LEGAL ASPECTS OF PRIVATIZATION
WITH SPECIAL REFERENCE TO THE
SUDAN

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Dedication

To my esteemed supervisor, Dr. Mohammad Ibrahim Eltahir,

the man from whom I learnt how to think as a mature lawyer.
Abbreviations

GRAS: Geological Research Authority of Sudan.

HCDPE: the Higher Committee for Disposition of Public Enterprises.

MLE: Medium or Large Enterprises.

M/EBO: Management/Employee Buyout.

SOE: State-Owned Enterprise.

TCDPE: the Technical Committee for Disposition of Public Enterprises.
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**Burundi:**
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Law No: 117/ 1961: (Nationalizations)
Law number: 72/ 1963: (Nationalizations)
Law No: 32/1966: (Nationalizations).
Law No. 43-1974 (investment law).


**Former Czechoslovakia:**

Law of October 1990 (small privatizations).

**Former Soviet Union:**

Constitution of 1936.

**France:**

French constitution of 1958.

Privatization Act (1986).


**Germany:**


**Guinea:**

Ordinance No. 91/025 on March 1991, on the institutional framework for public enterprises provides that:

**Guinea-Bissau:**


**Hungary:**

Act no. VI of 1988 (companies Act).

Act no. 7 January 1990 (Privatization Agency Authority)

**Mexico:**

Mexican constitution.

Public Enterprises law 1986.

**Morocco:**

Constitutions Law 1956

Privatization law 1990.
Mozambique:
Decree of November 1991.

Philippine:

Poland:

Portugal:

Senegal:
The Constitutions Law 1956.
Law no.87-23 of August 1987 (SOE’s Privatization)

Slovenia:

Turkey:

Ukraine:
Law No.2171-XII (March-1992) on privatization of small state enterprises.

United Kingdom:
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Conventions and Bilateral Agreements:
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Abstract

The thesis is conducted on the international experiment in the transfer of the state-owned enterprises to the private sector (privatization), concentrating on the legal aspects of the process. The Sudanese experiment has been assessed in comparison with the international models.

To illustrate the international experience, the researcher has exploited a considerable number of the relevant international legal references of privatization and the publications of the World Bank. Locally, the researcher has relied upon the information presented to him by the Ministry of Finance and National Economy, the Department of Legal Affairs of the Central Bank of Sudan, and the annual reports of the two committees concerned with the privatization operations in the Sudan, precisely the Higher and Technical Committees for Disposition of Public Enterprises. The two Committees presented a large number of the significant privatization contracts to the researcher. Furthermore, a considerable number of the privatized enterprises personnel have been interviewed.

In the light of the international experiment, any government interested to implement a privatization program should prepare a privatization strategy which determines the economic objectives of the program as well as the legal formulas of the privatization contracts. The privatization strategy should also determine and ultimately abolish the valid legislations which may hinder the program. For example, a legislation which grants a monopolistic situation for the enterprise to be privatized should be abolished, for instance; whereas any legislation which encourages competition has to be activated and encouraged.

Among the significant results of the study is the detection of the widening of the concept of privatization to include other types of privatization manifested in lease and management contracts, beside the sales contracts to which it used to be confined. There is also an international tendency towards the adoption of the contracts which avoid the state the full transfer of the state-owned enterprises. The Sudanese government, for instance, has extensively activated sale contracts which has restricted the opportunities for further future control over the privatized enterprises.

The execution of privatization program may clash with the constitutional articles which restrict the transfer of state-owned enterprises to private sector. This is obviously prevalent in the countries of communist/socialist history prior to economic liberalization. These
articles should be amended before the commencement of any privatization operation as this may lead to legal obstacles which may ultimately eradicate the program.

Concerning the institutional framework of privatization, some governments have assigned the execution of the program to the administrative personnel of the enterprises to be privatized, while others preferred to delegate neutral committees for the supervision of the proceedings. The Sudanese government has adopted the latter choice to guarantee neutrality and transparency of action.

Some countries relied upon the existing public sector management legislations in administering the privatization programs, whereas others enacted detached legislations for the execution of the programs. The study has, however, recommended the use of the public sector management legislations if they clearly decide the right to take decisions with respect to the enterprise to be privatized. In the case of absence of legislation or ambiguity, the government has to enact detached legislation to organize and supervise the activities. According to the study results, the Sudanese government has succeeded in the enactment of a detached legislation to organize the process of the privatization.

Due to the typical big size of the infrastructure sectors, governments all over the world have adopted the “Unbundling” technique which means the division of the sector to be privatized into smaller segments so as to facilitate the contribution of the private sector by lowering the costs. On the other hand, it enables the government to control the sectors maintaining the ownership of the strategic segments in particular. The Sudanese government used this technique in many privatization operations.

Privatization activities usually lead to loss of employment. Therefore, in countries where social security nets are weak, or due to failure to secure the funds necessitated by the compensational procedure, the research recommends the method of “Generous Severance Payment”. This method has been adopted by many countries because it secures the financing required and evades the problems created by the delay of monthly payments of pensions. Use can be made of proceeds of privatization. Because of the practicability of this method, the World Bank has contributed to the financing of this method in many countries across the world. Due to some crisis between the Sudanese government and the international community, the Sudanese government has not benefited from these facilities.
خَصَصٌ

يتناول هذا البحث التجريبي العالمي عملية تحويل مؤسسات الدولة الاقتصادية للقطاع الخاص (Privatization) مع التركيز على الجوانب القانونية للعملية، ويقارن البحث بين التجارة السودانية والتجارة العالمية بهذا الصدد.

لعرض الترجمة العالمية قد لاجأ الباحث إلى عدد مقدر من المراجع القانونية العالمية المتعلقة بالخصخصة، كذلك فقد اطلع البحث على الكثير من منشورات البنك الدولي التي تتناول الخصخصة من النواحي القانونية والاقتصادية. لدراسة وتحليل التجارة السودانية، فقد اعتمد الباحث على المعلومات التي حول عليها من وزارة المالية والاقتصاد الوطني، وكذلك من دائرة الشؤون القانونية بالبنك المركزي. كذلك فقد وفر أعضاء اللجان العليا والفنية للتصرف في المرافق العالمية ووسائل الإعلام في مجلة الأهرامية للباحث وذلك بجميع التقارير السنوية لعمليات الخصخصة. وبعد كبير من عمليات الخصخصة منذ بداية تطبيق البرنامج في السودان في أوائل تسعينات القرن الماضي وحتى تاريخ أكمل البحث، كذلك فقد اعتمد البحث على الكثير من القياسات المباشرة مع إدارة المؤسسات التي تمت خصخصتها.

بالنظر إلى تجارب الدول فقد خلص البحث إلى أن وقبل الدخول في إنتاج برنامج الخصخصة للاستراتيجية للخصخصة، الخصخصة هي الخطوة الشاملة التي تحدد الأهداف الاقتصادية للبرنامج، وتحديد ما يجب إجباره من تشريعات قاسية قد تعيق نسب نحو البرنامج، وما يجب إصداره من تشريعات تيسر إنسجام البرنامج. على سبيل المثال فإن التشريعات التي تكلل أوضاع إحكامية للمؤسسات والمراد خصخصتها يصبح سريعاً أماماً، الأمر الذي يتبث تشكيل المنافسة، فإن إصدارها أو تعديلها يصبح أمرًا مهماً.

يرزز البحث أن مفهوم الخصخصة يشمّش ليشمل عددًا من الدراسات القانونية كالأيجر، وعقود الإدارة، ولا يقتصر على عقود التناقل الملكي فقط. وقد خلص البحث إلى أنه وبحلول من أن معظم الدول قد إنجازت للعقود غير الناقدة الملكية في خصخصة مؤسساتها، فقد ملت الحكومة السودانية إلى عقود البيع النهائي، مما يفدها أي نوع من السيطرة على تلك المؤسسات في المستقبل.

قد يستخدم إنتاج برنامج الخصخصة في دولة ما بعض مواد الدستور التي تمتنا صراحة ببعض المواد الملكية للدولي إلى القطاع الخاص، ويجدر به ذلك علية في الدول التي كانت شديدة أو إشرافية قبل تحرير إقتصاداتها. على ضوء الدراسات المقدمة التي تطلبها تعديل شيوخة أو إشرافية قبل تحرير إقتصاداتها. على ضوء الدراسات المقدمة التي تطلبها تعديل مواد الدستور قبل جود العمل في إعداد العقود القرية بين الدولة والمناسبات. في المؤسسات الخصخصة قد تنصف برنامج الخصخصة في كل. خلص البحث إلى أنه وبالرغم من أن الحكومات المعنية في السودان قد تبنوا أصوليات مختلفة، من ضمنها الإبديولوجية الأشترائية، فقد خلت الدستاور في السودان من المواد التي تحظر إنتاج مواد القطاع العام للقطاع الخاص.

وما يتعلق بالالتزام الموسيقي للخصخصة (Institutional Framework)، والذي يتولى تحديد سووليات ووجوه المشاركين في تنفيذ برنامج الخصخصة، فقد خلص البحث إلى أن بعض الدول قد احتضن أن تتيح إدراج المواد الخصخصة عمليات الخصخصة بنفسها، بينما رأى البعض الآخر أن تكون لجنة إقامة الإشراو على جميع عمليات الخصخصة. خلص البحث إلى أن الخيار الثاني هو الأوفق وذلك لدعم الهدايا والشفافية، وقد اتبعت الدولة في السودان الخيار الثاني بتشكيلها لجنة العليا للتصرف في المرافق العامة لتنويع الإشراف على كل عمليات الخصخصة. في البلاد.
اعتمدت بعض الدول في إفاذ برامج الخصخصة في إدارات مؤسسات القطاع العام، بينما اتجه البعض الآخر إلى إفاذ تشريعات منفصلة لتفاصل تلك البرامج.

خلص البحث إلى أنه يمكن الاعتماد على التشريعات المتعلقة بإدارات مؤسسات القطاع العام إذا كانت تحتوي على مواد واضحة فيما يتعلق بحق إصدار وإفاذ القرار بالتصفية في المؤسسة المستهدفة، أما في حالة غياب تلك المواد أو غوضها فأنه يتوجب على الدولة إصدار قانون منفصل تنظيم عمليات الخصخصة.

يرزق البحث أن الحكومة السودانية قد أصابت بإفاذ قانون منفصل لتنظيم عمليات الخصخصة (قانون التصرف في المراقب العامة لنفس سنة 1990).

بالنظر إلى الحجم الكبير لقطاعات البنية التحتية (Infrastructure Sectors) فقد أبرز البحث أن معظم الدول قد لجأت إلى تقسيم تلك القطاعات لأغراض (Unbundling) (Segments) يحمل الخصخصة، ويقصد بالتقسيم تقسيم المراد خصخصته لعدة أقسام وذلك على شكل تخصص ذو القطاع الخاص في تلك المرافق عبر تكبير المبلغ الكلي للقطاع المراد خصخصته. من ناحية أخرى فإن هذا التقسيم يمكن الدولة من التصرف في الأقسام غير الاستراتيجية والاحتفاظ بالأقسام الاستراتيجية تحت إدارتها أو ملكيتها.

وقد استعملت الحكومة السودانية هذا التقسيم لخصخصة بعض قطاعات البنية التحتية.

عامةً ما تسبب عمليات الخصخصة في تخفيض عدد العاملين في المؤسسات الخصخصة مما يؤدي لتفاقم مشاكل العاملين وخصوصاً في الدول التي تكون فيها شبكات الضمان الاجتماعي ضيقة تتأثر أو تعجز عن الإبقاء على حقوق العاملين المفصلون بالسرعة المطلوبة. خصص البحث إلى أن أحد أهم المعالجات التي اتبعتها الكثير من الدول الفواني السريعة والناجحة لحقوق العاملين المفصلون هي عملية الدفع السخي لإنهاء الخدمة (Generous Severance Payment) أو (وارد جنرال) بوجود هذه القيادة تسمى حقوق المفصل بأن يدفع له مبلغ كبير تساوي (مرتب ثلاثية إلى خمسة أعوام) ولمرة واحدة. عادة يتم تسويق تلك المعالجة من عائدات التصرف في المؤسسة التي كان يعمل بها. نسبة لمساواة تلك الطريقة فقد ساهم البنك الدولي في تمويل هذه العملية في كثير من الدول. في ظل ضعف شبكة الضمان الاجتماعي في السودان فقد خلق البحث إلى أن عدم استعمال تلك المعالجة، وبالتالي عدم الإستفادة من مساهمة البنك الدولي، قد أدى إلى تفاقم مشاكل العاملين المفصلين في كثير من المؤسسات المخصصة.


Introductory Chapter

Privatization has become one of the most important legal and economical subjects in most of countries of the world. The pioneer privatization program was launched in one of the free economies states (England). This program resulted in the famous dispute between the government and labour unions for many reasons. An important reason is that the privatized sectors were historically functioned by the public sector, such as coal mining. After the spread of privatization programs worldwide, wide opposition against privatization of public sectors has emerged. Opinions of opponents and devotees vary, of course, from one country to another and from one ideology to another. Devotees of privatization normally ignore the historical necessities for the intervention of the state in the economic life as producer and trader. On the other hand, opponents of privatization normally ignore the new changes in the international economy and ideologies. Therefore, in this introductory chapter we will discuss the different opinions of devotees and opponents, the historical background of privatization, and the different definitions of privatization. All these points will be discussed with concentration on the situation in Sudan. Lastly, the structure of this thesis will be demonstrated.

(i) Privatization: Devotees and Opponents:

Over the last three decades, an increased number of countries have embarked on programs to privatize their public enterprises, reserving the earlier strategy of public enterprises as the engine of economic development. Developing countries formerly created SOEs for many reasons: to balance or replace the weak investment of private sectors, produce higher investment ratios and extract a capital for investment in
the economy, transfer technology to strategic sectors, generate employment, and make goods available at lower costs. Although many SOEs have been productive and profitable, large number have been economically inefficient, incurring heavy financial losses, and absorbing disproportionate shares of domestic credit.¹

The reasons for the decline of the role of SOEs in countries’ activities vary from one country to another. One reason, however, stands out: SOEs have generally posted disappointed performance.² They managed to survive through tariff protection against competing investors, preferences in public procurement, exclusive rights, preferential access to credit (often by state-owned banks), government guarantees, tax exemptions, and public subsidies. They often serve political objectives or purposes; consequently, they suffer frequent intervention by politicians and bureaucrats. Almost everywhere, the burden of SOEs on state finances has become untenable.³

Several studies compared the performance of public and private enterprises, but the results vary. Some conclude that an enterprise’s efficiency is determined not so much by its public or private character as by the regularity structure and the degree of competition under which it operates. Others find that the private ownership in itself leads to great productivity.⁴

Many devotees of privatization concentrate their criticisms on the disadvantages of the intervention of government in the market as a trader on the ground that it resulted in:

² - Muir and Saba, Privatization in Developing Countries p.12, 1st ed., World Bank Publications, Washington DC.
⁴ - Our humble view, writers who consider privatization as the only solution for achieving great productivity regard less the good performance of SOE are either motivated by the current global wave of privatization or by ideological view points.
1- Absence of administrative monitoring and suitable sanctions, spread of corruption, and bureaucracy which wastes the time of the consumers.

2- Lack of quality levels in the services and production because of the absence of competition.

3- Absence of good performance-incentives because of non-accommodation between wages and life needs.

4- Political intervention in the management of SOE often leads to the ignorance of the known economic measurements.

5- Ignorance of the real demand of the market that the monopolistic position enables the governmental producers to impose their production without considering quality levels.

6- Ignorance of technological modernization and updating on the pretext of creating new jobs for humans.

7- Lack of capacity of the national economy to compete globally.  

Devotees, normally, build their evidences of privatization advantages on that:

1- Trend of privatization was initially launched as a result for the well documented poor performance and failure of SOEs. They also mention the development of economic efficiency after privatization in many countries.

2- Private sector usually exploits resources better than the public sector, and provides products and services at cheaper prices.

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3- Private sector employs efficient managers without political intervention.7

4- Private sector usually depends on advanced administration systems that help in reaching the economic objectives by the cheapest costs.8

5- Private sector uses precise monitoring systems; a thing which results in good performance.

6- Supervision in private sectors is exercised by their owners who are more keen than state’s officials.

7- Maximization of the role of the private sector in economic life avoids the state many sorts of subsidy and minimizes the heavy burden on the public budget.

8- Transformation of the public sector into private one provides a real opportunity for people to own SOEs.9 For example, after a decision issued by the British Government to privatize the company in April 1990, more than 350 bus drivers, managers and maintenance labourers in Chesterfield Public Company for Transportation took the decision to purchase the company. The price was 2.45 million pounds. Purchase operation was financed by paying %15 (215 thousand pounds) of the capital of the company from their personal savings. The rest, %85, was financed by the Employee Benefit Trust (EBT), by a loan from the Unity Trust Bank. This operation was considered one of the most successful operations for the transfer of the ownership of a public sector company to its labours and managers.10

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8 - Id p. 31.
9 - This is one of different methods of privatization of the governmental companies known as Employee Share Ownership Plans (ESOP). By this method, the employees of the company can own all or the majority of the company’s shares. Then, the employees (the new owners) are free to select the ideal methods to administrate the company.
9- Transfer of SOEs to private sector provides large sources of money for the state to finance developmental programs.

10- Under the New Global System liberty of trade transfer of capital and free movement of products between countries impose the idea of privatization.\textsuperscript{11}

On the other hand, opponents criticize privatization depending on many evidences. For example, they claim that:

1- Lack of the historical experience of the private sector, especially in the developing countries, is the basic cause for the state to build monopolies.\textsuperscript{12}

2- In the strategic investment fields like military industries and petroleum production, involvement of private sector constitutes a stark breach of the sovereignty of the state, especially if the investor is a foreigner.\textsuperscript{13}

3- The state has an essential role to administrate, control, and own all public utilities. Also, it has a separate character and its properties, by their nature, are public monopolies.

4- Academia, politicians, and media have recently attacked privatization, voicing concerns about its records, the sources of the gains, and its impact on social welfare and on the poor.\textsuperscript{14}


\textsuperscript{12} - Shokri Rajab Elashmawi, Privatization; Employees’ Share Ownership Plans, Concepts-International and Arabic Experiences p. 81, 1\textsuperscript{st} ed. 2007,University Home Press, Cairo.

\textsuperscript{13} - This can be argued by that the state can impose the Golden Share in any privatization operation. The Golden Share enables the government to remain its control over the privatized enterprise, attend the general meetings, vote, and appoint representatives in the board of directors. By this share the state is entitled, in some events, to refuse any decision. Abstractly, the Golden Share is the eye of the state in the privatized company or enterprise.

\textsuperscript{14} - Alberto Chong and Florencio Lopez (Ch), Privatization in Latin America; Myths and Reality p. 1, 1\textsuperscript{st} ed. 2005, Stanford University Press.
5- The negative reaction of privatization has reflected in opinion polls and in some governments’ reluctance to further their privatization programs.\(^{15}\)

In Sudan, in the absence of published opinions of experts (devotees or opponents), the followings are the justifications of the government for the current privatization program:\(^{16}\)

1- Lack in productivity of state-owned enterprises (SOEs).
2- Non-accommodation of productivity with real costs of production.
3- Lack of public administration systems.
4- Lack of foreign finance sources.
5- Contradiction between public sector regulations which weakens the role of the Ministry of Finance in supervising and monitoring the public wealth.\(^{17}\)
6- Weak performance of managers of SOEs.
7- Weakness of public sector contribution in supporting public treasury (the contribution of public sector is only \(\%3\) from the public income).
8- The continual deficit in repaying the foreign loans of SOEs.
9- The constant deficit of SOEs budgets reached the limit of non-fulfilling their normal obligations like wages, instalments of pensions and insurance, and taxations.

(ii) Historical Background:

The current wave of privatization in Sudan and in many countries followed the earlier period of nationalizations. Nationalizations and intervention of governments in trade and services almost touched every

\(^{15}\) Shokri Rajab Elashmawi supra 12, p.82.

\(^{16}\) Sources: the Annual Reports of the Technical Committee for Disposition of Public Enterprises (TCDPE).

\(^{17}\) Our humble opinion; this justification does not reflect good reason for privatization as it reflects the lack of the ministry of finance to spread its supervision on the public money.
area of economic activity in the majority of countries. (United States is among the few countries that were not affected by this trend).  

(1) Spread of SOEs, Nationalizations and Public Sector:

A state-owned enterprise is: (a) a government owned productive organization that (b) is expected to earn a significant portion of its revenue from the sale of the goods or services it produces, (c) possesses an accounting system separate from any government agency that controls or supervises it, and (d) a distinct legal entity.

There were many elements that helped in the spread of SOEs and governmental monopolies in different eras. The past era of the European colonization in, almost, all Africa and great part of Asia and Latin America assisted such spread. The new European governance found that the financial capacity of the citizens of these countries is weak and their experience is poor; they cannot contribute in the development of their countries. Therefore, the colonization facilitated the establishment of SOEs and contribution of foreign capital. Thereafter, independence movement in Asia, later in Africa, fostered growing nationalizations by the new national governments as new states required to regain control of their productive assets from the foreign enterprises. In the 1960s and 1970s, on the tomorrow of their independence most African countries, including many of the socialist or Marxist-Leninist (such as Angola, Benin, Congo and Tanzania), undertook large nationalization programs.

In Central and Eastern Europe, nationalizations were imposed under the Soviet influence through and after the Second World War. During the same period many Latin American countries decided to base

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18 - Pierre Guislain, supra 3 p.3
20 - Pierre Guislain, Supra3 p.6
their development strategy in state-owned enterprises. In Argentina, for example, the government nationalized the telephone company in 1946, and about the same time acquired six railway companies owned by British, French and Argentinean investors.\textsuperscript{21}

The Second World War also contributed in the spread of great wave towards nationalization, even in Western Europe, to reform many economies destroyed by the war. For example, in France, during and after the war; nationalizations took place in practically every area of the French economy. Armaments, aviation, railways, coal mining, air transport, electricity, gas, banks and insurance companies were nationalized.\textsuperscript{22}

In Egypt, July Revolution took the power in 1952. In 1956, a decision to nationalize As-Sways Channel Company was issued by the Revolution Command Council.\textsuperscript{23} A few years later, the revolution strictly adopted the socialist ideology; therefore, large movement towards nationalization began in 1961 when the government enacted the law No. 117.\textsuperscript{24} The first section of this law provided for the nationalization of some private companies. Also, the same section provided for nationalization of all banks and insurance companies and other companies mentioned in the schedule of the law; thereafter, the state enacted many other laws to add vast number of private companies to the schedule of this law. By Law No. 72-1963, all the private companies and big private enterprises were nationalized (more than 200 companies and

\textsuperscript{21} Id p.6
\textsuperscript{22} - These nationalizations were applied according to many laws such as 4\textsuperscript{th} August Law, which contained list of enterprises for privatization. Such law determined the methods of compensations of the former owners of these enterprises. This law provided that the compensations will be paid as installments. Another law was; December 2\textsuperscript{nd} 1945 (Nationalization of Bank of France). A third, was May 17\textsuperscript{th} Law to nationalize the coal mining.
\textsuperscript{23} - This nationalization immediately resulted in the Triqual Assault by France, Britain and Israel against Egypt.
\textsuperscript{24} - This law provided that: the nationalized company may remain as its shape before the nationalization as a company with shares. The new difference is that company’s shares will be transferred to the state property.
enterprises). The Law No: 32- 1966 organized the future shapes of the nationalized companies; it provided that any nationalized enterprise may establish a company limited by shares regardless that it was not a company at the time of its nationalization.

Results of nationalization in Egypt have been much debated by lawyers and economists. The results vary, of course, from one writer to another according to his political or ideological background. Leftists, socialists, communists and some neutralists are still now supporting the past nationalizations depending on different evidence. They appreciate the good economic position of the Egyptian citizen at the era of nationalizations. They are considering the subsidy presented by the state to the poor peoples. On the other hand they ignore the recent global changes in trade, technology, and ideologies.

Opponents for the former nationalizations in Egypt are still now mentioning that the former nationalizations were imposed and practised just from the ideological view points of socialist extremists. They claim that nationalizations were prejudicially imposed without respecting the rights of the original owners. They also criticized the performance of the nationalized enterprises with comparison to their performance before the nationalization. They ignore the political and economic circumstances wherein such private enterprises, properties, and companies were nationalized.

(2) Spread of Public Sector and Nationalization in Sudan:

In Sudan, there were two elements that constituted the themes of the current wave of privatization. One is the big number of SOEs which were

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26. - S. 10 of the 1966 law in Egypt. The advantageous development in this law appeared from that the former law of 1961 provided that any nationalized enterprise shall remain as its shape before nationalization.
established through the different eras of the governance. Another is the big number of private enterprises, companies, and properties which were nationalized in 1970-73 at the beginnings of May Revolution.

(a) Spread of State-Owned Enterprises:

Sudanese governments, since the colonization era, have adopted the idea of establishing productive public sector units like Jazeera Agricultural Scheme (established by a special Act in 1927), which became one of the pillars of Sudanese economy. The success of ‘Jazeera’ Scheme encouraged Sudanese governments to establish other productive units to achieve additive value to the national income. Creation of jobs was also an important goal for establishing governmental productive units. Sugar factories, tanneries, transportation corporations and many other types of SOEs were established. They contributed actively in the national income by a proportion reached %50 from the national income sometimes.27

A good example for public economic units in the banking sector in Sudan is the Real Estate Bank which was established in 1966 by the ‘Real Estate Bank Act 1966’. The bank was established to exercise many social and economic activities like giving a loan for any Sudanese person owning a land (by lease or free holding) to build new buildings or to rehabilitate old buildings on such a land. Another objective of the bank is to finance researches and studies to reduce building costs for peoples of limited incomes, and to use the local materials in the buildings whenever it is possible.28

Another example in banking public sector is the Sudanese Saving Bank. This bank was established under the Sudanese Saving Bank Act

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28 - S. 15 (d), Real Estate Bank Act 1966.
1974. The main features of the bank and its activities are shown in some sections of the Act, for example: (a) The bank shall be a body corporate with perpetual succession and common seal. It may enter into contracts and may sue and be sued under its own name.\textsuperscript{29}(b) The headquarter shall be in Wad-Madani, and the bank may establish branches or agencies in such places as it deems necessary for the achievement of business.\textsuperscript{30}(c) Objectives of the bank are to develop thrift consciousness, encourage savings, and collect and invest savings in fields of economic and social development. At its beginnings and a few years later, the bank did well to achieve its objectives. Recently, the bank is exercising ordinary banking activities regardless the social and developmental objectives for which the bank was established.

The River Transportation Corporation was established in 1973 by specific Act. Such type of services was not easy to be exercised by the private sector at that time. The main objective of this corporation is to achieve and develop efficient system for transporting passengers, baggage, goods, post and animals by river transportation on good technical and economic bases.\textsuperscript{31}

In July 1975 Sudan Airlines Act was enacted. Some features of the Act are the followings: (a) the corporation is a body corporate with perpetual succession and seal. It can sue or be sued under its own name and its headquarter shall be in Khartoum.\textsuperscript{32}(b) Objectives of the corporation are to achieve and develop an efficient system for air transportation, and to transport passengers, baggage, goods and post on good commercial and technical bases.\textsuperscript{33}

\textsuperscript{29} - S. 3 (1) of the Sudanese Saving Bank Act 1974.
\textsuperscript{30} - S. 3 (2) of the Sudanese Saving Bank Act 1974.
\textsuperscript{31} - S. 7(1) a, b, c, River Transportation Corporation Act 1973.
\textsuperscript{32} - S. 4 (1) of the Sudan Airlines Corporation Act 1975.
\textsuperscript{33} - S. 6 (1) a, b, c, d, e, f and g of Sudan Airlines Corporation Act 1975.
In Sudan the list of state-owned enterprises includes many activities which are not suitable to be owned by the state. The list included hotels\textsuperscript{34} and retailing shops for consumer goods and clothes.\textsuperscript{35} State ownership of intensive capital industries\textsuperscript{36} may be suitable in a country like Sudan. For example, military industries enterprises are suitable to be owned and traded by the state in Sudan, since it may be categorized as intensive capital productions and, at the same time, strategic ones.

Finally, we will mention some of the important productive units which were owned by the state until the beginnings of the current wave of privatization in Sudan:

- Atbara Cement Factory was established in 1947 as a private company under the name of Atbara Portland Cement Factory; thereafter, the government nationalized the factory in 1970.\textsuperscript{37}

- Public Corporation for Printing and Publication (The Governmental Press): established in 1924 under name of Macore Kodale. Later, the owner involved in partnership with Sudan Government in 1954.\textsuperscript{38}

- Mechanical Transport Utility was established in 1942. Its main objective was to repair governmental cars and army tanks.\textsuperscript{39}

(b) Nationalization:

As we have previously mentioned May Regime at its beginnings adopted socialism as an economic ideology. Also there was a marked tendency in the Command Council of May Revolution to create a strong relation between the socialism and Arab-nationalism. The two ideologies

\textsuperscript{34} - Like Sudan Hotel, Grand Hotel and Friendship Palace Hotel.
\textsuperscript{35} - Like Aljazeera Company for Trading and Services.
\textsuperscript{36} - Such as Atbara Cement Factory, Rabak Cement Factory and all the Sugar Factories.
\textsuperscript{37} - (TCDPE) Annual Report 2005 p.25.
\textsuperscript{38} - (TCDPE) Annual Report 2005 p.32.
\textsuperscript{39} - (TCDPE) Annual Report 2005 p. 33.
motivated the regime to nationalize private companies and properties with clear imitation of the methods in which the nationalizations in Egypt were exercised. The nationalized Companies, banks and other properties constituted a good subject for the current privatization operations.

In 25-5-1970, The Banks Nationalization Law was enacted. The introduction reads:

‘This Act may be cited as the; Banks Nationalization Act- 1970 and shall come into force on the date of the signature of the Command Council of the Revolution”

S.1 of the Act reads:

S.1/ ‘1- as on the date of the commencement of this Act, the banks specified hereunder situated in The Democratic Republic of Sudan shall be nationalized, their ownership shall vest in the State and shall have their names altered as mentioned against each of them

(a) Barclays Bank D.O.O. it shall be called ‘The State Bank for Foreign Trade’.
(b) National and Grindlays Bank, it shall be called ‘Omdurman National Bank’.
(c) Commercial Bank of Ethiopia, it shall be called ‘Juba Commercial Bank’
(d) Arab Bank, it shall be called ‘Red Sea Commercial Bank’.
(e) Bank Misr, it shall be called ‘Peoples Co-Operative Bank’.
(f) Elnilein Bank, it shall bear the same name.
(g) Sudan Commercial Bank, it shall bear the same name.’

’S.1/2- All nationalized banks shall continue to function with the provision of this Act, and this Act shall be deemed to have amended any other law to the extent of the inconsistency between this Act and the provisions of such other law.’

S.3 of the same Act provided for the transforming of the nationalized banks into share capital companies. It reads:

‘S.3-1: All banks nationalized under the provisions of this Act shall be converted into share companies. The board of directors of the Bank of Sudan shall by a decision make their memoranda of association and all their shares shall be owned by the Bank of Sudan.’
S.3-2: *the Bank of Sudan shall be deemed a competent Administrative authority to control and supervise the nationalized Banks. The board of directors of the Bank of Sudan shall exercise the powers of the general meeting as regards these banks.*

Then, the Act appointed committees for fixing the net-values of the nationalized banks. S.4 reads:

*S.4-1: the net value due to nationalized banks shall be fixed by committees constituted of three members each. The President of the Revolutionary Command shall constitute such committees and determine their duties by a decision made by him.*

*S.4-2: Every committee shall make its decisions within a period not exceeding six months from the date of its constitution, and shall communicate such decisions to the interested party.*

*S.4-3: The interested may appeal against the decision of the Committee within one month of the receipt of such decision to the authority appointed by the President of the Revolutionary Command Council. The competent authority shall give its decision in the appeal within three months from the date of appeal and its decision shall be final.*

The Nationalization Act put severe sections about the compensations of the former owners of the nationalized banks (long period of compensation payment mentioned in s.4 of the Act). After the abandon of socialism, the regime faced great pressure from the former owners of the nationalized banks and their states. Therefore, some features of reasonable compensations appeared. An amendment was issued in 1973. Such amendment provided that: The state may, if the public interest so requires, make an agreement to pay compensations to the former owners in a shorter time than it was provided in 1970\textsuperscript{th} Act.\footnote{S. 2 of the Banks Nationalization Act as amended in 1973.}

In 1970 the Companies Nationalization Act was enacted. S.2 (1) of such Act reads:
'As from the date of the coming into force of this Act, the companies specified hereunder and situated in the Democratic Republic of Sudan shall be nationalized, their ownership shall vest in the state and their names shall be altered as stated against each one of them:-

(a) The Gellately Hankey and Co. (Sudan) group of Companies shall be called ‘May Commercial Corporation for Workers
(b) Imperial chemical Industries (Sudan) ltd shall be called: ‘The National Chemical Company.
(c)The Sudan Mercantile Group of Companies and Mitchell Cotts Group of Companies: and the two groups shall be merged in the State Corporation for Foreign Trade.’

The above companies were nationalized on 25/5/1970, and then followed by long list of other companies in July of the same year. For example, Sudan Portland for Cement, Blue Nile for Packing ltd., Bata (Sudan), Sifrian and Co., Trading Cotton Co., Port Sudan Co. for Trading and Cottons, and Red Sea Shipping Co.41

From the interpretation of the Companies Nationalization Act 1970 it appears that the motives or purposes of nationalization were of ideological nature. The introduction of the interpretation stated:

‘The foreign companies played a very dangerous role in the economic life of the state; they are devices for the colonization to assist the foreign interference in our economic and political life. The role of these companies extended to help the enemies of Sudan to destroy the social and economical life of Sudanese peoples. Therefore, for all these reasons, the state does not find any way to resist these activities, except by taking the decision to nationalize these groups of companies and vest their property on the state.’

41 - The list included: the National Company for Currency Machineries, Automobile Co. ltd., the Foreign Part of the Tractors Company, Gattan Trading Co., Sayers & Cooley Co., National Co. for Trade and Cotton, Khartoum Co. for Cotton, Ray Ivan and Co.ltd., The list is very long, and the methods of nationalization were varied from direct nationalization to nationalization and a amalgamation after nationalization with other nationalized companies. Abstractly, all the big companies were nationalized, especially those of foreign owners or participants.
Again, some features of mitigating the severe nationalizations wave appeared in the few years following the abandon of socialism. Rational and equitable compensations for the former owners of the nationalized companies were decided by President Numairi. It is to be noted that the reluctance from the severe nationalizations had not been exercised by reversing the ownership to the former owners; but by paying better compensations. These compensations were granted only to the owners of Sudanese origins. Owners of foreign origins were not compensated despite the fact that most of them were holding the Sudanese nationality, a thing which constituted prejudicial discriminative treatment between citizens of one nationality.\footnote{Such as Sifrian, Sirkees Azmirilian, and many others who were borne in the Sudan and contributed actively in vesting modern methods of trade in Sudan. They established agencies, factories, shipping companies and exporting businesses. It seems that May Regime treated the nationalized persons according to their origins, colours, or otherwise.\label{fn:42}}

For example, the Republican Decision No.34 1976 in s. (1), about the compensation for Kikos Johoaneadis (Elgadarif Crops Sieves Co.), stated that Mr. Ahmed Abdullah Salih and Mr. Salih Babikir (former shareholders in the nationalized company) shall be compensated well and equitably for their shares on the basis of their real value at the time of issuing this decision. In the same decision, s. (3) provided that the compensation for shares of Mr. Kikos Johoaneadis (a shareholder in the same company) shall remain as they were estimated in 1970.\footnote{A same bad treatment was excersised in the Republican Decision for the compensation of Murad Sons Co. ltd.\label{fn:43}}

Few years later, as a result for the nationalizations, the regime failed to attract foreign investors, a thing which resulted in a great inflation of Sudanese currency. It is a common notion that ‘capital is coward’. A country practicing nationalization should not anticipate foreign investment to come into its boundaries.
(3) Movement Towards Privatization:

Government initiatives in the area of privatization of SOEs and assets have increased substantially in the last three decades. Many governments have effectively privatized SOEs. An even larger number have announced privatization programs but are only at the earliest stages of implementing them in any substantial way. In at least 100 countries across all the continents, privatization is an inherent part of efforts to rationalize the SOEs as a whole.44

Europe:

In Western Europe, the pioneer experience of privatization was launched in the United Kingdom by one of the greatest Prime ministers, Mrs. Margret Thatcher. In 1979, Mrs. Thatcher took a decision to privatize a number of the most important sectors. The greatest one is the coal mining sector. After the issuance of the decision, Mrs. Thatcher was involved in the famous dispute with the labourers’ unions that the activities of such sector had, and for many centuries, been operated as a state monopoly. Lastly, Mrs. Thatcher beat labourers unions and imposed further privatizations in other activities and services such as gas, electricity and airlines. For this reason Mrs. Thatcher has been nicknamed the “Iron Woman”.

In Germany, after the re-union with the former East Germany in 1990, the Germany’s Privatization Agency (Treuhand) was established. In a few years the Treuhand succeeded to privatize more than 8.000 of former East Germany’s SOEs, and was hoping to assist other governments’ privatization programs on a consulting basis.45 If we noted that the former East Germany was one of the strongest communist regimes, it will be fair to look to the performance of the Treuhand as a

44 - Pierre Guislain, supra 3, p.6.
successful one. The mission of the Treuhand was not to privatize the SOEs only in West Germany, but to privatize SOEs in all Germany after the union. It was required to treat with two different types of SOEs. The first are the SOEs of the former West Germany. SOEs in West Germany, before the union, were working in a liberal state, where the rule of the law is well respected and both government and labourers knew their rights and duties without false slogans. The second are the SOEs of the former East Germany, where the voice of labourers was very high, and their domination over SOEs was very strong.

In France, despite the fact that the legislature did not enact any Act for privatization until 1986 (the date of the first Privatization Act), the necessaries of the business sectors and the economic activities compelled the government to undertake some sorts of combinations with the private sector in some governmental economical units. Moreover, the government transferred some of the assets of these units to the private sector. Despite the fact that the government was keen to make good mechanisms for monitoring the combined units, these mechanisms did not depend on any legal bases. There was no Act or section in the constitutional law covering the intervention of the private sector in the governmental economic units. The labourers’ unions, therefore, sued the French Government on that the transfers of governmental assets were not constitutionally correct.

One of the most important suits was made by the labourers’ unions against the governmental company (Remix) in 1986 (before the issuance of the Privatization Act). The company undertook the administration of

46 - Nationalization Laws: April 1939, 1953 and 1957 impose very complicated procedures and parliament approvals for permissions to the private sector to contribute in any governmental productive units. The government, with regard to international economical changes, found that it is very important to contribute the private sector in many different governmental productive units.

Renault Factories for Cars Manufacturing. Remix made a contract whereby the factories’ administration is transferred to a private company (C.G.T). The labourers’ unions considered this a revocation of the former nationalizations laws “mask privatization” without legislative or constitutional authority. But, on 17th of July 1987, the problem was solved by the issuance of the Savings Act. One of the provisions of this Act considered all the transfers of the governmental units’ assets which were practised before the issuance of such law valid whenever the transfer is exercised under pressure of urgency. By this Act, all former privatization operations (before 1986) found their legality.

In countries which formerly followed the former Soviet Union in their economies, Hungary and the Czech Republic were the leaders in the Central and Eastern Europe. Until 1992, Hungary had the best privatization track record in Central and Eastern Europe after the East Germany. The Czech Republic became a serious contender with its mass privatization of 1200 SOEs in 1992, followed by 1200 privatizations in 1993. Mass privatization enabled the Czechs to speed up the privatization process by making SOEs responsible for preparing their own privatizing plans and by selling tradable low-cost vouchers to citizens who then exchange them for shares in privatized companies.

Poland was the first European country that liberated its political and economic system from the domination of the former Soviet Union. Paradoxically enough, the labourers’ unions, who are presumed to defend the public sector, were the leaders of this entire change before the collapse of the Soviet Union in 1989. Poland was the cradle of the mass

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48 - Mask Privatization is expression used for all privatization operations which were exercised before the issuance of the Privatization Act 1986; it was commonly used by the media and opponents of the privatization in France.
51 - Id p.69.
privatization concept, but a political controversy prevented a mass privatization scheme from being enacted into a law until mid-1993. But after 1993 a mass privatization scheme was executed by issuing the Privatization Law of 1993.\textsuperscript{52}

In the rest of the countries which adopted the former Soviet Union, the pace of privatization has been slower. The continuing civil war in what used to be Yugoslavia had put damper on privatization efforts, with limited exception of Slovenia. The distressed state of the Romania and Bulgaria combined with political instability, prevented privatization from really getting off the ground. However, the access to the European Union will compel many countries to revise their economical programs to fulfil the Union requirements. Any country formerly adopted the Soviet Union without basic reforming, will find huge a number of difficulties for handling with the Union countries.\textsuperscript{53}

Privatization operations in what was formerly the Soviet Union, in Russia, began immediately after the collapse of the Union. The figures show that most shops, restaurants, and small businesses passed into private hands. By the end of 1993, the mass privatization began in Russia and assisted by a permission to hundreds of foreign companies, including the American companies, to involve in the Russian economy. The number of privatized enterprises progressed to amount 1000 by the end of 1993.\textsuperscript{54}

\textsuperscript{52} Id p.71.
\textsuperscript{53} There is a big competition to implementation. Such implementation requires reforming of many fields and in the candidate country. For example, Turkey is struggling for many years to implement, The number of the requirements directed Turkey, many times, to accept different conditions despite its peoples’ pressure.
**Latin America:**

In Latin America, Chile and Mexico have become the leaders. Chile’s program which essentially falls into two phases began during the mid-1970s. From 1974 to 1978, the country’s military-led government privatized 207 companies which yielded $1.2 billion in revenues for the government. The government relied on three privatization methods during this phase, that is, liquidation, direct sales, and auctions. Then, after the military governance, the democratic government found the road open to embark on mass privatization program.\(^55\) The former military government prepared and executed, to some extent, the legislations for the later democratic ones.\(^56\)

At its beginnings, Argentina’s privatization program had succeeded in privatizing only 5 percent of its SOEs, worth $1.5 billion until 1991. But, in 1992 alone the government sold its stake in Telecom Argentina for $1.2 billion, the electric utility SEGBA for $1.05 billion, and Gas del Stado for over $3 billion. Other sales in 1992 included various oil, highway and railways concessions, television channels, and many other monopolistic activities. These sales and concessions saved the country from inevitable economic disasters caused by the great mistakes of the former governmental planners.\(^57\)

**Asia:**

Through 1991, Asia has relatively small number of privatizations (2 percent of the total). Those Asian countries with the largest public sector, that is China, India, Vietnam and North Korea have not begun large-scale privatizations programs. But, in the few recent years, China has

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\(^56\) - It is a common concept that the nationalizations and monopolies of economic activities are initially related to practice of military and dictator governance, it seems the Chilean case is a unique one.

\(^57\) - Sunita Kikeri, John Nellis and Mary Shirely, supra 1.
launched a big security market, and a number of Chinese SOEs have begun to raise capital by selling shares to domestic and foreign investors. Also, Vietnam recently hired an advisor to work in designing for the privatization of its SOEs. Elsewhere in Asia, the newly industrialized countries such as South Korea, Hong Kong, Taiwan, Malaysia; have seen a little privatization activity for the simple reason that they do not have a big number of SOEs.58

Africa:

African countries have begun to think seriously about the future of their weak economies with regard to the new international competitive market. Despite the fact that the movement towards privatization in most of African, Asian, Latin American and even European countries began in the last three decades, the first sign for privatization was alarmed from African country that is Cameroon in 1965, after few months of the Cameroon’s independence. The feature of the privatization was enshrined in a 1965 speech by Ahmadou Ahidjo, the President of Cameroon.59

Nowadays, the African countries, commonly, move to tackle budget deficits and stimulate economic activity. They are looking at privatization as a tool for economic growth. They are supported by development banks like the World Bank and the African Development Bank, which have made privatization a vital component of their economic reform package in Africa. According to the World Bank, there were nearly 3000 SOEs in thirty countries of Sub-Saharan Africa by mid 1980s. Of these, 337 were privatized through 1991(immediately after the collapse of the Soviet Union), which represented 17 percent of the world

wide total. Guinea was reportedly the leader with over than 60 privatization operation in mid 1980s. Nigeria which has one of the largest economies in Africa, came in second, with about 50 privatizations through 1991. In a move to increase self sufficiency, the Nigerian government, in 1990, cut subsidies to public enterprises by %50. Cote d’ Ivories has also been actively privatizing its SOEs and has used a somewhat unconventional means of targeting potential enterprises for privatization. Rather than designate candidates for sale, the government has indicated that it is willing to consider offers for any enterprise deemed an attractive investment by private companies. Using this method, the government has spared itself nearly 30 enterprises, most of which are industrial or agro-industrial concerns.

