code of Civil Procedure Act of 2008 does provide for court administered and directed arbitration but this is hardly what foreign investors would want to see. The *Investment Promotion Act, 2009* (the "Investment Act") provides that investments under its purview may be subject to ADR if the parties so elect.

### **Protecting investors**

The recently created Ministry of Investment was designed to become a "one-stop shop" for potential foreign and strategic domestic investors; however, it is falling far short of its mandate, notwithstanding support from the World Bank's International Finance Corporation.

Upon granting an investment certificate to an investor, the Ministry helps that investor obtain the necessary licenses, land, incorporation, etc., and the investor may be eligible for various tax breaks and incentives. This writer is aware of several foreign businessmen who have applied for and received tax benefits from either the Ministry, or its predecessor the Southern Sudan Investment Authority

Foreigners are generally treated equally under the commercial law framework, except that foreigners cannot own land or wholly own a domestically-formed corporation. Also, the Investment Act lists seven economic sectors reserved for domestic investment and participation. Nor does the Act permit full and free repatriation of earnings.

One section of the Investment Act, however, does allow unfettered disposition of enterprise proceeds in any lawful manner. Another section also guarantees full and free transfer of convertible funds in and out of South Sudan in three instances: capital for investment, service of foreign loans, and remittance of earnings following a liquidation or sale of all or part of the enterprise.

### **Economically destructive tax system**

The wartime "tax" system, composed primarily of roadblocks at county, state, and national borders, has a very negative effect on prices and decisions by entrepreneurs to operate outside single areas. The prices of goods, including inputs into domestically produced goods, are extremely high and can render these goods uncompetitive with imported finished goods. Multiple taxation as a product moves to market throughout Southern Sudan increases its price and prevents some enterprises from even trying to expand operations beyond Juba. However, work continues to remove these barriers.

Business Profit Taxes range from 10% for a small business or enterprise, to 15% for a medium-sized business to a maximum of 20% for a large business or enterprise.

### **Lack of effective credit mechanism**

There are a number of domestic and international banks operating in Southern Sudan; however, lending activity remains low. Kenya Commercial Bank and Equity Bank are both well established in South Sudan. However interest rates, like in many other African countries, remain high (up to 18%) for what is essentially an unsecured loan. Further, credit-seekers lack the capacity to present a proper business plan or feasibility study to justify a loan. It should be noted that there is no credit-reporting mechanism as of yet.

The legal framework (all relevant laws are Republic of the Sudan laws and often Sharia based) does not provide the regulatory framework for the improvement of credit conditions. The banks that are in Southern Sudan appear primarily to perform foreign exchange operations or to have a presence in South Sudan.

### **Legislative process broken**

Only very few laws have been promulgated since 2005. In both 2009 and 2010, only two bills in each year (one of which was the Appropriations Act) were passed by the Southern Sudan Legislative Assembly. Since independence, while progress has been made, few of the key laws needed for a fully-functioning government have been passed. The laws that have been adopted are not gazetted nor distributed widely as there is neither a functioning Gazette Office nor Government Printer. There are no implementing regulations for the few laws that have been passed. Article 92 of *The Transitional Constitution of the Republic of South Sudan, 2011*, provides that the Legislative Assembly has the final say with regards to the passage of regulations. Given the problems of passing primary legislation, it is hardly surprising that no secondary legislation (much of which would be highly technical) has been passed.

It should also be noted that there is no published or transparent mechanism for setting and publishing fees for licenses, processes, and other procedures carried out by GoSS or lower levels of government. The private sector is not organized sufficiently to become an effective partner to GoSS in establishing policy or providing input and recommendations on legislation. There is a South Sudan Chamber of Commerce, Industry, and Agriculture, but currently this institution is still weak and therefore not fully operational.

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## Unskilled Labor Force

Both the public and private sectors face a serious shortage of skilled Southern Sudanese labour. But, there are many Kenyan, Uganda, Ethiopian, and Eritrean workers. This will continue to be a problem for many years to come and will require a serious and sustained effort both to create a basic educational system as well as vocational training and institutes of higher learning

## The Way Forward

The situation in Southern Sudan is still rather uncertain because of the continuing instability. The North continues to cause trouble in the disputed Abyei region—the boundaries of which was the subject of a Permanent Court of Arbitration decision in April 2009—and is now bombing the other areas of Blue Nile and South Kordofan. However, Southerners and the international community continue to be optimistic about an independent Republic of South Sudan.

## About the author

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