In Egypt, the idea of privatization began in 1973, three years after the death of President Jamal Abd-Alnassir. At the beginnings of Al-Sadat era (1970-81), the government decided that there must be some sort of equilibrium between the public and private sectors in driving the national economy. Also, the government decided that there must be a creation of competitive climate between the two sectors, and there must be some way of opening the economy as a whole. Opening the Egyptian economy became a declared policy in 1974 after the issuance of the Law No.43-1974. Such Act contained a number of sections encouraging the private sector to participate powerfully in the Egyptian economy. It included tax exemptions and reduction of customs for the sake of the private sector. The most important feature of this Act is that it permits capitals movement into/out the state. Then, in 1989 in the era of President Mubarak, the Investment Act of 1989 was enacted. This Act provided

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61 - Id p.10.
62 - This policy recognized as “Opened Economy”, it facilitated the road to the next Egyptian President, Hosni Mubarak, to execute mass-privatization operations.
for the rules of the investment in desert lands, industry, and tourism. The main guide to privatization was the Public Sector Companies Act 1991 which provides for listing the shares of a big number of the public companies in the stock exchange. This Act frankly targeted to transform the governmental companies into private ones and to minimize the role of the public sector in the economic activities as a trader.63

(4) Movement towards Privatization in Sudan:

In the beginnings of the National Salvation Revolution, the regime found huge difficulties to control the national economy because of the sanctions which were imposed by the western world on Sudan as a result of the extreme slogans which were declared by the regime. At that time, Sudan largely depended on many subsidies and loans given by many foreign banks and funds; the only way for the government to solve the financial crisis was to declare the liberalization of the economy so as to provide big financial resources to the public treasury. Three methods were adopted to provide financial sources. The first way was to open the door widely for imports to provide big amounts from taxations and custom. The second was to attract foreign investors to invest in Sudan to benefit from the hard currency brought by them. The third was to privatize the SOEs to avoid the state the permanent losses and liabilities of employees. The element which assisted privatization of SOEs in Sudan was that Sudanese SOEs presented disappointing performance. Most of them were a burden than a help.

The Disposition of Public Enterprises Act was enacted in 1990. This Act determined the Higher Committee for Disposition of Public Enterprises (HCDPE) to specify the candidate enterprises for

63 - Ahmed Mohriz, supra 25 pp. 105-12.
privatization according to clear measurements mentioned in the law,\textsuperscript{64} and to conclude privatization contracts on behalf of the state.\textsuperscript{65} HCDPE is authorized to windup any SOE whenever it thinks winding up is the only solution for such SOE.\textsuperscript{66} HCDPE is also authorized to terminate the service of labours.

The Disposition of Public Enterprises Act 1990 also provides for the Technical Committee for Disposition of Public Enterprises (TCDPE). The missions of this committee are: to undertake all technical work such as preparing advertising papers (brochures) of candidate SOEs, and determination of technical, financial, and administrative systems of the candidate SOEs in the preparations period.\textsuperscript{67}

The two committees executed many privatization operations; some of them were important and strategic whilst some were less important. The two committees have exercised their missions under many criticisms of the media, former employees, and the public opinion.

\textbf{(iii) Definition of Privatization:}

The majority of privatization writers stated that privatization is not a goal as it is a set of strategies for achieving certain objectives. In the absence of a strictly legal meaning, the World Bank writers have differently defined the word ‘privatization’.

One definition of privatization is:

\textit{“Privatization is the general process of involving the private sector in the ownership or operation of state-owned enterprises. Thus, the term refers to the private purchases of all or part of a public company; and also covers contracting out...”}

\textsuperscript{64} S. 4 (b) of the Disposition of Public Enterprises Act 1990
\textsuperscript{65} S. 4 (c) of the same Act.
\textsuperscript{66} S. 4(e) of the same Act.
\textsuperscript{67} S. 6 from (a) to (l) of the same Act.
and the privatization of management through management contracts, leases or franchise arrangements.  

Another one is:

‘Privatization is an element of broader economic policy comprising the deregulation and liberalization with the emphasis generally as such on improving the efficiency of retained SOEs as on efforts to divest. Even, when government intends to continue state-ownership, various measures can still be implemented to improve efficiency and reduce costs.’

A third definition reads:

‘Privatization means more than the sale or ailing public companies at fire sale prices. Privatization can be defined broadly as the transfer or sale of any asset, organization, function or activity from public to private sector. As such, in addition to the sale of publicly owned asset, the term also applies to join public-private ventures, concessions, leases, management contracts, as well as to some instruments such as Build-Own-Operate and Transfer (BOOT), or Build-Own and Transfer (BOT).’

A fourth definition gives four meanings for privatization:

1- Privatization means the widening of private property and granting an increasing role for the private sector in the national economy.

2- It means an instrument to dispose of the loosed state owned enterprises, and transfers these SOEs to the private sector. This conception is adopted in Britain and Australia and the two countries are the pioneer in the privatization field.

3- It means the divestiture of the Socialist Economy, because it is an ideological and economic philosophy that began to decline all over the world.

4- It means the opposite word for the word ‘nationalization’. If the word ‘nationalization’ means the transfer of the private property to public one, then the word ‘privatization should’ have the opposite meaning. The evidence for this is that

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70 - Pierre Guislain, supra 3 pp. 10-11.
the companies which were formerly nationalized are the same companies which are recently privatized.\footnote{Ahmed Maher, supra 7 pp. 24-27. Our humble view, like these definitions are essentially written by writers from countries suffered for a long period from the intervention of the state in the economical life namely, the former socialist or communist countries. In these countries the socialism and communism presented bad performance; a thing which resulted in very strong reaction. On the other countries which haven’t suffered the directed or communism or socialism economies, the estimation of privatization seems to be objective and neutral.}

A good definition for privatization, depending on the size of the privatization operation has been presented by Pierre Guislain. This definition ranked the privatization operation into three levels:\footnote{Pierre Guislain, supra 3. p. 10.}

1- At the first level it refers to the privatization of public enterprise, whether through divestiture. In a narrow sense, privatization implies permanent transfer of control whether as a consequence of transfer of ownership right from a public agency to one or more private parties or, for example, of a capital increase to which the public-sector shareholder has waived its right to subscribe.

A broadest definition of enterprise-level privatization includes any measure that results in temporary transfer of the private sector or activities exercised until then by a public agency. Such definition also covers subcontracting, management contracts, lease of state-owned enterprises and concessions.

2- At another level is privatization of a sector. Sector’s privatization holds a broadest definition than of enterprises in the techniques and legal methods of privatization.

3- At a third level, the word privatization can have an even connotation, to include the privatization not just of enterprises and sectors but of an entire economy. The degree of privatization of a given economy will depend on the state’s prior ownership, the and control and the scope of the reform program undertaken.

Our humble view, the word “privatization” simply means: the whole or partial transfer of governmental ownership, property, or missions to private body, whether for consideration or not, temporarily or permanently.
1- Privatization strategy is a comprehensive plan which forms the integral parts of the privatization operations legally and economically. The most important element in the privatization strategy is the determination of objectives of the privatization program. Clear objectives are determinants in specifying the legal preparative steps like the break-up of legal monopolies and winding up the candidate enterprises to be privatized. Clear privatization objectives are also determinants in specifying the suitable method of privatization like auctions, tenders, management contracts, and direct sales contracts. Therefore, chapter 2 will be devoted to analyze the legal aspects of privatization strategy.

2- Despite the common notion that privatization is a sale (divestiture) of the public enterprises to private entities, a number of formulas of privatization contracts explain that privatization can be executed without transfer of public ownership of enterprise. Types of privatization contracts will be the subject of Chapter 3.

3- Constitutions of some countries, especially the former socialist and Marxist-Leninists ones, may stand as barriers on the road towards privatization. Some constitutions expressly provide for the prohibition of transfer of public ownership to private parts, others put complicated procedures for the transfer. Therefore, Articles of these constitutions should be amended or circumvented to achieve smooth application of privatization program. Also treaties, conventions, and bilateral agreement to which a country is a party may foster or delay the application of the privatization program. Effects of constitutions and the international law will be the subject of Chapter 4.

4- Competition is likely to be a more important determinant of economic performance than ownership. Therefore, transfer of state-owned enterprises to private ownership without application of the rules of
fair competition results in the same problems that formerly compelled states to privatize their state-owned enterprises. Fair competition legislations are required, but the strict application of these legislations in a country remains the main challenge for execution of good privatization program. Chapter 5 will discuss the affection of the competition on privatization.

5- Public sector management legislations in a country may be sufficient to achieve successful application of privatization program. In the advanced countries, public sector management legislations specify the methods of the transfer of the public enterprises and their assets. Furthermore, in the advanced countries the public sector management legislations may preserve good performance of the privatized enterprises after the privatization. The role of public sector management legislations will be discussed in chapter 6.

6- In the absence of efficient public-sector legislations, countries legally implement their privatization program by passing law on privatization which specifies the scope of the program, establishes the institutional authority to conduct the privatization program, and defines the most important elements of the process. In some countries a separate law is required for any privatization operations. Therefore, chapter 7 will be devoted to discuss the different types of privatization laws.

7- The institutional framework is required to conduct privatizations. Determination of the institutional framework requires the definition of the roles, responsibilities and authorities of the various actors in the privatization operation, such as the legislature, the government, individual ministries, and the transaction body. Chapter 8 will shed light on the institutional frameworks of privatization.

8- In most of the countries; infrastructure sectors are, or were, usually thought to exhibit monopoly characteristics; that is, one operator
should be able to provide the services more efficiently than could several operators acting separately. According to their nature, infrastructure sectors have special legal features; therefore, the legal preparative steps and the special formulas of privatization of these sectors will be explained in Chapter 9.

9- It is a universal concern that privatization will result in major job losses as new owners of privatized SOEs shed excess labour to improve efficiency and to minimize costs regardless the social reflections; therefore, sufferance of labour and the ideal methods to adjust them will be explained in Chapter 10.

10- In addition to the recommendations of the international writers of privatization, the conclusions and recommendations of the researcher will be dealt with in a separate chapter.
Chapter 2

Privatization Strategy

Privatization strategy is a comprehensive plan which forms the integral parts of the privatization operations economically and legally. In fact, since most privatization programs are integral parts of more comprehensive economic reforms, the privatization strategy should define the key objectives driving the government’s overall economic reforming program. The absence of clearly stated objectives weakens not only the perception of the privatization process, but also makes an ambiguity in the legal methods that shall be adopted to carry out the privatization processes.

Selling SOEs should not be an end in itself, but one instrument of economic policy among others. Some writers argue that privatization can be an objective in itself, especially for transition countries on the way from the command economy to free market economy. If privatization is understood in its broad concept as a part of the entire liberalization of the whole economy, then this would indeed be right (see definitions of privatization in the Introductory Chapter).

The short-term privatization strategy, from its name, implies irrational rush of privatization legislations and operations, a thing which may result in bad consequences socially, politically, economically and,

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73 - It is very important to note that there are big differences in the expert’s opinions about the privatization with regard to the entire economic reform. Some of them consider privatization, separately, a goal regardless the entire reforming of the national economy; they do not look to the privatization as an integral part of overall economy reform. Theoretically, according to this approach, a country may execute privatization program without involving any other economical reforms. We believe this may be right that in UK the famous privatization program was executed without any other reforming steps like liberation of prices, since the prices were already liberalized in a free market country like UK. But, on the other hand, the majority of economical experts look to the privatization as a part of entire economy reform, especially in the developing and least developing countries.

indeed, legally. But, short-term strategy does not always mean inevitable privatization failure as it indicates urgent necessity for reforming state-owned enterprises. Also, SOEs and sectors to be privatized should accurately be characterized and analyzed to determine whether it is suitable to privatize them or not.

This chapter sheds light on the different states’ objectives of strategy with regard to the suitable legal methods of privatization. In other words, every objective requires adoption of suitable legal method for its application. Ranking enterprises for privatization according to their legal status or with regard to the governmental portion in such enterprises normally leads to ideal methods of preparing and privatizing them. Such ranking has an important role in the eye of the public opinion. For example, enterprises in which the government is a minority shareholder can easily be privatized without great opposition. Privatization of sectors has its special legal preparative methods which should accurately be adopted to absorb the negative results of privatization. Without underestimating the important role of the short-term strategy as a tool to achieve privatization program, part of this chapter will be devoted to illustrate the effect of the deluge of laws in the short-term privatization strategy.

(i) Privatization Objectives as Determinants of Legal Methods:

In fact, the selected objectives have significant implications not only in the legal preparative methods before privatization like break-up of existing monopolies, but also in the legal formulas of the contracts of privatization.
(1) Objectives of Privatization

Many objectives of privatization have been introduced by governments and privatization experts. For example, in Africa the majority of countries ranked a number of objectives for privatization. These objectives were summarized in the great reference of Gerald Bisong Tanyi. This reference covers almost all strategies of privatization in Africa. The core objectives in African countries are mentioned as follows:

- To improve public finance (e.g. by using the proceeds from the sale of state owned enterprises to reduce the public debt and by eliminating the need to subsidize loss-making enterprises).
- To boost economic efficiency.
- To redistribute wealth to previously disadvantaged groups.
- To increase the local investors’ base.
- To attract foreign capital and facilitate the transfer of technology.

Then, Tanyi said:

“Designing and implementing the objectives of privatization in Africa presents socio-political challenges, because privatization is commonly perceived in the continent as a euphemism for unemployment. Whereas most governments in Africa welcome privatization to the extent that it offers an opportunity to spin off loss-making enterprises and to generate revenue in the short term, they are not impressed with the argument that privatizing a profitable state-owned enterprise is perhaps even more rewarding than selling a few loss-making enterprises. This explains why the list of candidates in most African countries typically excludes profitable enterprises and also explains why these privatization programs have been stalled.”

From the above statement, we can deduce that most African privatization objectives are designed to avoid the government financial

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76 - Id, p. 15.
crisis regardless the social reflections of these objectives. The usual method of privatization in Africa normally is the ‘divestiture’ (i.e. transfer of governmental ownership by sale). With regard to the incapability of most of the local investors, divestiture usually results in great intervention of foreign investors. Usually, foreign investors do not concern themselves about the creation of new jobs to the local workforce. The successful SOEs in Africa are normally excluded from privatization. This is not a good idea that in many countries with successful privatization programs good SOEs are privatized before the bad ones.\textsuperscript{77}

The declared objectives of privatization in Egypt are to:\textsuperscript{78}

* Increase the levels of employment in the privatized SOEs.
* Limit dissipation of finance resources and achieve reasonable levels for the exploitation of such resources.
* Provide opportunities to contact with the foreign markets, provide modern technologies, and attract foreign capital to invest in the republic.
* Widen the distribution property between the citizens, and increase the participation of the private sector in the national investment.
* Create new jobs.
* Allot sales’ proceeds for paying government’s debts due to the banking sector and rehabilitate the other SOEs and reduce their budget deficits.
* Reactivation of stock-exchanges.\textsuperscript{79}

\textsuperscript{77} - The profitability of SOE is not a good justification for remaining the governmental ownership, since that other SOEs in the same country will go to privatization and, consequently, to competitive climate. Usually the privatized ones win the governmental SOE.

\textsuperscript{78} - Source: Procedures and General Instructions for Governmental Program for Widen and Reforming the Property in Enterprises Sector (Booklet) Technical office, Ministry of Finance, Cairo 1993.

\textsuperscript{79} - The Egyptian objectives are translated from Arabic by the researcher.
After many decades of privatization experiences, World Bank experts presented a bundle of proposals for the objectives to be adopted by countries in privatizing both SOES and public sectors. These are:

* Efficiency and development of economy. This includes:
  (a) Creation of market economy.
  (b) Encouragement of private enterprises to expand of the private sector in general.
  (c) Promotion of macroeconomic or sectoral efficiency and competitiveness.
  (d) Fostering economic flexibility and eliminating rigidities.
  (f) Promotion of competition, particularly by abolishing monopolies.
  (g) Establishing or developing efficient capital markets, and mobilizing of domestic savings.
  (h) Improving the access to foreign market for domestic products.
  (i) Promotion of domestic investment.
  (j) Promoting the integration of the domestic economy into the world economy.
  (k) Maintaining or creation of new employment.

* Efficiency and development of enterprises. This can be achieved by:
  (a) Fostering the enterprises’ efficiency and their domestic and international competition.
  (b) Introducing new technologies and promoting innovations.
  (c) Upgrading plants and equipment.
  (d) Increasing productivity.
  (e) Improving the quality of the goods and services produced.
  (f) Introducing new management methods and teams.

(g) Allowing the enterprises to enter into domestic and international alliances essential to survival.

* Budgetary and financial improvements. This includes:
  (a) Maximizing net privatization receipts in order to fund government expenditures, reduce taxations, trim the public sector deficit, or pay off public debt.
  (b) Reducing the financial drain of SOEs on the state (in the form of subsidies, unpaid taxes, loan arrears, guarantees given, and so on).
  (c) Mobilize private sector to finance investments that can no longer be funded from public finance.
  (e) Generating new sources of taxes revenues.
  (f) Limiting the future risk of demands on the budget inherent in the state ownership of businesses, including the need to provide capital for their expansion, or to rescue them if they are in financial troubles.
  (g) Reducing capital flight abroad and repatriate capital already transferred.

* Income distribution and redistribution. This includes:
  (a) Fostering broader capital ownership and promoting popular or mass capitalism.
  (b) Developing a national middle class.
  (c) Encouraging employee ownership (also important for many reasons).
  (d) Restoring full rights to former owners of property expropriated by former regimes.
  (e) Enriching those managing or implementing privatization projects (rarely admitted objective).

* Political considerations. This includes:
(a) Reducing the size and scope of the public sector or its share in economic activity.
(b) Redefining the field of the activity of the public sector, abandoning production tasks and focusing on the core of governmental functions, including the creation of environment favourable to private economy activity.
(c) Reducing or eliminating the ability of a future government to reverse the measures taken by the incumbent government to alter the role of the state in the economy.
(d) Reducing the opportunity for corruption and misuse of public property by government officials and SOEs managers.
(e) Raising the government’s popularity and its likelihood of being returned to power in the next election.

The declared objectives of the privatization strategy in Sudan are the following:81

* Reducing Budget deficit, absorb excess liquidity and curb inflation,
* Encouraging the private sector to increase expenditure and investments, and causing private companies to increase their capital stocks to assist in mobilizing the economy.
* Utilizing liquidity available to the private sector according to priorities,
* Expanding the range of competition between investors to serve the public good,
* Enlarging direct private ownership by converting some public entities into general joint–stock companies that accumulate small investors.
* Improving the investment climate to attract local and foreign investments,
* Acquiring and utilizing advanced technologies, and

81 - Source: www.mof@sudan.net (site of the Ministry of Finance and National Economy in Sudan).
* Eliminating bureaucratic behavior and practices improving the administrative system and generalizing principles of transparency.

The declared objectives of privatization in Sudan, to some extent, represent the real motives of the government. Real objectives were frankly declared without the tendency to absorb social or political opposition. This is clear from that the list of objectives does not include redistribution of wealth to previously disadvantaged groups (like most of African countries objectives), or increase the levels of employment (like Egyptian objectives). On the other hand, they have no any extraordinary objective; they almost resemble the objectives of many other countries and they do not regard the special circumstances in Sudan. For example, despite the fact that Sudan is in the recent years suffering large regional conflicts based on marginalization, there is no any mentioning of the regional development in the privatization objectives. Whether the Sudanese objectives accommodate the legal methods by which Sudanese SOEs and sectors were privatized is a matter which will be discussed in other part of this chapter.

*(2) Preparations before Determining the Legal Method of Privatization:*

As we have mentioned in the introductory chapter (Definition of Privatization), privatization may be defined in the level of SOE, and in a wider level as privatization of sector. For both SOEs and sectors, some preparative steps must be followed before determining the suitable legal methods of privatization (types of contracts). Characteristics of SOE can determine the methods to be taken for preparation and implementation. For example, the legal status of the candidate enterprise, to a far extent, may ascertain the required preparation before its privatization. Also, the

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82 - Privatization may be a good opportunity to ensure the regional development since that many of privatized SOEs located in the regions, not in Khartoum, such like Atbara and Rabak cement factories.
size of the candidate enterprise has important implications for the required preparations.

(a) Legal Status of SOE:

The legal status of SOE means the degree of domination of the government in the targeted SOE, or state’s controlling power in its holdings of the targeted SOE. Pierre Guislain, an expert in the World Bank, differentiate between three bundles of SOEs and state holdings, going from entities with limited autonomy from the government to companies in which the government is an ordinary, non-controlling shareholder:83

- Public-Law Entities. This includes;
* Government departments or ministries, and division, thereof, without distinct juridical personality.
* Autonomous entities with their own budget but without separate juridical personality.
* Public agencies with juridical personality.
* Statutory corporations, public establishments and national corporations which may be subject in part to private-sector laws.

-SOEs Organized under Private Company Law. This includes:
* Joint-stock companies wholly owned by the public sector (state and/or public agencies).
* Joint-venture companies whose shareholders include public entities and private partners (local and/or foreign).

Minority Shareholdings:
* These include enterprises in which the state or other public entities have a minority or non-controlling stake.

To apply the World Bank’s expert ranking in Sudanese SOEs and state holdings, good examples should be accompanied with such ranking.

About the first bundle it is clear that ministries and its departments are of sovereignty nature, and there is no way to speak about privatizing them in Sudan. But in the same bundle of entities, statutory corporations such like Sudan Railways, National Electricity Corporation and National Water Corporation could be privatized only if a legal preparative step occurred to repeal the statutes that previously founded them. Then, new Acts are required to transform them into share-capital companies under the provisions of the Companies Ordinance 1925. Then, the government can sell the shares.

In the second bundle, joint-stock companies wholly owned by the state, the matter is easier and there is no need for double-step legal method as a preparative method (repeal of Act, and transformation into share-capital companies) that the governmental shares could directly be sold. A good example for this appears from the privatization of Atbara Cement Factory that the Factory Company was registered under the provisions of the Sudanese Companies Ordinance 1925. All the shares of the Factory Company were registered in the Sudanese government name; only one share was registered under the name of the Bank of Khartoum which was governmental ownership at the time of the factory’s privatization. Also Rabak Cement Factory, at the time of its privatization, was wholly owned by the government. About the joint-venture companies whose shares are owned by public entities and private partners (local

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84 - This is the case in Sudan and almost all the developing countries, but in country like USA even a serious ministries activities like Internal Affairs were privatized (the prisons administration).
and/or foreigners), the matter seems to be easiest since the government can sell all/or some of its shares to private investor. Selling the governmental shares in the joint ventures may, sometimes, result in problems for the private part in the joint venture. The private part in many cases would have never involved in a joint venture unless he had been guaranteed the permanence of the governmental ownership of the rest of shares, because of some merits and protective reasons. In such a case, the private partner should be granted a pre-emptive right to purchase the government’s shares.85

About the third bundle: in the case of private enterprise in which the state or other public entities have a minority or non-controlling stake, the matter is easy; the state is free to sell to any private sector, unless there is a pre-emptive right to the majority shareholders. A good example for divestiture of public shares was Kenana Sugar Factory. The government, under a financial crisis, decided to become a minority shareholder by selling considerable portion of its shares to the private Kuwaiti partner. This transaction happened before the current wave of privatization.

Abstractly, according to their big size, some enterprises may have to be subject for company law (that is, private law) before they can be transferred to the private sector as legal entities. In other words, the transformation of public enterprise to a company with shares facilitates privatization of such enterprise.

The following table shows some preparative legal methods for privatization in Sudan:

**Table No. (1): Samples of Legal Preparative Methods for Privatization in Sudan.**

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85 - Grant of pre-emption right to the private part may lead to amend the Article of association.
<table>
<thead>
<tr>
<th>SOE</th>
<th>Legal Preparative Method</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bank of Khartoum</td>
<td>To be transformed into a public limited company.</td>
<td>Turned into public limited company.</td>
</tr>
<tr>
<td>Cooperative Development Bank</td>
<td>To be transformed into a public limited company.</td>
<td>Turned into public limited company.</td>
</tr>
<tr>
<td>Real Estate Bank</td>
<td>To be transformed into a public limited company.</td>
<td>Registered as private company.</td>
</tr>
<tr>
<td>Rabak Cement Factory</td>
<td>A public limited company.</td>
<td>Registered as a private company.</td>
</tr>
<tr>
<td>Friendship Palace Hotel</td>
<td>A private limited company.</td>
<td>Turned into private limited company.</td>
</tr>
</tbody>
</table>

Source: [www. mof@sudan.net](http://www.mof@sudan.net) (site of the Ministry of Finance and National Economy in Sudan).

(b) Size of SOE:

The size of SOE to be privatized is also critical. At first sight, small SOEs such as small hotel or petroleum station are far different from those of big size like national telephone companies or cement factories. Many transition countries have adopted two-stage legislations of privatization by focusing first on small privatizations before moving on to larger operations. Czechoslovakia, Ukraine, and some other former socialist countries\(^{86}\) have even enacted separate laws providing for different legal methods of privatization for each group. For example, in Ukraine, the Law No.2171-XII (March-1992) on privatization of small

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state enterprises was enacted. It provided for the organization of privatization of small enterprises before any other privatization laws (for large enterprises). After small enterprises’ legislations proved their success, legislations for privatization of large enterprises were issued. This method seems to be the safest that the government will benefit from its mistakes by smaller expenses.

In Sudan, SOEs have been privatized randomly regardless of the size of the SOE. For example, Atbara Cement Factory (the largest cement factory in Sudan) was privatized on August 27th 2002 for US $ 42,000,000, while the Friendship Palace Hotel was privatized in July 20th 2002 for US$ 12,000,000. The Friendship Palace Hotel is of less importance and value than Atbara Cement Factory. According to the Ukrainian experience this is incorrect, and the Friendship Palace Hotel should rank before Atbara Cement Factory in the privatization list. This example does not so much mean that all the large SOEs in Sudan were privatized before the small ones as it means that privatizations of SOEs in Sudan have randomly been exercised regardless of the size or value of the enterprise.

(c) Legal Preparations of Sector:

Legal preparations and even final legal methods of privatization of a sector are influenced by the market structure, as well as by other sector-specific characteristics. The structure of a market may be determined mainly by legal or economic variables, as the case may be. Legal variables dominate, for example, in the presence of legal monopolies. In this case, the law forbids any one except the holder of the monopoly franchise to engage in specified activities. The economic side

87 - Id p. 189.
88 - Our humble opinion, this method should be followed in Sudan to allow the country to benefit from the mistakes of privatization of small SOEs before involving in large ones.
dominates in cases of natural monopolies,\(^8^9\) where only one company could survive. In other words, in the case of legal monopoly the legal preparative method is the demonopolization of such monopoly. In the case of natural monopoly, where the large costs restrict other investors from involving the monopolistic activity the preparative steps are economic. “Demonopolization” of legal monopoly means the process of the elimination of the legal barriers in the face of private contribution. For example, by repealing the legislations or regulations that formerly granted the monopoly.\(^9^0\) Demonopolization of natural monopolies is of an economic nature; the government can break up such type of monopolies by attracting foreign investor or by developing the capacity of the local investors through economica programs and procedures.\(^9^1\)

**Table No. (2): Samples of Legal and Natural Monopolies in Sudan.**

<table>
<thead>
<tr>
<th>Entity</th>
<th>Type of Monopoly</th>
<th>Preparative Method towards Privatization</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sudan Free Shops and Zones corporation.</td>
<td>Legal</td>
<td>To be transformed into a public limited company in 5 years time.</td>
<td>Turned into private limited company.</td>
</tr>
<tr>
<td>Sudan Shipping Lines Corporation.</td>
<td>Natural</td>
<td>To be transformed into a public limited company.</td>
<td>Study under revision.</td>
</tr>
<tr>
<td>Sea Ports Corporation.</td>
<td>Legal</td>
<td>To be transformed into a public limited company.</td>
<td>Study under revision.</td>
</tr>
</tbody>
</table>

\(^8^9\) - A natural monopoly prevails when one producer can supply a given market at a lower cost than two or more competing producers (without legislative protection) because of the heavy sunk costs; water distribution is a typical example.

\(^9^0\) - Pierre Guislain, supra 2 p. 37.

\(^9^1\) - This means not that the law has no role in demonopolization such types of monopolies. The role of the law may be indirect; it may be by issuance of suitable legislations to attract capable foreign investors. The good legislations may also develop the local investors’ capability to compete with the foreign investors or, at least to contribute with them to break-up the natural monopolies. Good examples for enabling legislation are the taxation legislations, investment legislations and custom legislations.
The question which may arise is: can all types of sectors be privatized? Different terms are used for sectors or activities that are deemed to be ineligible for privatization. In some countries, reference is made to strategic or vital economic sectors and activities. The magic word, in particular in Latin countries, may be the “public service”. Such word includes many activities like postal services, education, health, social security, justice, and national defense.\textsuperscript{92} The term “public services” itself is ambiguous; it has never been precisely defined and it is often used subjectively.\textsuperscript{93} To some, privatizing a public service is tantamount to selling off the family jewels or abandoning the key role of the state. Our humble view is that peoples are usually not so much concerned by the body who provides the services as they are with the quality, price, and stability of such service.

Telecommunications sector may be a good example for public service’s sector which can rationally be privatized. Until the last decade of the past century, in every part of the world, telecommunications sector was dominated by national monopolies. As a result, most countries lacked in domestic investors with relevant sector experience. But in some other

\textsuperscript{92} - Regozenski, Credible Privatizations; Lessons from Latin America p. 142, 1996\textsuperscript{th} ed., Oxford University Press.
\textsuperscript{93} - Pierre Guislain, supra2 p. 24.
countries, the concept of privatization has been deeply rooted and
developed to treat privatization as an instrument for the improvement of
the public service regardless of the type of ownership.94

The demonopolization or break-up of the telecommunications sector
in Sudan resulted in a good example for the capability of the private
sector to present the ‘public service’. The demonopolization began on
December 6th 1992 by the break-up of the monopoly of the National
Telecommunications Corporation. Thereafter, the Sudanese government,
represented by the Minister of Finance and Economic Planning,
concluded a primary agreement with a group of local and foreign
investors whereby those investors shall establish a public company under
the provisions of Sudanese Companies Ordinance 1925. The final
agreement was signed on April 19th 1993, and a joint venture company
was established. The objective of this company was to exercise
telecommunications activities in Sudan. Each investor shall pay the
amount of his shares in cash, while the government’s contribution shall
be paid as the assets of the former Telecommunications Corporation.
With regard to the principles of privatization, the only mistake we have
illustrated in this agreement was that the government granted a 15-year
legal monopoly for the new public company (Sudatel).95 This mistake
resulted in delaying many other capable companies to participate for 15
years, a thing which resulted in a total absence of competition and,
consequently, high tariffs. However, recently, after the end of the
monopoly, many capable companies joined such activities, and the
market now witnesses frequent reductions of tariffs for the sake of
Sudanese citizens.

94 - Id p. 23.
95 - Source: Internal files of TCDPE.
(3) Preparative Legal Methods as Tools to Achieve Privatization Objectives:

Two elements are determinant in achieving good preparative steps and final privatization contracts; the financial capacity of the citizens and the existence of active market of shares. In other words, if the shareholding class exists in a country, this will largely facilitate the preparative legal methods and final legal methods of privatization. As an example, a country with stock-exchange will never face the problems that a country without regular stock-exchange does. In the case of the existence of regular stock-exchange, the door will be opened for the state to adopt many options to prepare SOEs or sectors to join privatization. For example, waiving of shares will be available and will achieve, realistically, the objective of the distribution of ownership for prior disadvantaged groups. Another example, in preparation of SOE to be privatized, listing SOE’s shares in the stock-exchange emanates the credibility of the government on the eye of people in that a public company will actually supersede the former SOE. However, exercising stock-exchange activities for lay-people, to a large extent, is a matter of culture. In many countries, despite the financial capacity of its citizens, transaction on stock-exchanges is not familiar or not popular. Following is a general overview the that shows the experience of some countries in preparing and transferring their SOE.

In Former Socialist Countries:

In the former socialist countries, market economy had to be created almost from scratch. The need to create a shareholding class and the political difficulties of the reform process, together with the difficulty of arousing investor interest, has led some countries in central and eastern Europe and in the former Soviet Union to adopt a completely novel

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96 - As we have previously mentioned, this objective listed in most of African privatization objectives.
approach of privatization. First, private ownership had to be authorized and encouraged to facilitate large-scale and speedy transfer of productive assets from the public to private sector. The legal methods of privatization had to be supplemented by new ones, such as transfer of SOE or shares to the entire population under mass privatization program.

**United Kingdom and France and Some European Countries:**

The United Kingdom’s and French privatization programs aimed at widespread share ownership. Both countries, however, could rely on their established capital markets and securities exchange mechanisms. In the United Kingdom, privatization was part of an ambitious economic reform program, so all the known legal methods of privatization have been exercised. The French program was more self-contained and limited in scope: utilities and transport sectors were not included; therefore, complicated legal methods for preparations and privatizations operations have not been taken. Waiving of shares was the most legal method for the most of operations. Other European countries, including Italy, Portugal and Spain, have also relied heavily on public floatation.

**Latin America:**

In Latin America, except Brazil, the existence of a continuous financial crisis affected the governments’ options to achieve their declared privatization objectives. Most of Latin American countries were compelled to execute short-term programs in their privatizations to gain quick incomes through direct sales to avoid political and economic...

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97 - The traditional legal methods of privatization, for example are: direct sales to private investor or investors, lease contracts, management contracts and concessions.
99 - Pierre Guislain, supra2 p. 31.
risks.\textsuperscript{100} A great confusion between the objectives declared in privatization strategies and legal methods resulted sometimes in the reluctance from privatization itself.\textsuperscript{101}

\textbf{Asia:}

In Asia, the divestiture (total or partial transfer by sale of SOEs and sectors) \textsuperscript{102} trend has not been as pronounced. Few countries adopted or implemented large divestiture programs. The others have adopted macroeconomic liberalization and opening of certain sectors (including infrastructure) to provide investment through BOT system, namely BOO formula (build, own and operate).\textsuperscript{103} It is obvious that in the majority of Asian countries governments did not aim to make completely abandon SOEs and sectors.\textsuperscript{104}

But in some countries in Asia; divestiture took grand area, namely in the Philippine. The Philippine is among the leading Asian countries in number of divestitures. This may be explained by that Philippine has involved in a financial crisis for many decades; the government directly targeted the income gained by full divestiture.

\textbf{Africa:}

\begin{footnotesize}
\begin{enumerate}
\item[100] Regozenski \& Others, supra 20 p. 221.
\item[101] Back movement to socialism, by Hugo Chavez (president of Venezuela) leadership, obviously explains the tendency of some Latin American countries to reluctance from the privatization.
\item[102] Divestiture is a partial or total transfer of existed governmental ownership to private sector or investor and usually, without imposing any conditions providing for some sort of control after privatization such as intervention in the future way for management of the privatized SOE. Also divestiture, usually, doesn’t impose any restrictions in the future options of the new owner to transfer the ownership of the privatized SOE.
\item[103] Button K., Privatization and Deregulation, its implications in Asia p 98, 1998\textsuperscript{th} ed. Harper \& Row USA.
\item[104] BOO implies that privatization is not for former established SOE or sector, it implies break-up of former monopoly. On other words privatization is in permission for exercise an activity formerly monopolized for state, without permission to future transformation, unless the contract otherwise provides.
\end{enumerate}
\end{footnotesize}
In Africa, where most of SOEs were in a state of virtual bankruptcy and lacked financial statements, privatization has often had to be effected through liquidation, thereby allowing buyers to acquire SOE assets without incurring the risks of large, uncertain, or contingent liabilities. Africa is the continent where, on average, the least progress has been achieved in privatization.\textsuperscript{105}

\textit{Sudan:}

In Sudan, there are two periods or eras affected the accommodation between the declared objectives and privatization’s legal methods. The declared objectives were stable through the period from 1990 to 2005; they were of a realistic nature without a tendency to absorb the public opposition or slogan purposes (see the introductory chapter). The first period took place before the oil production. In this period the government was in bad need for hard currency resources. Therefore, many productive and important enterprises were essentially transferred to private investors to repay debts of the government. The majority of the sales proceeds were used to address immediate economical crisis. Divestitures by direct sales come on top of the legal methods of privatization of the first period of privatization in Sudan. Examples for divestitures through direct sales in the first period are:

- Blue Nile Packing Company: sold to the Afro-Asian Company for Development and Investment in October 24\textsuperscript{th} 1992 for a consideration of about SP 113,000,000. About half of the amount of the sale was considered as repayment of a former debt.\textsuperscript{106}

- Sata (Sudanese Company for Shoe Production), was sold to the Afro-Asian Company for Development and Investment in

\textsuperscript{105} Pierre Guislain, supra 2 p. 30.
\textsuperscript{106} - Source: Internal files of TCDPC.
November 1st 1993 for about $15,000,000. Only $3,000,000 was paid directly to the Sudanese government. The rest, 12,000,000, was considered as a repayment for former debt.\textsuperscript{107}

- Riaa & Kiriekab Sweets Factory (former nationalized company), was sold to Mr. Samir Ahmed Gasim for a consideration of about SP55000.000. This amount seems to be very low unless it is justified by the deep financial crisis of the Sudanese government at the time of the sale (January 7\textsuperscript{th} 1992).\textsuperscript{108}

In the second period of privatization (after oil production), many of financial crisis in Sudan were resolved and different types of privatization legal methods were followed. Followings are the varieties of privatization legal methods after the oil production:

- Real Estate Bank: according to the resolution of the Council of the M Ministers No. (389) 2001 it was listed as a candidate SOE for privatization. In December 2002, the Sudanese government concluded a contract with Jumaa El-Jumaa for Trading and Investment Company (private company). The important note is that the government, after oil production, began to impose some conditions in privatization contracts. In this privatization process, the government imposed that the bank shall be transformed into a public company five years after signing the sale contract.\textsuperscript{109} This is a good step to grant a portion for the Sudanese people or, at least, big numbers of investors (included foreigners) in a big economic corporation like the Real Estate bank.

- Sudan Airways: The fixed assets of Sudan Airways were estimated at $50,000,000. The study of estimation was prepared by an international expert establishment that is Barons for Financial

\textsuperscript{107} - Id.
\textsuperscript{108} - Id.
\textsuperscript{109} - Source: TCDPE Annual Report 2005 p.32.
Services. All offers presented in March 2003 were rejected. The government refused to accept any of them depending on that the deep financial crisis has been resolved by oil production, and that there was no need to conclude low sale contract. Thereafter, TCDPC presented a proposal whereby a ministerial committee has to undertake the supervision of Sudan Airways privatization. The ministerial committee is also responsible for preparing a clear plan for reforming the company to become more attractive.110

- Sudanese Free Shops and Zones Corporation is a good example for privatization of SOE through an ideal legal method.111 This company is a grand-scale company that exercises very important activity. If the activities of this company are properly administered the state will gain good hard currency income. Therefore, the government after the oil production thought that it is not suitable to sell the company to individual investor by a sale contract. Despite the long period and the complicated procedures of the transformation into a share-company, the government selected this legal method. In other words, if the privatization of such corporation had happened in the period before oil production, the deep financial crisis would have compelled the government to use a sale contract to individual investor so as to provide quick financial sources of hard currency.

Abstractly, and from the practical viewpoint, in the case of privatization of SOE: governments should declare the real objectives and select the suitable legal method without tending to absorb public opposition. Undeclared objectives will lead to the use of wrong legal methods, a thing which may result in an incredibility impression on the
government and, consequently, in the privatization program as a whole. Accommodation between objectives and legal methods is required, for example, where efficiency and maximization of privatization proceeds are sought, a call for bids is generally preferable to direct negotiations with a single investor. Free vouchers or discounted employees shares are not appropriate instruments if the main objective is to maximize revenue, but they may well serve the political objectives of privatization program. Similarly, a public floatation may be the right legal method to promote the wide spread of shares ownership and stimulate financial markets.

In almost all African countries (including Sudan), the people’s culture, to a far extent, limit the objectives of privatization. For example, in the event of that the key objective of the program is to make a wide spread of shares ownership, the public offering of shares becomes the most suitable legal method of privatization. But, the individualist tendency of the African investors will not help in achieving such objective.

(ii) **Short and Long-term Strategy:**

As we have previously mentioned, the short-term strategy, without underestimating its role as a well-known type of privatization strategies, implies an irrational rush towards privatization. For example, in many countries, short-term strategy resulted in a deluge of big numbers of laws in a limited time, a thing which resulted in very complicated political and social problems. Another result for short-term strategy appears from that many countries were compelled to discontinue this type of strategies and began to prepare long-term strategies. This change resulted in very high losses for these countries. Moreover, it resulted in delaying the privatization program itself. A short-term strategy requires countries with special features in their laws and the local market. In other words, it
needs a country already prepared before the privatization decision. For example, prices in the country are already liberalized, and the yearly income of the citizen is of reasonable level. Privatization essentially requires liberalized prices, but the sudden jump of prices will lead to strong opposition against privatization.

In this part, we will discuss the experiences of some countries with the short-term privatization strategy:

\textit{(a) Deluge of Laws:}

Peru is the most obvious bad example for the short-term privatization strategy. The Financial Times wrote:

\begin{quote}
\textit{10-days of 126 laws, more than half of them intended to stimulate private investment, has brought about the most radical reorientation in the Peruvian state or more than 20 years...state monopolies have been eliminated, private individuals and companies may be now compete directly with the state in such varied areas as telecommunications, the generation and transmission of electricity, and the provision of postal and railway services. They may apply for concessions to administer state owned hospitals, airports and even schools. There is what minister call an aggressive plan to sell-off public companies, which have drained to Peruvian exchequer of up to $2,5 billion annually." The article also quoted then-prime minister Alfonoso De Los Heros of the importance of these reforms relative to Peru’s terrorism problem. “Much more important is an adequate legal framework. If these decrees survive then investment, both national and local, will come.”}
\end{quote}


“The reforms have indeed survived: many SOEs, including the telecommunications and power companies, have been privatized, raising over $4 billion and generating investments or plans of equal magnitude; SOE subsidies have been cut from their astronomical reform levels (4.2 billion in fiscal 1989-90); interested rates and exchange rates have been liberalized; the quotation of Peruvian debt to secondary markets has risen from 5 percent to 60 percent and more of face value; the securities exchange index has soared; inflation has been brought under control, dropping from over 7,000 percent in 1990 to about 11 percent in 1995; foreign investment has risen substantially, and real GDP rose by an average of more
than 8 percent a year from 1993 to 1995. These impressive results, however, have been achieved at a cost of severe restriction of freedom. In April 1992 Parliament was dissolved, half of the members of the Supreme Court were dismissed, and strict control was instituted over television programs, all in the name of the fight against terrorism. It is said, also, that income distribution worsened over this period.”


As mentioned above, this irrational wave of privatization resulted in a big political problem by dissolving the parliament, and legal problem by dismissing the members of the Supreme Court. The members of the Supreme Court were dismissed because of their inability to play their essential role in protecting those who suffer from the sudden increase of costs of their everyday needs, termination of jobs and, consequently, ambiguity of the future. In Peru, the parliament was dissolved because of the non-compliance of the president and government with its decisions to stop the deluge of privatization laws without a prior preparation of a legal framework. Such a framework should patiently be prepared to consider the different probable impacts on society.

Despite the fact that the short-term privatization strategy is a well-known type of privatization strategies, the issuance of 126 laws in 10 days is a matter that seems to be irrational, and implies unpleasant bad political pressure towards privatization.\(^\text{113}\)

If the only measurement for the success of a privatization program is the increase of the state’s privatization proceeds; the Peruvian experience will, indeed, be categorized as one of the most successful experiences. On the other hand, if the measurement is the good reflection

\(^{112}\) - Pierre Guislain, supra p. 16
\(^{113}\) - This matter can be justified by that in the period immediately followed the collapse of former Soviet Union, the western countries hurried to impose free market economies all over the world. Most Latin American economies at that time were directed ones, so, the wave of privatization was concentrated sharply in Latin America to eliminate any feature of socialism and communism.
in providing citizens’ everyday needs at a lower cost, then the Peruvian experience will be considered as one of the failed experiences.

The deluge of privatization laws makes the legislative authority just like a dummy in the hands of the executive authority. Consequently, the parliament will lose its dignity in people’s eyes, a thing which will increase the public opposition against the privatization program as a whole.

(b) Reverse Privatization Strategy:

Some countries who adopted a short-term privatization strategy found big difficulties in continuing such a strategy. They found themselves between two hard choices: whether to continue in the short-term strategy, a thing which may result in bad reflections (mentioned in the Peruvian experience), or to reverse their strategies from short to long-terms strategies, a thing which is very costly. Despite the high cost of reversing privatization strategy, some countries like Hungary opted for this choice. The new government of Hungary (elected in 1994) noted that the foreign investment refused to contribute in the privatization processes. Reports of experts proved that the short-term strategy lead foreign investors to fear that such a strategy may result in people’s revolution against the privatization processes and, consequently, their ownership in the privatized SOEs and sectors may face re-nationalization. Despite the higher costs of reversing the strategy, the new government reversed the strategy, a thing which resulted in a large flow of foreign investments into the country.114

Conclusion:

114 - Kathy Megyery and Frank Sader, Facilitating Foreign Participation in Privatization p. 11, 1st ed 1997, the International Finance Corporation & the World Bank, Washington D.C.
Privatization strategy is a comprehensive plan which forms the integral parts of the privatization operations, economically and legally.

The absence of clearly stated objectives of the privatization strategy weakens not only the perception of the privatization process, but also makes for an ambiguity in the legal methods that shall be adopted to prepare SOEs for privatization, and to implement privatization processes. Determining the objectives of privatization program is not a matter of mere slogan; it is a matter of accommodating these objectives with the available instruments of the state to achieve these objectives. Many countries declared objectives (like creation of new jobs) other than the actual ones so as to absorb the public opposition, but after a period of time, methods and results of the privatization program showed the real objectives: voluminous numbers of jobs have been terminated, and public opposition has largely increased.

The Sudanese government has not declared fictitious or slogan objective for its privatization program. Therefore, despite the painful results and the public opposition, the objectives of the privatization program represent the reality. The vast majority of privatization processes in Sudan were practiced through direct sales.

After objectives have been defined, many legal preparative methods have to be prepared such like demonopolization of monopolies, or to transform some productive governmental units into companies with shares. The legal preparative methods, for example in privatizing SOEs, should consider the legal status and the size of SOE to be privatized. As for monopolies, the matter requires preparation of new laws to demnopolize them if they are legal ones. If the monopolies are natural ones, the government should, even from scratch, take the required steps to create competition.
There are two types of privatization strategies: short-term strategies and long-term strategy. Despite the fact that short term strategy may result in some bad features of privatization such like the deluge of big numbers of laws for executing privatization program, it remains a well-known type of privatization strategies. Success of short term strategy fosters the execution of the privatization program. A long term privatization strategy seems to be more acceptable in the majority of countries all over the world. The long term of the execution of the privatization program until now (more than 17 years) implies that the Sudanese strategy is a long term one.
Chapter 3

Patterns of Privatization

Privatization requires heavy governmental involvement because politicians involved are frequently setting up the legal methods and running up the sale process. According to some privatization writers; this may lead to favouritism and other manifestations of corruption. For example, in Argentina as in other countries, an obscure of bidding process raised doubt of corruption and political favouritism.\textsuperscript{115} Privatization may be the last chance for politicians to appropriate cash flows and deliver favours that further their political objectives.\textsuperscript{116} The role of politicians in privatization is central in two main areas, the legal methods of privatization chosen and the types of contracts written.

The way the privatization carried out is of great importance. A successful program can increase social welfare and bring efficiency gains while bad application of a privatization program may create opportunities for inefficiency and corruption.\textsuperscript{117}

While the choice of specific privatization legal methods should rest with the responsible privatization agency and depend on the SOE to be sold, the government will have to define which legal methods will be applied in the privatization program. At the most general level, government can decide to either initiate a partial or full transfer of ownership through some types of sales agreements. In other cases, the government may opt to maintain ownership while involving private

\textsuperscript{117} - Id. p. 189.
operators through a management contract, or a lease or concession arrangement. While the latter approach is not a privatization in a narrow sense; that the government hands the assets of the public sector to private sector, it might still be an appropriate measure in some circumstances.

Governments use a variety of legal methods for transferring SOEs, sectors, and services to private sector. The main methods include the following:

- **Auction**: here the SOE assets are sold to the highest bidder in open bidding.
- **Negotiation sales**: here the price and terms of the transaction agreed upon by direct negotiations between the purchaser and the vendor.
- **Tender**: Bidders submit sealed bids, which are opened at announced time, with the property generally going to the highest bidder.
- **Public offering of shares**: the government’s shares are offered in local or international capital market.
- **Management/employee buyout**: SOE management and/or employee buying a controlling interest in the company.
- **Stock distribution**: here a percentage of shares in the SOE is given or sold at preferential terms to employees and other special groups such as former political prisoners.
- **Vouchers or coupon privatization**: eligible citizens are given or are sold coupons or vouchers at nominal prices which can be exchanged for shares in former state-owned companies or in investment funds that control the actual company shares.
In addition to transfer of ownership (divestiture), there are other legal methods for achieving many of the objectives of the privatization. Despite that part of privatization writers do not mention them as legal methods of privatization, the majority of privatization writers mentioned them as fundamental legal methods of privatization according to the wide concept of privatization. The wide concept of privatization includes, in addition to the transfer of ownership public assets, transfer of governmental activities by management contracts or lease of the governmental assets and so on. The following shows these types of legal methods:

- **Joint ventures**: The private investor and the SOE join forces to form a distinct legal entity that preserve the distinction between public and private capital.

- **Build-own-operate-and-transfer (BOT) agreement**: Such agreements are used mainly for infrastructure projects. For example, private investor paying a cost of constructing a toll road, bridge, or facility and then is entitled to collect a share of the revenues for an agreed-upon period of time (say, 20 years), after which time ownership reverts to the government.

- **Leasing**: The private investor pays an agreed-upon annual fee to operate an SOE or other publicly owned facility but is entitled to keep the balance of the operating profits.

- **Management contract**: the government pays a private operator an agreed-upon fee to operate an SOE or other facility.

(i) **Auctions**:
Auctions so far have been used mostly for small businesses, such as retailing shops which, in general, are of little interest to major investors. In the Eastern Europe and the former Soviet republics, tens, if not
hundreds, of thousands of such auctions have been conducted. In any case, the states employees who ran these shops or establishments are given the first chance to bid for them before the bidding is opened to the other investors. There have been some cases of state-owned medium or large enterprises (MLE) being liquidated, and their assets sold at auctions, particularly in the developing countries.\footnote{118}

However, some examples for privatization of MLEs through auctions happened in Mexico that the vast majority of the privatized SOEs were, at the beginnings of the execution of the Mexican program, of small and middle sizes.\footnote{119}

The main role of auctions in privatization processes appears as an instrument to dispose of SOE assets. If the government thinks that certain governmental enterprise is not attractive to be sold as an entity, selling assets of such SOE will be the optimum choice for the government to dispose off such SOE. Here the transaction consists basically of the sale of assets, rather than shares in a going concern. In other words, the sale of separate assets may be the only means for selling the enterprise as a whole.\footnote{120} Despite that biddings or tenders may be used to achieve the same goal, auction comes first because it crystallizes the transaction since that it is normally exercised upon open doors.

In Sudan, auctions are mostly exercised in selling the liquidated SOEs. It is unheard for invitation for auction to sell one of the SOEs itself; all privatization operations were executed by other legal methods. The privatization operation of the Printing and Publication Corporation was concluded through auction. Selling of such corporation as an entity

\footnote{118} - Using auctions for selling retailing shops and restaurants can not be illustrated in countries other than the countries of Eastern Europe and the former Soviet Union. Even, in the developing countries which formerly followed the socialism, the degree of intervention of the state in the economical life didn’t reach this degree of intervention in retailing shops and the similar.

\footnote{119} - Alberto Chong and Florencio Lopez, supra 1, p. 40.

became difficult for that it was suffering huge number of debts and losses. For example, in the internal files of TCDPE\textsuperscript{121}, an agreement was made on 8.2.2003 to settle a debt of SD11,984,000 due to Hilton Hotel. Khartoum-North District Court judged the full amount of the debt to the Hotel on 8/9/2001. The Ministry of Finance and National Economy offered to pay \%25 of the total amount of the debt as a settlement and the Hilton Hotel administration accepted this settlement. Also in the internal files of TCDPE, we found another settlement agreement dated: 24/2/2003\textsuperscript{122}. By this agreement; Danfodio Company sold printing machines to the Printing and Publication Corporation. The cheque rejected and a suit was presented to Khartoum Divisional Court. After a long time of negotiations, Danfodio Company accepted a sum of SD7,000,000 as a settlement for the bigger amount\textsuperscript{123}.

From the above, we can deduce that selling of the assets of this corporation may be the ideal solution for TCDPE to dispose off this corporation. The entity of such SOE was not attractive to private investors because it was burdened with huge numbers of debts.

(ii) \textbf{Negotiated and Direct Sales:}

In a negotiation sale or direct sale (used interchangeably), the SOE and/or its owners (the government) negotiate directly with a single investor or a group for the transfer of all or part of its shares to the investor. This method in the European countries is used mostly to privatize successful SOEs. In some cases the parties are brought to the negotiating table by an investment bank or other financial intermediary. In other cases, the negotiations are the result of direct contacts between the vendor and the prospective purchaser. Some countries such as the

\textsuperscript{121} - Without number.
\textsuperscript{122} - TCDPE, headed paper No LF/MTA/A.
\textsuperscript{123} - The full amount of the debt does not mentioned in the agreement.
Czech Republic, even allow investors to choose their own programs for privatizing an SOE.\textsuperscript{124}

A few European countries, such as Germany, have made extensive use of negotiated sales to divest their SOEs. However, as a rule, negotiation sales are less common than the other types of legal method of privatization in the rest of the European countries, and when they are used, they tend to be reserved for the largest SOEs.\textsuperscript{125}

In a little number of the European countries; negotiation sales were successfully used as a first step for wider share distribution. For example, in the case of Montedison, in which ENI (Italy’s energy sector holding company) had acquired a controlling interest of about %30, ENI concluded an agreement for GEMNIA (a largely private financial holding company) to acquire this interest to investors in a private sector.\textsuperscript{126}

From the vendor’s point of view, there are several disadvantages associated with the negotiated sales. First, a negotiated sale is widely regarded as too time-consuming although this is not necessarily the case. Second, it tends to result in a lower selling price than a tender, because the element of competition is absent. Third, because the negotiations take place out of the public view; there is a possibility that opponents of the government or for the privatization process will try to make political problems by accusing the government’s negotiators by that they are selling at lower prices.

The experts of the World Bank advise that the application of the negotiated and direct sales of privatization requires the government to undertake ‘wide investor research’.\textsuperscript{127} For example, in Argentina, the law of privatization and the implementing decrees provide for some

\textsuperscript{124} - Dmitri Pluonis and Andrew McWilliams, Privatization; Investing in State-Owned Enterprises Around the World p.20, 1994 ed., John Wiley & Sons, Inc. USA.
\textsuperscript{125} - Id p.21.
\textsuperscript{126} - Charles Vuylsteke, supra 6 p. 18.
\textsuperscript{127} - Id p. 17.
manufacturing enterprises and petrochemical concerns, a competition depending on the purchasing party’s general reputation, financial strength, records of former performances, etc. In Spain, these conditions are required for all direct and negotiation sales regardless of the size of the SOE.\textsuperscript{128}

Also, because of the seriousness of the negotiated and direct sales, some countries have adopted many preventive procedures to control the legality of such transactions. A number of countries have introduced mandatory procedures or guidelines for negotiated sales. For example, in Philippine, the guidelines of the Privatization Trust provide minimum standards for such types of sales; negotiated offers can be restored to only if tenders’ biddings proved unsatisfactory, impractical or inappropriate.\textsuperscript{129}

In the majority of the African countries, the matter differs: the negotiated and direct sale contracts take their feasibility from that Africa is still now suffering from the huge number of regional and ethnic problems. The marginalized regions are always struggling with the centre for development and national economic equity. Governments in Africa may want to take accounts for the country’s multi-ethnic dimension and ethnic rivalries to ensure that lucrative enterprises are not acquired by purchasers from a single group. Similarly, the government may want to ensure that the purchaser with the best investment plan (i.e., capable for creating jobs and boosting development) prevails. \textit{Also in Africa, given the fact the this legal method of privatization is essentially private and susceptible to abuse, there is a strong need for transparency. For example, a big number of SOEs in Africa have been sold to special interest groups (especially from the former colonial powers) and to so-called foreign investors who are mere fronts for certain domestic political elites. Such irregular transactions create the spectre of renationalization.}
But in some African countries, like Togo, the matter differs. That Ministry of State Enterprises has formulated detailed guidelines for such type of contracts. They essentially provide for the preparation of a dossier (in terms of items to be addressed by interested parties) and a brochure for each enterprise, to be distributed through all available channels such as local and foreign banks, chambers of commerce, and foreign trade offices and embassies. Interested parties are invited to make a field visit. Following an initial contact, the Minister of State Enterprises authorizes plant visits and the gathering of further data and information. Upon the receipt of an offer from an interested investor, the Ministry verifies if all elements specified in the dossier in respect of investor qualifications and contents of proposal are included. An inter-ministerial commission will meet to consider the investor’s proposals, and select the suitable investor for negotiations.\cite{vuylsteke6:18}

Despite the fact that successful negotiated sales, by their nature, depend on the trust of the government in its officials or representatives, it is advisable to follow the Togo’s method that it creates a reasonable level of transparency in selecting the suitable investor. However, one of the advantages of the negotiated sales is that the prospective owner is known in advance and can be evaluated, and may be selected based on the ability to bring a number of benefits such as good management, technology, market access, and the like. In many instances, the future success of the operation may be as important to the government as the proceeds from the sale itself. In addition, negotiated and direct sales are advisable; they assist the government to negotiate with the new investor about the future of the work force of the SOE to be privatized.\cite{vuylsteke6:19}

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\begin{footnotesize}
\begin{enumerate}
\item \cite{tanyi:82-83} - Gerald Bisong Tanyi, Designing Privatization Strategies in Africa; Law, Economics, and Practice pp.82-83, 1st ed. 2004, Praeger Publishers, Westport USA.
\item \cite{vuylsteke6:18} - Charles Vuylsteke, supra 6 p. 18.
\item \cite{vuylsteke6:19} - Id p. 19.
\end{enumerate}
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In Sudan, there are many cases of negotiated sales, but the most important one is Atbara Cement Factory Company sale contract.\textsuperscript{133} From the terms of the contract we can deduce whether it has achieved a successful privatization operation. Followings are some terms of the contract (see the appendix).\textsuperscript{134}

**INTRODUCTION:**

“This agreement is made and entered into on August 27\textsuperscript{th} 2002 by and between:

* The Government of the Republic of the Sudan, represented by Mr. Alzobier Ahmed Alhassan, Minister of Finance and National Economy.

* The Sudanese African Company for Trading and Investment, thereinafter referred to as ‘the second party’

* Whereas the Sudanese Government is debited for the Sudanese African Company for Trade and Investment by $41,000,000., and whereas Atbara Cement Factory Company “registered under the provisions of the Sudanese Companies Ordinance 1925, under the registration No. C 2785” is, with all its shares and portable and fixed assets, goodwill, trademarks and intellectual property right; the first party offered the sale of the company’s shares to the second party.

* The second party accepted to sell the offered shares of Atbara Cement Factory Company.

**SALES:**

(2) The sales are:

a- Atbara Cement Factory Company, free of any former obligations, legally and financially, and this includes 10,000 fully-paid shares.

b- Brick Factory in Atbara.

c- All assets and lands owned by Atbara Cement Factory Company Ltd.

d- All lands and real estates owned by Atbara Cement Factory Company Ltd., as mentioned in the fourth schedule of this agreement.

e- Fixed and portable assets as mentioned in the balance sheet on 30-6-2002.

\textsuperscript{133} - Source: Internal files of TCDPE.

\textsuperscript{134} - Translated by the researcher (there is no English copy in TCDPE).
f- All the intellectual property rights of Atbara Cement Factory Company Ltd, and this includes goodwill, business names, patents and any other evaluated property owned by the sold company at the day of this agreement.

**PRICE AND PAYMENTS:**

(3) The two parties agree that the purchase price shall be an aggregate amount of $41,000,000. (fourty one million American dollars), and the second party shall pay the purchase price in the following manner:

a- By a deposit of $20,500,000, upon the execution of this agreement. Half of the deposited sum shall be paid in cash, the rest shall be considered as repayment for the debts of the first party (see the introduction).

b- $20,500,000 shall be paid as five instalments of $4,100,000 each. The period of the payment of the instalments shall be as follows:

First, the first instalment shall be paid one year after the handover of the factory. $2,050,000 shall be considered as a repayment of first party’s debts (mentioned in the introduction).

Second, the second instalment, ($4,100,000); shall be paid two years after. $2,050,000 shall be paid as a repayment of the first party’s debts (mentioned in the introduction). Third, the third instalment ($4,100,000) shall be paid three years after. $2,050,000 shall be paid as repayment of the first party’s former debts (mentioned in the introduction). Fourth, the fourth instalment, ($4,100,000) shall be paid three years after. $2,050,000 shall be paid as repayment of the first party’s debts (mentioned in the introduction). Fifth, the fifth instalment of $4,100,000 shall be paid after five years. $2,050,000 shall be paid as a repayment for the first party’s debts (mentioned in the introduction).

From the above contract we can come with the following:

1- The Sudanese government was debited for the purchaser by a large amount of money: $41,000,000. Because of this debt, the Sudanese government was not in a good position to impose strong conditions in the contract.

2- The Sudanese government found that it can not maintain part of the ownership of the Company. The purchaser was in a strong negotiation
position and could impose that he must be the only owner,\textsuperscript{135} a thing which would not achieve a wide spread of shares of one of the greatest and strategic factories in Sudan.

3- Despite that such type of agreements usually requires intermediary or guarantantor, the Sudanese government wasn’t in a good position to require so.\textsuperscript{136}

4- Negotiated sales, for transparency purposes, were rarely used in the European countries (except in Germany), while in Sudan, the negotiated sales were widely used\textsuperscript{137}. The justification is that after the National Salvation regime took the governance in 1989, the state faced a big deficit in the public budget. Also, the new government faced big difficulties to borrow money from the international financial institution. Therefore, it borrowed a lot of hard currency loans from some Islamic institutions funds like Dar Al-Maal Al-Islami. The government also faced financial problems to repay such loans and, consequently, relied upon the negotiated sales in many of governmental productive units to repay these loans.

5- The Sudanese government did not take the reasonable time to make “wide investor research”.

6- The Sudanese government did not adopt any sort of competition to find out the suitable investor depending on his good reputation, financial strength etc. like in Argentina, Brazil, and Togo.

7- Because of the heavy debts, there was no way for the Sudanese government to impose any restrictions in using negotiated sales such like Philippine. The Philippine government, as mentioned previously, adopted

\textsuperscript{135} - To some extent, Sudanese government; kept the right of wide spread ownership for one of the most important and largest industrial schemes. The Sudanese government imposes in the terms of the contract that the purchaser shall, after five years from signing the contract, transform the sold Company into public one.

\textsuperscript{136} - This was, also, because of the former debts.

\textsuperscript{137} - Two negotiated sales explained infra prove and explain this result.
the negotiated sales only if the tender biddings proved unsatisfactory, impractical, or weak offers.

It is to be noted that in the following examples of negotiated sales, the terms of Atbara Cement Factory sale were used verbatim. Therefore, we will not repeat them, and will only concentrate on some terms. We will leave the area of the privatized SOE and the price paid, without any discussion. We do not want to accuse anybody.\footnote{The price of Atbara Cement Factory Company seems to be a huge one with regard to the other negotiated sales between the Sudan government and the Sudanese African Company for Trading and investment, but we do not have any measurement to determine or to estimate the fair price.}

Another example for using negotiated sales for repaying former debts is the negotiated sale contract of the Blue Nile Company for Packing and the Afro Asian Company for Development. The sold shares of the two companies were fully owned by the Sudanese government. The area of the two companies is (29,955 SQ.M), located in Khartoum-North Industrial Area: No. 1/1 and 1/2, Block No. 4 (East). The vendor was TCDPE; the purchaser was the Sudanese African Company for Trading and Investment. The price was $5,221,000, in addition to SP61,000,000. The $5,221,000 was considered as repayment for former debts due to the purchaser, and the SP61,000,000 was considered as an advance payment.

The above example, indeed, presents one of the negative examples for using the negotiated sales for the privatization of the Sudanese SOEs. This is clear from that the creditor usually does not accept one of the loss-making SOEs. On the other hand, the debited government usually finds itself in a weak negotiation position and, consequently, accepts all the conditions imposed by the creditor.

A third negative example is the negotiated sale of the Sudanese Company for Shoes Production (SATA), (formerly BATA).\footnote{One of the former nationalized companies.} The company is located in Khartoum-North Industrial Area No. 12 Block...
No.4 and No. 15 Block No.5, the area of the factory is 63,000 SQ.M. The price was $3,000,000 in addition to SP12,941,000. The $3,000,000 was considered as a repayment for former debts for the purchaser company on the Government of Sudan, and the sum of SP. 12,941,000 was considered as an advance payment. The method of paying the price seems to be unfair for a big factory like SATA. Such a factory possesses a big area in the greatest industrial area in Sudan as a whole, and it has, in addition to the financial value, a very respectful goodwill in Sudan.

A fourth example for negotiated contracts is the contract of the Fine Spinning Factory (Khartoum North) on 24.11.1997. The vendor is TCDPE, the purchaser is the Arab Islamic Company for Gulf Investments (Al-Sharija – United Arab Emirates), a subsidiary for the Holding Company; (Dar A-lmaal Al-Islami). The area of the Factory is 50,000 sqm. The price was $14,000,000. The full amount of price was considered as a repayment of former debts. After signing the contract, the purchaser company shall exempt the rest of the debt (the total amount of the debt is more than the price), and give a clearance-certificate to the Sudanese government. The purchaser company shall be obliged to rehabilitate the factory. The government shall be obliged to pay all the obligations resulting from the termination of jobs. In the case of the purchaser failing to operate the factory within the determined period, he shall be obliged to pay SP1,000,000 for every week after the determined date. The purchaser company shall not be entitled to sell the factory at any time before the rehabilitation, but can make a partnership with any technical or financial partner. The governing law is the Sudanese law, and the arbitration shall be subject to the Civil Transactions Act 1983, and its decision shall be final.

140 - Source: Internal files of TCDPE.
141 - Id.
In this contract, the price as a whole was considered as repayment for former debts. Therefore, from the lessons of the other negotiated contracts, we claim that, in Sudan, negotiated sales are not successful, especially where the government is indebted to the purchaser. The ideal way to repay debts through privatization proceeds is to open the wide door for tenders with closed envelopes. After determining the highest price, creditors may be granted priority to pay price and, consequently, own the targeted SOE. Thereafter, whether the price is considered as a repayment for former debts or not, is a matter of less importance.

Exercising negotiated sales by the manner in which these sales were applied in Sudan will open the door widely for accusing the government of favouritism and other types of corruption, a thing which may harm the credibility of the privatization program as a whole.

It is important to say that one of the main elements of the success of privatization program is the public confidence in the persons who are responsible for attracting and treating for foreign and local investors. We do not want to accuse any person. Moreover, we consider the circumstances which compelled the government to conclude such contracts. But in the future, we call for guidelines for the negotiated sales such as in Togo, Philippine, and Argentina.

(iii) **Tenders:**

Unlike an auction, which as a rule is issued to dispose of the asset of an SOE, normally in liquidation, a tender often is used to divest SOEs as entities that are going concern. In a tender privatization, prospective investors in an SOE submit their bids in sealed envelopes, which are opened publicly at announced time and place. Many governments prefer tenders because of their relative simplicity and ease of implementation. Tenders also, in general, result in higher prices than negotiated sales, due
to the element of competition. Governments using tenders in privatization also feel less vulnerable to politically motivated accusations of poor negotiating performance or improprieties in negotiations, because the tender process is conducted in the public eye according to predetermined guidelines.

(1) **Important Documents for Tenders:**

For a tender to be perfectly exercised, the followings are required:

- **Confidentiality agreement.** Potential bidders should confirm that any information received by them will only be used in the context of formulating an investment decision and not for commercial purposes.

- **Information memorandum.** This document outlines the activities, history, competition, ownership structure, and the financial performance of the SOE over the last three or five years.

- **Questionnaire on potential acquirers.** The vendor must ensure that bidders are reputable, technically competent, have sufficient funds to effect the purchase of privatizable SOE, and that they are not in bankruptcy.

- **Draft Sales and Purchase Agreement.** The terms and conditions of the sale should be prepared in advance and submitted to potential acquirers at the time they receive the information memorandum. In the tenders, it is important that the vendors should insist on negotiating on the basis of their own legal documents, rather than the purchaser’s. This is important because having control of drafting of legally binding documents reduces the chances that the final agreement does not reflect what was agreed upon during negotiations.

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• Access to data room. In addition to the documents outlined above, for those parties who have demonstrated that they are bona fide “would be” investors, access to “data room” and of the management of the company is granted. As its name indicates, “data room” is a room in which confidential information on the company is gathered. Potential bidders whom the room may take as many notes as they wish from the documents made available to them but they cannot copy them or take them outside of the room because the information made available to bidders is likely to be valuable to competitors. It is important to limit access to data room only to those who are most likely to bid for the company.

Tenders contracts, as we have previously mentioned, are used for MLEs (middle and large enterprises). These types of SOEs are of big importance for the state, and many countries in the world aim to make some contribution by local investors. Weakness in the capability of local private sector in a country may lead to that the majority of purchasers are foreigners. Because of this, governments often impose conditions for the sale of their SOEs and companies. In some countries, especially the developing ones, tenders contracts of privatization usually contain condition that if the new owner is a foreigner; a percentage of the shares of the privatized SOE will be offered again to the local investors.143

Generally, in all operations of privatization processes the role of the legal advisors as well as economic advisors should not be underestimated. The legal advisor may ascertain the method of privatization prior to the economical advisor since that the legal adviser is presumed to know well about the legal requirements. The legal requirements in many countries beat the economic benefits. This often happens if the legal requirements

143 - Id pp. 42-43.
overlap the economic benefits. The following privatization operation from Canada explains this opinion:

Telesat Canada was established in 1969 as a joint venture between the government and Canada’s major telecommunications carriers. (Most Canadian telecommunications were investor-owned). Its mission was to develop a domestic satellite-based communications system. It is the only carrier providing domestic satellite facilities. It operates two satellites and a network of 500 earth stations and, in 1992 it launched two new telecommunications satellites: the Anik E2 and Anik E1. It is also the only Canadian carrier providing basic telecommunications facilities to northern communities and to remote region in Canada.

Telesat’s major shareholders were the government of Canada with 3,225,000 shares held directly and indirectly or %53 of the total, and the Canadian telephone companies 2,535,000 shares or %41.6 percent of the total. Telesat accounted for about one percent of total Canadian telecommunications industry revenue in 1992. The company had 877 employees with 672 located at the head office in Ottawa and the remainder were in the regional offices.

The privatization of Telesat was announced in the 1991 Canadian budget. Wood Gundy, a Canadian merchant/investment bank, was engaged through a competitive process as the government’s financial advisor. Valuation, resolution of policy issues, and privatization options were taken to government, and a privatization plan was approved. There were two sales options considered for privatization; public offering of shares and tender’s sale. The public offering from the economic viewpoint was more gainful. After many economic and legal discussions, the government opted for privatizing Telesat through tender’s sale. The ground of such selection was that the legal advisor was of the opinion that public offering takes a long time and the employees wages will remain
and their post services rights will increase. Therefore, the government agreed to privatize the company through trade sale. A legislation to allow sale was passed at the end of 1991.

In 1992 the government announced for tenders. The government stated that its decision on a purchaser would be based on the “best overall offer”. This was understood by the business community, on the basis of the past sales, to be the best cash price.\textsuperscript{144}

In Sudan, banks are the main and important SOEs which were privatized in the last years. A good example for tender’s privatization processes is the operation of Elnilein Industrial Development Group. This privatization process was exercised by fulfilling the entire legal requirements and, according to our humble view; a high level of transparency was applied. Good ranking for legal preparations for privatization, consultation prior to participation, clear tender announcement in newspapers, and efficient privatization agreement presented one of good example for privatization.

As a first step after listing the bank on the candidate SOEs for privatization, the Bank of Sudan (the major owner of the bank by \textdegree 99 of shares) obtained a legal opinion from a neutral legal advisor about the legal settings and the ideal method to privatize the bank. The neutral legal advisor, Mr. Hashim Abu-Bakr Al-Jaalie (advocate), prepared the following legal advice:\textsuperscript{145}

\textit{“Elnilein Industrial Development Group was established under Elnilein Industrial Development Group Act (1994). Such Act provided that the group shall have a separate legal entity and seal, and can sue and be sued under its name. Also, the Law provided that the Bank of Sudan shall own \textdegree 99 of its shares and the Ministry of Finance and National Economy shall own the rest \textdegree 1 of the capital.”}

\textsuperscript{144} - Id, p. 50-53.
\textsuperscript{145} - Source: Department of legal Affairs of Bank of Sudan.
Since that Elnilein Industrial Development Group is a public utility and, accordingly, was established by a special Act, any change in its position shall be by a new Act. Therefore, if the owners decided to dispose of this Bank or to sell the shares of this bank to any private part, wholly or partially, this will not be valid unless it is exercised according to a new legislation from the same authority that formerly enacted the law of the Bank. In this case it is the National Assembly or the Parliament.

Therefore, we advise that the national legislative authority shall issue a legislation whereby Elnilein Industrial Development Group shall be transformed into a public share company, and registered under the provisions of the Companies Ordinance 1925. Such company shall exercise banking activities. The mentioned legislation shall include a provision whereby all the rights and liabilities of the former Elnilein Industrial Development Group shall be transferred to the new company. Also the legislation shall include a provision whereby all the capital and property rights shall be transformed into equal shares, %99 for the Bank of Sudan and 1% for the Ministry of Finance and National Economy. Thereafter, the Bank of Sudan and the Ministry of Finance will be free to sell their shares, wholly or partially.

If the Bank of Sudan and the Ministry of Finance and National Economy aim to maintain their shares in the new company, the legislation shall permit the company to increase its capital. The recent capital can be evaluated as shares and allotted to the Bank of Sudan and the Ministry of Finance and National Economy. The additive capital can be offered to the public at large or to any other investor by public offering of shares.¹⁴⁶

The important advice that can be implied from Mr. Hashim’s note is that Elnilein Industrial Development Group cannot be privatized according to the provisions of the Disposition of Public Enterprises Act 1990. Also, the note contained long complicated procedures without referring to any other law or provision prohibiting the sale under the Disposition of Public Enterprises Act 1990.

¹⁴⁶ -This legal advice was presented in Arabic; translated to the English by the researcher. Source: Internal files presented to the researcher by Legal Affairs Department in Bank of Sudan.
On 21.3.2006, the Head of Legal Affairs Department in the Bank of Sudan, Mr. Osman Ahmed Mahjoub, prepared a legal opinion. This legal opinion contained very strong evidences that there is no legal barrier against the privatization of Elnilein Group under the provisions of the Disposition of Public Enterprises Act 1990. His opinion reads as following:

“I have read the legal opinion presented by Mr. Hashim Abu-Baker Al-Jaalie (copy accompanied). I, respectfully, do not agree with him because of the followings:

(1) Elnilein Industrial Development Group is a public corporation established as a bank according to s.4 of Elnilein Industrial Development Group Act 1994. This is true and there is no issue in this point.

(2) The Bank (the group) cannot be wound-up without legislation according to S. 29 of the same Act. This is true and also there is no issue here.

(3) Winding-up the (group) or selling it, does not require a legislation to transform the (group) into a public shares company registered under the provisions of the Sudanese Companies Ordinance 1925 etc, as mentioned in Hashim’s opinion.

(4) The mentioned bank is a state-owned enterprise. The definition of “state-owned enterprise” mentioned in S.2 of the Disposition of Public Enterprise Act 1990 typically covered it. The definition in S.2 reads: ‘enterprise means: any public corporation, public establishment, or any public sector company owned wholly or partially by the state.

(5) According to term (4) above; the law by which the group is wound-up or sold is the Disposition of Public Enterprises Act 1990, and according to s.4 of the same Act, the matter does not require anything other than a decision from the HCDPE. S.4 of the Disposition of Public Enterprise Act 1990 authorizes HCDPE to take the decision of the disposition through one of the following:

(a) Participating with any part other than the state, by any form of participation;
(b) Selling to parties other than the state;
(c) Final liquidation.

147 - The researcher found this legal opinion and the legal advice in the internal file titled Elnilien Group Agreement, in the Bank of Sudan
The required legislation for selling or winding up the Bank (the group) is already existent. Therefore, we do not agree with Mr. Hashim in the requirements mentioned in his note.  

Thereafter, invitation for bidding was prepared as the follow:

**Invitation for Bidding**

Elnilein Industrial Development Group (NIDBG) came into being in 1993 as a result of merging two pioneer banking establishments: the former Industrial Development Bank of Sudan (a branchless specialized financing institution established in 1961) and Elnilein Bank (a pioneer commercial bank with more than 30 (thirty) branches spreading all over Sudan, established in 1964).

The new objective of the new NID is to promote industrial development at large along with extending multi-faceted and full-fledged banking services to all other sectors of the economy at both local and international levels.

**Main Activities:**

NIDB undertakes the following activities:

i- Extending multi-faceted and full-fledged services to all sectors of the economy at both local and international levels.

ii- In the context of development financing; NIDBG assume the following functions:

* Providing financial and technical assistance for the establishment of new industries and modernization and/or expansion of the existing ones.
* Providing finance to agriculture and service sector.
* Promoting investment opportunities among Sudanese expatriates and foreign potential investors.
* Extending medium and short-term credit to finance working capital requirements.
* Extending technical consultancy services to industrial venture and other forms of business.
* Co-operating with government units in conducting researches and studies pertaining to development issues.

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148 - Source: Legal Affairs Department .Bank of Sudan.
* Providing support to local technical innovations, with special attention to small-scale industries, artisans, craftsmen and family-run business.

* Participating in share-capital of some regional financing institutions and domestic companies.

As such you are here to by request to provide your proposal for acquiring %60 percent of Elnilein Industrial Development Bank Group (NIDBG) shares within two weeks time based on the following:

1- Your future vision for the bank.
2- Your plans to promote the role of the bank in the financial market.
3- The proposed price for the shares.

The proposals should be handed over in sealed envelopes to Mr. Mohamed Abbas, with the following title:

BIDS FOR ACQUIRING SHARES OF ELNILIEN BANK GROUP.

(The dead line for receiving bids is 12:00 noon of August 15th 2006.)

Thereafter, Bank of Sudan appointed a committee to verify the bids. The committee determined specific measurements for selecting the winner candidate. The committee received twenty nine sealed-envelope offers from in/outside Sudan. Primarily, twenty offers were considered as candidates according to the legal entity, C.V and the financial capacity of the candidate.

The following investors were excluded as candidates because of the followings:

• Mirgani Abdelraheem & Co., because there is no legal entity or documents supporting financial capacity.

• Salaheldeeen Ahmed Idris & Jamal Elwali, because there is no legal entity.
• Alzoora Group, because there is no legal entity or documents supporting the financial capacity.
• Sususiness Group, because there is no C.V and financial capacity.
• Elshiekh Sultan Bin-Khalifa Bin-Zaied Al-Nahian, because there is no legal entity, C.V or documents supporting the financial capacity.
• Noor Investment Co., because there is no financial capacity.
• Waiel Abd-Elgadir & Others, because there is no financial capacity documents or legal entity.

The Committee determined the points for the competition as follows:

First: The Technical Part, 55 points, divided as:
  a - Legal personality: 10 points.
  B- Former experience in banking field: 7 points.
  c- Number of general experience: 3 points.
  d- Proposed frame-work plan: 35 points.

Second: The financial part, 45 points, divided as:
  a- Advanced payment amount: 30 points.
  b- Conditions and period of payment: 10 points.
  c- Financial situation and administrative parts: 5points

The final list of candidates ranked the candidate companies, groups and legal entities according to their points as follow:
  a- Al-salaam Bank & Iemaar Co: 90.7 points.
  b- Hamad & Qatar Bank International: 60.8 points.
  c- Saudi Facilities Holding Co: 61.6 points.
  d- Gasha for Shipping & Handling Co: 58.2 points.
  e- Dubai Islamic Bank: 57.9 points.
Therefore, the committee recommended the acceptance of the offer presented by Al-salaam & Iemaar co. Also, the committee recommended that the proposed frame-work plan and the time-table program should be considered an inherent part of the contract. Thereafter, a very accurate agreement with clear rights and liabilities for both parties was signed. Some terms of the contract read the follow (Also see the appendix):\(^{149}\)

**Shares Sale Agreement\(^{150}\)**

This agreement is made in November 11\(^{th}\) 2006 and entered into by and between Sudan Central Bank (thereinafter referred to as “the Vendor”), represented in this agreement by Mr. Bader-Alden Mahmud Abbas, Vice-Governor of Sudan Central Bank, and Al-salaam Bank group (thereinafter referred to as the “Purchaser”), represented in this agreement by Mr. Hussein Mohammed Salem Almiza, and on the address of the Vendor and the Purchaser referred to in S. 13 of this agreement.

**Section (1): Introduction**

Whereas Elnilein Industrial Development Bank Group is a bank established under the provisions of Elnilein Industrial Development Group Act 1994 and its main office in Khartoum of Republic of Sudan, to exercise the activities detailed in S.5 of the mentioned Act, and whereas the nominal capital of the Bank is SD. 5,000,000,000 (five billions Sudanese dinar). The Purchaser owns 99%, and the Ministry of Finance and National Economy owns %1 of its shares. And whereas the Vendor offered to sell %60 of its shares in the mentioned Bank, and whereas the Purchaser offered and accepted to buy these shares with absolute knowledge of the financial situation of the mentioned Bank on 31.12.2005, and thereafter the Vendor has agreed to the Purchaser’s offer the two Parties have agreed to the following:

**Section (2):**

\(^{149}\) We haven’t found the English copy of this contract. Legal Affairs Department in Bank of Sudan said; the English copy may be existed in the TCDPE. Also the TCDPE said there was no English copy signed. Like these documents should be existed in any related unit of the government and by many languages, that these document represent good advertisement for the investment in Sudan. We believe that the documents of this operation are legally attractive to any investor according to the competitive steps which were exercised in this privatization operation.

\(^{150}\) Source: Legal Affairs Department, Bank of Sudan.
In this agreement, unless the context requires otherwise; following words and expressions means:

“Vendor”: thereinafter means the Central Bank of Sudan.


“Bank”: thereinafter means Elnilein Industrial Development Bank Group

“Agreement”: thereinafter means this agreement.

“Closing”: thereinafter means the date of Purchaser’s fulfilling purchase of shares according to S.(6) of this agreement.


Section (5): Shares price
The full price of the purchased shares shall be $80, 000,000 (eighty millions American Dollars).

Section (6): Payments
The Purchaser shall pay the price of the purchased shares in this agreement as follow:

(1) %50 (fifty percent) of the total amount; in cash at the time of signing this agreement.

(2) %50 (fifty percent) of the total amount after the Vendor completed the transference and received a registration certificate, within a period not exceeding six months after signing this agreement.

Section (11): Governing Law
The governing Laws for this agreement shall be the Sudanese laws.

Section (12): Arbitration
In the event of any conflict between the two parties to this agreement about the application or interpretation of the provisions of this agreement; solving of such conflict shall be by direct negotiations between the two parties. In case of failure, the solution shall be in reliance to arbitration. The applicable law in such a case shall be the Sudanese Arbitration Act 2005.

Section (13): Notifications
All notifications and correspondences between the two parties shall be to the addresses of the parties as follows:
(1) Vendor’s address:
Khartoum-Sudan
P.O. Office: 313.
Fax: 00249-183-780273.
E-Mail: sabir@bankofsudan.org.
(2) Purchasers address:
United Arab Emirates-Dubai
P.O. Office: 120180- Dubai
Fax: 009714-3193114 /or/ 009714-3673156.
E-mail: djabr@amlakfinance.com. /or/ Djab@leadercapital.com

Parties:
* Vendor: Central Bank of Sudan, represented by Bader El-din Mahmud Abbas
  Vice-Governor of Central Bank of Sudan.
* Purchaser: Al- salaam Bank Group, represented by Hussein Mohammad Salem
  Al-miza

All following steps of privatization were accurately exercised. Both parties fulfilled their obligation in the determined time. Despite some little legal and financial disputes here and there, the privatization operation is considered as one of the most impressive privatization operations. The new company of the Bank on 26.8.2007 published the following:

“Elnilein Bank would like to inform all Sudanese peoples, especially his respectful customer that, thanks to god, Elnilein Industrial Development Group has been registered as a limited private company according to the provisions of the Sudanese Companies Ordinance 1925. Registration certificate No: (C.31030) has been issued by the Registrar of Companies. The Bank will continue to exercise banking activities in accordance with the same objectives of the former Bank (included in the memorandum of the new company.)”¹⁵¹

As a summary for Elnilein privatization operation, we can say that the high level of transparency, which was exercised in the different steps

of the operation, represented the key of the success of the operation as a whole. Appointing a committee for verifying the bids was, indeed, the corner stone in this success.

The five reports which were prepared by the above committee enabled the HCDPE to ensure that those investors were of reasonable capability to compete in this tender. The final report of the committee which specified the standards of competition reflected a high level of transparency. With regard to that the vender is not compelled to sell to a certain bidder; the selection of the highest-degree bidder as the winner purchaser gave the vendor (the Central Bank of Sudan) high credibility on exercising the privatization of the banking sector.

The terms of the agreement were accurately prepared and completely covered all the requirements of both vendor and purchaser. Lastly, we recommend that all high-scale enterprises such like banks, cement factories, sugar factories, etc., be privatized by the same steps which were followed in Elnilein Bank’s privatization. Adoption of tenders with sealed envelopes, and granting the sale to the highest-price competitor will prevent corruption and political favouritism. In other words, in privatization of small and medium SOEs, the statement: the vendor is not obliged to sell to the highest-price or any other competitor, should be exercised in a narrow sense and monitored by a neutral body.

The privatization operation of the Bank of Khartoum is the most important privatization operation in Sudan for three reasons. First, the bank is the largest one in Sudan through all eras. Second, because the bank is one of the former nationalized banks in the May era. Third, the privatization of this Bank created big opposition because of the historical

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152 - Department of legal affairs in the Bank of Sudan.
153 - This Bank was nationalized in 1970 by law issued by the Command Council of May Revolution.
background of the Bank, and the number of jobs which were terminated as a result of its privatization.

The Bank of Khartoum was established in 1913, titled ‘Anglo-Egyptian Bank’. In 1935, the name was changed to be ‘Barclays for Overseas Bank’. In 1954, at the beginnings of the national rule, the name of the Bank changed to be ‘Barclays D.O Bank’. One year later, in 1970, the May regime took power with socialist stream, and the Bank was nationalized by the state and its name changed to be ‘State’s Bank for Foreign Commerce’. After the socialism stream of May regime was marginally mitigated, the Bank was transformed into a public company owned by the state (%99 of the shares owned by the Bank of Sudan, %1 owned by the Ministry of Finance). The first step for privatizing such Bank began in 1993 by amalgamating the Bank with the Unity Bank and National Import and Transport Bank. Thereafter, the Bank was transformed into a public share company owned by the state (%75 of the shares) and other parties: Shiekan Company, Sudanese Development Establishment, Omdurman National Bank, Sudanese Free Zones Corporation and the Financial Investment Bank (%25 of the shares). The state began to privatize the bank by public offering (%25 of its shares). The public offering did not meet the anticipated success.154

Finally, the government (the Bank of Sudan and the Ministry of Finance and National Economy) sold %60 of its shares to Dubai Islamic Bank for $57,000,000. The same steps of transparency were followed. A committee for determining competition measurements was appointed. Also, the degrees for each measurement were accurately determined. Lastly, the winner was the highest-price competitor. The Central Bank of Sudan did not use the statement which is normally used in tenders (vendor is not obliged to sell to the highest-price or any other bidder).

154 - Source: Department of legal affairs of the Bank of Sudan.
In our humble opinion, this privatization operation also represents one of the most successful privatization operations of banks in Sudan. It is to be noted that the two operations of Elnilein and the Bank of Khartoum were prepared and concluded by the Central Bank of Sudan, not by the TCDPE. However, following are some terms of the Bank of Khartoum Agreement (Memorandum of Understanding). (See the appendix).

“This agreement is made on............155 day of July 2005 between:

(1) The Bank of Sudan whose registered office is in Khartoum –Sudan (the ‘Vendor ‘and

(2) Dubai Islamic Bank PJSC whose registered office is at Dubai-United Arab Emirates and which shall include all assigns and transfers of Dubai Islamic Bank PJSC, including without limitation any third party to whom Dubai Islamic Bank PJSC transfers any shares acquired by Dubai Islamic Bank PJSC pursuant to the terms of this agreement as (the ‘Purchaser’).

WHERAS, the Vendor has agreed with the Purchaser for the sale of 7,086,000 fully paid shares in the Bank of Khartoum Public Limited Company (the ‘Company’) being a company registered in the Republic of Sudan.

NOW, THEREFORE, IT IS HEREBY AGREED AS FOLLOWS:

1 Definitions

For the purposes of this agreement:

‘Purchase Price’ is US$ 57,000,000 (fifty seven millions);

‘Requisite Consent’ is defined in cl 3.4;

‘Share’ means the 7,086,000 ordinary shares of 1000 Sudanese Dinars each of the Company

‘Sub-Contracts’ means the sub-contracts entered into in order to enable the performance of, or otherwise in connection with, the Existing Commitments;

‘Tax’ includes (but is not limited to) income tax, corporation tax, advance corporation tax, capital gains tax, development land tax, development gains tax,

155 - The day is not mentioned because the Department of Legal affairs in the Central Bank presented the draft of the agreement to the researcher; they said we are not permitted to present the original agreement.
social security and earnings related contributions, income tax payable by way of
pay-as-you-earn deductions, estate duty, inheritance tax, capital transfer tax,
stamp duty and value added tax, and all costs, charges, interest, penalties,
surcharges and expenses related to any disallowance of relief or claim for
taxation;

‘Warranties’ means the warranties set fourth in schedule 1; and ‘Warranty’ shall be
construed accordingly;

2 Sale and Purchase of Sales
The Vendor has agreed in principle and subject to contract to sell with full title
guarantee and the Purchaser has agreed in principle and subject to contract to
purchase the shares for the sum of US$ 57,000,000 (fifty seven millions),
completion to take place on the Completion Date.

9 Assignment
This agreement shall not be assignable by either of the parties hereto
without the prior written consent of the other party hereto. Notwithstanding the
foregoing, the Purchaser shall have the right to transfer any or all of the shares
it owns now or in the future to third parties of the Purchaser’s choosing. Any
third party who becomes an owner of any shares following such a transfer by
the Purchaser shall be entitled to rely upon and enforce any terms of this
agreement against the Vendor as if that third party had been a signatory to this
agreement.

10 No press release, notice or other public announcement concerning the
transaction set out herein shall be made or issued (other than to the extent
required by the law) by one party hereto without the prior written approval of
the other.

13 Arbitration
Any dispute to any provision of this agreement shall be referred to a single
arbitrator in London to be agreed between the parties. Failing such agreement
within seven days of the request by one party to the other that such a question or
difference be referred to arbitration in accordance with this clause such
reference shall be to an arbitrator appointed by the President for the time being
of the Law Society of England and Wales. The decision of such arbitrator shall
be final and binding upon the parties. Any reference under this clause shall be
deemed to a reference to arbitration within the meaning of the Arbitration Act 1996.

15. **Termination**

15.1 If the requisite contents are not obtained within a period of six months from the date hereof, then (unless the parties otherwise agree and subject to cl 15.2) neither the Vendor nor the Purchaser shall be obliged to complete the purchase and sale of the shares, this agreement shall automatically terminate upon the expiry of the said period and neither party shall be under any liability to the other by reason of such termination, other than obligation on the Vendor contained in cl 6.2

17 **The Governing law**

The construction, validity and performance of this agreement shall be governed by the laws of England. The parties submit to the non-exclusive jurisdiction of English courts."

It is to be noted, there was big exaggeration in the terms of this agreement, especially in the formalities, definitions, and in the introduction. The subject matter of the agreement (government’s shares) which is more significant has not found the same detailing in the agreement.\textsuperscript{156} This may be justified by that in a country like Sudan, where corruption and absence of transparency are normal practices; investors will do their best to prevent any corruption. Another reason perhaps is that in developing countries, political regimes are always subject to people’s revolutions and militarily changes. Therefore, investors, especially foreigners, may become a good target for the new governors’ accusation. Such accusations may lead to confiscation or renationalization of the privatized SOEs. Therefore, exaggeration of the terms of a contract may constitute the first defence-line against such accusations ensuring transparency. The other important note is that the

\textsuperscript{156} - We have examined many privatizations contracts on different countries, but we haven’t found such sort of exaggeration of terms.
governing law is the English law. Inevitably, the Purchaser imposed this term in the contract to secure himself against the political changes, a thing which supports our view above.

Privatization of the Real Estate Bank privatization is the only operation which was executed by TCDPE. We do not have justification for this. Also, the personnel in TCDPE and in the Central Bank of Sudan have not presented any reasonable justification for the confusion of functions between TCDPE and the Central Bank of Sudan. The only justification that can be implied is that the Central Bank of Sudan has no right to dispose of any SOE except those in the banking sector. This may be argued by that the Real Estate Bank was completely privatized by TCDPE. On the other hand, if we say that the law gives TCDPE the absolute authority to privatize all the Sudanese SOEs regardless of the sector to which the targeted SOE belongs. This will be argued by that the other two of the three agreements of banks privatizations were concluded by the Central Bank of Sudan.\textsuperscript{157} However, following are some terms of the privatization contract of the Real Estates Bank (see appendixes):

\textbf{REAL ESTATES BANK SALE CONTRACT}\textsuperscript{158}

\textit{“This contract is made in Khartoum on December 4\textsuperscript{th} 2002 between:

(a) The Government of the Sudan; thereinafter referred to as (First Party), represented by the Minister of Finance and National Economy (The President of HCDPE).

(b) Eljumaa Company for Trade and Investment Company; (registered under the Sudanese companies Ordinance 1925, by registration certificate No. (C.17153) in 27.8.2001., the company’s head office is in; Elfaihaa Building, Fifth Floor, Khartoum-Sudan, and Elshiekh Jumaa Bin-Fahd Bin-Mubarak Eljumaa. Thereinafter referred to as the (Second Party), represented by the Head of the}

\textsuperscript{157} - This matter will widely be discussed in the following chapters of this dissertation, especially in the chapter titled as Law of privatization. The agreement is translated by the researcher.

\textsuperscript{158} - Source: Department of legal affairs in the Bank of Sudan.

(1) Whereas the First Party offered to sell the Sudanese Real Estates Bank including all its branches and the Sudanese Real Estates for Investment & Trade co. ltd, and all the Bank’s shares in all other companies, and all its registered fixed assets (according to the accompanied lists), and its portable assets (according to the accompanied lists), for a price of USA $ 15,500,000 (fifteen millions and five hundred thousand USA Dollars), according to his powers by S.(4-A) of the Disposition of Public Enterprises Law 1990. And;

(4) The First Party has agreed to sell to the Second Party; the Real Estates Bank, the Sudanese Real Estates Company for Trade and Investment, all the fixed and portable assets (mentioned in the enclosed list), and all the shares owned by the Bank in the other companies (mentioned in the enclosed list).

(5) The Second Party accepted the purchase of the Bank and to pay the price amount: USA $ 15,500,000 (fifteen millions and five hundred thousands American Dollars).

(7) The Second Party is obliged by;
First: Paying an amount of USA $ 15,500,000 (fifty million and five hundred thousand American Dollars) in cash, at the time of signing this contract.
Second: Transforming the Real Estates Bank into a private shares company, and thereafter into public a shares company five years after the transformation into private one.

(9) This contract shall be subject to the Sudanese laws, and shall be executed and interpreted according to the Sudanese law.
(10) Any dispute between the Parties to this contract shall be solved through direct negotiations between the two parties. In case of failure, the governing law shall be the Civil Procedures Act 1983.

Signatures:
First Party: Dr. Hassan Ahmed Taha: representative of the Minister of Finance
The list of privatizations through tenders in Sudan is long. Here we will mention some of them in brief:

- **Friendship Palace Hotel Sale Contract** which was concluded on 20/7/2002 between HCDPE, represented by Mr. Alzobier Ahmed Alhassan, Minister of Finance and National Economy (Vendor), and Jumaa Eljumaa Company for Trade and Investment, registered in Khartoum – Elfaihaa Builing. The Sudanese Government owned 100% of the Hotel’s shares. The location of the Hotel is No 64, Block No 5 (Hillat-Hamad, Khartoum-North). The price was US$18.000.000. One of the important Purchaser’s obligations is to transform the Hotel to a five star one, and to transform the Hotel’s company from private company into a public one.

- **White Nile Tannery Contract**: the contract was concluded in 31/1/1992 between HCDPE (Vendor), and Faisal Islamic Bank, Elrawasi Charity Company, Bash Investment Company, Sudanese Investors Company, and Elridaa Company for Investment (Purchasers). The price was S.P120.000.000; paid as four instalments, S.P12.000.000 immediately at the time of signing the contract, S.P48.000.000 one month after, third instalment of S.P24.000.000 one month after, and fourth instalment of S.P36.000.000 one month after the third instalment. By the

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159 - This Hotel was formerly owned by Daewoo Corporation, a Korean company, (60% of the shares) and the Sudanese Government (40% of the shares). In 1992, Daewoo Corporation sold all its shares to a Chinese company (SCMC) for US$ 12, 000,000. In 28/12/1992 the Sudanese government used the pre-emptive right and paid the amount to Daewoo Corporation. Then the Sudanese Government sold its 100% shares to Jumaa Eljumaa Company. A big conflict arose between Daewoo and the Sudanese government on the ground that the price paid by Sudanese government was lower than the real price. It is clear that the price agreed upon between Daewoo and the Sudanese government on the ground that the price paid by Sudanese government was lower than the real price. It is clear that the price agreed upon between Daewoo and the Sudanese government was too low so as to reduce the taxation and other fees of the sale. Then, Daewoo Corporation sued the Sudanese Government in London according to a term in the former contract; (the governing law was the English Law). Lastly, the Sudanese Government won the suit that the English court considered that the reduction of the price in the contract is not suitable causation to null the new contract or to compel the Sudanese Government to pay the difference between the paid price and the real one. Source: Internal files in TCDPE.
contract, the Purchaser shall be obliged to operate the tannery within a period not exceeding six months after signing the contract. The Purchaser shall not be entitled, under any circumstances, to sell his shares to any third party except by the written consent of the Vendor.\footnote{160}

- Red Sea Hotel Sale Contract: the Hotel was sold in 27/12/1992 by a contract between the Sudanese Government, represented by HCDPE (Vendor), and Sudanese Kuwaiti Hotels Company (Purchaser). The price was S.D11,000,000, in addition to S.D1,600,000 as sales tax.\footnote{161} The price was paid by instalments: %50 before signing the contract, %25 one year after signing the contract, and %25 two years after signing the contract.\footnote{162}

(iv) Public Offering of Shares:

A public offering of SOE shares entails the sale of all or part of the government’s holdings in a company to be public through domestic or international stock markets. The price of the shares can be fixed by the sponsor or by the government itself, or the offering may be on a tender basis.

In order for a public offering to be successful, several grounds have to be preserved. First of all, in order for SOE to be attractive to the general public, it has to be well known as well as financially sound with good future potential. Secondly, an adequate distribution network of shares has to exist, combined with a good marketing strategy in order to generate sufficient interest. Finally it is important that the share price reflects a fair market value of the company. Too high prices discourage

\footnote{160 - This condition in the contract constitutes a golden share and it seems irrational. The golden share normally imposed by the government in privatization of strategic SOEs and sectors.}

\footnote{161 - This price was not low; that in 1992; the real estates were not valuable like nowadays. Also the location of the Hotel is in Port Sudan not in Khartoum, the capital.}
investors and could stall the privatization, while too low price might create criticism of poor management of public assets.

While public share offerings are most common in developed countries, they are not limited only for these countries. For example, Nigeria has privatized thirty-five SOEs through public share offerings, and Sri Lanka has conducted a very successful share offering since 1989. Chile, Jamaica, and Philippines are other examples of those who have used public share offering to divest SOEs. However, the capital markets in most of the post socialist and developing countries are either nonexistent or too shallow to support extensive use of this method of privatization. Most of their SOEs are also in too poor a condition to be fit for the public share offerings.163

World Bank experts, in developing countries, value public offerings of shares because they allow a wide spread of ownership including domestic investors, strengthen the developing capital market, and are by design very transparent transactions. World Bank’s experts also recommend that public offerings of shares should not be concentrated in the domestic investors, that foreign investors usually emanate the local stock exchanges. On the other hand, foreign investors gain additional confidence regarding the privatization, because the participation of a large number of domestic investors makes it even less likely that the process will be reversed. In addition, they typically find the shares an attractive investment opportunity only if the future profitability potential of the company is high. One way to support this perception is to combine a public offer with a direct sale of part of the company to a strategic strong investor. In the case of Mexico’s TELEMAX, for example, the government decided to first sell a minority share of about 20% together with a management contract to a foreign consortium. It then

163 - Dmitri Pluonis and Andrew Mc Williams, supra 10, pp.21-22.
sold 25% in the domestic and international markets, resulting in a total revenue of about US$3 billion.\textsuperscript{164}

The need for strategic investors is of less importance in companies whose future potential is driven by the access to valuable raw materials. In 1990, Argentina sold 45% of its national oil company YPF in domestic and international offers for US$ 3.3 billion. Similarly, Ghana’s Ashanti Goldfields offering in the London and Ghana stock exchange resulted in proceeds of US$ 316 million in 1994. In both cases, the sale supported the local capital market; the Argentina government successfully revived its depressed stock, while the Ghana’s stocks market capitalization increased almost tenfold with the Ashanti offerings.\textsuperscript{165} However, in all these cases, effective distribution mechanisms existed. Either the companies were so well known that their shares could even be offered in stock exchange abroad, or well functioning market existed at least in the country. Thus Peru managed to successfully privatize a number of smaller companies on the Lima stock exchange.\textsuperscript{166}

In Sudan we do not have experience in privatization through public offering of shares because of the following reasons:

a- Weakness of the public awareness about the feasibility of public companies.\textsuperscript{167}

b- The former disappointing performance of public companies.

c- Most of investors in Sudan have an individualistic tendency due to some primitive traditions.

d- The Sudanese government itself did not use this method of privatization in all former operations. Therefore, we recommend

\textsuperscript{165} - Id p. 15.
\textsuperscript{166} - Id p. 15.
\textsuperscript{167} - Nowadays there are some features for the feasibility of investing in public companies after rare successful experiences such as Sudatel.
that the Sudanese government has to execute, at least, one or two privatization operations to illustrate the public response for this method. The success of such method opens the door widely for the middle-class man to invest his savings in the privatized SOEs. Such experience should be assisted by fixing lower prices for the shares. In the first chapter of this dissertation we mentioned that gaining of big proceeds is not in itself a justifiable objective for privatization. Spread of company culture will support public offering of shares in Sudan. Since the public offering of shares is one of the ideal methods to prevent favouritism and corruption. Exercising such method will increase the transparency and credibility of the privatization program as a whole.

e- The Sudanese government has unjustifiable tendency to attract the foreign investors by using direct negotiated sales regardless of the necessity of attracting the local ones. Direct or negotiated sales are exercised when the seller is in a weak position and the purchaser is in a strong position. The decision makers in this country must be aware of that: by oil production and liberation of price, the financial capacity of the local investors has largely increased and the deep need for hard currency has mitigated.

f- The role of the legislature in encouraging the middle-class man to invest in public companies is by mitigating the burden of taxation law, customs tariff, and other financial burdens on the public companies.\(^{168}\) For example, the legislature may state that any company with a determined number of shareholders, (not a number of shares), will be granted a fixed margin of reduction on taxations.

\(^{168}\) - Public offerings mainly targeted the middle-class and lower-class man; therefore, shares are floated.
In other words, the preferred treatment in this case will be for the number of the shareholders not the number of the shares.

(v) **Voucher or Coupon Privatization:**

Many Eastern European countries created mass privatization schemes in which vouchers were given to all citizens essentially free of charge. These vouchers could then be exchanged into shares at special auctions. The main advantages of this method are that the process of privatization gains speed by simplifying the task of divesting a large number of SOEs, that the transfer of ownership is highly equitable, and that it supports the formation of local capital market. However, this method clearly will not generate any government revenue, and the gain in productive efficiency and the profitability of the enterprises will be delayed.

In the Czech Republic’s mass privatization program, all adult citizens were given the opportunity to purchase vouchers at the considerably discounted price of about US$35, which could be exchanged for shares in privatized SOEs that had elected to participate in the mass privatization program, either directly or through an “investment fund”.

To some extent, there may be an implicit contradiction between the aims of the mass privatization, which is to spread ownership of former SOEs as widely as possible, and the private investor’s interest in securing sufficient control over the SOE.

For instance, in the Czech Republic, SOEs and other interested parties were invited to submit privatization proposals to the government, in which they were to propose the percentage of shares to be sold through various methods, including the voucher program. In the first wave of

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1200 MLEs SOEs to be privatized, approximately 50% of the total shares were sold by the voucher program, indicating that many companies were holding shares back in the hope of finding a “strategic investor”.

Russia is virtually alone in requiring foreign investors in privatized SOEs to purchase vouchers at auction, just like ordinary Russians. This requirement is probably the main reason why there have been almost no foreign equity investments in Russian SOEs. Instead, investors have gone the route of forming joint ventures with their SOE counterparts, freeing them from the potential risk and management headaches with voucher privatization.

Our humble view, in all Africa, except for some few countries in the continent, such type of privatization cannot be exercised. This method of privatization requires a good level of public company culture, a thing which is not deep-rooted in Africa and may be in all developing and, indeed, the least developing countries. Another reason is the lack of efficiency of the administrative and executive systems in the developing and least developing countries. For example if, in a country like Sudan, the government tried to spread the vouchers method in its privatizations (like the Czech Republic). It will, in addition to the poor public awareness, find that there is no dependable record or register that exclusively determines the number of the Sudanese citizens. This reason can also be applied in almost all African countries. Therefore, it is unheard for application of privatization by vouchers in Africa.

(vi) Joint Venture:

In a joint venture, a whole SOE or part of it typically forms a new company together with a strong outside investor. In most cases the

170 - Id p.49.
outside investor brings in new capital and technology, while the SOE provides existing physical assets. Governments often favour this method of privatization, because it allows them to maintain control, or at least strong influence, over the enterprise, while the company obtains the financing and expertise required for its modernization. Especially in the former socialist economies, governments tend to place too much emphasis on this approach relative to the other alternatives, hoping to obtain the needed capital without surrendering control over the assets. For that reason, the Czech Republic favoured such legal method between the country’s largest cars manufacturer and West Germany’s VW.\(^{172}\)

A very impressive example for joint venture was applied between U.S. Windspower and Ukraine’s state-owned Electricity. U.S. Windspower (a manufacturer of wind turbines for generating electricity) formed a joint venture with Ukraine’s state-owned electricity utility Krimenergo in order to develop wind power applications in the Crimean Peninsula. If the venture meets its founders’ expectations, it should allow Krimenergo to shut down the Chernobyl nuclear power station, site of a catastrophic accident in 1986.

U.S. Windspower will design and engineer the wind turbines. Krimenergo will pay for the technology in windmill parts that will be manufactured at a former Soviet tank plant. U.S. Windspower officials declined to place a value on the joint venture because of the non-convertibility of the Ukrainian currency, but a comparable venture in the United States would be worth US$500 million.\(^{173}\)

Joint venture is used, sometimes, as transitional method towards privatization. In this case the government brings a private part to contribute in the targeted SOE as a first step to privatize such SOE. The


\(^{173}\) - Dmitri Pluonis and Andrew Mc Williams, 10, p. 25.
second step will be a gradual divestiture of the government’s shares of the SOE to ensure quite transfer to the private sector, a thing which grants the least limits of public opposition.

There is a very good example for privatization through joint venture in the privatization of the telecommunication sector in Sudan. Gradual steps for the transference were exercised, rational selection for the new contributors (local and foreigners) occurred, and reasonable conditions in the joint venture agreement were agreed upon.

As a first step for executing the privatization of telecommunications in Sudan, the Sudanese government attracted some local and foreign investors to establish a company (Sudatel) to contribute with the Sudanese government in the Public Telecommunication Corporation. Following is the list of investors:

1- The Advanced Technology Group.
2- Naiel Investment Company.
3- Danfodio Charity Company.
4- Sheikh: Hamad Bin-Jamoud Elgafri (Omani).
5- Sheikh: Adil Batargi (Saudi).
6- Bank of Khartoum.
7- International Sudanese French Bank.
8- Faisal Sudanese Islamic Bank.
9- Islamic Bank for Western Sudan.
10- Real Estate’s Bank.
11- Limited Investment Agency.
12- Saudi Sudanese Bank.
13- Bittar and Co.

174 - The attraction was by a promise to break-up the monopoly of the Public Telecommunications Corporation activities, and to grant a long monopoly for the new company.
14- Mohammad Abd-Elgadir Ali Elkobani.
15- Siemens International (Germany).
16- Ahmed Mohammed Osman Hassan.
17- Hashim Hajoo.
18- Mustafa Awad Allam.

Thereafter, an agreement was concluded on 6/12/1992 between the Sudanese Government (represented by the Minister of Finance and National Economy), and the invited investors, whereby:

S.1 The Sudanese Government, and the invited investor shall, as soon as possible establish a public company, under the provisions of the Sudanese Companies Ordinance, 1925.

S.2.1 Every investor shall pay the full amount of his shares, except the government, and all the share value shall be paid in special account, such account shall be by the US$.

S.2.2 The Sudanese Government, shall be permitted to pay its portion in the capital from the assets of the former Public Corporation for Telecommunications.

S.3.1 The special account shall be frozen, except for paying the agreed-upon expenses.

S. 3.2 The Sudanese Government shall be obliged to issue all the required concessions, licences, and powers to the new Company to exercise its activities.

S.3.3 The concession for exercising telecommunications activities shall be exclusively granted to the new company.

S.3.4 If the Sudanese Government does not fulfil its obligations in this agreement, the investors will have the right to windup the Company.

S.4.1 The Company shall offer not less than 25% of its shares for the public subscription.

S.4.2 The portion of the Sudanese Government in the capital of the Company shall not, at any time, be less than %26 of the total number of shares.

S.10 this agreement shall be terminated by winding up the company or by the bankruptcy of the Company.
S.11 No shareholder will be permitted to transfer his shares to any third party except by a written consent of the other shareholders.\textsuperscript{175}

On 7/3/1994, the investors (the founders) delivered to the Sudanese Government the registration certificate of the new company (Sudanese Telecommunications Company Ltd. (Sudatel)).\textsuperscript{176} The second step was made through agreement concluded on 19.4.1993 between the Sudanese Government and the Sudanese Telecommunications Company Ltd. (Sudatel), to sell the assets of the former Public Telecommunications Corporation. The main features of the agreement were the following:\textsuperscript{177}

\textit{According to the provisions of the Disposition of Public Enterprises Law 1990 and whereas the investors in (Sudatel) have offered to purchase the telecommunication sector;}

\textit{S.1 The Sudanese Government and the Sudanese Telecommunications Company Ltd. shall prepare a strategic plan to develop the telecommunications sector.}

\textit{S.1.2 The Government and the Sudanese Telecommunications Company (Sudatel) shall prepare the method of the estimation of the assets of the former Public Telecommunications Corporation;}

\textit{S.1.3 The Sudanese Telecommunication Company (Sudatel) shall be obliged to present its services to the Sudanese peoples according to the international standards;}

\textit{S.4 The Sudanese Telecommunications Company (Sudatel) shall be obliged to provide all the services of the former Public Corporation for Telecommunications therefore;}

\textit{S.5 The Sudanese Government shall grant a fifteen-year legal monopoly to the Limited Sudanese Company for Telecommunication (Sudatel).}

\textit{S.6 The Sudanese Government shall grant to the Limited Sudanese Telecommunications Company (Sudatel) all the other merits conferred by the Investment Encouragement Law 1992.}

\textsuperscript{175} - Source: internal files of TCDPE.
\textsuperscript{176} - Source: Id.
\textsuperscript{177} - Source: Id.
Some terms of the above agreement (the legal monopoly) were absolutely against the philosophy of the privatization itself (see S.5 of the above agreement). However, the ambiguous, uncertain, and unreasonable terms of the agreements may be justified by that the privatization of the telecommunication sector is one of the earliest privatization operations and the experience, at that time, had not been rationalized. Another reason is that telecommunications sector at that time witnessed a serious collapse, a thing which compelled the government to accept such condition.

(vii) **Lease and Concession Agreements:**

In a lease agreement, a private investor rents an asset or enterprise from the government for a specified period of time and retains the enterprise’s profits for its management services. A concession agreement is similar, in that the concessionaire pays either a fixed fee or a percentage of profits for the right to operate a facility or to provide a service, keeping the rest of the proceeds. The only practical difference we have illustrated between many leases and concessions agreements is that leasing agreements usually refer to natural resources and manufacturing plants, while concessions usually refer to a public service or other activity.

A good example for lease experience in Africa was applied in Togo. After failing to find a private buyer for loss-making steel mini-mill, the government of Togo agreed to lease it to a privately owned company for a fixed annual fee during the first two years and an increasing share of the gross margin (up to 40% in the year 6 and thereafter) for the remainder of the lease.\(^{178}\) In Latin America, Argentina made an extensive use of concessions arrangements in its privatizations. In a wide range of

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\(^{178}\) - Dmitri Pluonis and Andrew McWilliams, supra note 10 p, 28.
sectors, covering television channels, petroleum drilling areas, rail-roads operations, roads, port facilities or live-stock markets, the government concluded concessions worth approximately US$1.5 billion between 1990 and 1993 with considerable participation of foreign investors.\textsuperscript{179}

While, as we have mentioned above, leases are usually used for natural resources and manufacturing plants, the only two leasing contracts in Sudan were applied in privatization of hotels (the Grand Hotel), and a tourist village (Arrous Tour Village). However, the terms of the lease contract of the Grand Hotel were the follows (Also see the appendix):

\textbf{(Contract for the Lease, Renovation, and Rehabilitation of the Grand Hotel – Khartoum.)}

"1-This agreement is made and entered into by and between the Government of the Sudan represented by the Minister of Finance and National Economy, hereinafter referred to as the “Land Lord” and Lanka-Suka Hotels and Resorts SDN BHD, a company registered in Malaysia, or its duly nominated subsidiary as the second duly authorized, (power of attorney, Annex A), hereinafter referred to as the “Tenant”.

2- Whereas the Land Lord has offered to lease, renovate and rehabilitate the mentioned hotel,

3- And whereas the tenant is interested to lease, renovate and rehabilitate the mentioned hotel.

4- The Tenant has agreed to lease and renovate and rehabilitate the mentioned hotel according to the following conditions:

5- The tenant has no right to change the purpose of the hotel unless by a written consent of the Land Lord.

6- Payments shall be as follow:

\begin{itemize}
  \item \textit{a-} The first year, after the rehabilitation; the Tenant shall pay US$180,000 to the Land Lord.
  \item \textit{b-} For the second year the Tenant shall pay a sum of US$180,000.
\end{itemize}

\textsuperscript{179} - Kathy Megyery and Frank Sader, supra 50 p. 18.
c- From the third to the fifth years the Tenant shall pay US$ 220,000 in addition to 2.5% from the revenue to the Land Lord, for every year.

d- From the sixth to the tenth years the Tenant shall pay US$220,000 in addition to 2.5 from the revenue for every year.

e- From the eleventh to the twentieth years the Tenant shall pay US$308,000, in addition to 3% from the revenue and 5% from the net profits for every year.

f- From the twenty first to the twenty five years the Tenant shall pay US$350 in addition to 3% from the revenue and 5% from the net profits.

g- The payment for every year shall not exceed two months from the beginning of the accounting year.

h- The Tenant shall pay 50% from the agreed-upon amount of the first year at the time of signing this agreement, and the other 50% shall be paid immediately after the handing over of the Hotel.

7- The Land Lord has agreed to deliver all the related concessions, facilities and all the exemptions granted by the Encourage of the Investment Act 1996.

8- The lease period shall be 25 years commencing twelve (12) months from the date of taking over the Hotel from the actual completion of the rehabilitation whichever is the earlier, with an option to the Tenant to renew the lease period for a further 15 years upon a written request made by the Tenant not less than twelve (12) months before the expiry of the initial twenty-five (25) year period subject to the consent of the Land Lord.

9- The tenant should bear all the costs of rehabilitation.

10- The Tenant has the right to add any facilities or extra buildings in the Hotel premises in order to increase its capacity subject to the consent of the Land Lord.

11- The Land Lord agrees to hand over the Hotel to the Tenant free from any liabilities to any other party, and with its present condition and contents as mentioned in the list of contents. The Tenant has to hand over back the Hotel in good condition at the termination of the contract without responsibilities or liabilities, which may accrue during the contract period.

12- Any extensions, rehabilitation, maintenance, or renewal in the Hotel will be the property of the Land Lord at the time of termination of the contract period for any reason whatsoever or at the end of the lease period.
13- The Tenant should be responsible for any damage or loss in the Hotel or its contents during the contract period, and has to compensate the Land Lord for such damage or loss.

14- The Tenant shall be responsible for any damage or loss or negligence caused by his sub contractors.

15- The Tenant shall not transfer any of his rights or liabilities in the contract wholly or partly to any third party without a prior written consent of the Land Lord.

16- The Tenant has the right to dispose of any tool, material or movable property which he has placed, provided that the replacement shall be of a better quality and shall be the property of the Land Lord.

17- In the event of the Tenant’s failure to pay the annual rent agreed upon in the contract in the time specified in this contract, or in the event of the breach of any of his responsibilities and liabilities, the Land Lord shall issue a notice in writing specifying the default and requiring the Tenant to remedy the default within 30 days, and if after 30 days without the breach complained being remedied, the Land Lord shall have the option to terminate his contract without referring the matter to the court and to restore the Hotel without prejudice to all other legal rights, provided that all ways such as breach of contract default are not caused by any of the following:

i- War or civil commotions.

ii- Political or labour unrest.

iii- Force majeure

18- In the case of any dispute between the two parties regarding this contract, they shall agree to settle it amicably, and in the case of their failure, the dispute shall be referred to arbitration according to the civil la, and binding and the venue of arbitration shall be the city of Khartoum. Procedures Acts 1983 and the award of arbitration shall be final.

19- This contract shall be subject to the laws of the Republic of Sudan.

Signatures:

Abd-Elwahhab Osman                                Dato Ahmed Sebi
Ministry of Finance and National Economy.           General Manager of Lanka-Suka Hotels Company.
Another example for privatization by lease contract in Sudan is Arrous Tour Village on 3/8/1993. The owner is Sudan government (represented by TCDPE), and the tenant is Tommy Company for Diving and Photography (a foreign investor). The size of the operation was not big and the terms of the contract were simple. The main features of the contract are that the tenant shall continue to work in the tourism field; the period of the contract was renewable for seven years. The payment was as follows:

1- US$25,000 for the first year.
2- US$40,000 for the second year.
3- US$55,000 for the third year.
4- US$70,000 for the fourth year.
5- US$86,000 for the fifth year.
6- US$100,000 for the sixth year.
7- US$115,000 for the seventh year.

However, the tenant failed to fulfil his obligations and the contract was terminated; thereafter, the village was transferred to the Ministry of Tourism and Environment.\textsuperscript{180}

(viii) Management Contracts:

Under a management contract, a private operator takes over the management of the enterprise in exchange for a fee, while the government remains the enterprise’s owner. The contract is typically specified such that the private management has autonomy in the daily operations of the enterprise, while all fundamental decisions, such as investments, remain with the public sector. Governments typically establish a management contract in order to improve the SOE efficiency.

\textsuperscript{180} - Source: Annual Report of TCDPE 2005 p. 47.
However, the new investor will not risk his own capital for any restructuring or future investments.

While the contractor might be given extensive management powers and operational control, it has no financial exposure and receives its fee regardless of the profitability of the enterprise. The SOE continues to bear the full commercial risk and it is responsible for all working capital and debt financing.

In Africa, management contracts are mostly used in infrastructure areas such as the water supply in Abidjan (Cote d’Ivories) and Guinea. Here the governments decided to introduce private sector efficiency, but were not yet willing to take the step of divestiture of the ownership itself. In both cases the efficiency in the supply and treatment of water has improved drastically.\(^{181}\)

Several factors will influence the design of a management contract. A clear agreement must exist as to the intended objectives of the management role and the degree of authority and control to be vested in the prospective manager. Management contracts are found in many business sectors according to the circumstances and the needs of a country. For example in Africa, as we have mentioned above, their basic applications were in the services sectors such like water services. But in the most of countries all over the world, they have found their widest application in the tourism/hotel industry.\(^ {182}\)

However, World Bank experts argue the following:

“\textit{The choice of the management contractor is the most important element determining the results of the arrangement. In some instances, the management contractor is a joint venture company between a government or SOE and private company. A properly structured remuneration package devised which will, in many cases, includes three features; charges of the provision of the management company’s}

\(^{181}\) - Kathy Mergy and Frank Sader, supra 50 p. 20.

\(^{182}\) - Charles Vuylsteke, supra 6 p.38.
personnel in accordance with agreed formula, including a small profit element; agreed reimbursable costs; and incentive payments linked to the profits, production or other appropriate formula. There is no standard term in the management contracts, but if the management company makes no investment which it needs to recoup over a longer duration, three to five years is normal depending on the scale and complexity of the problems faced."\(^{183}\)

In Sudan, we have not illustrated any use for such type of agreements, but with regard to the rapid movement towards privatization, especially in the tourism/hotel industry, such agreements will take place.

(ix) **Management/Employee Buyout (M/EBO):**

M/EBO can be defined as a pattern of privatization of SOEs whereby the SOE is transformed into a public company with shares, and thereafter, selling the whole, majority, or a part of the shares of the new company to the employees of the former SOE.

Many governments attempted to support domestic investment through M/EBO schemes, where the management and employee of enterprise have the right to make an offer for their enterprise prior to privatization; the incentives are strong for managers and workers to make use of this option. Politically this approach is particularly attractive, avoiding the criticisms of “selling out” to foreign interests. In reality, however, this strategy is often counterproductive. Due to the lack of funds, management and workers are usually allowed to pay at a discount or in instalments.\(^{184}\)

Despite the fact that M/EBO has become the most wide-spread pattern of privatization of the SOEs to the former employees, it is not a


\(^{184}\) - Bim and Alexander, Privatization in Russia; Problems of Immediate Future p. 71, 1994 ed., Sweet and Maxwell.
wholly new method to privatize the SOEs to their employees. Many decades ago, before the current wave of privatization, many countries around the world recognized the “Cooperatives”. The state in many cases transferred the ownership of these cooperatives whether for the employees or to the beneficiaries from the services and distribution of consumer goods.\footnote{Mason, ESOPs and Co-operative Enterprises: The Employee Common Ownership Plan (ECOP) p.212, 1992 ed., Macmillan London.}

Poland is regarded as a pioneer country in M/EBO. 1110 cases of privatization by this method have been exercised in Poland. In Poland, the employees of the SOE must firstly present a request to the government to privatize their enterprise by this method; then an approval from the Ministry of Transference of Ownership in Warsaw is required. Missions of this ministry are to organize and monitor privatization operations. The first appearance of M/EBO in England was in the second half of the eightieth of the past century. Roadchef for Highways Services was the first governmental company that adopted this method.\footnote{Dmitri Pluonis and Andrew McWilliams, supra 10 p. 22.}

In Sudan, the M/EBO has never been practiced, but some features of privatization through this method appeared in the privatization of two agricultural corporations: the White Nile Agricultural Corporation and the Blue Nile Agricultural Corporation. An agreement was concluded between HCDPE and Eljanien for Agricultural and Animal Production to lease the two agricultural corporations. This agreement resulted in a dispute between the Sudanese government and the corporations’ farmers, because of tribal and ethnic reasons. Therefore, the Sudanese government decided that the proper method to privatize the two corporations is to transfer the ownership of the two corporations to the local farmers.\footnote{Source: Internal files of TCDPE.}
(x) **Build-Own-Operate-And-Transfer (BOT) Agreements:**

BOOTs agreements are used mainly for large energy and infrastructure projects. The investors provide the financing and build and operate the facility for a fixed period of time. They recover their initial capital outlay plus a reasonable return by charging user fees. At the end of the contract, ownership reverts to the government.

The government of Malaysia awarded a concession to a private company, United Engineers Malaysia, to build and operate the 900-Kilometer North-South Expressway. The total cost of the project was US$3.5 billion. In return, the concessionaire receives the right to collect and retain all vehicle tolls for thirty years. In addition, the government agreed to reduce the concessionaire risks by making up any shortfall in the projected traffic volume for the first seventeen years, as well as offsetting any adverse changes in the foreign exchange rate of external loan interest charges.\(^{188}\)

As we have mentioned above, BOOT method is mainly used in the large energy and infrastructure projects. In this dissertation, there is a separate chapter devoted for the privatization of infrastructure projects.

(xi) **Liquidation and Asset Sale:**

When a SOE is in a particularly bad financial condition with high liabilities, a direct sale might prove impossible. In such a case, the government might opt to liquidate the enterprise and sell its assets. The advantage for the private purchaser is that he can acquire the SOE without the attached liabilities.

In Sudan, there are many applications for liquidation and assets sale as method of privatization, especially in the liquidation of the

Mechanical Transportation Corporation. The valuable component of the corporation was sold to private investors. The examples are:\(^\text{189}\)

1- Fuel station, the area is 1050 SQ.M; the location is in the centre of Khartoum North. The purchaser is Osman Hussein Babikir. The seller is TCDPE, represented by its President, Mr. Hafiz Ata-Almannan. The price was S.D15.000.000. Date: 2/8/2000. In our humble view, the price was too low.

2- Fuel station, the area is 1500 SQ.M; the location is in the centre of Khartoum South. The purchaser is Nubta Petroleum Company. The seller is TCDPE, represented by its president Mr. Hafez Ata-Almannan. The price was S.D19.333. 000. Date 22/8/2000. In our humble view: the price was also too low.

3- Fuel station, the area is 2350 SQ.M; the location is in Alhilla Aljadeeda – Khartoum (Abu-Hamama). The purchaser is the National Petroleum Company. The seller is TCDPE, represented by its president Mr. Hafiz Ata-Almannan. The price was S.D33.800.000. Date 30/8/2000. In our humble view, the price was too low.

<table>
<thead>
<tr>
<th>NO</th>
<th>SOE</th>
<th>Legal Method</th>
<th>Beneficiary</th>
<th>Price by million</th>
<th>year</th>
<th>Recent Condition</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>White Nile Tannery</td>
<td>Sale</td>
<td>Blue Nile Co. Groups</td>
<td>120.p</td>
<td>1992</td>
<td>Excellent</td>
<td>Successful</td>
</tr>
<tr>
<td>2</td>
<td>The Public Co. for Spinning</td>
<td>Liquidation</td>
<td>_</td>
<td>_</td>
<td>_</td>
<td>_</td>
<td>_</td>
</tr>
<tr>
<td>3</td>
<td>Abu- Nieamma Kinaf Factory</td>
<td>Sale</td>
<td>Mr. Hashim Hajoo</td>
<td>750.p</td>
<td>1992</td>
<td>_</td>
<td>Failed</td>
</tr>
</tbody>
</table>

\(^{189}\) Source: Internal files of TCDPE.
<table>
<thead>
<tr>
<th>No.</th>
<th>Company/Project Name</th>
<th>Type</th>
<th>Acquirer/Other Details</th>
<th>Sales Price</th>
<th>Year</th>
<th>Result</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>White Nile Packing Company</td>
<td>Sale</td>
<td>Sudanese Afro. Co.</td>
<td>61.5p, US$5,2</td>
<td>1993</td>
<td>Excellent</td>
<td>Successful</td>
</tr>
<tr>
<td>5</td>
<td>Sata Company</td>
<td>Sale</td>
<td>Sudanese Afro. Co.</td>
<td>12.5p, US$3,8</td>
<td>1993</td>
<td>Excellent</td>
<td>Successful</td>
</tr>
<tr>
<td>6</td>
<td>Kriekab and Ryia Sweets Factory</td>
<td>Sale</td>
<td>Ahmed Gasim Sons</td>
<td>95.</td>
<td>1991</td>
<td>Excellent</td>
<td>Successful</td>
</tr>
<tr>
<td>7</td>
<td>Khartoum Ternary</td>
<td>Sale</td>
<td>Al-hijra Co.</td>
<td>103.6p.</td>
<td>1994</td>
<td>Good</td>
<td>—</td>
</tr>
<tr>
<td>8</td>
<td>Port Sudan Spinning Factory</td>
<td>Sale</td>
<td>Daewoo Company</td>
<td>US$ 30</td>
<td>1990</td>
<td>Good</td>
<td>—</td>
</tr>
<tr>
<td>9</td>
<td>Leather Trading and Production Co.</td>
<td>Liquidation</td>
<td>—</td>
<td>—</td>
<td>1995</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>10</td>
<td>Al-jazeera Ternary</td>
<td>Joint-venture</td>
<td>S.D.G. &amp; Daewoo</td>
<td>—</td>
<td>1993</td>
<td>Excellent</td>
<td>S.D.G 40% Daewoo 60%</td>
</tr>
<tr>
<td>14</td>
<td>Commercial Bank</td>
<td>Sale</td>
<td>Farmers Bank</td>
<td>750 p</td>
<td>1992</td>
<td>Excellent</td>
<td>—</td>
</tr>
<tr>
<td>15</td>
<td>Bank of Khartoum.</td>
<td>Public Share Co</td>
<td>S.D.G and Others</td>
<td>—</td>
<td>2001</td>
<td>—</td>
<td>60% sold to Abu-Dhabi Bank</td>
</tr>
<tr>
<td>16</td>
<td>Real Estates Bank</td>
<td>Sale</td>
<td>Jumaa Eljumaa</td>
<td>US$15</td>
<td>2002</td>
<td>Good</td>
<td>—</td>
</tr>
<tr>
<td>17</td>
<td>The Grand Hotel</td>
<td>Lease</td>
<td>Lanka-Suka Co.</td>
<td>—</td>
<td>1996</td>
<td>Excellent</td>
<td>US$ 200,000 Per year</td>
</tr>
<tr>
<td>18</td>
<td>Red Sea Hotel</td>
<td>Sale</td>
<td>Sud. Kuwaiti co.</td>
<td>110 p</td>
<td>1993</td>
<td>Excellent</td>
<td>—</td>
</tr>
<tr>
<td>19</td>
<td>Friendship Palace</td>
<td>Sale</td>
<td>Jumaa Eljumaa</td>
<td>US$18</td>
<td>2002</td>
<td>Excellent</td>
<td>—</td>
</tr>
<tr>
<td>20</td>
<td>Sud. Mining Corp.</td>
<td>Sale</td>
<td>Mining Enterprises co.</td>
<td>500 p.</td>
<td>1993</td>
<td>Excellent</td>
<td>V. good experience.</td>
</tr>
<tr>
<td>21</td>
<td>Mechanical Agriculture Corp.</td>
<td>Liquidation</td>
<td>—</td>
<td>—</td>
<td>1996</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>22</td>
<td>Pub. Corp. for Animal Production</td>
<td>Liquidation</td>
<td>—</td>
<td>—</td>
<td>1997</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>23</td>
<td>Sudan Hotel</td>
<td>Sale</td>
<td>National Fund for social Insurance</td>
<td>275 p</td>
<td>1993</td>
<td>Excellent</td>
<td>—</td>
</tr>
<tr>
<td>24</td>
<td>Al-nuba Mountains agriculture</td>
<td>Liquidation</td>
<td>—</td>
<td>—</td>
<td>1991</td>
<td>—</td>
<td>—</td>
</tr>
</tbody>
</table>
Conclusion:

Privatization legal methods are:

1- Auctions: These have been mostly used for small enterprises or those of less importance such as retailing shops. But, there have been some cases of medium and large state-owned enterprises being liquidated and their assets sold in auctions. The liquidated SOE assets are normally sold to the highest bidder in opening bidding. In Sudan, auctions were only used for selling the assets of the liquidated SOEs.

2- Negotiated sales: These have mostly been used to privatize the successful SOEs in Europe. Germany has made an extensive use for this legal method to privatize large number of its SOEs. Negotiated sale contract does not mean a total absence of competition as it means that the government is free to select the suitable investor depending on standards other than the price. But, on the other hand negotiated sales contracts require a high level of transparency to guard against corruption and public opposition.

In Sudan, negotiated sales were used to settle some governmental debts. Also, in Sudan, negotiated sales have been practiced to privatize both successful (Atbara Cement Factory) and unsuccessful (Sata Factory) SOEs. In Sudan, there is a total absence of transparency in most of privatization operations which were practised through negotiated sale contracts, a thing which resulted in public opposition or, at least, the absence of public support for these privatization operations.

3- Tenders: They are used to divest SOEs as entities of a going concern. This is the main difference between tenders and auctions which, as rule,
are practiced to dispose of the assets of SOE, normally at liquidation. In a tender privatization, investors submit their bids in sealed envelopes, which are opened publicly at the announced time and place. Tenders are preferable for governments because of their simplicity and ease in application, and because of the competition. Another reason for preferability of tenders is that they often result in a highest price for the SOE to be privatized.

4- **Public offering of shares:** They enable the government to sell all or part of its holdings in a company to be general public through domestic or international stock markets. The price of the shares can be fixed by an underwriter or by the government itself, or the offering may be on a tender basis. To make a successful privatization through public offering of shares, the targeted SOE should be attractive to the general public; therefore it has to be a well-known one. Also, public offering of shares requires the existence of active stock-exchange in the country so as to attract local and foreign investors. Finally, it is important that the share price reflects a fair market value of the company.

In Sudan we do not have experience in privatization through public offering of shares. This is because of the weakness of public awareness about the feasibility of sharing in the public companies. Furthermore, public companies in Sudan presented disappointing performance in the past. Another reason is that most of the Sudanese investors have individualistic tendency because of some primitive traditions.

5- **Voucher or Coupon Privatization:** This has been mainly used in countries which formerly adopted the communist and socialist regimes, specifically in those which implemented mass privatization programs. In these countries, vouchers of SOEs were given to all citizens essentially free of charge. These vouchers could then be exchanged into shares at special
auctions. The main advantages of this method are that the process of privatization gains speed by simplifying the task of divesting a large number of SOEs, that the transfer of ownership is highly equitable, and that it supports the formation of local capital market. In Sudan we do not recognize such method of privatization.

6- Joint Venture: It means that a whole SOE or part of it typically forms a new company together with a strong outside investor. This is mainly to benefit from the outside investor in bringing new capital and technology.

    Governments often favour this method of privatization because it allows them to maintain control, or at least strong influence over the enterprise.

    Joint venture is used sometimes as a transitional method towards privatization. In this case, the government brings a private partner to contribute in the targeted SOE as a first step to privatize such SOE. After this, the government gradually divest its shares to the public or to another qualified investor.

    In Sudan, the ideal example for privatization through joint venture is the privatization of the telecommunication sector. The government constituted a new company with qualified investors. Then, the government gradually divested its shares in the international stock exchanges.

7- Lease and concessions agreements: They are to a large far extent similar. In a lease agreement, a private investor rents an asset or enterprise from the government for a specified period of time and retains the enterprise’s profits for its management services. A concession agreement is similar, in that the concessionaire pays either a fixed fee or a percentage of profits for the right to operate a facility or to provide a service, keeping the rest of the proceeds. The obvious difference between lease and concession is in the practical application. Leasing agreement usually refers to natural
resources and manufacturing plants, while concessions usually refer to public services. Lease and concessions have been successfully used in Africa and Latin America.

Unlike the international experience, in Sudan lease agreements were used in the privatization of hotels and tourist villages (see the Grand Hotel and Arrous Village privatization contracts in this Chapter).

8- **Management contracts**: They confer a private operator to take over the management of the enterprise in exchange for a fee, while the government remains the enterprise’s owner. The private operator has autonomy in the daily works operations decisions, but the fundamental decisions, such as investment remain with the public sector. Management contracts are concluded mainly to improve the SOE efficiency. In Africa, management contracts are mostly used in infrastructure areas such as water supply.

9- **Management/Employee Buyout (M/EBO)**: This can be defined as a pattern of privatization of the SOEs whereby the SOE is transformed into a public company with shares, and then selling the whole, majority or a part of the shares of the new company to the employees of the former SOE. In Sudan such type of privatization methods has not been used.

10- **Build-Own-Operate-And-Transfer (BOOT) Agreements**: These are used mainly for large energy and infrastructure projects. The investors provide the financing, and build and operate the facility for a fixed period of time. They recover their initial capital outlay plus a reasonable return by charging user fees. At the end of the contract, ownership reverts to the government (more details are in Chapter 10 in this thesis).

11- **Liquidation and Asset Sale**: This is a suitable method to dispose of SOE that reflects bad financial condition with high liabilities. In other words, governments use this method when direct sale becomes impossible. The
advantage for the private purchaser is that he can acquire the SOE without the attached liabilities.

In Sudan, there are many applications for this method, especially in the liquidation of the Mechanical Transportation Corporation.
Chapter 4

The Impacts of Constitutions and International Law

In the most of former communist countries and centrally-planned economies, productive assets are by constitutional law defined as public property. In such cases, the transfer of ownership would effectively be unconstitutional. This was the case in many countries such as Hungary and Poland\textsuperscript{190}, which until the last of the ninetieth of the past century recognized the right to private property only to a very limited extent. Therefore, constitutional amendments to allow full private ownership of productive assets were required to allow privatization to proceed. In the former Sudanese Constitution of 1973, and despite the fact that there were no explicit provisions for prohibition of the private ownership of the productive assets; some provisions were, indirectly restricted the private sector, specially the foreign one, to join powerfully in the Sudanese economy.\textsuperscript{191}

The conduct of privatization transactions in a given country can also be affected by the international treaties and agreements to which such country is a party. In other words, many countries, on all continents, have entered into regional agreements on trade, customs controls or commercial protocols. All these international agreements have a significant impact on the privatization in a given country, especially in fostering privatization operations. In rare cases, these agreements, specially the bilateral ones, may be in need of amendments or even of

\textsuperscript{190} - This was the case despite the fact that Poland was the first country in Europe which abandoned the communism in its policy and economy.

\textsuperscript{191} - These provisions were of slogan political nature, and they were stated in the Sudanese Constitution in the period immediately followed the abandonment of May Regime the frank communism direction to the socialism. More explanation will be performed in this chapter.
complete termination so as not to affect the entire privatization programme.

This Chapter examines how a country’s constitution and certain provisions of international law, affect the privatization choices available to a government or a legislator.

(i) Constitutional Requirements:

A country’s constitution may contain provisions that affect privatization operations either directly or indirectly. Provisions of this kind may limit the scope of the privatization program, determine to whom decision-making authority belongs, or impose certain control on privatization authorities.

(a) Limits on the Scope of Privatization:

The constitutions of many socialist countries provided that all productive assets (including enterprises) were the property of the state “of all the people”, and granted the state (or the public sector) special protection and privileges. Very obvious examples for these provisions are in the constitution of the former Soviet Union, particularly article 4 of the constitution (see Table No. 4).

Portugal’s 1976 constitution even declared irreversible the nationalizations that followed the April 1974 revolution. It had to be amended twice, in 1980 and 1982, to authorize the privatization of these SOEs. The constitution of Bangladesh also had to be amended by a decree issued in 1977 to authorize privatization.192

Some constitutions continue to prohibit all private-sector activity in what deemed to be strategic sectors. Article 177 of the Brazilian

constitution gave the state a monopoly on prospecting for petroleum, natural gas and other hydrocarbons; petroleum refining; import and export of petroleum products; sea transportation of domestic crude oil; and pipeline of crude oil and natural gas regardless of origin. This monopoly was repealed in November 1995 by the constitutional amendment. Article 27 of the Mexican constitution contains similar restrictive provisions for the hydrocarbons. The Mexican constitution also originally contained a provision, amended in May 1990, prohibiting privatization of commercial banks. Such constitutional provisions also cover the energy, water, and telecommunications sectors.193

Elsewhere, certain types of activities are reserved to the state, though participation by private sector is permitted through joint-venture companies or under concessions, lease, or management contracts. This is common in the hydrocarbons sectors, as for example in Bolivia, where the constitution provides that petroleum deposits are the property of the state, which may nevertheless entrust exploration and production just under concession contracts.194

Some constitutions may include other restrictions such as the limitations on the foreign investment in specific activities. These restrictions clearly hinder privatization programs. Until it is repealed by constitutional amendment of August 15 1995, Article 178 of the Brazilian constitution reserved coastal and internal shipping to national vessel, meaning vessel whose carriers, ship owners, captains and at least two-thirds of the crew are Brazilian. Similarly, Article 176, which restricted mining (exploration and production) to Brazilian-controlled firms, was modified on the same day and now requires only that the firm be

194 - Pierre Guislain, supra 3 .p.32
established under the Brazilian law and has its headquarters and management in the country.\textsuperscript{195}

In Sudan, until it was amended in 1998, the Permanent Constitution of the Republic of Sudan 1973; Articles 30, 31, and 32 reads:

\begin{quote}
\textit{Article 30:} The socialist system shall be the foundation of the economy of the Sudanese society so as to realize sufficiency in production and fairness in distribution, and to introduce decent living for all citizens and prevent any form of exploitation and injustice.
\end{quote}

\begin{quote}
\textit{Article 31:} The Sudanese economy shall be directed to realize the objectives of the development plans in order to achieve the society of sufficiency and justice and the state shall own and manage the fundamental means of production in the economy.
\end{quote}

\begin{quote}
\textit{Article 32:} The Sudanese economy shall consist of the activities of the following sectors:
\begin{itemize}
  \item The public sector, which shall be a pioneer sector and shall lead progress in the fields of the purpose of the development, and shall be based on public ownership and be subject to people’s control.
  \item The Co-operative, which shall be based on the collective ownership by all members participating in co-operative societies. The state shall care for the co-operative and the law shall regulate their formation and management.
  \item The private sector, which shall be based on non-exploiting private ownership. The state shall protect and encourage it and organize its formation to play a positive and active role in the national economy.
\end{itemize}
\end{quote}

Historically, the Sudanese Constitution of 1973 was issued in the period following the collapse of the communism in Sudan after the famous bloody struggle between the former President Numairi and the communist members of the Command Council of May regime in 1971. It

\textsuperscript{195} - Fracisco Anuatti-Neto and others, supra 4 p. 156.
seems that the sudden direction to liberal economy in this period was irrational; therefore, the constitution was designed to ensure that the government would not totally exclude the revolution’s slogans. This period also witnessed real contradiction between the declared slogans and policies of the revolution and the actual practice. In this period, many grand private investments were established in the country.\textsuperscript{196}

However, the mentioned articles of Sudanese Constitution 1973 state the follows:

1- Article 30, implies that Sudan is totally a socialist state and the opportunities of the private sector to play an active role in the national economy are very narrow.

2- Article 31 implies that the private sector would not play a big role in the grand schemes such like infrastructure schemes (water, electricity, roads and bridges etc.).

3- The constitution ranks the private sector last, a thing which implies that it is of less importance than the public and co-operative sectors.

We can claim that these articles of the Sudanese Constitution were not particularly designed to limit the role of the private sector as they were designed to reflect the ideological direction of the May Regime. The only truth we can assure is that the role of the private sector in the beginnings of May regime was very weak. Also the contribution of foreign investment was also weak because of the declared socialist policy.

The role of the former nationalizations wave (1969-1971) should not be underestimated in minimizing the role of the private sector in Sudan. It is to be noted that the current wave of privatization began before the issuance of the Sudanese Constitution in 1998. In other words,

\textsuperscript{196} - Such like International Tyres Factory in Port Sudan (1974).
the recent government enacted the privatization (The Disposition of Public Enterprises Law 1990) without amending or repealing the mentioned Articles in the 1973 Permanent Constitution. The privatization law was issued during the moratorium of the constitution (1989 to 1998).

However, the Interim National Constitution of the Republic of Sudan 2005 opened the door wide for liberal economy policies without restricting the private ownership of any of the economic activities. The Interim National Constitution of the Republic of Sudan 2005 in chapter 11 Article (10): (Fundamentals of National Economy) stated the following:

1- The overacting of the aims of development shall be the eradication of poverty, attainment of the Millennium Development Goals, guaranteeing the equitable distribution of wealth, redressing imbalances of income, and achieving a decent standard of life for all citizens.

2- The state shall develop and manage the national economy in order to achieve prosperity through policies aimed at increasing production, creating an efficient and self-reliant economy and encouraging free market and prohibiting of monopoly.

3- The state shall enhance regional economic integration.

Table No.4: Ownership Provisions of socialist constitutions.

<table>
<thead>
<tr>
<th>Country</th>
<th>Constitution Year</th>
<th>Ownership Provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Soviet Union</td>
<td>1936</td>
<td>“The economic foundation of the USSR is the socialist economic and socialist ownership of the instruments and means of production, firmly established as a result of liquidation of the capitalist economic system, the abolition of private ownership of the instruments and means of production, and the elimination of the exploitation of man by man.”</td>
</tr>
</tbody>
</table>
Bulgaria: Until its revision in April 1990, Article 13 of the constitution stated: “The economic system of the People’s Republic of Bulgaria is socialist; it is based on the public ownership of the means of production.”

Angola: Article 9 of the 1975 constitution stated: “The foundation of economic and social development is socialist ownership, consubstantiated state ownership and cooperative ownership. The state shall adopt measures permitting continuous broadening and consolidation of socialist relations of production.”

Guinea-Bissau: The 1984 constitution described the country as “A sovereign, democratic, secular, unitary, anti-colonialist and anti-imperialist republic.”(Article 1); the latter two adjectives have since been deleted. Its Article 12, which has been since amended, declared the following to be state-owned assets: “the soil, the subsoil, water resources, mineral resources, main energy sources, forests, basic means of industrial production, mass media, banks, insurance, roads and essential means of transportation.”

Mozambique: Until it was revised in November 1990, the constitution, adopted in 1975, stated: “In the People’s Republic of Mozambique the state economic sector is the leading and driving factor in the national economy. State property is given special protection and its development and expansion is incumbent upon all state agencies, social organizations and citizens” (article 10).

Source: Pierre Guislain (Foot note no. 3) p.35.

(b) Parliamentary Approval:

The constitution or constitutional traditions of a country may provide that privatization must be approved by parliament. This is the case with Article 34 of the French Constitution of 1958 which states that the rules governing nationalization of enterprises and transfer of ownership of public-sector enterprises to the private sector shall be set by law. The constitutions of Benin, Morocco, Senegal, Togo, and other countries with a French tradition similarly require that the transfer of majority state-owned enterprises to the private sector be authorized in advance by parliament.197

197 - Pierre Guislain, supra 3 p. 37.
A country’s constitution, constitutional traditions\textsuperscript{198} or legislation may allow the government or other public agencies to privatize without intervention by the legislature. In this case, no enabling legislation is legally required. This is the situation in most of the common-law countries, such as Australia, Malaysia, New Zealand and the United Kingdom. In such system it is generally considered that, in the absence of explicit prohibition, the government possesses an inherent power to privatize public enterprises without the need for special legislative authorization.\textsuperscript{199}

In some other countries, the role assigned to parliament is defined more precisely. Not only must a law be enacted but it must also contain specific provisions. The Paraguayan constitution, for example, requires that the law spell out procedures for granting the preferential right to shares in the privatized enterprise to which its employees are entitled.\textsuperscript{200}

Abstractly, while the role of the parliament in the privatization, sometimes, delays the privatization operation, the approval of the parliament gives many advantages for privatization operations. These advantages are:

1- Absorbing the public opposition against privatization operations on the ground that members of the parliament are the representatives of the people of the country. All the classes of society, the business private sector, the middle class man and, indeed, the labourers are presumed to be represented in the parliament.\textsuperscript{201}

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\textsuperscript{198} - Some countries have no written constitutional law such as England, therefore, constitutional traditions is the suitable word.
\textsuperscript{199} - Pierre Guislain, supra 3 p. 38.
\textsuperscript{200} - Francisco Anuatti-Neto (Ch), supra 4 p. 226.
\textsuperscript{201} - One of the most important barriers against privatization, especially in the least developing countries, is the opposition of the Labourers Unions.
2- Giving strong support to the agency, committee or any governmental authority to execute successful privatization program.

3- Reflecting reasonable level of transparency.

In some cases, the role of the parliament may cause disadvantages to privatization operations. It may result in:

1- Delaying the privatization operation, because of complicated procedures of issuing a parliamentary approval or legislation.

2- Political interference in economic decision. In most of developing countries around the world the economic performance of the parliament seems to be irrational for many reasons: either because of the know-how of the parliament’s members that they are usually elected just for tribal or ethnic reasons. The re-election of members usually motivates them to vote against or delay the privatization, regardless of the logical or national benefit of the privatization.

3- Irrational approval of the privatization operations by the appointed parliaments: existence of a parliament in a country does not mean that such country is a democratic one. In many dictatorial countries, the president or other authorities (such as command councils of military revolutions) appoints the parliament which will automatically approve any governmental proposal of privatization regardless of its feasibility.

In Sudan, the privatization law (the Disposition of Public Enterprises Act 1990) was enacted in the period of the absence of parliament. This law was prepared and enacted by the former Command Council of the National Salvation Revolution. The total absence of the role of a parliament (even an appointed one) may be one of the
disadvantages of such law. Absence of parliament’s role painted clouds of doubts over the whole program of privatization in Sudan. This appears from the voluminous number of criticisms of lay peoples and opinions of some economists which are frequently published in the newspapers.

The government, after widening the margin of liberties in the last years, is required to put the Disposition of Public Enterprise Law on the table of the parliament for obtaining the approval of the parliament for the other operations. In the Budget Speech of 2007, the Minister of Finance and National Economy said that the government has privatized just %30 of the candidate SOEs. Therefore, the opportunity still now exists to pursue the public consent for the privatization operations.

The recent Parliament, although it is not democratically elected, represents many of the active political forces in the country, therefore the approval of this parliament will give credibility to the mentioned law.

(c) Limits on the Discretion of the Government:

Constitutional provisions may also limit the extent of the government’s discretionary powers regarding privatization. Comparison of the French and British examples may represent good examples for such limitation.

First, the constitutional requirement that the implementation of privatization program be authorized by law requires the French government to request prior parliamentary authorization.202 In the United Kingdom, in the absence of such constitutional requirement, there is a good discretionary power for the government to implement privatization operations.

Second, the valuation of the enterprise to be privatized also differs between France and United Kingdom. In France, the Constitutional Council which is responsible for verifying the constitutionality of laws before they come into force, has ruled that the constitutional principles of equality among all citizens and Article 17 of the Universal Declaration of the Human Rights (see the Appendix), which mandates the payment of just compensation when property is confiscated, prohibit the transfer of public assets to private investors at less than the real value\textsuperscript{203}. The Council judged that enterprises to be privatized therefore had to be valued by independent expert, and that no sale is allowed at a price below that determined by these experts. In the United Kingdom, in contrast, privatization transactions are examined only after the fact by the National Audit Office and the Public Accounts Committee. In other words, while valuation of the asset to be privatized in France must be done by a neutral committee (non-governmental), in the United Kingdom valuation is done by a governmental body. Both National Audit Office and the Public Accounts Committee are governmental bodies.

Third, the French Constitutional Council intervened again to try to regulate use of golden share by the Minister of Economy. The privatization laws enacted in France in 1986 and 1993 provide that, in any company to be privatized, the government be granted a golden share that would enable the minister of the economy to reject any sales allowing a shareholder to own more than a certain percentage of the governmental company’s capital\textsuperscript{204}. The Council accepted the constitutionality of these provisions, but only on condition that the minister justifies each use of this right. In the United Kingdom, where privatization conditions and procedures need not be authorized by law,

\textsuperscript{203} - Id, p. 59.
\textsuperscript{204} - Id, p.66.
the rule governing uses of the golden shares are contained in the article of association of the enterprise concerned. This contractual arrangement limits the basis for judicial intervention.

If we compare the requirements of the French constitution with the case in Sudan we will find that:

First: in Sudan it is clear that there is no way to speak about any constitutional limitation on the discretion of the government to involve any privatization operation whatever the size or feasibility of the enterprise. This is, of course, because of the constitution moratorium which was declared by the Command Council of the National Salvation Revolution In 1989. In addition, the 1998 and 2005 Constitutions do not include any provisions about parliamentary or otherwise supervision over the privatization operations.

The important question here is whether it is important to put limitation on the discretion of the government in any future constitution? Since the federation will, inevitably, be the only form of governance in Sudan (as a result of the peace agreement), we believe that any new constitution should impose restrictive articles on the discretion of the governments of the Sudanese regions. For example, the peace agreement in the South of Sudan provided real independent authorities for the southern government. Also, Darfur is on its way to be granted the same independent authorities. Therefore, exercising privatization operations by the new governors may result in:

a- Irrational selection of SOEs for privatization because of the lack of experiences and the inefficiency of the new governors.

b- Tribal and ethnic standards in privatizing SOEs may result in preferential or discriminative treatment in transferring the SOEs to private investors. This is a
common practice in all Africa (see Chapter 3 “Negotiated Sales”).

We call for a clear role of the constitution in privatization in Sudan. The scope of the supervision of the constitution over privatization can be determined by the federal parliament. Different parliamentary committees like the economic committee and the political committee are presumed to play a significant role in rationalizing privatization operations politically, economically, and legally.

Second: The valuation of enterprise to be privatized is the mission of TCDPE, and according to the law, TCDPE is free to select the suitable technical house or expert to valuate the candidate SOE. In other words, the evaluation authority is in the hand of governmental body. Again, we call for following the French system in valuation of candidates (mentioned above).

Third: Sudan is one of the poorest countries in the world; services or products which are presented by the governmental enterprises in many cases, have no alternative producer. Therefore, for the protection of the Sudanese citizen from any prejudicial abuse; we call for enabling provisions in the constitution. These provisions should be designed to enable a minister, say the Minister of Finance, to intervene and impose golden shares on any privatization operation.

(d) Control of Constitutionality of Privatization Legislation:

In France, as mentioned above, the constitutional court may review legislation before it is comes into force. In Poland, President Lech Walesa referred to the constitutional court a new privatization law that had been approved by parliament in July 1995 over his earlier veto. Grounds for referral were that it violated the separation of powers between the executive and legislative branches by requiring a specific parliamentary
approval of privatization transactions in numerous “strategic sectors”. The court ruled that this new law is indeed unconstitutional.205

Constitutional challenges to privatization legislation have become a regular feature in Turkey. In July 1994 the Turkey’s constitutional court ruled that privatization enabling law No. 3987, which authorized the government to privatize through issuance of statutory decree, was illegal because this power belonged exclusively to parliament. As a result for this ruling, the statutory decrees already issued to execute this law also become null and void. In India, members of parliament, public interest groups and labour unions petitions with the Supreme Court contesting the government’s telecommunications privatization policy and the award of specific licenses. The court ruled in February 1996 that policy matters were in the ambit of the legislative and executive branches, not of courts. It rejected the petitions against the privatization program.206

(ii) Role of the International Law:

The conduct of privatization transactions in a given country can also be affected by the international law (treaties, conventions, and bilateral agreements to which such country is a party). Many countries, in all continents, have entered into regional agreements on trade, customs controls, or broader economic integration. Examples are the European Union (EU), CARICOM (Caribbean), NAFTA (North America), ASEAN, COMESA (Common Market of Eastern & Southern Africa). Such regional agreements often generate supranational law or foster harmonization of their legislation in their member countries.

For example, despite the fact that EU treaty is neutral, many of the obligations within the treaty deduce that they encourage the privatization.

205 - Pierre Guislain, supra 3 p. 44.
206 - Id pp. 48–49.
The abolition of customs barriers, liberalization of formerly monopolistic markets, and imposition of common competition rules on private as well as public enterprises all foster the entry of private operators. Privatization is one of the options most governments must consider in order to reduce public-sector debts and deficits and meet the criteria set by the Maastricht Treaty for joining the new European countries.

A good example for the role of treaties in fostering the privatization in Sudan is reflected by COMESA. Sudan is a member of COMESA. COMESA was established as a response for the Final Document of Lagos Work-Plan which was signed in April 1980 by African presidents. The Work-Plan provided that the African countries must establish many regional economical groups as a preface for the Entire African Economical Unity. Eastern and Southern African regions were required, according to Lagos Work-Plan 1980, for establishing a preferential trade area. The governments of Eastern and Southern African countries signed the Preferential Trade Area Treaty (PTA) in December 1981, and the treaty came into force in 1982. Thereafter, the (PTA) witnessed very important development by signing the COMESA (Common Market of Eastern & Southern Africa) treaty in 1993. Sudan is not a founding member in (PTA), but implemented it in 1990 according to Article 46 of the treaty which permits the implementation of any neighbour country of one of the founders.²⁰⁷

COMESA treaty 1993 determines many objectives. These objectives were prepared to create a favourable climate to enhance the economic performance of the member countries, elimination of barriers of trade between these countries, creation of good opportunity for foreign investment and encourage competition between foreign and local investors in the member countries. For achieving the objectives; the

²⁰⁷ - Sudan & COMESA, a brochure published by the Sudanese Ministry of Foreign Trade in 2003.
framework of COMESA concentrates on eliminating the customs and non-custom barriers in goods and services trade, encouraging cooperation in transportation between member countries, and cooperation in the financial field by following matching policies between member countries. Therefore, there are four organs of COMESA which have the power to take decisions on behalf of COMESA, these being: the Authority of Heads of States and the Government; the Council of Ministers; the Court of Justice; and the Committee of Governors of Central Banks:208

The Authority: made up of Heads of States and Government is the supreme Policy Organ of the Common Market and is responsible for the general policy, direction, and control of the performance of the executive functions of the Common Market and the achievement of its aims and objectives. The decisions and directives of the Authority are by consensus and are binding on all subordinate institutions, other than the Court of Justice, on matters within its jurisdiction, as well as on the member States.

The Council of Ministers: (Council) is the second highest Policy Organ of COMESA. It is composed of ministers designated by the member states. The Council is responsible for ensuring the proper functioning of COMESA in accordance with the provisions of the Treaty. The Council takes policy decisions on the programmes and activities of the COMESA, including the monitoring and reviewing of its financial and administrative management. As provided for in the Treaty, Council decisions are made by consensus, failing which, by a two-thirds majority of the members of the Council.

The COMESA Court of Justice: is the judicial organ of COMESA, having jurisdiction to adjudicate upon all matters which may be referred to it pursuant to the COMESA treaty. Specifically, it ensures the proper

208 - Chapter 2 article (2) of COMESA treaty: all the structure bodies are provided in the same chapter.
interpretation and application of the provisions of the treaty; and it adjudicates any disputes that may arise among the member states regarding the interpretation and application of the provisions of the treaty. The decisions of the Court are binding and final. Decisions of the Court on the interpretation of the provisions of the COMESA Treaty have precedence over decisions of national courts. The Court, when acting within its jurisdiction, is independent of the Authority and the Council. It is headed by a President and consists of six additional judges appointed by the Authority. Consideration is being given to establishing the Court of Justice in the not too distant future.

The Committee of Governors of Central Banks: is empowered under the treaty to determine the maximum debt and credit limits to the COMESA Clearing House, the daily interest rate for outstanding debt balances and the Staff Rules for Clearing House staff. It also monitors, and ensures the proper implementation of the Monetary and Financial Co-operation programs.

By performing and explaining COMESA treaty, its decision makers, executive bodies, and the governing body, we are initially aim to express the following:

1- The obvious role of the treaty in fostering the privatization program in Sudan and in all member countries appears from that it resembles the same role of the EU treaty in fostering privatization in Europe in many directions. Despite the fact that COMESA treaty itself is neutral with regard to the type of ownership, the abolition of customs barriers and the liberalization of former monopolistic markets are directly inviting the government of the country to rely upon the private sector to compete and fulfil the treaty requirements.
2- There is a clear tendency in COMESA treaty to attract the private sector to take big portion in the market. This is clear from the structure of the executive bodies of the treaty (the Consultant Committee of the Business Sector).

3- Nine of member countries of COMESA enjoy the membership of the World Trading Organization (WTO). Therefore, we can deduce that their economies are liberal. In most of the liberal economies the private sector takes the lead in the economy. Usually, the public sector is not capable to compete with the private sector. Theoretically, members of COMESA who are not members of WTO are required to create a strong private sector to compete in COMESA, a thing which, directly or indirectly, calls them to privatize their SOEs.

4- COMESA members, who are members of other international treaties of trade, will remain complying with the provisions of international treaties and agreements which encourage the role of the private sector in the economy. WTO represents the mother of these treaties as it expressly calls its members to privatize their internal economies.

5- There is no way to argue that this treaty is a friendly one and its provisions are not obligatory, that its articles provide for the required mechanisms of its execution politically, technically and even judicially.

In a meeting with Mr. Stephen Doctor Matatia; Head of COMESA Coordinating Unit – Sudan; he said:

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209 - Sudan & COMESA, supra 18.
210 - See chapter 1 of this dissertation.
212 - December 13th 2007 at 10:25 AM, Ministry of Foreign Trade, COMESA Unit, Khartoum-Sudan.
1- “Of course, COMESA represents one of the African devices to accommodate the international tendency towards privatization. Moreover, privatization and globalization are just devices, windows, or hope for achieving entire human development.

2- The general belief around the world is that the public sector should be privatized in order to achieve efficiency and sustainability. WTO represents the “mother” for all current economic treaties, agreements, protocols and reciprocities; therefore, features of encouraging the contribution of the private sector in trade are there.

3- It is true that privatization brings suffering for both citizens and labourers. But such suffering seems to be seasonal and for a short term that the real benefits of privatization normally take many years to reflect on the every-day life of the citizens. This period typically resembles “tighting of belts”.

4- Privatization, especially in the least-developing countries, attracts foreign investment and consequently the modern technological means of production.

5- In the other social-life activities such as education and health, privatization provides high quality levels of performance.

6- In Sudan, privatization had been started while most of experts were outside Sudan as immigrants, this, indeed, affected the privatization. The Sudanese government is now required to attract them back home.

In another meeting with the Deputy Head of COMESA Coordinating Unit: Mr. Mutasim Makkawi; we asked him whether COMESA Treaty fosters privatization in Sudan. Also, we requested him to speak generally, depending on his experience, about COMESA. He said:

“This actually represents the reality; COMESA is one of the international bundles of treaties, agreements and conventions which are directly targeting to create a climate favourable for the liberalization of trade all over the world. In other words, this treaty is a response for the recent direction of the world towards Globalization. In participating our missions, we absolutely disregard any tendency to make any monopolistic, discriminative treatment, or favouritism between the member countries whether for the Sudanese investor or other member country’s citizen. For example, many of the Sudanese ceramic...

213 - December 12th 2007 at 12:20 AM, Ministry of Foreign Trade, COMESA Unit, Khartoum-Sudan.
factories requested COMESA unit in the Ministry of Foreign Trade in Sudan to impose high tariff on the imported ceramic from the member countries, namely Egypt. We refused to respond to such request on the ground that we are obliged to apply the provisions of the COMESA Treaty verbatim. Another reason is that we are regarding the benefit of the Sudanese citizen that the cheapest good is favourable for the Sudanese citizen, regardless of the producer country. On the participation of the state in the economy as a trader, Mr. Mutasim said: This matter has been abandoned all over the world except in some Latin American countries. Therefore, in my opinion Sudan should follow the new orientation of the international economy towards the privatization. He also said that fortunately Sudan launched the privatization era in an ample time before many of the other African countries who are, nowadays, suffering to privatize their economies.”

Another example for treaties on trade to which Sudan is a party is the Great Arab Free Trade Area treaty (GAFTA). GAFTA was established as a result for the resolution of Arab Summit which was convened in Cairo in 1996. The Arab Summit recommended that the Economic and Social Council undertake and fosters setup for the Great Arab Free Trade Area. The Council in its meeting in Feb. 1997 agreed the executive programme and the proposed time schedule for establishing GAFTA in accordance with the provisions of the Agreement for Trade Facilitation and Development between Arab states and in conformity with the general rules of the World Trade Organization (WTO).214

The Arab member states are the seventeen Arab states including Emirates, Saudi Arabia, Syria, Bahrain, Jordan, Qatar, Oman, Kuwait, Egypt, Sudan, Iraq, Lebanon, Libya, Tunisia, Morocco, Yemen, and Palestine.215

While the majority of Arab countries were required to reduce the custom tariff, taxes, and duties on the products of member countries,

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214 - Source: GAFTA Unit in the Ministry of Trade.
215 - Id.
some countries, as least-developed, were granted a grace period to retain their custom tariff, taxes, and duties.

Sudan has enjoyed privilege accorded by the Great Arab Free Trade Area in to least-developed Arab states. This treatment was indicated during the Fourteenth Arab League Session dated 28/3/2002, and upon the resolution of Arab League No. 223, wherein the fifth paragraph read as follows:

“Offering or granting the least-developed Arab states an interim period starting from the day of accession, with equal reduction annually for their tariff, taxes, and duties of similar effect which are imposed on Arab commodities starting from the year 2005 to be fully removed by 2010.”

This resolution grants Sudan and other least-developed Arab states a special status in applying a gradual reduction on their customs duties starting from January 2006, and over to complete the proposed plan by the first of January 2010.

With regard to the facilities and privileges of reduction of taxes and custom duties which facilitate access of Sudanese exports in the GAFTA states, all Sudanese embassies, attaches, and consulates were notified by the Ministry of Foreign Trade to insure the implementation and practice of Arab member states upon customs and privileges.

Reaffirming to the resolution No. 1565 of the Economic and Social Council; the Sudanese Minister of Finance and National Economy issued the Ministerial Decree No. 109-2005 on gradual reduction to of customs charges and taxes for similar effect imposed on imports of Arab origin products, within the framework entitled for the implementation of the programme proposed by the GAFTA over the period from 1st January 2006 for an equal yearly reduction of 20% up to complete a abolishment ending 1st January 2010.

216 - Id.
217 - Id.
Sudan notified all its customs points in order to apply the decree of the Ministry of Finance. As a result, the customs practically applied the decree. In 2007, a reduction of %40 of customs was commenced as from January 1st 2007.

From GAFTA Treaty we can deduce that it fosters privatization operations in Sudan depending on the following:

1- The Economic and Social Council, which is mandated by the Arab Summit in Cairo-1996 to undertake and foster the set up of GAFTA, agreed in February 1997 that GAFTA provisions should be in accordance with the provisions of WTO which fosters privatization all over the world.

2- Many member countries in GAFTA are already members in WTO, therefore they cannot agree to any provision or treatment that contradicts the WTO requirements.

3- Many Sudanese crop exports to GAFTA were formerly exported on monopolistic basis, such as Arabic gum and sesame. Therefore, the break-up of former monopolies arises as an important element in marketing such crops.

The table below shows the gradual increase of Sudanese exports to GAFTA after the break-up of some former monopolies.

Box No. (5): Main Sudanese Exports to GAFTA. 2001- 2006. (Continued on the next page) Value in thousand dollars.

<table>
<thead>
<tr>
<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>33436</td>
<td>31785</td>
<td>32512</td>
<td>0</td>
<td>21066</td>
<td>10632</td>
<td>Cotton</td>
</tr>
</tbody>
</table>

218 - Arabic gum exportation was formerly monopolized by the Arabic Gum Company until it was demonopolized in the early ninetieths of the past century.
219 - Sesame exportation was formerly monopolized by the Oil Grain Company until it was demonopolized in the early ninetieths of the past century.
No doubt the application of treaties to which Sudan is a party requires the active contribution of the private sector. These treaties were signed with many member countries of international treaties. Such treaties explicitly or implicitly impose wide participation of the private sector in the national economy.

Bilateral agreements may also raise special privatization issues. This is the case in the privatization of airlines. Bilateral agreements governing air-traffic between the signatory states often require that “substantial ownership” or “effective control” of the designated companies be held by a signatory state or by national a thereof. An airline

<table>
<thead>
<tr>
<th></th>
<th>Arabic gum</th>
<th>Sesame</th>
<th>Meats</th>
<th>Live animal</th>
<th>Leather</th>
<th>Gold</th>
<th>Umbaz</th>
<th>Groundnuts</th>
<th>Petroleum products</th>
<th>Other</th>
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Source: Bank of Sudan
privatization that would transfer control to foreign investors could then block the application of these agreements and result in the loss of the airline’s main assets, that is, its routes. There are ways to limit this risk; for example, when British Airways was privatised; a golden share was awarded to the government, which allowed it to oppose any foreign acquisition of shares. In the case of KLM, particularly strict measurements were taken. The government holds a call option that allows it to regain a majority shareholding if needed. In addition, the bylaws of the company provide that a majority of the members of the supervisory board shall be nominated by the government. Following is accurate analysis of KLM’s case, written by an international expert in the privatization field:

“*KLM was created in 1919 on only a purely private basis. It was not until 1929 that a majority of shares was transferred to the state. In March 1986, on the eve of privatization, the state held 54.9 percent of the company’s capital. The privatization procedure was original: the company bought back a portion of the state’s shares and undertook to resell them, together with 12 million newly issued shares, to a bank syndicate commissioned to place them. This reduced the share of the state to 38.2 percent of the capital. In addition specific measures were taken to strengthen the government’s control over the company, with the purpose, in particular, to prevent jeopardizing the bilateral air traffic agreements concluded between the Netherlands and other countries.

*The Dutch government signed an agreement with KLM providing that the state would lose its majority interest in the share capital of KLM as a result of the issue of common shares by KLM and of the sale of common KLM shares by the state. A provision was included allowed the state to regain its majority interest at short notice, if that was desirable for reasons of air transport policy or to prevent an undesired accumulation of power in the general meeting of shareholders.

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*Under the agreement KLM, granted the state the option to purchase 18,000,000 B preference shares. The state could exercise this option if necessary, and reasonable, in particular (a) “under one or more international agreements or one or more licences granted by whatever country, limitation or aggravating conditions would be imposed on the operation by KLM of scheduled services because substantial or majority ownership of KLM would no longer be demonstrably Dutch” or (b) it is necessary to prevent one person or company or a group of persons or companies from acquiring a stake in KLM that would result in an undesirable balance of power in the general meeting.

*In addition, the government was granted by virtue by an amendment to the company’s article of association, a majority of the seats on the supervisory board of the company, even though it is only a minority shareholder. The new paragraph 13 of Article’s 20 of KLM articles of association provides that “the state of the Netherlands shall appoint the smallest possible majority of the supervisory board”.

In Sudan, privatization of Sudan Airways Co. may lead to problems for the new owner. Whether the Sudanese government has taken the same safeguards (mentioned above), remains an ambiguous matter. The file of privatization of Sudan Airways was shifted from TCDPE to the Council of Ministers to be executed by a ministerial committee. In the Council of Ministers there is no any information allowed about this operation, a thing which will not assist in advising, assisting, or analyzing such operation.

**Conclusion:**

The models which are examined in this chapter are generally considered to have precedence over ordinary law. They are by large binding on legislators and governments and cannot be amended except through lengthy and complicated procedures. Specific constitutional provisions and certain treaties might therefore have to be amended to facilitate implementation of the privatization program.
Constitutional provisions may prohibit the privatization of an economic sector such as natural resources or infrastructure, subject it to special rules and limitations, or restrict foreign investment. In many cases, however, suitable legal techniques are available to allow the legislator to circumvent obstacles that may appear to be major constraints.

Other constitutions allow privatization but make it conditional in particular safeguards. Thus the constitution or constitutional principles in many countries prescribe that a law be enacted to authorize the privatization of SOEs (or some of them). Privatization programs may be subject to control by the courts of their constitutionality.

The international law greatly intervenes for the sake of the privatization. WTO convention, the mother of all other trade conventions and agreement, supports the international wave towards privatization.

Many regional conventions such as GAFTA expressly stated that there must not be any contradiction between its articles and the articles of WTO convention.

Since the membership of COMESA Treaty includes a number of WTO members, this implies the total compliance of those members with the provisions of the mother convention (WTO), a thing which requires the other countries of COMESA to deal with countries wherein the private sector has fundamental role in the production and trade. In other words, it has been proved that the public sector will never achieve anything in the existence of real competition with the private sector. Therefore, a country member in international or regional agreement should activate the role of the private sector to compete globally or, at least, regionally.

Executing a privatization program is not always easy or could be completed without problems. For example, privatization of airlines
requires prior legal consultation. Bilateral agreements between countries are of high importance in airline activities; they are to a far extent govern ones of major elements in airlines activities, that is, the routes. Bilateral agreements usually specify the methods of engaging these routes. Before privatization signatories are states, but after privatization the ownership will be transferred to a private party, a thing which requires the intervention of the state to maintain control over these routes. Golden share is the weapon of the state to maintain such a control.
Chapter 5

Privatization and Competition

Legislations that govern and organize the competition on the markets are considered as important devices to achieve successful privatization program. Competition is the economic democracy which must be adopted by all countries in all commercial transactions. Competition should actually be exercised, and a strong guarantee for its application before and after privatization operations is required.

It is a common notion that competition is likely to be a more important determinant of economic performance than ownership. Therefore, on their way towards privatization, countries should boost the competition rules between the productive enterprises regardless of the type of the ownership (public or private). For a privatization program to be successful, features of non-competitive treatment between state-owned enterprises and the private ones should be declined. Adoption of non-discrimination against the private sector, liberalization of prices, demonopolization, and deregulation of laws and procedures of obtaining licences and other official permissions, and application of suitable trade legislations are required for privatization.

We will not devote this chapter on the Sudanese laws related to competition that in Sudan there is a sufficient number of laws which, theoretically, satisfy the protection of competition such as Intellectual Property Act, Dumping Prohibition Act, Investment Encouragement Act 1999, and Money Laundry Act, etc. All these acts were designed to protect competition. This chapter will first concentrate on the entailed

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treatment between the private and public sector. Liberalization of prices and its consequences will follow. Prior steps words privatization like demonopoliztion or break-up of monopolies and its feasibility will be mentioned, and deregulation of some regulations will be discussed. Foreign trade legislations, as a device for attracting foreign investors will be examined. Lastly, in a country like Sudan where serious decisions may be taken regardless of the public interest; we will examine some of these irrational decisions. These decisions usually create sorts of monopolies and discriminative treatment which usually harm the privatization program.

(i) Non-discrimination against the Private Sector:

Absence of discrimination between the private and public sector is an essential part of competition policy and a particularly important factor in privatization transactions. The private sector must be allowed to compete with the public sector on equal footing. This equality should be achieved by; for example, the removing of subsidies, elimination of discriminative treatment in tax system, removal of all entry barriers hampering the private sector, and the equal access to public contracts.

In some countries, Brazil for example, guarantees of non-discrimination are, even, found in the constitution. Article 173 of the 1988 of Brazilian constitution provides that public corporations, joint venture companies, and other public entities that engage in economic activities are subject to the same legal system as private companies, including labour and tax rules. In addition, public corporations and joint-venture companies shall not enjoy any tax privileges that are not extended to the private sector.\footnote{222 -Pierre Guislain, The Privatization challenge; a strategic, Legal, and Institutional Analysis of International Experience pp. 53-54, 4\textsuperscript{th} ed. 2001, World Bank Publications Washington DC.}
Abolishing preferential treatment for SOEs public supplies is often a vital component of a good competition policy. The public contracting system is important in that in most countries the state and the public sector in general, including SOEs and other public entities, are by far the largest potential consumers of goods and services. Consequently, governmental supplies such as petroleum, water, gas and electricity are more accessible for SOEs and public sector. Equal access to this market is of vital importance for an investor in a newly privatized company.\textsuperscript{223}

In the Salvation Revolution era (the privatization era), competition between private enterprises and SOEs can be divided into two periods:

\textit{1- Abdelraheem Hamdi era (1991-1996):}

This is the period in which the privatization operations had been staged. In this period there were many features of noncompetitively governmental policies. These policies had very negative reflection in the private sector. The following can illustrate this point further:

\begin{itemize}
  \item[a-] The provisions of the Taxation Law had severely been activated against the private sector; while the public sectors and SOEs were almost totally exempted from the taxations, customs tariffs and the like. This severe treatment in the application of taxation and customs tariff resulted in a great damage of the private sector, leading many of Sudanese investors and traders to abandon investment and transfer their capitals (illegally) outside Sudan.\textsuperscript{224}
  
  \item[b-] Governmental charity companies and organizations were widely spread and excersised pure commercial activities like importation of consumer commodities, retailing activities, and
\end{itemize}

\textsuperscript{223} - George Yarrow, supra 1 p.368.

\textsuperscript{224} - One of the great traders in Omdurman was chocked and died because of the unreasonable amount of taxation imposed on him
local trading activities, and in some events, importation of luxury goods. These companies and organizations were totally exempted from taxes, customs tariff, and any other governmental fees. The number of these companies and organizations had increased to reach 286.\textsuperscript{225}
c- The private sector had not been granted any contribution in public contracts, and all public contracts were executed either by governmental companies or by certain investors (supporters of the regime).\textsuperscript{226}

2- Abd-Elwahhab Osman era and the period until now:

Dr. Abd-Elwahhab Osman took over the Ministry of Finance and National Economy after Mr. Hamdi. The new minister adopted different policies. In his era, a different reforming was applied. The following illustrate some features of such reforming:

a- Reasonable taxation treatment was adopted on the private sector, a thing which marginally developed its role in the economy.

b- The governmental charity companies and organizations were compelled to pay the same customs tariffs as well as the private investors. Despite that the preferential treatment in taxes had remained but, at least, some sort of reasonable competition between the private and public sector was created.

c- The private sector, to some extent, has taken an opportunity to contribute in the public contracts.

(ii) Liberalization of Prices:

\textsuperscript{225} - Source: Ministry of Finance and National economy-Khartoum.
\textsuperscript{226} - It is true that there is no conclusive evidence for this, but this is a common notion on minds the majority of the Sudanese peoples. If it is correct; this will lead to considerable doubt that most of the public contracts were executed by corruption and favouritism.
Price liberalization should normally precede privatization; especially in countries which formerly controlled the prices before implementation in privatization such as Central Europe, Eastern Europe, and other countries which formerly adopted the socialist or Marxist-Leninist ideology in their economies. Without freedom to set prices, few investors would be interested in acquiring SOEs.

Prices were liberalized in Sudan in 1991; this, indeed, gave Sudan important advantages over many countries. Despite the fact that economies of these countries are more advanced than the Sudanese, many political concerns have delayed the liberalization of prices in these countries. As a result, their privatization programs were suspended until the liberalization of prices. Egypt is a good example: although the preparations for the privatization began in 1992; liberalization of prices did not occur until 1994.\textsuperscript{227} The justification of such delaying is that socialism has been deeply rooted in Egypt since 1952 and the sudden removal of socialist principles (the subsidy) would result in social opposition.

Liberalization of prices in Sudan has a good impact in the performance of the privatized sectors, especially in telecommunications. Nowadays, telecommunications companies are strongly competing by reducing fees to attract more customers.

\textbf{(iii) Monopolies and Antitrust Provisions:}

It is better to start this part by Yarrow’s statement about the necessity and means of prevention of monopolies and antitrust provisions. Privatization is initially designed and directed to resist monopolies which harm the competition and, consequently, the right of a citizen to have a

reasonable price through fair competition. It is unreasonable to use privatization itself as a device to create a new monopoly, and to turn down the role of privatization as an instrument for demonopolization on the way of the creation of competition.

Professor Yarrow assured:

“To deter attempts to restrict competition it may be necessary to enact laws applicable to public and private enterprises that would prohibit the establishment of cartels, trusts, monopolies and other restrictive businesses practices. The introduction of such legislation might block certain privatization transactions that would have otherwise proceeded. For example, the acquisition of an SOE or other state asset by one of its competitors could result in excessive concentration. The privatization process should not normally lead to the simple conversion of public monopolies into private ones or to the formation of monopolistic situations where one or a few companies control the relevant market.”

Professor Yarrow’s statement clearly shows that we are in real need for laws to prohibit the establishment of cartels and monopolies through the privatization itself.

In Sudan there were many mistakes in the terms of privatization contracts and agreements that constituted obvious monopolies. One of these mistakes is in the privatization agreement of the former telecommunications corporation in Sudan. The Sudanese government granted the new owner (Sudatel) irrational merit. The non-competitive and the new monopolistic situations were not implicitly included in the agreement; they were explicitly declared. In the agreement between the Sudanese government and the Sudanese Company for Telecommunications On 19/4/1993, and under the signature of the Minster of Transportation and Telecommunications; the Sudanese

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228 George Yarrow, Supra 1. p. 358.
229 - This doesn’t means such privatization operation was not a successful one. It is, indeed, successful in general, but granting such monopoly is against the philosophy of the privatization.
government granted a 15-year monopoly for the new owners (see Chapter 3). This monopolistic provision in the agreement resulted in:

\( a- \) Total absence of competition in the telecommunications field from the beginnings of the ninetieth of the past century until the mid of the first decade of the current century.

\( b- \) Fees of telephone lines and calls were very high if compared with the nowadays prices.

\( c- \) The former fees of the telephone lines and calls under the monopoly led consumers to abandon Sudatel services and use mobile telephones.

The above criticisms of granting monopolistic position to this company may be argued by that the telecommunications service is a strategic investment, and requires intensive capital to execute the infrastructure works. Accordingly, the new investors should be granted a monopoly to return their capital in a reasonable period of time. We do not accept the argument that telecommunications is not the only strategic service or industry in Sudan; there are many strategic services and industrial investments in the country. If the government grant monopoly for every strategic service investment; this will create wide monopolistic climate, abuse on fees and tariffs, and bad impression on the foreign investors that the investment in Sudan is not widely opened for all investors. On the other hand, the Investment Encouragement Acts 1991 and 1999 (as amended in 2002) contains voluminous numbers of exemptions and other merits to strategic projects. Among these exemptions and merits the strategic projects can be exempted from all
types of taxations for a period reaching 20 years. Exemption of customs tariff for raw materials, machineries, and different types of cars, is also granted. Also, every new project with a feasibility study can be granted a land by encouraging price regardless of the size of such investment. All these merits are quite sufficient for any type of investment; therefore, any speaking about monopolistic treatment in a privatization contract seems to be a sort of abuse depending on the bad situation of the economy of the country.

The above criticisms can also be supported by that Sudan at the time of privatization of telecommunications was not in a good economic position, and the government was compelled to accept the conditions of the new owners. To some extent, this argument seems to be acceptable, but, recently and after oil discoveries and production, any feature of monopolistic treatment should be considered as mere corruption or favouritism.

Professor Yarrow’s statement (explained above) is directly warning that; privatization should not be used as a device or instrument to create a monopoly by transferring SOE to private ownership. The legal monopoly is protected by the law or provision in governmental agreement such as the privatization agreement of the Sudanese telecommunications in 1993.

In addition to the legal monopoly there is another type of monopolies, that is the natural monopoly. The natural monopoly is not protected by law or governmental agreement or contract; its monopolistic nature appears from that there is no sufficient number of persons, corporations, or other entities capable of exercising a certain activity. Despite the fact that there is no law for the protection of the natural monopoly, Professor Yarrow stated that:

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230 - S. 10 (a), (b) and (d) of Investment Encouragement Act 1999 as amended in 2002.
“In the presence of natural monopolies, regulation will often be indispensable to prevent the monopoly company from extracting rents by restricting supply for its services and selling them at high prices or otherwise abusing its exclusive market position. In many countries public monopolies have not been subject to regulation, precisely they were thought (often wrongly) to serve the public interest rather than the profit motive. Privatizing these monopolies is calling for the establishment of a regularity framework for these activities that can not be exposed to competition.”231

Natural monopolies are concentrated in the least-developing countries for clear reason; the citizens of these countries mostly have no financial capacity for exercising intensive capital activities like generation of electricity, gas services, mining and other types of activities. In the advanced countries, most of the intensive capital activities are exercised by a big number of private sector investors. Therefore, the natural monopolies are rare in these countries.

For the sake of competition as an important component of the privatization operations, the activities of the governmental natural monopolies should be regulated so as to:

1- Prevent the monopolizing company or investor from abusing their position in the market by imposing a high level of prices on the consumers.

2- To prepare them for future privatization (if they are public ones). The regulation of the public natural monopolies is, for example, by restricting their liberty in determining the prices of goods or services, and training them to face the competition in the event of new investor involved in the same monopolized activity.

In Sudan, for example, electricity generation, theoretically, became a natural monopoly232; that by the new Act of Electricity 2001 s.3 (a) and

231 - George Yarrow, supra 1 p. 386.
232 - Electricity generation was a legal monopoly until the issuance of Electricity Act 2002.
(b): any company, partnership, or individual investor has the right to
generate the electricity, or establish generation stations in accordance
with the conditions and specifications provided for in the Electricity Act
2001. But, as we have previously mentioned; exercising such activities
needs intensive capital investment, therefore it may remain as a natural
monopoly.

The Electricity Act 2001 requires that a person who aims to invest
in electricity generation should fulfil the following requirements:233

a- Technical efficiency and experience in the field of
electricity generation.
b- Financial capacity.
c- Compliance with the public policy of electricity in Sudan.
d- Registration of a branch in Sudan, if the applicant is a
foreign company.
e- National companies shall be registered under the
provisions of the Sudanese Companies Ordinance 1925.
f- Partnerships and individuals shall register a business
name.

The only legal monopolistic feature we have noted in the
Electricity Act 2001 is that the distribution of the generated electricity
should be through the national electricity grid (S.4). This grid is owned by
the National Electricity Corporation.

S.4 of the Electricity Act 2001 creates a strange situation. While
the Act succeeded to break-up the former legal monopoly of the National
Electricity Corporation in the generation activity, the same Act kept the
legal monopoly of the transmission and distribution of power on the hand
of the National Corporation. This strange position can be justified by that

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since there is a grid for distribution of electricity, the new investors are not in need of building new ones, because it will result in high tariff. Theoretically, this justification seems to be acceptable, but if a new investor offers to build his distribution net and, at the same time, comply with the fixed level of tariff, s.4 will become a barrier in the face of good privatization offer. We do not call for the amendment or repeal of S.4 as we call for setting flexible provisions in the Act. For example, S.4 shall be followed by a provision indicating that if a potential investor offers to build a distribution net for his generation station, this shall be available provided that in such a case he will not be permitted to abuse the consumers.

Finally, it should be noted that internationally the enforcement of anti-monopoly legislation is often entrusted to a specialized competition commission or office, such as the German Federal Cartel Office or the UK’s Office of Fair Trading and Mergers and Monopolies Commission.

In Sudan such enforcement is the mission of the courts which, normally, do not include experienced judges in this field. Therefore, it is better to constitute efficient commissions to enforce the competition rules or to train Sudanese judges in such a field through scholarships or higher studies like LL.M or Ph.Ds in the international commissions, or other institutions.

(iv) **Deregulation:**

Many countries are burdened by a multitude number of rules that govern the exercise of all economic activities. If these countries wish to attract investors to participate in their privatization programs, they should streamline these regulations and procedures for obtaining licences and other official permits required to conduct business. For example, a rule that required the use of products of domestic origin might prohibit an
investor from using his traditional suppliers (including companies controlled by the investor). The investor might therefore lose interest in participating in the privatization program. This was the case in the dispute between the Sudanese government and the Gulf International Corporation in 1974. The Sudanese government decided that the Gulf International Corporation is obliged to use the Sudanese cotton in all weaving and spinning operations in the Sudanese Weaving Factory (joint venture). In return, the Sudanese government shall grant a big number of preferential treatments for the factory such as total taxation exemption for a long period of time, exemption and reduction of customs tariff on all imported raw materials other than cotton, and grand land area (400,000sq.m) in Khartoum-North Industrial Area. After a period of time, the Gulf International, found that the majority of the quantities of cotton production in Sudan are short-staple while most of the factory’s products in spinning and weaving require long-staple cotton. Gulf International requested the Sudanese government to permit the factory to import long-staple, man-made and silk yarns so as to modernize its production to compete internationally. The Sudanese government refused to accept on the ground that it is against its public policy of imports. In addition, the Sudanese government claimed that the Central Bank has no sufficient hard currency to cover such letters of credit. Thereafter, the Gulf international offered to import its needs using the Nil Value method whereby Gulf International would be obliged to pay the hard currency from its own resources to cover the documents. Again, the Sudanese government refused to consent. A few years later, Gulf International stopped the production operations.234 The result was that the service of hundreds, if not thousands, of the work-force was terminated.

234 - Source: old files in the stores of Ministry of Industry.
(v) **Foreign Trade; Legislations and Practice:**

In their negotiations with the government, investors will often try to have foreign trade legislation (like customs) either applied or amended to their advantage, a thing that may conflict with the objectives of an efficient and competitive economy. As an example, many investors have sought after special protection against competing imports *(see Chapter 4; meeting with Mr. Mutasim Makkawi; Deputy Head of COMESA Unit, Ministry of Foreign Trade – Sudan).* If an investor is granted exemption from the normal provisions of a country’s foreign trade legislations, this should be done transparently. An investor who produces the same commodity locally will obviously be willing to offer a cheaper price, a thing which will save hard currency and promote the local production.

In practice, most of countries which were involved entire privatization programs didn not grant any exemptions of any kind against investors who involved in their privatization operations. But some countries like Guinea, Togo, have granted very generous protection in certain privatization operations, for example, in the form of high import tariff on competing products.235 However, under the current directions of the new international economy system, exemption from foreign trade legislation as a discriminative treatment for the benefit of one investor over the others became a matter from the past. Many international conventions, treaties, and regional agreements prohibit or, at least, restrict these exemptions.

Some provisions in the Investment Encouragement Act 1999 as amended in 2002 indirectly created some features of non-competitive treatment between investors. All the new projects, industrial, agricultural, and service are entitled to partial or total exemption from taxations or

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customs tariffs; a thing which will attract them to lower their prices depending on these exemptions. The old projects will face a big problem that their exemptions were expired. Therefore, they will no longer be able to compete with the new projects. Accordingly, decision makers are required to create some rational balance between old and new investors. It is quite clear that the preferential treatment for the new project is provided in the investment laws of many countries, and there is no way to speak about the elimination of such preferentiality treatment. We believe that economic and legal experts in this country are capable to make such balance.

Giving experts an opportunity to propose solutions, although they are not government officials, will enhance efforts of the government to create a real climate for competition.236 The government should not isolate non-governmental opinions because of their opposition or their contradictory ideologies.

(vi) Irrational Decisions:

The preceding parts of this chapter discussed factors which foster the competition and privatization such as non-discrimination against private sector, liberalization of prices, deregulation, and prohibition of the misuse of foreign trade legislations. Also, we discussed some barriers in the way of competition. Issues which will be discussed in this part are unique practices; we have not found any similar practice in all privatization references. In the era in which Sudan is anticipating entire economic growth and self-satisfaction, many irrational governmental decisions have been taken. It is well known that all over the world the first step to launch a privatization program is to create a free trade

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236 - All the personnel in the Ministry of Investment – Khartoum said: we do not have any solution for this problem. Moreover, many of them said: we are not decision makers; we are just executers for the public investment policy and its relative legislations.
climate, not to put barriers in the way of the liberty of the economy. All countries of the world tend to demonopolize the former monopolies, deregulate non-competitive regulations, and present incentives for the sake of equitable competition. But in Sudan the matter differs: many irrational governmental decisions against competition and trade liberty have been taken. The sorrowful thing is that these decisions are stated in the provisions of some privatization contracts.

(a) Noncompetitively Privatization Contracts:

Attracting the private sector to play a considerable role in the economic life of a country is indeed one of the most important components in the privatization processes. Methods of attraction are many; examples are: granting exemptions of taxations and customs tariff, lands, transfer of capital and profits into and out Sudan, and the merits which are provided in the Investment Encouragement Act 1999 as amended in 2002. As we have previously mentioned, exaggeration in granting encouraging facilities in the privatization contracts may sometimes lead to the creation of uncompetitive or discriminative treatment between the similar privatized SOEs. In other words, the new investors in the similar privatized SOEs should be granted similar encouraging facilities or privileges in the privatization contracts. Granting excessive facilities for certain privatized SOE over the similar ones will lead to accusations of corruption, favouritism, and political interests, a thing which will lead to public opposition against the whole privatization program.

The government under the pressure of the deficit of the public budget and the disappointing performance of the SOE may accept all the conditions of the buyer regardless of the harmful effects of such acceptance on the similar privatized enterprises.
The privatization contract of Atbara Cement Factory (mentioned in Chapter 3 and its Appendix) included many terms which constitute some sort of discriminative treatment. Therefore, the Secretary General of Taxation Chamber on 15/10/2002 sent a letter to the Minister of Finance and National Economy. The letter criticized the exaggerated exemptions and discriminative treatment between Atbara Cement and the other Sudanese cement factories. Following are some of the contents of the letter:

1- Terms 5/11 to 5/14 of the contract are not constitutional and against the international agreements. They prejudice the rights of the state and the other similar factories like Rabak Cement Factory. Moreover, they are monopolistic and against the liberalization of economy policy.

2- SS. 13, 20, 22, 37 are against the Additive Value Tax Act 1999; they exempt the imported commodities from the additive value tax and permit the sale without issuing sale invoices.

3- The exemption from the additive value tax should only be exercised by a legislative order by the Minister of Finance and National Economy after the recommendation of the General Secretary of Taxation Chamber.237

From the above, it is clear that any discriminative treatment in privatization contracts may result in problems between the different investors of the privatized SOEs and the different governmental bodies of one country.

(b) Non-competitive Climate of Investment:

Sudan is one of the major exporters of livestock and frozen meats. Sudanese cattle, cows, and camels are of excellent quality. They have great demand in the Arab countries; especially in the Gulf States (Saudi Arabia is the biggest importer among them). The only reason that reduces the number of exported livestock is the weakness of medical care in

237 - Source: Internal file in TCDPE.
Sudan. Therefore, the only logical solution is to promote the medical care of Sudanese livestock so as to maximize the exports.

Suddenly, without any prior preparations, the Sudanese government on 29/9/2002 signed an agreement with the Arabian Livestock & Meat Company (owned by Prince: Alwaleed Bin-Talal) whereby the Sudanese government granted the Saudi company an exclusive agency for the Sudanese livestock exports in all Arab Gulf area. According to this agreement, the Sudanese government commissioned the Advanced Commercial & Chemical Works Co. Ltd., to execute this agreement on its behalf. The Sudanese livestock exporters would no longer be free to transact directly with the importers of Saudi Arabia and the Arab Gulf area. They should deliver their livestock imports to the Commercial & Chemical Works Co. which is responsible to deliver them to the Saudi exclusive agent.

Following are the main terms of the Agreement (translated by the researcher). (Source: Ministry of Foreign Trade):

“This is an agreement signed on September 29th 2007, between:

The Arabian Livestock and Meat Company, a Saudi company with limited liability, its head office address is Alhadab Building, King Abd-Elaziz St. Elrabia Area, Riyadh- Saudi Arabia P.O Box 60632-11555, represented in this agreement by his Royal-Highness Alwaleed Bin-Talal, Head of the board of directors., thereafter referred to as the (First Party).

The Sudanese Party:

Advanced Commercial & Chemical Co. Ltd., its head office in Elamarat-Khartoum, St. No. 19, Khartoum-Sudan, P.O Box 44690 Khartoum-Sudan, represented by Mr. Isam Omar Shami, Head of the board of directors; thereafter referred to as the (Second Party).

Introduction:

238 - There was no body knew any thing about this agreement, neither the Livestock Importers Union nor Livestock exporter. The Prince Alwaleed Bin-Talal came to Khartoum in 29/9/2002 and signed the agreement with the Sudanese company in the presence of the President of the Sudan and the Minister of Foreign Trade. Few hours after, Prince Alwaleed left Sudan.
Whereas the First Party aims to import varieties of Sudanese livestock to Saudi Arabia and the Gulf Area, and has the required financial, administrative and marketing capacities for the purposes of this agreement, the two parties have agreed that the First Party shall be the exclusive agent for the Second Party in Saudi Arabia and the other states of the Arab Gulf Cooperation Council. Since that the Second Party has good relations, merits and facilities from the Sudanese government enabling him to fulfil the requirements of this agreement in supplying the First Party by good qualities and of the Sudanese livestock, the two Parties agreed to the following:

Quantities:
Not less than 1,500,000 heads of livestock per year.

Third: First Party Obligations:
First party obligations are:
1- Establishment of efficient administrations to import and market the livestock exported by the Second Party.
2- Making the required advertisement in the media of the exclusive agency area.
3- Fulfilment of all procedures required for the safety of exported livestock.
4- Creation of new markets.
5- Cooperation with the Sudanese Government in providing suitable solutions for transport and growth of Sudanese livestock number.

Fourth: Second Party Obligations:
The Second Party is obliged to:
1- Supply the First Party with the qualities and quantities mentioned in this agreement. The quantities shall be supplied partially as in the purchase orders issued by the First Party.
2- Present all the certificates required in Sudan or in the exclusive agency area
3- Comply with the specifications and measurements of Saudi Arabia and the Gulf Cooperation Council.
4- Issue weight certificates in the presence of the First Party’s representative and guarantee the safety of the exported livestock up to the port of exportation.
5- Deliver the required quantities in a period not exceeding three weeks from the issuance of purchasing order from the First Party, and present any document required by customs authorities.
6- The Second Party shall be obliged not to sell to any other party in the exclusive agency area. In the event of Second Party’s selling to any other party, he will be responsible to pay a reasonable compensation to the First Party.

7- In the event of any production rejected for non-compliance with the conditions of this agreement, the Second Party will be obliged to burden all the rejection costs.

**Seventh: Duration:**

This agreement shall be valid for five years beginning six months after signing this agreement. The period of validity of this agreement shall be renewable for further five years unless any party of this agreement informs the other by his will to terminate the agreement.

**Eighth: Price:**

The price shall be $1330 for ton.

**Ninth: Method of Payment:**

Payment shall be through letters of credit or bank guarantee acceptable by the other party.

Few days later, another agreement was signed between the same parties. By this agreement, all Sudanese livestock exports to Egypt were granted exclusively to the same Saudi company.

The Sudanese livestock exporters protested against the two agencies and requested the Minister of Finance and National Economy to terminate the two agencies. They claimed that:

* The Sudanese exporters are not in need for the exclusive agency; they have their own customers in Saudi Arabia, Arab Gulf Area, and Egypt.
* The Sudanese exporters were burdened by contractual obligations to their customers before signing the two exclusive agencies.
* The Sudanese exporters can provide prices higher than those stated in the two exclusive agencies.
* The two agencies created a monopolistic position in the foreign trade, a thing which is not advisable under the policy of economic liberalization.

On the other hand, part of the Sudanese exporters supported the exclusive agencies on the grounds that:

* They provide a very strong agent in Saudi Arabia, Gulf States and Egypt (Prince Alwaleed Bin-Talal).

* In the absence of a strong agent, Saudi importers usually impose their prices on the Sudanese exporters, a thing which resulted in a deep reduction of Sudanese livestock prices in Saudi Arabia (the major importer of Sudanese livestock).

However, the exclusive agency was applied, and the exclusive agent specified a limited number of live stocks for exportation. As a result, a dispute arose between Sudanese exporters over the portion of every exporter. Thereafter, the Minister of Foreign Trade appointed the Committee of Exporters of the Exclusive Agency to determine the portion of each exporter. The committee determined the portion of each registered exporter of livestock. Determination of exporter’s portions raised a new problem that the new exporters 239 (who were registered after the determination of the portions) requested the Minster of Foreign trade to determine their portions. The committee, again, repeated the portioning of exported livestock.

The opposition against the exclusive agency had quickly increased and the exclusive agency became subject to the criticisms of the public opinion and media. The justifications and defences of the Ministry of Foreign Trade failed to absorb the public opposition. Therefore, the Minister of Foreign Trade intervened to mitigate the public opposition. On 1/10/2002, the Minister of Foreign trade issued the Ministerial

239 - Eldamazeen co. for Live Stock Exportation, Elsawakni co. for Livestock Production, Albutana co. for Livestock Production, and Western Sudan for Living Stock co.
Decision No. 39 to organize exportation operations. The ministerial decision stated that:

“2- All livestock exportation procedures shall be in accordance with the conditions and regulations issued by the Export Department of the Ministry of Foreign Trade.

3- All letters of credits which were formerly opened by the exporters before signing the exclusive agency on 29/9/2002 shall be remedied by the Ministry of Foreign Trade.

4- Advanced Commercial & Chemical Works Co. Ltd. shall no longer be entitled to export unless by the approval of the Ministry of Foreign Trade.

These procedures had not succeeded to absorb the public opposition. Therefore, a ministerial committee was appointed to revise and propose about the exclusive agency. The ministerial committee included the Minister of Finance, Minister of Justice, Minister of Foreign Trade, Minister of Industry, Minister of Animal Resources, and the Governor of the Central Bank. The ministerial committee decided that the intermediate company (The Advanced Commercial & Chemical Works Ltd.) should be dismissed and the Saudi company should directly deal with Sudanese exporters.240

On 9/7/2003, basic provisions in the exclusive agency were repealed, and the new ones provided that the frozen-meats of camels and live camels be dismissed from the exclusive agency (Egypt is the major importer).

As new a step for mitigation of public opposition, the Minister delivered a letter to the exclusive agent on 19/4/2004, whereby: “exportation of all kinds of frozen meats out of the exclusive agency is permitted». The exclusive agent protested and delivered a letter to the Minister.241 The letter expressed that the permission for exportation of frozen meats out

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the exclusive agency constitutes an open breach of the provisions of the exclusive agency. In the same letter the exclusive agent invited for a meeting with the Minister to solve the problem.

The termination of the agreement of the exclusive agency came by the letter No. FT/MO/ 207, on 20/9/2004. The letter was sent by the Minister of Foreign Trade to the Advocate General so as to inform the Saudi party of the termination. (Source of all information about the exclusive agency is the Ministry of Foreign Trade).

Despite the fact that the terminated exclusive agency did not directly affect one of the privatization operations in Sudan; followings should be noted:

1- The terminated agency was granted to a foreigner party, the Saudi prince Alwaleed Bin-Talal. With regard to that many of Sudanese SOEs have been sold to investors from Arab countries, especially the Arab Gulf states; the way in which the exclusive agency was granted and terminated reflects the haphazard and floundering governmental decisions in Sudan.

2- The terminated agency clearly showed that the different types of the non-competitive agreements and exclusive rights will no longer remain. The opposition against the exclusive agency began from the first day of the agreement and remained until the date of the termination (two years).

3- In the era of the privatization and liberal market, politicians must be aware that any political

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242 - Like Atbara Cement Factory, Elnilien Bank and Bank of Khartoum.
favouritism, whatever its justification, will inevitably lead to instability in the market and the investors (especially the foreign ones) will prefer to invest outside the country.

A non-competitive economic climate may also be created after the privatization operation. In some cases after selling certain SOE to foreign or local investors, the government disregarded the interests of the new investor and took some non-competitive decisions for the sake of other investors in the same field of the privatized SOEs. Such practice indicates that the only objective of privatization in the country is to dispose off the SOE to avoid its disappointing performance regardless of the other objectives of the privatization program. For example, one of the government obligations in the privatization contract of Atbara Cement Factory is that the government shall be obliged to impose the same taxations and production fees on imported cement. In 2005, under a crisis of cement in the local market, the Council of Ministers, according to S. 5(3) of the Customs Act 1996, issued a decision to reduce the customs tariff on imported cement from %45 to %35. Accordingly, the Council of Ministers had to reduce the production tariff of the local factories such as Atbara and Rabak factories, but this did not happen. As a result, the local factories suffered huge losses. Therefore, Mr. Omer Abd-Alati, advocate of Atbara Cement Factory, presented a grievance to the Advocate General on 10/1/2005. The grievance included that the government has not complied with the terms of the privatization contract of Atbara Cement Factory that the terms of the contract obligate the government to grant equal reductions for the Factory. On 12/2/2005 the Advocate General sent a letter requiring TCDPE to respond to the suit. The response of TCDPE

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243 - Many of the supporters to the Exclusive Agency justify their support by that; granting the exclusive agency to a character like the Prince Alwaleed Bin-Talal provides strong international political support for Sudan in the recent circumstance.
was that the reduction of customs and taxations is not its responsibility; it should be requested from the Council of Ministers. The response of the Council of Ministers was delayed for many months, a thing which resulted in big losses for the factory.244

**Conclusion:**

Factors of success of privatization program include, among others, elimination of all forms of discrimination against the private sector and protection of competition. In a country like Sudan, some reforms are needed in almost all categories of laws and agreements that may stand as barriers in the way of privatization.

Since that the public sectors products are mainly subsidized by the public treasury of the state; liberalization of prices represents one of the main features of non-discrimination between the private and public sector.

In Sudan, despite the big sufferance caused by liberalization of prices in the early ninetieth of the past century, such liberalization resulted in a solid ground for the privatization program. Countries which had not earlier liberalized prices found big difficulties to accommodate the current international wave of privatization.

Foreign investment legislations in a country may widen the scope of foreign investors’ participation in the privatization program of such a country. In other words, non-discriminative legislations and treatment between foreigners and nationals will speed up the privatization program.

Fortunately, in Sudan there is no discrimination between the local and outside investors.245 Moreover, in some cases local investors grieve that the foreigners often enjoy preferred treatment over the nationals.

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244 - Source: Internal Files of TCDPE.
Monopolies, whether legal or natural are barriers in the way of privatization; they have to be eliminated. The legal and economic advisers of the government should work out the unnecessary monopolies and propose the ideal methods to break them up. In addition, non-competitive contracts, bilateral agreements, and governmental decisions, should be restricted.
Chapter 6

Privatization and Public-Sector Management

Sale and other arrangements of public enterprises affect a wide range of existing laws and regulations in a country. One of these is the constitutional laws which they have been discussed in Chapter 4.

In many countries, especially those of French influence in their legislations, privatization has not been exercised by a special governmental body (committee or agency). Therefore, legislations of public-sector management are important in executing privatization programs in these countries that these legislations usually determine methods of transferring SOEs or their assets. Theoretically, these legislations are presumed to be satisfactory in executing successful privatization programs. But in many events, legislature has to intervene again to reorganize some norms. For example, in many countries SOE or some of its assets may be owned by other public entity. In this event, the legislature should intervene to identify the legal owner, and to identify the rules that govern the exercising of ownership rights.

In Sudan, although there is a separate legislation for privatization, a thing which theoretically implies that TCDPE is smoothly exercising its missions; the need for identifying the legal owner stands as a barrier in the way of TCDPE. Also, the privatization program was launched in a period wherein the governance is central; therefore, after the application of the federal governance, TCDPE (federal committee) have faced many problems in transferring ownership and concessions to new investors.

Privatization law is not the only measure for the success of a privatization program in a country. A bundle of laws may participate in the achievement of successful privatization program. For example,
legislations which determine the powers between the different governmental bodies appear as an important factor in achieving successful privatization program. In other words, the clash of powers between the different governmental departments widely affects the smooth privatization program.

In this chapter, determination of the legal owner of a public enterprise to be privatized will be discussed first, followed by an analysis of the rules that govern the exercise of ownerships rights over these enterprises, assets and the concessions rights.

(i) Identifying the Legal Owners:

Privatization involves the transfer of ownership from one entity to another, requiring undisputed and clear property titles and other documentation necessary to establish ownership. The ownership of any asset to be sold will have to be cleared prior to sale. In many countries the need to define and clear-up property titles result in lengthy delays. For example, on the former socialist and Marxist-Liniest countries, owners often challenge the privatization decision by contesting the government’s right to sell enterprises that have been nationalized in the past (see nationalizations in the introductory chapter).

In many countries, SOE or some of its assets may be owned by another public entity. In Bulgaria, Poland\textsuperscript{246}, Guinea (up to 1985)\textsuperscript{247} and other countries whose legal systems are or used to be modelled to the Soviet system, the SOEs do not (or did not) own their real estates (lands and buildings) or sometimes their movable assets (tools, vehicles, and furniture). The state financed the procurements of these assets, and in


\textsuperscript{247} Gerald Bisong Tanyi, Designing Privatization Strategies in Africa p. 138, 1\textsuperscript{st} ed 2004, Praeger Publishers USA.
return the SOE paid an annual sum representing depreciation. These assets continued to belong to the state and could not be sold by the SOE without prior authorization. This system has important implications particularly for the allocation of the privatization proceeds.  

In many socialist (or former socialist) countries, including Hungary, Vietnam, and the former Yugoslavia, profound confusion existed between state property and property of a particular enterprise. In addition, uncertainty prevailed as to which public authority was the true owner, a situation which was also found in Russia and Germany. These difficulties were often complicated because of the past nationalizations that many of these enterprises were nationalized without determining the successor body (ministry, enterprise, or authority). Prior clarification of ownership rights is obviously important for a smooth implementation of the privatization process. Examples for the necessity of clarification of ownership rights have happened in former Yugoslavia. In former Yugoslavia, clarifying ownership rights is a particularly complicated problem in the successor states of the former Yugoslavia because of the uncertain nature of the ownership of public enterprises after the fragmentation of the state. Article 1 of the privatization law of the republic of Slovenia (November 11, 1992) is informative in this point; the law specifies that the privatization operations will only be applied on SOEs which their right of ownership is clear and undisputed.

In Sudan, the chronic problem facing smooth privatization processes is the uncertainty of ownership of lands of the privatized enterprises. The bad thing is that uncertainty of ownership usually happens because of the clash between the authorities of the governmental

249- Id, p. 91.
250- Id p.93.
bodies, the regional governments, and TCDPE which is a federal agency. Moreover, the worse thing is that the disputes and contradictions of tasks and authorities usually happen after concluding the privatization contracts.

The internal files of TCDPE contain voluminous number of grievances presented by the purchasers to TCDPE to comply with its obligations in the privatization contracts. In only one privatization operation; that is Atbara Cement Factory, the file contains about 24 grievances presented by the purchaser requesting TCDPE to enable him to possess the factory’s lands which are listed in the schedules of the assets in the sale contract. The response of TCDPE was very weak; a big number of notes was sent from the legal adviser of TCDPE to different ministers, states governments, and governmental units to solve the purchaser’s problems. For example, one of the sold assets in the schedule of the contract is the land No. 18/3 Block 10 - Atbara City - River Nile State, registered under the name: Atbara Factory Employees Club. The state government refused to register the land under the name of the purchaser on the ground that the land was granted for one year as a primary lease-period and the period ended on 1/1/1985. Therefore, the legal adviser of TCDPE wrote a note to the president of TCDPE so as to make a note to the Minister of Finance, President of HCDPE, to order the Nile River State Governor to renew the lease-period.251

In another example in the same file, the new investor of a privatized factory has wasted a lot of time, efforts and money to compel the government to execute its obligations in the contract. Sufferance of the investor appears from the following details:252

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251 - Source: Internal files of TCDPE.
252 - Id.
1- The land No. 2/15 Block 4 (West) - Industry Area – Khartoum North is registered under the name of Atbara Cement Factory. Before the privatization process of the Factory, an agreement was signed between Khartoum State and the Board of Directors of Atbara Cement Factory Company whereby such land be transferred to Khartoum State on 12/9/93; the price was SD.20.000.000. In addition, Khartoum State was obliged to grant another investment land to the factory company.

2- Khartoum State paid the SD.20 000.000 but did not comply with the other part of the agreement (granting another investment land). Thereafter, Khartoum State built many buildings in the land and sold the same land to Pepsi-Cola Company.

3- A dispute between the two companies (Atbara Factory’s new owners and Pepsi-Cola) had been launched about the property of the land. The Minister of Justice decided that the ownership of the land should be for Atbara Cement Factory according to the registration certificate of the Registrar of Land.

4- The State of Khartoum refused to comply with the decision of the Minister of Justice.

5- On 29/12/2003, TCDPE invited the Minister of Justice and Khartoum State Governor to meet and solve the dispute. The meeting failed to solve the dispute.

6- The Federal Minister of Finance and National Economy, the president of the HCDPE, issued a ministerial decision on 27/8/2004 ordering Khartoum State Governor to enable Atbara Cement Factory to possess and exercise all the ownership rights in the disputed land.

The third bad example from the internal files of TCDPE about Atbara Cement Factory privatization is that the new investor opted to possess the whole quarries area of the lime stone of the factory on the ground that the nearer future plans of productions cover this area. The
area of the quarries is 11.904 Fadden granted to the factory in 1946 for 80 years. Until the privatization, the actual exploited area was only 600 Fadden. Despite the consent of the River Nile State authorities to renew the concession of the whole area of the quarries of lime stone (11.904 Fadden) to the new owner; the Geological Research Authority of Sudan (GRAS) refused to renew the concession of the rest unexploited quarries area (11.304 Fadden) unless it is actually exploited. The advocate of the new owner Mr. Omer Abdul-Aati claimed that the Mineral Resources and Mining Development Act 2007 (s.4) authorizes the River Nile State government to grant and renew quarries of lime stone concessions without consent of GRAS. He also said: the central authority for granting and renewing quarries of lime stone was ended by the repeal of the Quarries and Mines Act 1972 (s.4). GRAS assured that it is the only authority, not the River Nile State, which is authorized to grant or renew the concessions of quarries of lime stones according to both old law of 1972 and new law (Mineral Resources and Mining Development Act 2007). Again, the new investor presented a grievance to the TCDPE (see more discussion about this problem in part (ii) of this chapter).

However, to solve this problem, after many months, the Minister of Finance and National Economy (the president of HCDPE) sent a letter to GRAS to renew to the investor.\textsuperscript{253}

A fourth bad example, in Omm-Altiyour (near Atbara) there are many lands formerly granted by the government to the factory as extensions. Before the privatization process, some of the local citizens trespassed on these lands and built a number of markets and shops. Despite that the lease-period had not ended, the local authorities of the River Nile State Government refused to take any decision against the trespassers. The River Nile State frankly informed the new owner that

\textsuperscript{253} - Id.
any decision to clear-off these lands will result in a struggle between the government and the local citizens.\textsuperscript{254}

In the fifth example, which is the most prejudicial one, the trespass to factory’s lands was practised by the State Government itself. Despite that the lease-period had not ended; the local government of the River Nile State built costly buildings for the Ministry of Engineering Affairs on two lands owned by the factory in Alziedab and Altina areas.\textsuperscript{255} The new owner requested the River Nile State to enable him to possess his lands. Without justification, the government of River Nile State refused to relief the grievance. It is clear that the River Nile State aimed to compel the new investor whether to shoulder the costs of the buildings or to leave the two lands freely.

We can imagine the sufferance of the new investor if we noted the following:

a- In the dispute between the purchaser and Khartoum State: the privatization contract was signed on August 27\textsuperscript{th} 2002, and the decision of the Federal Minister of Finance and National Economy which solved the dispute was issued in 2004. The solution of the dispute was issued after two years from the privatization contract, a thing which inevitably resulted in losses for the investor.

b- In the dispute between the purchaser and the River Nile State, theoretically, the foreign investor has no reason to be involved in such struggle that the foreign investor initially contracted with a federal governmental agency. Such federal governmental agency (TCDPE) should exercise its task to possess the new investors the ownership of the sold assets as a vendor or seller. To relief the purchaser’s grievances; TCDPE exercised the role of compromiser.

\textsuperscript{254} Id.
\textsuperscript{255} Id.
c- The new investor entered into a struggle to possess the main component of cement manufacturing; the quarries of lime stone. While cement manufacturing can start without owning an investment land in Khartoum, cement production will never start without owning these quarries. It seems to be shameful to speak about barriers of this kind.

d- In the fourth position, if the new investor had sued the local citizens, he would have found himself in a struggle with the peoples who were presumed to constitute the majority of the future work force of the factory. Therefore, the investor presented a grievance to TCDPE to relief him. This grievance is still now suspended (2008) and there is no solution blinking to relief the new owner.

TCDPE is presumed to solve all the problems which face the new investor; TCDPE itself mentioned that it has no sufficient authorities to relief the investors:

“The delegation order of the Minister of Finance and National Economy (the President of the HCDPE) to the legal adviser of the TCDPE is exclusively for signing on behalf of HCDPE in the disposition contract; it does not delegate the legal adviser of TCDPE to receive certificates of registration for the sale or clear of mortgage purposes. For example, at the time of selling Atbara Cement Factory, most of the laid-off employees were debited for the company instead of real estates mortgages. TCDPE covered these debts from their post service rights. The Commissioner of lands refused to accept the legal adviser’s letters to clear theses mortgages because that the legal adviser of the TCDPE is not delegated to do so.” 256

It is clear that most of problems the new owner of Atbara Cement Factory has faced are about the ownership of lands which were formerly granted to the former owner, and about renewing the concessions. It is to

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be noted that these types of problems frequently happen in many other privatization operations. If we apply Atbara Factory’s problems on the majority of the other privatization operations, we will find that most of these operations have faced similar problems; lands and concessions problems:

(a) Lands Problems:

The problems of lands of the privatized SOEs in Sudan can be analyzed into three types. First, disputes of lands ownership: because of non-fulfilling the procedures of the former allocations (before privatization). Second, solving lands problems takes a long time, and may result in dissipation of the proceeds of the privatization. Third, some barriers were built by the government itself such as the exaggeration of fees and taxations. Fourth, annual fees of renewing lease of lands, mostly, were not paid by the former owners (the governmental units), a thing which may require the new owner to pay cumulative amounts of fees.

- Disputes of lands Ownership:

In exercising its powers according to S.4 (a) of the Disposition of Public Enterprises Act 1990, certainly in exercising disposition of public enterprises by winding up the targeted enterprise; big problems arise that the documents of lands of the privatized SOE are not complete (certificates of ownership from the Registrar of Lands). Most of the privatized SOEs, or those on their way to privatization, do not keep registration certificates or any other documents. Many of the real estates of the privatized SOEs, or those on their way to privatization, were built on lands registered under the name of other SOEs.257

- Time Consuming and Revenue Wasting:

257 - Id p 72.
Solving lands problems often takes a long time and much money. In the event of a seller’s failure to fulfil his obligations to the purchaser; this will inevitably delay the payment of the price, a thing which will result in delaying the proceeds of privatization. In addition, the new investor will never start business or production before the transfer of lands of the privatized SOE under his name, a thing which delay the achievement of privatization objectives.

In the light of that many of lands and assets of many privatized SOEs are registered under the names of other SOEs; transferring the registered name to the name of the privatized SOE and, thereafter, to the new investor constitutes a double-step change in the land’s register, a thing which in many privatization operations resulted in paying %50 from the full value of the privatized land to lands authorities.

Following are examples shown from the TCDPE annual report (2005):

In the first example, many houses owned by the White Nile Tannery (before its privatization) were built in a land registered under the name of the former Mechanical Transportation Corporation. After the privatization of the tannery, these houses were sold on open auctions to some people. Lands authorities refused to register these houses under the names of the purchasers on the ground that these lands are not registered under the name of the tannery; therefore, TCDPE is not delegated to register them under the name of the tannery.

The second example is the flats which were built and sold by the Real States Banks to the peoples without following the right legal steps. In 1987, the Real estates Bank built these flats and sold them to the people with stark ignorance that these lands were not finally allocated to the bank and they were still registered under the name of Sudan Government. Therefore, the bank was required to obtain allocation of the
land under its name, a thing which would result in paying big amounts of money. The second step which was neglected is that the bank was required to open files for these flats in the land authorities. All these steps had not been fulfilled. After the privatization of the bank, the purchasers of the flats found themselves in a problem that they had to pay for the allocation of land under their names; they were also required to pay so as to open files in the land authorities for these flats. The problem is still now pending (until 2008). Land authorities are still now refusing to permit registration of these flats under the names of the purchasers unless the fees of the double-step are paid (almost %50 of the land’s value).

- Exaggeration on Lands Taxations and Registration Fees:

Lands authorities in many cases hamper the privatization operations by changing the type of the ownership of the SOE’s lands. Many lands of SOEs are owned as a free-hold ownership and the new investors bought these lands depending on this information. But in many cases, without justification, lands authorities changed the type of ownership from free-hold ownership to preferential allocation. Examples for this irrational practice happened in the privatization of the lands of the Real Estates Bank (mentioned above). In addition, land authorities, taxations Chamber, Zakat Chamber, and Commissioner of Land impose very high amounts of money for changing the register under the name of the new owner. It appears that there is a big absence of coordination between TCDPE and the ministries and other governmental bodies. Taxation chamber directly works under the supervision of the Minister of Finance and National Economy (the president of the Higher Committee for Disposition of public enterprises), Zakat chamber is directly working under the supervision of the President of the Republic (the President of the Council of Minsters), and Commissioner of Land which is directly
work under the supervision of the Chief Judge. Coordination between all above authorities is not impossible, and it should be one of the basic tasks of TCDPE.

\(d\) Non-payment of Annual Fees of Leases:

Before their privatization and for long periods some SOEs hadn’t paid the annual fees of leases of their lands depending on that these lands are governmental ones and the concerned SOE itself is a governmental ownership. After privatization, TCDPE found that these fees were greatly accumulated. As a result TCDPE paid big amounts of money to renew to the new owner. This certainly happened in the privatization operation of Atbara Cement Factory.

There is an explicit provision in the Land Settlement and Registration Act 1925 for the responsibility of the Sudanese Government (represented by TSDPE) to complete all the procedures of the registration for the new owner. S.56 (a) 0f this Act reads:

“On the transfer of lease held under this Act, until the contrary is expressed in the transfer, there shall be implied in the following agreements that is to say:-

a- an agreement on the part of the transferor that the rent, agreements and conditions reserved and contained in the register lease and on the part of the lessee to be paid, performed and observed have been so paid, performed or observed up to the date of the transfer.

With regard to the above section, in all privatization contracts and agreements we have read in the central bank or in the TCDPE office; there is no expressly condition or clause in a contract that exempts the government from its liability to pay all pending fees. TCDPE is the representative of the government in exercising the tasks of selling

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258 - During the last years, the Chief Justice issued many orders to reduce the registration fees. This usually happens in the last three months of the calendar year so as to satisfy the requirements of the judiciary budget. Therefore, TCDPE can coordinate with the Chief Justice to reduce the registration fees for lands of the privatized SOEs.
governmental enterprises, therefore; TCDPE, before selling any SOE, has to be assured that all fees of the lease of the targeted SOE are paid. Without such assurance; TCDPE will find itself in problems with the new owners and it will gradually lose its credibility and dignity.

Our humble view is that TCDPE, in exercising its tasks, should accurately preserve the following provision of laws and regulations to avoid relevant problems in the cases of non-payment of lease fees.

S.53 of the Land Settlement and Registration Act 1925 reads:

“The registrar shall, on proof to his satisfaction of the termination of a registered lease, enter in the register a note of the fact of the termination.”

With regard to the above section, and by coordination between TCDPE and the land authorities, TCDPE can benefit from non-payment of annual fees of leases and terminate the leases of the SOEs to be privatized. After the termination, the land will return under the name of Sudan Government. Consequently, such lands could be sold to the new investor without complicated procedures. The real motivation for such termination will not, of course, be the confiscation of the property as it means an instrument for saving time and costs for the sake of privatization.

The question which may arise is who has the right to terminate the lease, and on what basis? The logical answer for this question is that the

259 - The Commissioner of Land General issued the circular No.25 1950 which reads:

“1- we have heard that Chiefs of land registration offices, some times, terminate registrations of lease contracts by order of the district commissioner; a thing which resulted in many suits presented by the lessees. 2- S. 53 of the Land Settlement and Registration Act 1925 gives the commissioners, on proof of his satisfaction, to enter in the register a note of the fact of the termination. 3- The Advocate General; after a discussion with me about the ‘satisfied proof’, advised the following; a- the authority granted in s. 53 depends on presenting satisfied proof for termination of the registered lease, b- the question which arises is what is the satisfied proof?, c- when the lease contract contains a clause that ‘the lessee has the right to terminate the lease in the event of any breach of the lease contract done by the lessee’, in this case the lessee will have the right to terminate the lease without relying upon civil courts. The lessee right in such a case shall only be exercised according to lessee’s non-opposition, therefore, in the event of lessee opposed on the ground that the breach does not reach termination limit; the termination shall be according to judgement. “ Instructions contained in the above circular do not constitute barriers on the face of termination of leases of lands of the privatized SOEs; that the above circular was issued to restrict the disputes between private lessees and the leaser (the government). TCDPE is required to coordinate with the Chief Justice terminate leases of the targeted SOEs. Here no dispute will occur that the lessee and the leaser are the same entity. The justification for termination here is to avoid the complicated procedures and high costs.
entity that formerly granted the lease is presumed to be the same entity that has the right to terminate such leases. Since that most of privatized SOEs are industrial ones, the concerned bodies are; the Ministry of Industry and Land Authorities (all leases prior and during the sixtieth of the past century were granted by the Ministry of Industry).

Reasons for the termination of leases have two legal grounds: either for the public interest as it is mentioned in the constitutional law, or for a breach of contract. Using of the Constitutional Law to terminate leases of SOEs seems to be irrational. Therefore, TCDPE, in coordination with states governments (after the application of the federation), has to exploit the opportunity to rely upon non-payment of rents as breach of contract to terminate the lease of SOE’s lands. Such practice will not face public opposition since these SOEs have historically presented disappointed performance. Also, by following this method, TCDPE will benefit from the termination of leases in two directions. First, it will avoid the double-step payment of fees in transferring some SOEs (mentioned supra) that the ownership will return to the Sudanese government without allocation to any SOE. Second, by coordination with the ministers of investment and land authorities (federal and regional); TCDPE can directly allocate the land which its lease is terminated to the new investor.

It is to be noted that majority of the targeted SOEs in the current wave of privatizations were granted leases in the sixteenth, and prior to sixteenth of the past century. At that time, lease contracts were formed to ensure the necessity of paying the annual rent of lands. Followings are clauses which were usually included in the context of lease contracts. Such clauses related to payment of annual fees of lease contracts in this period. Following is a form of former lease contracts:

“This lease made on the first day of ................... between ........... ... and ........................... or on behalf of the Republic of Sudan (hereinafter called ‘the
Government’) of one part and ……………… (Hereinafter called ‘the lessee’ which expression shall include his successors and assigns) of the other part.

1- The government hereby leases in the lessee the land described above (which land together with the buildings at any time erected thereon is hereinafter called ‘the said premises to hold for the same preliminary term of one year from the date hereof and if at or before the end of that period the lessee should have produced to the local land registry certificate from the Governor that a building or buildings have been completed thereon in accordance of Clause 4 (2) hereof then to hold the same for a further term expiring on the 31st of the day of December the annexed calendar year).

2- The lessee shall pay to the government for the said premises the yearly rent of …………………

3- The rent shall be payable in advance on the first day of January in every year and the first of such yearly payments or the proportionate part thereof shall be made by the lessee on signing of this lease.  

- Changing Purpose of Allocation:

Depending on that the allocation was for governmental units and the owner is Sudan Government; most of the former managers of theses units ignored the purpose of the allocated lands. Thereafter, in many cases after signing the privatization contract, TCDPE found that the purposes of the allocated lands are totally different from those of the SOE itself. As an example, Atbara Cement Factory, at the time of its establishment, some of its lands were built in agricultural lands without changing the type of these lands to industrial ones. When the new owner opted to change the type of land-hold from agricultural to industrial; the River Nile State authorities required big amounts of money for changing the purposes of allocation, a thing which resulted in a big burden on TCDPE. 

In the other hand, changing the purpose of land allocation may assist TCDPE in solving some problems. In other words, following

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260 - Source; Internal files in the Ministry of Industry.
261 - Internal files of TCDPE.
termination of leases as a result for the misuse of allocation of land will constitute a good opportunity for TCDPE to avoid time consuming and money wasting. TCDPE, in coordination with the concerned authorities, can terminate the leases and transfer them without paying big amounts of money.

Changing purpose of allocation of land constitutes a strong reason for termination of land concession. Countries all over the world have granted investment privileges such as land allocation according to economical measures. Such measures usually balance between the local needs for the licensed project and the granted privileges. Land, of course, is one of the main privileges with regard to the necessity and size of the project, therefore, the state should have the right to return the land ownership whenever a misuse or un-consented change of the purpose of allocation is committed. The authority to return investment land ownership is usually provided in the investment legislation of a country, a thing which makes the investor aware about this matter.\(^{262}\) This is the case in the current law of investment in Sudan (Investment Encouragement Act 1999 as amended in 2002). S.24 of this Act (conditions of the continued enjoyment of the license and privileges) reads:

“No investor shall take any of the following measures, during the period of validity of the license and privileges, granted under the provisions of this Act, without obtaining a written approval, from the Minister or state’s minister, as the case may be, the measures being to:

a- conduct any amendment, or alteration, of the size of the project, or object for which the license has been granted, or transfer the project, from the place thereof prescribed in the license;

\(^{262}\) One of the misuses of the investment lands in Sudan is that many granted entities, whether private or public, have not executed the project for which the land is granted. Private entities usually consider the allocated lands as freehold ownership and wait for selling them at higher prices. Public entities in Sudan acquired the allocated lands and left them without executing the licensed projects, buildings or, even, registering them in their names. Such type of acquisition resulted in many problems for TCDPE in privatizing (mentioned supra in this chapter).
b- use, or sell any of the equipment, machinery, apparatuses, materials or spare parts, with respect to which privileges have been granted, for any other purpose, other than the purpose for which the license has been granted;

c- change the purpose of the use of the land allocated for the project, sell, mortgage, hire the same totally, or partially.”

S.26 of the same Act (the investor contravening provisions) reads:

“(1) an investor shall be deemed committed a contravening of the provisions of this Act, where he;

a- contravenes the provisions of sections 19, 24 and 25.

(2) Without prejudice to any such penalty, as may be provided for any other law, the Minister, or the state’s minister, as the case may be, may in case of commission, by the investor, of any of the contraventions, provided in subsection (1), impose any of the following sanctions in accordance with the size of the contravention and the circumstances of commission thereof, and the extent of such damages, as may affect the national economy;

e- Revocation of the licence and the same shall result in acquisition of the land granted to him under the provisions of this Act.”

- Consent of the Council of Ministers:

Many SOEs were privatized before 1/2/2003, but their new owners hav not registered lands of these SOEs under their names. On 1/2/2003 the Council of Minsters issued a decision for the prohibition of selling the governmental lands and assets without the prior consent of the Council.263 Therefore, the Commissioner of Lands refused to register all former unregistered transactions regardless of the time in which these tractions were exercised. As a result; TCDPE wasted a lot of time to coordinate with the Council of Minster to issue the required consents.

TCDPE exercises its missions under the supervision of HCDPE. HCDPE includes the Minister of Finance and National Economy

(president), Minister of Justice, Minister of the concerned ministry, and the Minister of Investment. Therefore, the claim of TCDPE that it all the time finds problem to obtain the consent of the Council of Minister seems to be unjustifiable. TCDPE was essentially established to avoid the bureaucratic procedures in executing the privatization program; it is required to execute privatization contracts, even from scratch, not by publishing its lack in its annual reports.

In a meeting with Mr. Hassan Alkhier, Head of the Investment Promotion Department in the Ministry of Investment, about the problems of the investment lands and the proposed solutions,264 he said:

"1- Most of the investment lands which were formerly granted to the governmental productive units in the fortieth, fiftieth, and, seventieth of the past century, especially those were granted outside Khartoum, have no records in the lands authorities. Therefore, after their privatization in the past and the current century; governmental bodies of these productive units failed to determine boundaries of these lands, a thing which resulted in many problems for the government and the owners after privatization.

2- The former governmental management bodies of units which were granted these lands are presumed to be responsible for such negligence. They are the persons who were responsible to pursue surveying and registering these lands under the names of these units.

3- The governmental management bodies have to inform TCDPE that these lands have not yet been registered under the name of the targeted SOE. Informing TCDPE enables it to solve problems of surveying and registration before privatizing the targeted SOE.

4- TCDPE, now, is required to register all lands of the targeted SOES, (listed in the schedule of the Disposition of Public enterprises Act 1990), under its name. Such registration will enable TCDPE to exercise the privatization operations as the owner not as a representative; a thing which will emanate its negotiating position.

- Concessions Problems:

264 - Ministry of Investment- Khartoum, January 8th 2008 1: 15 AM.
Renewing investment merits is not only on leases rights. In many other events, it relates to other types of rights on land such as concessions. Cement factories are examples for the strategic SOEs which were privatized in Sudan; they have faced big problems in exercising their concession’s rights in the lands of the privatized factory (see the problem between GRAS and the new owner of Atbara Cement Factory in Chapter 5).

In a meeting with Mr. Majzoub Ahmed Alkhalifa, Secretary of Quarries and Mines Department in GRAS\textsuperscript{265}, we asked him about the dispute between the new owner of Atbara Cement Factory and GRAS. He said:

“First, before enacting the Mineral Resources and Mining Development Act 2007, we were not concerned with the lime stone quarries of Atbara Cement Factory. Before 2007, lime-stone activities were treated as quarries activities and, according to the old law of 1972, the power for granting them was left to the local authorities of the region in which the quarries are located. But, the new Act of 2007 determines GRAS to be the concerned authority of all quarries resources which are in need for conversional treatment; cement activities are, indeed, one of them.

Second, we found that lime stone quarries of Atbara Cement Factory were not granted to the Factory, but randomly possessed. In addition, we have not found any maps determining the boundaries of these quarries. Therefore, for the legality of possessing such quarries, we required the new owner to exploit them actually so as to give us a good justification to register them under his name.

Third, our basic mission in GRAS is to organize and facilitate exploitation of the Sudanese geological resources for the benefit of the country as a whole; not to sophisticate such exploitation. However, we settled the problem, and the new investor now is enjoying all the concession’s rights.

(ii) Exercise of Ownership Rights:

\textsuperscript{265} - Khartoum. The Geological Researches Authority of Sudan (GRAS), January 8\textsuperscript{th} 2008. 11: 15 AM.
In countries which have not appointed certain agency or committee to exercise privatization activities; once the legal owner is identified, the next step is to ascertain who has the power to exercise the owner’s rights.

If no provisions in the legislation governing public enterprises or assets spell out who has capacity to sell SOEs, other parts of the country’s legal framework might provide guidance. In New Zealand, for example, in the absence of specific legislation to the contrary, the government or specific ministers are deemed to be authorized to sell public assets. The same situation prevails in most common-law countries.  

(a) Alienation of Public Enterprises and Shareholdings:

The legislations of public sector management in some countries sometimes explicitly authorize their privatization by subjecting it to specific, and usually, very basic rules. For example, the Mexican program, one of the most ambitious and successful programs, is based largely on the provisions of the public enterprise law of 1986. Article 32 of that law provides that when an SOE ceased to be of strategic importance, or when the public interest or national economy so requires, the minister responsible for privatization shall, taking into account the views of the concerned sectoral ministers, propose to the government the sale of the state’s holdings in the enterprise. Article 32 further provides that in the event of such a sale, the employees of the SOE shall enjoy a pre-emptive right. Article 86 states that the sale of shares may be carried out through the stock exchange or through financial institutions. This shall be on the basis of guidelines issued jointly by the minister of programming and budget and the minister of finance and public credit. These two articles form the legal basis for most Mexican privatization operations.  

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266 - Pierre Guislain, supra 3 p. 94.
267 - Id, pp. 94-96.
Similar provisions are found in SOE legislations of some other countries (especially in the African countries). For example, in Burundi; Article 6 of the Decree-Law No. 1/027 of September 1988, which sets the legal framework for the public law companies and the joint-venture companies under private law, provided that the state participations can be alienated only by a presidential decree issued on the advice of the Minister of finance and of the minister with jurisdiction of the SOE to be privatized. This general provision was replaced by Decree Law No. 1/21 of August 1991 on privatization of public enterprises that delegates the power to privatize to the government, regulates the privatization procedures, and empower the Minister of Finance to sign the deed of sale on behalf of the government.268

In Sudan the matter differs; the Sudanese legislator in the Disposition of Public Enterprises Act 1990 provides for establishing two committees to manage the execution of the privatization of the candidate SOEs; the Higher Committee for Disposition of Public Enterprises (HCDPE) and the Technical Committee for Disposition of Public Enterprises (TCDPE). HCDPE includes the Minister of Finance and National Economy (President), Minister of Justice (the Attorney General), the concerned minister, President of the General Corporation for Investment, and the Auditor General.269 Therefore, unlike the Mexican approach, in Sudan the concerned minister is only a member in the

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268 - Gerald Bisong Tanyi, supra 2 pp. 161-162.

privatization committee. The Sudanese approach widens the ground of decision making in the privatization without the total ignorance of the role of the concerned minister.\textsuperscript{270} The Sudanese legislator also gives the technical part an important role in the decision making of privatization. The Disposition of Public Enterprises Act provides for establishment of the TCDPE under the supervision of HCDPE.\textsuperscript{271} TCDPE is concerned with the creation of suitable preparations for the HCDPE before concluding privatization contracts.\textsuperscript{272}

The Sudanese approach can be criticized by that the appointment of two committees working in the same field may result in delaying the execution of the privatization program. The long list of tasks and missions of the two committees may also result in the clash of powers, or the interference of one committee in the missions of the other. On the other hand, this can be argued by that despite the complications of missions; the Sudanese approach confers reasonable credibility for the execution of the privatization operations. Individualism in decision making may create a climate favourable for corruption and favouritism.

\textbf{(b) Alienation of Public Assets:}

\textsuperscript{270} - S. 3 of the Disposition of Public Enterprises Act 1990 determines the missions of HCDPE to be: Taking the decision of the privatization of the targeted SOE. 2- Determining the targeted SOE. 3- Concluding privatization contracts on behalf of the Sudanese government. 4- In the events of sale, or joint venture privatization contracts; HCDPE has the right to: (a) rehabilitate the targeted SOE according to certain steps; (b) Transforming the SOE to be privatized to public company with shares, or provides for participation of employees in the shares of the SOE to be privatized, (c) Considering the state’s due to the purchaser as a part of the price and; (d) Installing payment of the privatization amount, or order that the payment shall be in cash. 5- In the event of disposition by final liquidation of the targeted SOE; it has the right to order so, and to transfer all the assets of such SOE to any other governmental body. 6- To exercise any other legal authority for termination the service of employees of the targeted SOE, without any violation of any right of the employees. 7- To issue its internal regulations.

\textsuperscript{271} - S. 4 of the Disposition of Public Enterprises Act 1990.

\textsuperscript{272} - Some of the missions of TCDPE (mentioned in s.3) are: 1- Determining the financial, technical and administrative systems of the targeted SOE during the privatization period. 2- Receiving, analyzing and evaluation of privatizations offers. 3- Presenting advices for HCDPE about any former privatization operation or any future operation. 4- Determining enabling systems for the prospective investors to have full information about the SOE to be privatized according to the instructions of HCDPE. 5- Issuing its internal regulations to organize its meetings and tasks.
The difference between alienation of public enterprises and shareholdings, and alienation of public assets is that the alienation of public enterprises and shareholdings is the alienation of legal entity with its assets, while alienation of public assets is the alienation of all or some of the SOE’s assets without alienation of its entity. On other words, despite that the alienation of assets of certain SOE may, in some events, represent the bigger part of its value; it doesn’t mean the alienation of legal entity of such SOE. With regard to this; alienation of public or SOE’s assets should, theoretically, be easier than the alienation of the SOE itself in two directions. First, the body which is entitled to alienate the assets is the managers of the SOE itself. Second, procedures of alienation of assets seem to be not complicated when compared with the procedures of alienation of the SOE as legal entity.

The alienation of public assets is often governed by administrative laws or specific legislation on public property or public finance legislation. In countries with French influence, a distinction is sometimes made between assets forming part of the state’s public domain and those belonging to the state’s private domain; the latter can be alienated more easily. Public domain assets can not be alienated except by transferring them first to the state’s private domain, a thing which can only be done by issuing a law for such purpose. The fact that public domain assets can not be sold does not mean that they cannot be used by private parties, for example, they can be leased. Morocco is a good example of countries with French influence. Following are the main features of the situation of alienation of assets of state’s public domain and state’s private domain in Morocco:273

• The legislation governing the state’s assets, in particular its public domain, has constrained the privatization of some SOEs in Morocco.
• All assets assigned to the provision of public service are considered to be part of the public domain in Morocco.
• Roads, rail roads, ports, and telephone lines, among other assets are inalienable.
• Those parts of the public domain may, however, be reclassified by a decree by the prime minister.274
• Public domain assets cannot be sold, but they are allowed for the private use by methods of temporary occupation or a concession.
• Temporary occupation and concessions can be granted for a maximum duration of ten years with annual fees.

The rules governing the sale of public assets, where such rules exist, are often not assisting the needs of the privatization program. In Italy, for example, the rules governing the sale of state property dated back to a 1924 law that imposed very complicated administrative procedures, including review by the council of state and control by the court of accounts. To speed up the privatization process, a decree-law was enacted in 1993 that authorized the government to follow greatly simplified procedures for the alienation of state assets.275 In Egypt, as for the sale of SOEs’ assets, SOEs legislation and statutes usually empowered the management bodies of an SOE to sell its assets, subject to certain limits.276 In Vietnam, a Ministry of Finance circular No. 95 TC/CN prescribes that a public enterprise must obtain the approval of its

274- This discretionary power of the prime minister represents the corner stone in the entire privatization program in Morocco. Without this enabling authority the legislator would find difficulty that the scope of public domain is very wide in Morocco.
supervising ministry if its assets are to be used to establish a joint-venture company; to purchase share in joint-stock companies or to invest in limited liability companies.277

In Sudan, it is to be noted that in the most of the privatized, or to be privatized SOEs, the main attractive elements for the new investor are the entity, concessions, privileges and monopolies (whether natural or legal). In most of the privatized SOEs, or those which have been preparing for privatization; assets are not attractive to new investors. Assets or machineries in most of these SOEs are obsolete or depreciated. For example, in Sudan Airways privatization preparations; TCDPE found that all aircrafts owned by the company are totally depreciated and there is big difficulty to evaluate them. Despite this fact, TCDPE refused to consider or to evaluate them as scrap on the ground that such evaluation may reflect the bad situation of the company, a thing which will result in weakening the offers of the potential investors.278

Later, TCDPE expressly declared that it has no technical experts to determine the situation of the mentioned aircrafts; whether to be considered as valid, rehabilitable, or a scrap. It appears that considering aircrafts as valid may result in a fictitious value and, consequently, delay or prevent the privatization operation. On the other hand, underestimation of them may lead to public opposition or accusation of corruption. However, the Council of Ministers took the mission of privatization of Sudan Airways and appointed ministerial committee to evaluate and privatize the company.279

Hesitation of TCDPE shows the feasibility of relying upon the internal management bodies of the SOE in the event of the privatization of SOE’s assets. Management bodies of the targeted SOE should be

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278 - Internal File in TCDPE.
279 - Id.
granted considerable role in the disposal of SOE’s assets. They are the persons who know well about value, technical position, current situation, and otherwise specifications of assets of the SOE. The total ignorance of role of these bodies will result in costly procedures in identifying and estimating SOE’s assets that the government will be required to contract with outside experts.

In the absence of a clear role for the management bodies of the SOE in the Disposition of Public Enterprises Act 1990, the only way to enable the management bodies to contribute in the privatization is through the Financial and Accountancy Procedure Regulations 1992. Under the light of that most of assets of the privatized, or those on their road for privatization, are almost obsolete or depreciated; considering them as a surplus seems to be rational. According to the Financial and accountancy Procedure Regulations 1992, the internal management bodies have, indirectly, major role in preparing SOEs for the privatization operation. By virtue of their experience they can determine the current position and value. Also, by such Regulations managers of SOEs can exercise the authority of the disposal of them.

At first sight, one may think that selling governmental assets through internal management bodies can be criticized by that it may be exercised without efficient monitoring by specialized body like TCDPE. Also, assets may be sold without equitable competition, a thing which may result in favouritism, underestimation, or any other sort of corruption. Rules of dispose of surplus in the Financial and Accountancy Procedure Regulations 1992 contain efficient measurements for the sake of competition and transparency. Following is a summarized explanation for the disposal of surplus sections in the Financial and Accountancy Regulations of 1992:
a- To ensure that the disposal of surplus is exercised by approval of the highest concerned authority, regulation 70 provides that: “no one of State organs shall dispose of surpluses, save upon the approval of the minister or state’s minister”.

b- To ensure that the disposal is exercised through a suitable and transparent method, regulation 73 provides: “1- no sale by auction, or tenders shall be made, save after completion of the followings: 2- (a) disposal of cars, machineries, heavy equipments, scrap iron and stagnant new spare parts shall be made through tenders, or public auctions only; 2- (b) the items intended to be sold shall be disposed of, other than those mentioned in paragraph 2- (a), through tenders, public auction or direct contracting”.

c- To ensure an accurate evaluation of the sold assets, the regulations provides for formation of evaluation committee therefore, regulation 74 provides: “1- The head of unit shall form a committee, under the chairmanship of one of his assistants and membership a representative of the Accounts Administration, one or more technicians and two representatives of the ministry, or the state’s ministry, as the case may be. 2- the evaluation committee shall classify the offered materials intended to be sold in homogenous groups, together with showing the weight, number of measurement and any other specifications of every item, to prevent any change that may occur, upon offering the items prepared for sale and evaluation and pricing thereof. 3- The chairman and members of the evaluation committee shall prepare the report, sign and submit the same, to the head of unit, for approval. 4- The head of unit shall approve the reports of the evaluation committee and its lists, and such lists shall be absolutely secret, and delivered to the chairman of the sale committee, and shall not be opened, save on the day of auction.”

d- Formation of the sale committee requires express provision for methods of formation. Therefore, regulation 75 provides: “the head of unit shall form a committee from those possessed of competence, to be known as the “sale committee”, to sell the items intended to be disposed of, in accordance with the procedure provided in regulation 76”.

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e- Regulation 76 provides: “1- The sale committee, upon sale of items intended to be disposed of shall follow the following procedures; 1-a: advertisement of the items intended to be sold shall be made in detail, in the local newspapers, or other media of publicity or through internal publications in remote are; 1-b: fees shall be collected, according to the size of tender, and as the head of unit may specify, in consideration of obtaining the specification book, and be non-returnable; 1-c: in case of high price reached by the auction being bellow the basic price of the item, the sale committee shall recommend postponement of sale, for another auction, and submit the matter, to the head of unit, to take such auction, as he may deem fit. 2-a: the chairman of the sale committee shall deposit the final price of the item, and record the number thereof, at the back of the deposit receipt of the purchaser; 2-b: the price at which the auction settles shall be corded in the sale ticket of an original and two copies, signed by the member of the sale committee, who prepares the tickets, and approved by the chairman of the sale of the sale committee; 2-c: the original ticket shall be delivered to the unit, in cause of auction held at public corporations and institutions, and the body in which the return of auction vests; 2-d: in case of auctions, the sale committee may seek the help of the sufficient number of police for keeping the order; 2-e: the chairman of the sale committee shall be entitled to exclude any purchaser, who causes any type of rioting or contravenes the procedure of auction. 3-a: auctioneers approved on the state’s register shall, according to the directions of the chairman of the sale committee, offer the items intended to be sold to the public; 3-b: the member of the auctioneers union shall direct the public to the area concerned, according to contracts to be concluded between the selling body, of the first party and the auctioneer of the second party; 3-c: in the case of non-existence of an auctioneer in the area concerned, one of the employees of the ministry, or the state’s ministry, as the case may be, shall conduct the operation of offering.

It is clear that the Financial and Accountancy Procedure Regulations 1992 contain very satisfactory requirements and instructions to monitor and organize the disposal of public assets. Such regulations can help privatization operations in Sudan, especially when the assets of the targeted SOE are depreciated. On other words, according to the
situation of the SOEs in Sudan, where the assets are obsolete or depreciated; using internal bodies of management of the SOE as device for privatizing such SOE, seems to be more desirable than the privatization through TCDPE. Privatization of Sudan Airways shows that privatization of SOEs exclusively through TCDPE is not always the ideal method.

(c) Prohibition of Alienation of Public Assets:

In some instances, a government may wish to declare a moratorium on all transfer of assets or shares of public enterprises. This may be the case where prior reforms are part of comprehensive program of public-sector reform or where they arise from radical changes in the political regime, events that often are attended by instability and uncertainty concerning the exercise of ownership rights. Such moratoriums have adopted in Bulgaria, Cambodia, Russia, and Ukraine, for example to stop contradictions that took place during transitions in these countries. However, prohibition of transfer of public enterprises or assets is usually limited in time.

Conclusion:

The privatization process is affected directly or indirectly by a big number of rules, regulations, and legislations. Privatization is a public act involving a transfer of assets and entities owned by the public sector. It is also a process managed by public agencies and officials.

An important distinction needs to be drawn between the public agency with the right of ownership over enterprises or assets covered by the privatization program (the state, or other agency or public entity), on the one hand, and the authorities empowered to exercise those ownership rights, in particular; the right to alienate enterprises and assets on the other hand. The privatization agency or committee should have strong
power to eliminate all barriers on the face of the privatization processes. The privatization committee in Sudan is a federal one, headed by the Federal Minister of Finance, who is entitled to obtain the consent of the Federal Council of Ministers to solve any barrier that may impede, delay or, sometimes, cancel any privatization operation.

 Coordination between the Council of Ministers and the privatization committee in Sudan will avoid all problems discussed in this chapter. For example, in the case of good coordination; identifying the legal owner of the SOE’s assets, land, or concessions is easy since that any SOE, regardless of the ministry or any other governmental body claiming its ownership, is a public property and the law gives the executive authority absolute power to alienate such SOE. Therefore, it is shameful to note that the privatization committee in Sudan has suffered a lot to obtain the consent of the Council of the Ministers to conclude a privatization contract because of bureaucratic formalities. In many cases the privatization committee in Sudan faced many barriers to enable the new purchasers to exercise their ownership rights because of the decisions of the council of the minister itself (see the decision of the Council of Ministers No. 24/2003, mentioned in part (i) in this chapter). Absence of coordination between the privatization committee, the regional governments, and other governmental bodies, namely the bodies responsible to grant some concessions to the enterprises after the privatization, caused many problems for the committee and the new investors.

 As we mentioned in this chapter, some regional governments place many difficulties in the face of the new owners of the privatized SOE, such as like renewing concessions, leases, and the like. On the other hand some concerned governmental bodies and agencies refused to grant or renew some concessions to the new owners after the privatization on the
ground that they are the concerned bodies to grant or renew such concessions (not the TCDPE).

Despite the fact that the TCDPE is a federal committee and, according to the Disposition of Public Enterprises Act 1990, can impose its orders on any regional governments and any other governmental body; a suitable coordination between TCDPE and regional government and other governmental bodies is required. TCDPE structure has to include a representative or coordinator between TCDPE and the regional governments and the authorities which are responsible to grant and renew special types of concessions such like GRAS (Geological Researches Authority of Sudan).
Chapter 7

The Privatization Law

The majority of countries legally implement their privatization program by passing law on privatization which specifies the scope of the program, establishes the institutional authority to conduct the privatization program, and defines the most important elements of the process. However, a separate law is not necessary in all cases. Existing legislations may be sufficient to conduct the privatization programs (see Chapter 6).

When a privatization law is required, it must typically specify the extent of privatization by generally defining what is to be privatized. Rather than listing governmental SOEs that will be sold, the law may provide a general right to privatize all existing SOEs. The government might choose to define a clear negative list of SOEs or sectors that will not be subject to privatization because of their special status or strategic importance.

The law should also define the specific entities responsible for privatization, clearly specifying their rights and responsibilities. It is particularly useful to establish clear authority and control over the process to avoid misunderstandings and political quarrels later in the process. Such authority should have the necessary flexibility (by the privatization law) to conduct the privatization program until it is completed.

Entities responsible for the application of privatization and their tasks and authorities will be the subject of the next chapter. Therefore, this chapter deals with the enabling provisions which are frequently found in privatization laws. After the discussion of the main legal instruments to execute privatization and the scope of privatization laws, the following
parts will explain: the valuation of SOEs to be privatized, the selection of buyers, and the employees’ preferential schemes which enable the employees of SOEs to own the SOE according to many provisions in the privatization laws. Lastly, we will perform the required structure of a privatization law as recommended by one of the famous and important international discussion papers.

(i) Privatization without Specific Legislation:

In fact, many countries began their privatization programs without specific or a separate law. This was the case in Hungary where privatization began in 1988 with “spontaneous privatization” which allowed, by virtue of Act VI of 1988 on companies, the transformation of state’s enterprises into companies on the basis of management decisions and thus allowed the sale of part of state property. However, because that the process was unmanaged and led to abuse; the State Property Agency was established and a new legal framework for privatization was put in place.\(^{280}\)

The advantage of a specific privatization law is the high degree of accountability and formal authority for the entity in charge of conducting the privatization program. In addition, the existence of such a law clearly indicates political support and commitment by the legislative authority and government. However, there is also the danger of major delays through the long-time political debates in the parliament of a country prior to passing a privatization law. In addition to the parliamentary delays, enacting privatization legislation may require major challenges bigger than the ordinary parliament debates. It may require amendment in the constitution of the country and other legislations in such country (mentioned in Chapter 4 of this thesis). Amendment of the constitutional

\(^{280}\) - Privatization in Hungary p. 9, 1994, AVRT Publications. (No author’s name).
law in a country may require years or months to happen. Also, the amendment or repeal of current legislations which put some obstacles in the face of privatization may require a long period, a thing which is inevitably time-consuming.

In the absence of specific legislation to privatization, and where the government does not want to involve the complicated procedure of enacting a specific privatization law, a government with good imagination and creativity of its lawyer can circumvent the amendment of many legislations. These circumvents, in addition to solving legal problems, may result in solving some technical obstacles or barriers.

The following examples represent a high degree of the professionalized treatment of lawyers of some countries in circumventing the legal and other obstacles and barriers in the face of privatization.281

*In Vietnam (a former communist state), the ownership of SOE’s land can not be transferred to a private enterprise. The problem has been solved by establishing joint-venture companies whose public sector partner held the rights to land use of granted long leases.

*In Nicaragua, the state’s ownership titles to certain assets are imprecise or disputed. Therefore, making sale of these assets to private enterprise is very difficult. The problem was solved by that the state has concluded leas-sale contracts allowed assets to be transferred without immediate sale. A lessee was given an option to purchase these assets at the end of the contract.

*In Brazil and Mexico, the exercise of certain activities cannot be transferred permanently to the private sector. Therefore, the contracting authorities concluded concessions contract providing for the transfer of

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assets to the concessionaire for the duration of the concession. Assets shall be returned to the contracting authority at the end of the contract.

(ii) Privatization by Legislation:

As we have previously mentioned, most privatizing countries have enacted specific privatization legislations whether or not required to do so by the constitution. In the case of specific legislation, countries have to choose between general legislation applicable to all SOEs to be privatized or specific law for each SOE or group of SOEs. In some cases, the targeted SOEs are specifically named, and in others the law addresses one or more categories of enterprises without naming them.

The scope of some laws, but in rare countries, may be limited in time. As an example for privatization legislation limited in the time of execution: Article 1 of the Moroccan privatization law of 1990, which sets the deadline for the completion of privatization on 31 December 1995. The law was amended in January 1995 to extend the deadline to December 31 1998, and to add new enterprises to the list.\(^{282}\) The restrictions of this kind, which are usually found in laws with a positive list of the privatizable enterprises, can result in great deterrents of privatization. They weaken the government’s position in negotiations with buyers, especially when the legal time is nearing expiration.

In the event of enacting legislation for privatization, such law may take a general shape when it does not provide for determining specific SOEs to be privatized, specify the methods by which privatization processes shall be executed, or restrict its scope in one privatization operation. The specific privatization legislation may provide for appointing a list of SOEs to be privatized without providing for the

methods of privatization. In another feature, the legislator may determine the methods of the privatization of the listed SOEs.

**(1) General Legislations:**

A law of general scope should be considered if common rules for all privatization transactions are deemed important. Such a law may confer a general mandate on the government or an agency to privatize SOEs.

A suitable example for general law has been enacted in Philippines, where the law provides that it is up to the president of the republic to decide which state-owned enterprises shall be privatized (Article IV of the Presidential Proclamation December 8 1992).²⁸³

A law that confers broad authorization to privatize without specifying the enterprises usually defines its scope of application either by defining “privatization” or other word for the same meaning.²⁸⁴ The privatization mandate may thus be limited by excluding particular sectors or SOEs, as happened in the former East Germany, where the privatization law excluded, among other sectors, transportation infrastructure, the postal service, and municipal enterprises.²⁸⁵

In Sudan, the privatization law (Disposition of Public Enterprises Act 1990) is a general legislation. This law confers wide authorities on the Higher Committee for disposition of Public enterprises (HCDPE) without specifying SOEs to be privatized. S.3 of this law provides for the establishment of HCDPE to include:

* The Minister of Finance and National Planning (president).
* The Minister of Justice and the Attorney General (member).
* The concerned Minister of the targeted SOE (member).
* The President of the General Corporation of Investment (member).

²⁸³ Guislain, supra 2 p. 116.
²⁸⁴ - Such like the word “Disposition” in Sudan.
²⁸⁵ - Guislain, supra 2 p. 117.
In the same section, the Act authorizes HCDPE to execute the privatization program and to exercise all the powers necessary for its mission. For example, to take the decision of the disposal of any of SOE, it orders the General Corporation for Investment to take the supervision over the targeted SOE until its privatization, conclude the privatization contracts on behalf of the state, rehabilitate the targeted SOE after the privatization decision (before signing the final contract), exercise any legal authority necessary for the termination of the services of the employees of the targeted SOE, and enact its internal regulations.

The law provides for the establishing of the Technical Committee for Disposition of Public Enterprises (TCDPE) as assistant committee for HCDPE. S.4 of the same Act provided for the missions of TCDPE, for example; to prepare the suitable methods for advertising the targeted SOEs for privatization, estimate the assets of the targeted SOE, determine the number of employees and their legal rights, determine the financial system that should be followed while privatizing the SOE, prepare the data rooms for the potential investors, and enact its internal regulations.

*(2) Legislations Specify the Privatizable Enterprises:*

The law may list SOEs to be wholly or partially privatized. Therefore, government’s authority is limited to these listed SOEs.

Listing privatizable SOEs is not necessarily a good solution because it limits the discretion of the government. In addition, frequent changes in the local and international market may also dictate priorities other than those originally prescribed by the law.

Some countries have issued decrees pursuant to the privatization law so as to widen the list of the candidate SOEs, a thing which harms the stability of the privatization law. For example, in Mozambique, an initial list of SOEs was adopted by a decree in November 1991. New SOEs
were added in 1993 and 1994 by decrees taken pursuant to Article 14 of August 1991 privatization law.\textsuperscript{286}

Despite the fact that Sudanese privatization law is a general one, the actual practice in Sudan carries some features of this type of privatization laws. The resemblance between Sudanese experience and this type of privatization laws is clear from that despite HCDPE is concerned with specifying the SOEs to be privatized; it usually prepares a list of the targeted SOEs and delivers them to the Council of Ministers to be approved. There is no provision for the approval of the Council of Ministers in the law. The logical reason for the approval of the Council of the Minister is that HCDPE aims to give the privatization strong political support and to absorb the public opposition.

\textit{(3) Legislations Applying to Certain Types of Privatization:}

The legislation may also subject different types of privatization to different regulations. In France, for example, the privatization laws of July 2 and August 6, 1986, provided different privatization patterns. The procedures set in these laws apply to the enterprises listed in their annexes as follows:

First, a prior legislative authorization is required to privatize majority state-owned enterprises (state ownership of \%50 or more).

Second, a legislative approval is not required in enterprises in which the state directly holds less than 50 percent of the shares. Also, legislative approval is not required in the case of the partial sale of shares of public enterprises in which the state is a majority shareholder and remains the majority shareholder after such sale.\textsuperscript{287}

\textsuperscript{286} - Id p. 118.
\textsuperscript{287} - Pierre Guislain, supra 2, p. 119.
Specific laws authorizing the privatization of one or more SOEs have been enacted in many countries such as Canada. Such privatization laws tend to be used when the scope of the privatization program is limited or an SOE or group of SOEs possess special problems that can not be easily resolved in a general enabling law. This would normally apply to the privatization of an entire sector, especially a highly regulated sector such as natural resources or infrastructure sectors. Some countries with a weak legal framework have turned to a very special type of privatization law. Thus in Guinea, agreements for the sale of particular enterprises have been ratified by a presidential ordinance in order to give them full effect, notwithstanding conflicting provisions of other legislation. This enabled Guinea to start privatizing SOEs in 1986 without having to wait for revision of all its business legislations or the enactment of a privatization law which occurred only in 1993.

In Sudan, despite the fact that the Sudanese legislation of privatization is a general one; there is some resemblance with regard to the Guinean privatization laws. In some privatization processes, namely in the banking sector, we have noted that the Central Bank of Sudan obtained the consent of the Council of Ministers before involving these operations. But, it is to be noted that the privatization law does not require this consent; many other privatization operations were executed without seeking permission of the Council of Ministers.

(iii) Valuation and Sale of Enterprises:

Parliaments and governments often build safeguards into their legislations to ensure transparency of the process and reduce some of the risks typically associated with privatization. The law commonly imposes basic rules to be followed by the implementing agency or committee, particularly regarding the prior valuation of SOEs, the use of specific sale method, and the procedures for selecting buyers.

(1) Valuation:

Valuing public enterprises or public assets is a difficult operation because public officials normally wish to avoid being accused of giving away the valuable properties of the society. High valuation affords them political protection in the event that the decision to sell at a given price is disputed.

In most cases, overvaluation of the SOE has led to delay or even cancellation of many SOEs from the list of the candidates. For example, in the case of VSNL, the Indian International Telephone Company: The public floatation of VSNL was cancelled on May 3, 1994, in response to a negative reaction to the high share price. The high valuation of the company’s share happened as a reaction for the former parliament committee’s accusation to the government for selling some governmental holdings (in 1992-1993) at prices below their true values. The government did not wish to lower the price for fear of being accused of selling the company at a discount to foreigners.290 From the case of VSNL, we can imply that the valuation of SOEs by certain experts (privatization legislation usually sets them) is a technical one, and in many events does not represent the reality. In many cases, the real price (market price) is profoundly less.

Our opinion, despite the fact that setting a reference price is useful, it may be preferable to obtain the real price through competitive,

290 - Dick Welch, supra 9 p. 85.
transparent, and open sale procedures with wide dissemination of information. A competitive procedure usually offers the government better guarantees than does expert valuation performed before the sale. Therefore, providing for obligatory-expert valuation in the privatization legislation seems to be irrational. However, when a valuation is required by legislation it should be carried out by independent and qualified experts and in conformity with generally accepted valuation principles. The market price is, indeed, among them. The cost of the valuation must not exceed the benefits it is expected to yield.

Some countries have established evaluation commissions or other special bodies responsible for setting minimum prices. Our humble opinions is that the members of these commissions and bodies have no real stake in the success of the privatization program; they tend to be concerned only with not selling too cheaply, and they often end up setting price floors that are too high.

Fortunately, the Sudanese privatization Act (Disposition of Public Enterprises Act 1990) does not provide for obligatory-expert valuation, and provide for the HCDPE (S.3) to take such mission. TCDPE has relied upon the valuation of different expert houses in valuing many SOEs, a thing which implies that it has exercised valuation tasks neutrally.

As we mentioned in chapter 3 of this dissertation, most of the privatization operations in Sudan have been practised through negotiated sales. Therefore, practically, most of the privatization contracts have been concluded according to the agreed-upon prices.

Unfortunately, save in rare privatization operations in Sudan, there is a total absence of transparency in practising these operations. Absence of transparency, even without corruption, leads to clouds of doubts on the privatization program in Sudan as a whole.

(2) Authorized Privatization Method:
All too often that privatization laws and regulations prescribe the authorized privatization methods. In the absence of restrictions on the privatization legislation, the better approach would be to investigate what method would be more suitable. In practice, the legislator is usually neither familiar with privatization method nor in a position to predict the various circumstances that may necessitate special methods. The privatization law should therefore be draft in broad terms, having the executing authority to choose the appropriate methods of privatization.

The Argentine example shows how it is important to avoid the provisions in the privatization law that restrict the range of the authorized body or agency to select the privatization method that can be used. The diversity of legal status and economic characteristics of the enterprise to be privatized has compelled the authorities to resort to a wide range of privatization methods. Privatization program of the Ministry of Defence in Argentina, explains how it is important for the privatization law not to restrict the range of the authorized methods of privatization for the privatization agency. Following are the examples:291

*The Ministry of Defence in Argentina has a minority participation in the capital of Petropol, Monomeros, Vinilicios, Induclor, and Polisur (all part of the Bohia Blanca petrochemical complex). The most suitable method for privatization was to sell all governmental shares to one private investor.

*In Tandanor shipyard where the government is a majority participant in the SOE’s capital; different blocks of shares were sold to different investors.

*In Area Material Cordoba (aviation company), enterprise forming part of the armed forces, the ideal method for privatizing was to corpotorize such SOE to allow the later sale of state’s shares.*

*In unprofitable SOEs such like Hipasam (mining), which is heavily subsidized by the government; the ideal method of privatization was the direct sale of SOE’s asset to the private sector.*

*In Somia (a large iron and steel company), which is heavily indebted company, the suitable solution was the creation of new company, to be privatized, to which some of the assets and liabilities of the former enterprise were transferred. The other assets of the former SOE were sold directly, and the debts not transferred to the new entity continued to be the government’s responsibility.*

*In enterprises that do not own the land they occupy, like Tames, the ideal privatization method was the use of leases contracts.*

*In the large multipurpose enterprises that do not possess a juridical personality like Altos Hornos de Zapla (an iron steel company with forest resources for production of blast furnace charcoal); the solution came by restructuring, before privatization, into various commercial companies, each operating in a separate area of activity.*

In Sudan, despite the fact that some privatization methods are mentioned in the Disposition of Public Enterprises Act 1990 in s.4 (authorities of HCDPE), such mentioning does not come in a context restricting the authority of HCDPE to exercise other patterns of privatization. Such section provides that HCDPE, if decided to conclude a sale or joint venture contract, has a discretionary power to rehabilitate the SOE, transfer SOE into company with shares, consider the price as a repayment of a former debt, and to divide prices into instalments.292

292 - See s. 3 (a), (b), (c), and (e) of the Disposition of Public Enterprises Act 1990.
In Sudanese privatization legislation, unrestricting the authority of HCDPE in selecting legal methods of privatization clearly appears from that HCDPE has almost used all the known patterns of privatization (except two or three).293

(iv) Selection of Buyers:

Selection of buyers is difficult with regard to the problems which happened in many countries because of corruption, nepotism, favouritism, and discrimination against foreigners and certain minorities or ethnic groups. The law should lay down the broad lines for the selection of buyers, typically by mandating a competitive and transparent process. This includes a rule on advertising the sale, disclosure of information to investors, amount of time given to investors to prepare their bids, and so on.294

The selection of buyers can be derived directly from the choice of privatization method. For example, if a company is privatized by way of a public offering of shares, the selection will be anonymous and all investors can subscribe and be allocated shares. If mass privatization is chosen, all eligible citizens will have the opportunity to buy or receive shares or coupons.

Under other privatization method, the government or privatization agency or committee may have more discretion in the choice in the selection of buyers. This is the case, in particular, in the direct or negotiated sales which are preferred in many countries (like Sudan); the discretion of the government and the privatization agency will be wider in selecting strategic or core buyers. Therefore, we will explain how the

293 - See chapter 3, Box No. (3).
privatization law in many cases is directly intervening in selecting the buyers of the privatized SOEs. The well known methods of intervention of the privatization legislation in selecting buyers are: the direct restrictions on buyer selection, special or golden shares, and restrictions on foreign participation in the privatization.

(1) Restrictions on Entity of Buyers:

The privatization law should be free of unnecessary restrictions of the selection of buyers. Some restrictions, such as the exclusion of public agencies as buyers of privatized enterprises, may, however, be necessary to protect the objects of the privatization program.

In order to reduce the role of the public sector in the economy, many countries like Poland and Bulgaria have restricted the role of the public-sector entities to participate in the privatization process by buying shares of other SOEs. Thus, Article 1 of the Moroccan Privatization Law of 1990 explicitly prescribes that the ownership of shares held by the state or other public agencies in the companies listed in an annex to the law shall be transferred from the public to the private sector. Moreover, some countries have inserted more restrictive rules under this head in their privatization laws to further support the object and consistency of the privatization program by limiting the creation of new SOES. The same Moroccan law discussed above prescribes that, except when affected by law, the creation of any new public enterprise, subsidiary, secondary subsidiary of a public enterprise, and any new participation by a public enterprise in the capital of a private enterprise must be authorized, under penalty of nullity, by a government decree proposed by the minister for privatization.

296 - Pierre Guislain, supra2 p.125.
Despite the fact that restrictions on transferring SOE to other SOE and other public entities have been adopted by different countries, the Sudanese government has not benefited from these lessons. Tens of SOEs have been transferred to other SOEs and public entities. However, followings are samples of SOEs which were transferred to other public entities:

**Table No.(6) Transfer of SOEs to Public Entities in Sudan.** (continued in next page)

<table>
<thead>
<tr>
<th>No.</th>
<th>SOE</th>
<th>Legal method</th>
<th>Beneficiary</th>
<th>Price by million</th>
<th>Year</th>
<th>Recent position.</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Gadaw Factory</td>
<td>Transfer</td>
<td>River Nile State</td>
<td>_</td>
<td>1990</td>
<td>Bad</td>
<td>Failed</td>
</tr>
<tr>
<td>2</td>
<td>Karima Dates Evaporation Factory.</td>
<td>Sale</td>
<td>Northern State</td>
<td>SP11.400</td>
<td>1993</td>
<td>Good</td>
<td>_</td>
</tr>
<tr>
<td>3</td>
<td>Fila toxin Factory</td>
<td>Transfer</td>
<td>Red Sea State</td>
<td>_</td>
<td>1993</td>
<td>Bad</td>
<td>_</td>
</tr>
<tr>
<td>4</td>
<td>Dryly Onion Factory- Kasala</td>
<td>Transfer</td>
<td>Kasala State</td>
<td>_</td>
<td>1995</td>
<td>Bad</td>
<td>_</td>
</tr>
<tr>
<td>5</td>
<td>Arooma Cartoon Factory</td>
<td>Sale</td>
<td>Farmers Un. Cooperation</td>
<td>SP2.500</td>
<td>1990</td>
<td>Bad</td>
<td>_</td>
</tr>
<tr>
<td>6</td>
<td>Red Sea Tannery</td>
<td>Transfer</td>
<td>Red Sea State</td>
<td>_</td>
<td>1995</td>
<td>Bad</td>
<td>_</td>
</tr>
<tr>
<td>7</td>
<td>Nayala Tannery</td>
<td>Sale</td>
<td>Southern Darfur State</td>
<td>18.300</td>
<td>1993</td>
<td>Bad</td>
<td>Unpaid</td>
</tr>
<tr>
<td>8</td>
<td>Kadogli Weaving Factory</td>
<td>Transfer</td>
<td>Southern Kurdfan State</td>
<td>_</td>
<td>1997</td>
<td>Bad</td>
<td>_</td>
</tr>
<tr>
<td>9</td>
<td>Babanosa Milk Factory</td>
<td>Transfer</td>
<td>Western Kurdfan</td>
<td>_</td>
<td>1995</td>
<td>Bad</td>
<td>_</td>
</tr>
<tr>
<td>10</td>
<td>River</td>
<td>Transfer</td>
<td>Northern</td>
<td>_</td>
<td>1993</td>
<td>_</td>
<td>_</td>
</tr>
<tr>
<td>No.</td>
<td>Company/Corporation</td>
<td>Action</td>
<td>Location/State</td>
<td>Price</td>
<td>Year</td>
<td>Status</td>
<td>Remarks</td>
</tr>
<tr>
<td>-----</td>
<td>-------------------------------------</td>
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<td>---------------------------------</td>
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<td>------</td>
<td>------------</td>
<td>---------</td>
</tr>
<tr>
<td>11</td>
<td>Sudan Hotel</td>
<td>Sale</td>
<td>National Social Insurance Fund</td>
<td>SP275</td>
<td>1993</td>
<td>Good</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>Kha. Co. for Albutanaa Milks</td>
<td>Transfer</td>
<td>Al-Shaheed Charity Orgaiz.</td>
<td>_</td>
<td>1994</td>
<td>Bad</td>
<td></td>
</tr>
<tr>
<td>13</td>
<td>Wafra Chemical Factory</td>
<td>Transfer</td>
<td>Al-Shaheed Charity Orgaiz.</td>
<td>_</td>
<td>1993</td>
<td>_</td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>Juba Hotel</td>
<td>Transfer</td>
<td>Baher Eljabal State</td>
<td>_</td>
<td>1992</td>
<td>Good</td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>Oil Crops Company</td>
<td>Transfer</td>
<td>Al-Shaheed Charity Orgaiz.</td>
<td>_</td>
<td>1993</td>
<td>_</td>
<td></td>
</tr>
<tr>
<td>16</td>
<td>Atbara Rest</td>
<td>Sale</td>
<td>Northern State</td>
<td>SP5</td>
<td>1992</td>
<td>Good</td>
<td>Unpaid</td>
</tr>
<tr>
<td>17</td>
<td>Kosti Rest</td>
<td>Sale</td>
<td>White Nile State</td>
<td>SP2.5</td>
<td>1992</td>
<td>Good</td>
<td>Unpaid</td>
</tr>
<tr>
<td>18</td>
<td>Alnouba Lake Fish Corp.</td>
<td>Transfer</td>
<td>Northern State</td>
<td>SP280.7</td>
<td>1993</td>
<td>Good</td>
<td>Unpaid</td>
</tr>
<tr>
<td>19</td>
<td>Algash Delta Corp.</td>
<td>Transfer</td>
<td>Kasala State</td>
<td>_</td>
<td>1993</td>
<td>Good</td>
<td>Unpaid</td>
</tr>
<tr>
<td>20</td>
<td>Tokar Delta Corp.</td>
<td>Transfer</td>
<td>Red Sea State</td>
<td>_</td>
<td>1993</td>
<td>Good</td>
<td>Unpaid</td>
</tr>
<tr>
<td>21</td>
<td>Arrous Tourist Village</td>
<td>Transfer</td>
<td>Minis.of Tour.&amp; Env.</td>
<td>_</td>
<td>1993</td>
<td>_</td>
<td></td>
</tr>
<tr>
<td>22</td>
<td>North Jazeera Milks</td>
<td>Transfer</td>
<td>Aljazeera State</td>
<td>_</td>
<td>1994</td>
<td>Bad</td>
<td></td>
</tr>
<tr>
<td>23</td>
<td>Colds &amp; Supplies Corp.</td>
<td>Transfer</td>
<td>National Fund for Student Aid</td>
<td>SP128</td>
<td>1993</td>
<td>Good</td>
<td>Unpaid</td>
</tr>
</tbody>
</table>
The transfer of SOEs to public entities, as in the above table, implies the following:

* A big number of the Sudanese SOEs was transferred to their local states (states of their locations).
* Prices of many transferred SOEs have not been paid; therefore, the central government or the privatization agency has not gained any considerations.
* TCDPE itself estimated the recent conditions of the transferred SOEs (after the transference) as negative.

As the above table shows, and as a result for absence of a provision prohibiting or restricting the transfer of SOE for another SOE or other public entity; the Sudanese government and the privatization agency (HCDPE) has transferred big number of SOEs to public entities. The other countries of the world, when prohibiting or restricting such practice in their privatization legislations; are inevitably considering its effect in achieving the objectives of the privatization. In addition many of these countries prohibited establishing any new SOEs so as to avoid the repeating of the former disappointment performance of former SOEs and, consequently, launching new privatization programs to privatize the new SOEs.

As we mentioned in this thesis, executing privatization program is not easy task; it costs a lot of time, money, and effort. The Sudanese privatization legislation does not provide for the prohibition of establishing new SOEs or even restriction on them; a thing which may,
theoretically, result in establishing new SOEs. Because of the disappointing performance of the former Sudanese SOEs, the Sudanese legislator is required to provide for this meaning in the privatization legislation, or to enact a specific legislation to prohibit or limit the establishment of new state-owned enterprises.

**(2) Restrictions on Foreign Participation in Privatization:**

Foreign investment can play a very important role in a country’s economy and private sector development. Despite the fact that the good role of the foreign investment is obvious, it is not uncommon for privatization legislation to include express restrictions on participation by foreigners in the privatization program in a country. The degree of restriction or limitation varies from one country to another according to the type and size of the enterprise to be privatized. Followings are examples for provisions of restrictions and limitations in different countries:

* In Senegal, Article 11 of Law No.87-23 of August 1987 on SOE’s privatization provides:

  “For each enterprise, the minister with responsibility for the state portfolio shall set the proportion of shares that can be transferred in priority to natural or juridical persons of Senegalese nationality”.

* In Chad, Article 9 of Ordinance No.017/PR/92 of August 1992 on divestiture of SOE holdings Provides:

  “In the sale and/or transfer of state held assets, priority shall be accorded to natural or juridical persons of Chad nationality”.

* In Burkina Faso, Article 10 of Ordinance No. 91-0040/PRES of July 1991 empowers the minister responsible for SOE supervision to reserve in priority a share of each privatization for Burkinabe nationals.

297 - Beesley and other, supra 10 p. 121.
298 - Id. p. 122
299 - Id. p. 122.
*In Brazil, Article 13 of Law No. 8031 of April 1991 limited holding by foreigners to 40 percent of voting shares. This restriction has failed by a provision taken in October 26, 1993, allowing foreigners to acquire 100 percent of the shares of privatized SOE.\textsuperscript{300}

*In Czechoslovakia, Article 3 of the Law of October 1990 on small privatizations provides that only national of Czech and Slovak Federal Republic, and companies or other legal entities whose members or owners are all nationals, may become owners of enterprises and assets privatized pursuant to this law. The law on large privatizations does not contain such a restriction.\textsuperscript{301}

*In France, Article 10 of the law of August 1986 limited the total amount of shares transferred by the state to foreign persons, directly or indirectly, to 20 percent of the SOE’s capital. This provision was first amended by Article 8 of the Law of July 1993, which provides that this ceiling shall not apply to European Union investors; an amendment of April 12, 1996, abolished the remaining restrictions.\textsuperscript{302}

From the above sections, we can say the limitation or restriction of foreign investment in the privatization takes three forms:

a- Absolute priority for the sake of nationals in some African countries is imposed (Chad and Senegal).

b- In some European countries such as Czechoslovakia, the size of SOE to be privatized determines the scope of the participation of the foreign investment. In the little SOEs, foreigners are absolutely prohibited from participation, while in the large SOEs; participation of foreign investment is unlimited.

\textsuperscript{300} - Pierre Guislain, supra 2, p. 132.
\textsuperscript{301} - Lipton and others, supra 16 p. 139.
\textsuperscript{302} - Pierre Guislain, supra 2 p. 130.
In some European countries, such as France, the portion of foreigners in the privatized SOEs was limited at the beginnings of the earlier wave of the privatization. After spread of the conception and culture of privatization internationally, the limited or restrictive provisions were gradually absorbed by new laws.

In Latin American country (Brazil), the limited and restrictive provisions for the foreign participation were concentrated not according to size of SOEs or the percentage of shares allowed to foreigners. The limitations and restriction is on the controlling power of the foreign investors (the voting shares).

The above restrictions and limitations are detrimental to successful privatization processes. This lesson was learned by France and Brazil; after introducing restrictions on foreign investors in privatization, they abolished them. It is important to note that the success of the objects of the European Union compelled France to repeal the restrictive provisions in its privatization laws (France is one of the leader countries pressuring towards European Unity).

In the Sudanese privatization Act (Disposition of Public Enterprises Act 1990) there are no restrictions on the face of the foreign investment. On the contrast, there is clear tendency to maximize the participation of foreign investment in the privatization program. This appears from the big number of the large SOEs which have been privatized by selling or leasing them to foreign investors. Moreover, the frequent investment laws (1992, 1999, and 2002) provide for a big number of guarantees to the foreign investors about their investments in Sudan such as, non confiscation of their investments, non-discrimination
against them, and retransfer of their capitals outside Sudan. Many Sudanese investors and, even, the public opinion always claim that there is a clear discriminative treatment against the Sudanese investors for the sake of the foreigners.

(3) Special or Golden Shares:

The golden share technique has been used in some countries like France, Belgium, Brazil, Spain, and United Kingdom as a method to maintain some governmental control over the privatized company, mainly with respect to future transfers of shares. By allowing the government to veto some decisions or share transfers, this technique remains state control after privatization, even though the state is now only a minority shareholder (sometimes with a single share).

The golden share became an effective device to enable governments to control the transfer of blocks of shares of privatized airlines, so that any future change in shareholders do not bring the enterprise under foreign control, thereby causing it to lose the right to operate certain international routes. Golden share is also commonly used in privatizing infrastructure companies.

The rights conferred by golden shares are not, however, necessarily limited to controlling shareholder; they can extend to other decisions of the company, as they do in Senegal. The Senegalese privatization law authorizes the use of special or golden shares in certain circumstances, mainly in order to protect the state’s interests as creditor of privatized enterprises that have repayment or guarantee obligations to the state. Article 14 of the law provides that:

“the minister in charge of state holdings may decide by a ministerial order that one of the share held by the state in an enterprise to be privatized that has
previously received loans guaranteed or onlent by the state shall be converted to a special share carrying special rights. The special share allows the minister in charge of state holdings, under conditions and procedures prescribed by decree, to ensure that the enterprise takes all necessary measures to provide for payment of the loans guaranteed or onlent by the state”.

As we have mentioned above, France is among the countries which widely used the golden shares technique in its privatization program. The experience of France clearly appears the methods and purposes in which golden shares are used. Followings are examples of imposing golden shares:

Article 10 of the French Privatization Law of August 6, 1986, authorized the minister of the economy to determine, for each of 65 privatizable companies listed in the annex to Law No. 86-793 of July 2, 1986, protection of national interest by that a special share be granted to the state. The privatized company’s articles have to be amended accordingly.

Article 10 of the above law reads:

“The special share allows the Minister of the Economy to approve shareholdings by any person or group of persons acting together exceeding %10 of the capital. The special share may be permanently converted into an ordinary share at any time by an order of the Minister of the Economy. This conversion shall normally take place automatically after five years. In cases of violation of the provisions of the first paragraph hereof, the holder(s) of the holdings improperly acquired may not exercise their voting rights and must transfer such shares within three months.”

In practice, however, there was little application for these provisions in the period of 1986-88, and most SOEs were privatized without resources to this mechanism. Other legislation in effect at that time.

303- Beesley and others, supra 10 p. 143.
time empowered the government to control, and sometimes block, undesirable takeovers.  

In Sudan, there is no express provision in the privatization legislation (Disposition of Public Enterprises Act 1990) for the golden shares, but in many privatizations contracts we have noted that there is express mentioning for the golden share. The golden shares have been used in many sorts of the privatization contracts in Sudan such like negotiated sales and leases. Golden share in Sudan has been used to confer the Sudanese government some sort of control after privatization. For example, in Atbara Cement Factory privatization (see the appendix), the golden share was imposed to remain the company’s objects, forming the shape of enterprise after the privatization, and the future transfer of shares.

Followings are the articles of the company’s agreement which constitute the golden shares:

* Article 6-(3) of the agreement provides: “The second party shall be obliged not to amend the objects of the company.”

* Article 6-(4) provides: “The second party agrees to transform the Factory Company from private company to public one after five years from the beginning of production operations.”

* Article 6-(5) provides: “The second party agrees not to sell the Factory at any time, but, has the right to involve any co-ownership in a sense not effecting the terms of this agreement.”

In the privatization operation of the Real Estate Bank, golden share took the shape of transforming the privatized company from private to public. Article 7 (second) reads:

“Transformation of the Real Estates Bank into private shares company, and, into public shares company five years after the transformation into private one.”

304- Guislain, supra 2 p. 134.
Following table shows samples of golden shares in some Sudanese privatization contracts:

<table>
<thead>
<tr>
<th>SOE</th>
<th>Form of Golden share</th>
</tr>
</thead>
</table>
| Atbara Cement Factory.       | • The purchaser shall not amend the objects of the Factory Company.  
                                 | • The purchaser agrees to transform the Factory Company from private to public, five years after privatization.                                    
                                 | • The purchaser is obliged not to sell the Factory at any time, but has the right to involve any co-ownership in a sense not affecting the terms of the agreement. |
| Fine Spinning Factory, Khartoum North. | • The purchaser company shall not be entitled to sell the Factory at any time before the rehabilitation, but can make a partnership with any technical or financial partner. |
| Real Estate Bank             | • The purchaser shall increase the capital of the Bank to fulfil the Central Bank decisions on specialized banks.                                      
                                 | • The objects of the Bank shall include that the bank should finance building house complexes by gathering the financial resources from the saving of the beneficiaries and other financers (banks, corporations, organizations, and companies.     |
| Elnilein Industrial Development | • The purchaser agreed to keep the activities of the Bank as they are in the law of the Bank (Elnilein Industrial |
Illustrated by the researcher.

(v) Preferential Employees Schemes:

Privatizations laws often require the allocation free or discounted shares in privatized companies to specific groups, including employees and small shareholders, as well as other special benefits. The reasons for such giveaways vary but generally include the object of winning the targeted groups over to the privatization cause. These benefits may, for instance, create worker support for privatization (or reduce their opposition) and favorably impress citizens. For example, in Argentina, a portion of the shares, often about 10 percent, has generally been embarked for employees under privatization operations. By May 1993 about 117,000 employees had acquired shareholdings in this way in 64 privatized SOEs. Employees are allowed to pay for the shares allocated to them out of dividends. The Banco de Nación Argentina is the depository for these shares.305

In Bulgaria, Article 22 and 23 of the 1992 privatization law contains such provision with respect to the privatization of SOEs

305 - Flouret and others, supra12 p. 229.
organized under the company law Article 22, which applies to SOEs organized as joint-stock companies, states that the discount is 50 percent and that up to 20 percent of the shares belonging to the state can be sold in this way. It determines the total value of the discount to which each worker is entitled at an amount determined according to the worker’s seniority and salary, and provides that these preferential employee share will be nonvoting shares for the first three years.306

In France, the privatization law of August 1986 prescribed that 10 percent of the shares offered for sales had to be set aside to employees (and some former employees). It authorized discount for employees of up to 20 percent of the share price, with payment in installment of a maximum period of three years. Employees receiving a discount of over 5 percent, could not, however, transfer their shares in the first two years, while those granted payment facilities were required to retain them until they had paid for them in full. 307

In Poland, Article 24 of the privatization law provides that up to 20 percent of shares be reserved for workers of the company at 50 percent discount on the sale price to the general public (Polish citizens). 308

In Sudan the wide powers of the HCDPE in the privatizations operations, theoretically, enable it to grant such treatment for the employees of the privatized SOE. In practice, similar treatments were practiced in Sudan in privatizations operations of the agricultural SOEs; those are White Nile Agricultural Corporation, and Blue Nile Agricultural Corporation. A prior contract was concluded between HCDPE and Eljanien for Agricultural and Animal Production Co. to lease the two agricultural SOEs. This agreement resulted in dispute between the government and the farmers of the two SOEs because of tribal and ethnic

306 - Lipton, and others, supra 16 p. 188.
307 - Guislain supra 2 p. 133.
308 - Lipton and others, supra 16 p. 190.
reasons. Therefore, the government decided to transfer the ownership of 
the two SOEs freely to the farmers. (See Chapter 3)

The difference between the Sudanese and the international 
experience is that the decision of the Sudanese government (transfer the 
ownership to the farmers) was taken without an express provision in the 
law. In other words HCDPE practised discretionary power to solve the 
farmer’s dispute.

(vi) Structure of Privatization Law:

A discussion paper proposed the ideal structure of a privatization 
law. We will mention the proposals of the contents of a privatization law 
from this discussion paper verbatim:309

Summary of privatization law contents:
This section sets out what is usually contained in a privatization law. The 
contents of the law and the institutional and decision-making framework 
must avoid over-design and elaborate processes, instead adopting an 
approach that reflects the needs and resources of the country in which it is 
employed. It is desirable that policies, procedures, institutional and 
organizational frameworks contain much of what is set out here so that 
the primary privatization law is not over -burdened.

Principal Contents of Objectives of a Privatization Law:
A law should:

*Make provision to establish an institution responsible for privatization 
(e.g., Privatization Board (PB)) with a supporting executive made up of 
specialists (supported with specialist advice and assistance).

309- Peter Young, Building an Institutional Framework for Privatization: the Importance of Strong 
* State the powers, duties and functions of the PB and grant the necessary authority to the Board to carry out privatization policy and implement transactions according to a specified process.

* Ensure that the PB will be small enough to be effective but representative of government, the private sector and different elements of society.

* Ensure that privatization is a private sector activity in a public sector setting and brings to bear a mix of commercial, political and administrative skills and experience as needed.

* Enable the PB to meet regularly – e.g., once a month.

* State what can be privatized – e.g., all government property, broadly defined to include direct and indirectly owned, managed or controlled property.

**Detailed Provisions of the Privatization Law:**

A privatization law usually has two main types of provisions:

* Enabling provisions setting out powers, duties and functions.

* Facilitating provisions permitting the body to undertake certain activities which would otherwise be in conflict with prevailing law or the responsibilities of other bodies.

**Enabling Provisions:**

These may be provided for in the primary law, in secondary legislation (rules or regulations) or in procedures adopted under the authority of the primary law.

* Who can initiate and request the initiation of the process for a specific enterprise.

* Who can prepare the enterprise for privatization?

* Who can prepare documentation?

* Who can perform processes?
* Who can determine the extent of authority of the privatization body if there is a dispute with other parts of government or SOEs?
* The methods and techniques that can be used.
* Arrangements for carrying out privatization.
* Who negotiates?
* Who signs agreements?
* Who implements the process and transactions?
* Who executes steps in the aftermath of a sale?
* Who monitors ongoing issues?
* Who resolves conflicts between privatization law and policy and other laws and policies?
* The milestone approval system and who gives the approvals.
* What happens to revenues raised in sales?
* Whether there is a need for sunset provisions (i.e. special powers that cease after a defined period).
* Reporting and accountability requirements, including Parliamentary oversight, once created.

**Facilitating Provisions:**
These usually provide for:
* Ease of conveyance and registration of property by the body in a manner that expedites the process and determines who has power to vest property/title issues.
* Authority to exercise ownership rights over assets/shares that the privatization body does not own, (although it is better if the board owns them all, as it makes the negotiation process a lot easier).
* Entering into agreements on behalf of other bodies to sell the assets of a company/unit of government or to re-organize/merge/consolidate enterprises or activities.
* Management and restructuring prior to - and in the process of – privatization (legal/corporate restructuring, financial restructuring and ironing out debt issues but rarely production restructuring).

* Power to perform functions through other bodies might be established, or to act through advisers/sub-contractors etc.

* Power to enforce disclosure of information /co-operation.

* Power to investigate and obtain information from SOEs and units of government.

* Power to receive and take possession of property, rights, obligations, liabilities, shares etc.

* Power to wind up/dissolve/liquidate/legally restructure/break-up/hive off/convert legal form etc (needs examination of interaction with other laws, rights and obligations).

* Powers of entry and inspection.

* Power to handle claims against bodies.

* Power to receive payments and to operate a privatization fund/special accounts (to be compatible with general government accounting requirements).

* General approach to recurring issues such as (a) debt and non-performing assets; (b) labor matters including Voluntary Redundancy Scheme (VRS)/compensation/protection of rights; (d) other liabilities; and (e) use of proceeds.

* Accountability, audit, prevention of fraud and corruption issues, avoidance of conflicts of interest.

* Financing of on-going costs including liabilities for VRS and other employee funding.

* Appointing advisers.

* Dealing with borrowings of SOEs.

* Warehousing of shares (perhaps a privatization trust).
* Development of government/public sector asset register.
* Private financing of infrastructure.
* Regulatory issues.

**Conclusion:**

Most countries rely upon specific privatization laws to execute their privatizations programs. This is the case in most countries regardless of the existing legislations that are sufficient to conduct the privatization program. Once, however, privatization law is enacted, it must specify the requirements of executing a privatization program. Such law must accurately list the targeted SOEs for privatization, and its provisions should be flexible to include any future SOEs to be privatized. On the other hand, many countries began their privatization programs without specific law. This was the case in Hungary where the privatization began in 1988 with “spontaneous privatization”.

It is to be noted that specific privatization legislation may take the form of general legislation applicable to all SOEs to be privatized or specific law for specific SOE or group of SOEs. In some case, the targeted SOEs are specifically named and in others the law addresses one or more categories of enterprises without naming them. The scope of some specific laws may be limited in time, a thing which weakens the government’s position in the negotiations with the buyers, especially when the legal time is nearing expiration. A law of general or long scope seems to be more rational and accords the state a strong negotiating position. The Sudanese privatization legislation (Disposition of Public Enterprises Act 1990) is from this category.

The privatization law intervene in many cases to impose basic rules of evaluation of SOE to be privatized, the legal method of privatization, and in rare cases, the privatization law may intervene in selecting buyers of the SOE. In addition, the privatization legislation, sometimes,
determines the methods of the evaluation of the privatized SOEs. Privatization legislation usually peruses the transparency, but the problem is that public officials normally wish to avoid being accused of giving away the valuable properties of the society. Therefore, they decided to determine high prices of SOEs. High valuation affords them political protection in the event that the decision to sell at a given price is disputed. Therefore, rational balance is required between the officials’ evaluation and the real prices of such SOEs.

The privatization legislation may put some restrictions, such as the exclusion of public agencies as buyers of privatized enterprises, a thing which may however be necessary to protect the objects of the privatization program. But, in some cases, the privatization legislation puts some restrictions in the face of foreign investors to participate in the privatization program. We believe that it is not suitable for a legislation to include express restrictions on participation by foreigners in the privatization program in a country.

Many countries used the “golden share” to enable governments to maintain some control on the SOE’s company after the privatization. The rights conferred by golden shares are not; however, necessarily limited to controlling matters; they may extend to other decisions of the company such like future transfer of shares, or the change of the object of SOEs namely in the strategic SOEs like banks and cement factories (in Sudan).

Privatizations laws may require the allocation free or discounted shares in privatized companies to specific groups like employees and small shareholders. The reasons for such giveaways vary but generally include the objective of winning the targeted groups over to the privatization cause. These benefits may, for instance, create workers’ support for privatization or reduce their opposition and favorably impress citizens.
Chapter 8

Institutional Framework for Privatization

The institutional framework is necessarily required to implement and conduct privatizations. The institutional framework defines the roles, responsibilities, and authorities of the various actors in the privatization operation, such as the legislature, the government, and the transaction body. Despite the fact that the parliament is a legislative authority; in many countries, its role in the privatization has been broadening to reach conducting privatization operations. The role of the government in the institutional framework of privatization appears from that it often determines the general policies and appoints the agencies or committees of privatization to carry out the privatization program on its behalf. Privatization raises very complex legal issues that must be resolved in a timely and satisfactory manner. Therefore, international experts of privatization often concentrate their recommendations on the necessity of accurate adoption of the delegation of power and guarantee of the rule of the law principles. These principles are determinant factors in smoothing the task of the institutional framework as a whole.

This chapter firstly investigates the role of the parliament in the institutional framework, the main features of the institutional framework will annex, and lastly the necessary principles of law that should be accompanied with the institutional framework will be performed and discussed.
(i) Role of the Parliament:

In most countries the parliament has played an important role in the privatization process as evidenced by many privatization laws worldwide. Some parliaments have given themselves a role in the implementation stage, such as the adoption of annual privatization programs. This is relatively common in the transition countries, where the scope of the privatization law is usually very broad (this is the case in Poland as mentioned in Chapter 7). Privatization may also come under parliamentary debates as part of the security of the budget law or finance act, the program of a new government, parliamentary questions, and so on.

In some cases, legislators have given themselves prerogatives that have sometimes led to micromanagement of the privatization process and to direct opposition with the government.

In Argentina, a joint house senate parliamentary commission representing the various politically parties initially had to ratify most privatizations. In the early stages, the joint commission played an active role in the privatization process, for example, by requiring that the terms of the ENTEL (the greatest telecommunications SOE) call for bids be modified. The commission’s power have since been curtailed: if it does not take a position within thirty days, privatization can proceed.310

In Hungary, parliament first placed the new privatization agency under its own authority (Law No.7 of January 1990). Less than a year later, following the criticism of the first privatization operations, the law

was amended to place the agency under the authority of the council of ministers.\textsuperscript{311}

In the Slovak Republic, successive governments have tried to cancel privatizations agreed by their predecessors. In 1994, for example, the new parliament enacted a law invalidating many privatization transactions concluded by the former government shortly before the elections of October 1, 1994. However, this law was overturned in May 1995 by a ruling of the constitutional court that found that the parliament had acted beyond its constitutional powers.\textsuperscript{312}

Degrees of intervention of the parliaments in privatization, with regard to the types mentioned above, are generally detrimental to the smooth implementation of the privatization program. Members of parliaments usually have no tendency to speed up the privatization process. As the examples above show, some countries have tried to limit the role of the parliament during the execution period.

International experience with privatization shows that relations between parliament and government can be strained at any stage of privatization process even where the government is in a bad need for enacting the privatization legislation rather than executing such program. The bad face of the intervention of the parliament appears from that it constrains the privatization from the first step (enacting the required legislation). Delays attributable to intervention by parliament may be more detrimental in countries with bicameral systems.\textsuperscript{313} Following are examples for tensions between parliament and government:

*In Poland, the government announced a new program in June 1990 providing for speedy privatization of about 400 SOE through

\textsuperscript{312} - Id p. 80
\textsuperscript{313} - Pierre Guislain, The Privatization challenge pp. 149-150, 4\textsuperscript{th} ed. 2001, World Bank Publications, Washington DC.
investment funds whose shares would be sold to the Polish citizens. However, the lower house of parliament, dominated by the opposition, succeeded in blocking the project by sending it back for examination at the next session of parliament. However, the law was, after long time of delaying, enacted on April 30 1993.\(^\text{314}\)

*The best well known example for tension between government and parliament was probably between the Russian Federal government, on the one hand, and the national parliament and some local assemblies, on the other. Russia experienced countless strains between the government and the parliament, which culminated in the overthrow of the Supreme Soviet by force and the declaration of early elections in October 1993. The shutdown of the parliament provided an opportunity for privatization by the stream lining of the process. Before these events, the responsibilities for privatization have been divided between the Russian Federal Property Fund, responsible for sales and reporting to the Supreme Soviet, and the privatization ministry (GKI), responsible for policy and answering to the government. Following the overthrow, the minister assumed the responsibility for overseeing both organizations and came to be in charge of both policy and sales. Much progress of privatization was made in this period. The Duma (lower house) that followed the Supreme Soviet in December 1993 was less powerful than parliament.\(^\text{315}\)

*Bulgaria provides another example of the institutional statement that can result from conflicts between government and parliament. From February 1990, when Zhivkov government took the governance, privatization was a priority goal of successive governments. By May 1990 a privatization bill, drafted by the Ministry of Economic Reform, was ready. In addition, several decrees were issued in 1990 to allow for

\(^{314}\) Anderson and others, supra 2 p. 118.
\(^{315}\) Id, p. 126.
the privatization process to be started without waiting for the new law to be enacted. To speed up the process, the Council of Ministers set up a privatization agency by the Decree No. 16 of February 8, 1991. The agency’s function was ambiguous. A year later the agency had still taken no major initiative, the small privatization program by the Ministry of Industry and Commerce in 1990 had come to a halt, and the privatization law drafted in April 1990 and submitted to the national assembly in September 1990 had not yet been enacted, even though the government had an absolute majority (over 80 percent from January to October 1991) in the national assembly. These delays were largely caused by political rivalries and compromises that reflected the lack of confidence among the groups involved: the parliament, government, president, parties and factions, and privatization agency. The law was finally enacted by the national assembly on April 23, 1992, two years after the first draft was adopted by the council of ministers, and a new privatization agency replaced the one set up in 1991. It then took several months to appoint the director general of the agency and members of the oversight council. The year 1993 brought other institutional ups and downs. Another government decided to replace of the oversight council of the privatization agency who had been appointed by the previous government. The members filed suits against the decision. The court declared the replacement illegal because none of the causes of termination of functions (per Article 12 of the 1990 privatization law) were present. Abstractly, because of this political struggles: Bulgaria’s privatization program made little harvest during this period; only two major privatizations took place between 1990 and 1993. It is to be noted; during this struggles between the Bulgarian politicians, the other Eastern Europe countries Achieved high levels of major privatizations operations.316

316 - Id. pp. 134-37.
In Sudan, the privatization law was enacted in 1990 by the Command Council of Elniqaz Alwatani Revolution during the moratorium of the constitution and absence of the parliament. Absence of the role of the parliament in the stage of enacting the privatization legislation, to some extent, assisted the government to implement and speed the privatization operations in Sudan. In its counterpart, the total absence of role of elected parliament creates clouds of doubts about the credibility of the privatization program as a whole. Despite the disadvantages of the deep intervention of the parliament in the privatization; the role of the parliament can not be ignored that the privatized enterprises are public ownership and members of the parliament are presumed to be the representatives of the peoples. In addition, the role of the parliament as a monitoring authority should not be underestimated.

(ii) Structure of the Institutional Framework:

Countries around the world have chosen a variety of structures to implement their privatization program. The role of the legislature (the parliament) has been discussed in the previous part of this chapter. This part concerns with the executives bodies. In other words, it deals with the agencies or committees of carrying out the privatization.

The privatization bodies usually consists of two levels of agencies or committees. The first level is the political body (the steering committee/agency) which includes the head of the state, or the whole government, or group of ministries. The task of this committee (the steering body) is to define the privatization program, set its priorities, and take the major decisions. The second level is the technical part which is
represented by the executive agency which carried different titles in different countries like “privatization agency”, “privatization committee”, and “technical committee”. While in some countries the structure of second level has a total independence from the political apparatus, in the others these committees/agencies have no/or/little independence. However; at all levels of privatization bodies, depoliticizing and institutionalizing structure of privatization bodies are required.

(1)Depoliticizing the Institutional Framework:

Privatization is politically dangerous and bound to affect many interested groups. These include managements of the SOEs listed to privatization, workers who face uncertain future under the new ownership, and members of the government itself.

We can imply that governments are always facing the accusation of selling out valuable properties to foreigners, or inefficiently promoting ownership by local entrepreneurs. This is more likely to occur in instances where the process is not clearly defined or lacks transparency. In addition, within government itself, not all ministers embrace privatization with equal degree. Concerned ministries will often resist the privatization of enterprises under their authority because of the loss of the political leverage and power, which they derived from controlling SOEs.

The inclusion of various interested groups in the decision making process can transform a privatization program into highly politicized event. This, however, results in delays and uncertainty for the bidders involved. When foreign investors recognize that politics and indecisiveness are central features of a privatization progress, they will hesitate to participate, resulting in loss of bidders and potential investors for the privatizing government.
The case of Goplana (a Polish Chocolate Factory) illustrates several of the difficulties which occur when various interest groups have power to turn privatization into a highly political event: Goplana is a major polish chocolate plant which had a %15 market share in the early 1990s. Nestle, already with an established presence in Hungary and the Czech Republic, became interested in Poland with its market of 40 million people. In 1993, when Nestle decided to purchase Goplana, ED & F. Man, a British sugar and coca brokers and its partners, had set up a joint venture with Goplana management which required only the privatization minister’s signature. However, the privatization minister had appeared to have reservations regarding the joint venture arrangement. It was felt that selling to a “flagship” company such as Nestle would promote Poland to other investors. The situation was complicated by the fact that the workers, who in Poland hold the veto power over privatization transactions, wanted the joint venture arrangement and decided to oppose the Nestle deal. At a considerable political lobbying and efforts, Nestle eventually managed to get workers on its side, and the government announced to hold an open tender for joint venture arrangement. In the tender, ED & F. Man’s offer was $35.9 million for %46 share of the joint venture vs. Nestlé’s offer of $31.00 million for a %47 share. In order to enlist the support of workers, Nestle afforded more employment guarantees than ED & F. Man. It also established close contact with the workers’ council to resolve exceptional differences. Nestle was eventually declared the winner, and the deal was sealed in early 1993.

In Sudan, the problem of the conflicts of interest appears from what could be called “ideological interests”. The “ideological interests” in

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317 - Kathy Megyery and Frank Sader, Facilitating Foreign Participation in Privatization p.26, 1\textsuperscript{st} ed 1997, the International Finance Corporation & the World Bank, Washington DC.
Sudan is a unique practice; we have never noted such practice among the international experiences or the international texts of privatization. It is correct that some African countries have tailored their privatization laws with regard to some ethnic or otherwise measures so as to create some sort of internal equilibrium in the distribution of the national wealth (see chapter 2 and 3), but we have not illustrated any ideological balance in the privatization laws or operations in theses countries. To explain this, we have to note that the current governing regime in Sudan, from the first day of its existence, is strongly connected with the international stream of the political Islam. This stream has many institutions like banks, finance houses, and charity organizations. The objectives of these institutions are to spread the Islamic concepts in the investment; for example, prohibition of usury in transactions and spread many of the Islamic formulas like murabaha, mudaraba, etc... The clear economic relationship between the international political-Islam institutions and the current regime in Sudan clearly appears from the huge amounts of money which were granted or loaned by these institutions to the Sudanese government in the ninetieth of the past century (see chapter 3). Our humble view, selling SOEs to these institutions constitutes sort of abuse; therefore, these institutions should be dismissed from the competition of selling the Sudanese SOEs. Involving these institutions in the Sudanese privatization operations widely affected the decision of the privatization committees.

Box no. (8): Samples of SOEs Sold to International Islamic Institutions.

<table>
<thead>
<tr>
<th>SOE</th>
<th>Beneficiary</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atbara Cement Factory.</td>
<td>Dar Al-Maal Al-Islami.</td>
<td>2002</td>
</tr>
<tr>
<td></td>
<td>(Sudanese Afro Company for Trade)</td>
<td></td>
</tr>
</tbody>
</table>

318 -See Chapter 3 of this dissertation (negotiated sales)
<table>
<thead>
<tr>
<th>Company Name</th>
<th>Company Name</th>
<th>Year</th>
</tr>
</thead>
</table>

Illustrated by the Researcher.

Moreover, experts of the World Bank recommend the following:

“To avoid the politicization of its privatization program, any government should be concerned with establishing a clear-cut chain of command, unmistakeably specifying the authority to privatize. The right to make individual sales decisions should be concentrated to reduce the risk of political interference and lengthy internal debates. Of particular importance is the exclusion of any party that has particular short-term interests in individual companies, especially the workforce, the management, and the line ministries.”

From the above, it is clear that the minister of the line of the candidate SOE to privatization should be sacked from its privatization. The Sudanese government has not benefited from the advices of the international experts of privatization. This is clear from that the privatization Act in Sudan (Disposition of Public enterprises Act 1990) expressly puts the line minister of SOE to be privatized as a fundamental

319. Kathy Megery and Frank Sader, supra 8 p.22.
member in the privatization committee. S.2 of such law provides for the establishment of HCDPE to include:
* The Minister of Finance and National Planning (president).
* The Minister of Justice and the Attorney General (member).
* The Minister of the line of the targeted SOE (member).
* The President of the General Corporation of Investment (member).

(2) Institutionalizing Privatizations:

Any privatization body, especially the executive committee/agency, can function effectively only if it is sufficiently empowered to execute its mandate. The ability to carry out decisions is linked to political commitment that is ensuring the mandate to the privatization body and provides sufficient powers, scope and freedom from political interference to implement privatization. For investors, the knowledge that the agency has a clear mandate and authority will increase their trust in the overall process that they are in need to know the limits of the authority of their negotiating part.

As we have previously mentioned, countries have adopted different institutional frameworks characterized by varying degrees of independence of the privatization body (committee/agency) from the political apparatus or the head of the state. At one level, the privatization body (the steering committee) is an extension of the political system with limited autonomy and authority. This can include specialized government ministry or agency as in Poland and Hungary.\(^{320}\) The other options concentrated on politically independent and empowered entities as in Mexico or Peru.\(^{321}\)

The “executive agency” or commission is the entity that effectively implements privatization by actually selling SOEs. It should be

\(^{320}\) Anderson and other, supra 2 p. 161.
\(^{321}\) Francisco Anuatti-Netoto and others, supra 1 p. 211.
established as independent agency, reporting only to the steering committee. Typically, this agency prepares the guidelines for the sales, proposes which enterprises are to be sold and by which legal methods, and finally controls the complete sales process until the signings of the sales contract. In order not to overburden itself with the time-consuming details of individual transactions, such an agency often creates special committees or task forces for each particular SOE. These committees report back to the agency and make detailed proposals on each sales transaction. In addition, the agency should have some support services such as legal and technical advisory houses. These will typically provide specialized services to the task forces, facilitating their work while guaranteeing continuity of the agency’s procedures.

The dual or the contradicted authorities between the steering (privatization body) and the executive body has a bad reflection in the performance of the privatization body, and in many cases it resulted in delaying the execution of the privatization program as a whole.

The case of Hungary is a suitable example for the affection of the duality in executing the privatization program.\(^{322}\) Hungary privatization program, while overall quite successful, has suffered from the creation of an institutional twin structure. Initially the task of privatization was delegated to the State Property Agency (SPA) directly under the Minister of Privatization. After elections in 1992, however, the new government in addition created the Hungarian State Holding Company HSHC with the mandate to take control over strategic enterprises in which the government intended to retain at least some ownership. The new government transferred many large SOEs from the SPA to HSHC. Not surprisingly, the existence of two privatization agencies created political tensions, overlapping authority, and, consequently, confusion over the

\(^{322}\) - Anderson and others., supra 2 p. 178.
effective responsibility for privatization in Hungary. By late 1994, the decision has been taken to group the two bodies under the supervision of a specially appointed commissioner, motivated in large part by the desire to streamline the process for investors. However, this process proved politically difficult, and Hungary’s privatization program came to a virtual halt until mid-1995.323

After mentioning the Hungarian experience, it is important to say that clear separation of the responsibilities between the political steering committee and the executive agency is fundamental in the success of privatization program. The segregation of the roles of the steering and the technical bodies is a necessary precondition in that it separates decision-making on particular issues that are primarily political from the task of “selling”. Typically, the clearer the distinction between the two levels, the more likely that the executive or technical committee is equipped to handle transactions in neutral way.

Peru is a good example of countries which presented a good level of independence of privatization bodies. Peru’s privatization agency COPRI represents an excellent example of the ideal relationship between the government and the privatization agency. The COPRI is very independent and operates outside the political environment. This freedom was certainly a key factor in speeding up the process and rendering fast decisions. COPRI’s board, which consists of five key ministers, sets policies and objectives. Under it, the Executive Directorate (ED) has a relatively small staff of only 14 employees who coordinate the transaction

323 - In Poland, privatization has been a highly politicized process since its beginning. The impact of this has been compounded by the frequent elections. There have been five ministers since the program formally got underway. This has resulted in frequent changes in policy direction, privatization priorities and strategies as well as of the teams in place. Further, the Polish can require authorization from several levels of government and ministers as well as approval of managers and workers. For foreign investors, the complexity of understanding the role of various players, discontinuity in procedures and the difficulty of establishing on-going relationships have been major impediments to investing in Poland in the context of privatization. (See Anderson, Robert E., supra note 2 p. 185).
work which is effectively conducted by the special committees called CEPRIs. Each CEPRI has three to four top executives, usually from the private sector, with one committee for each SOE to be privatized.324

Based on this structure, Peru managed to develop one of the most effective privatization programs in the world. Privatization has, to a long extent, been unaffected by short term political concerns. Dynamic and highly motivated staffs combined with the experience of the senior managers in the CEPRIs have resulted in a very smooth process, and virtually all investors involved praise the agency for its efficiency, fairness, and technical skills. The result has been an intense competition for most of the enterprises for sale, translating into sales prices often beyond the most optimistic expectations of COPRI itself.325

Ghana and Mozambique, for example, created a similar institutional framework without being a subject to great political interference. Both privatization agencies, Ghana’s DIC as well as Mozambique’s UTRE, were established as similarly independent agencies in carrying out privatization transactions. Legally, both have the authority to conduct sell-off, and are quite capable of concluding privatizations in a reasonably efficient manner despite some investor criticisms that they seem to suffer from a lack of sufficient technical and financial skills. In practice, however, political intervention is not unusual that individual ministers or even the heads of the state themselves intervene by overturning decisions by the privatization agencies.326

In Argentina, SOEs were primarily entrusted to the Ministry of Economy with only some failing under the responsibility of the ministry of defence. Mexico’s UDP was established directly under the control of

324 - Francisco Anuatti-Neto and others supra 1 p.221.
325 - Id p.225.
the Ministry of Finance. Both arrangements appear to lend themselves to substantial political interference. In fact, however, this does not occur, and both agencies managed to operate very efficiently. The Mexican government was well aware of the dangers of politics and bureaucracy in privatization, and, driven by the desire for an efficient administrative solution, it granted the agency broad powers and autonomy. In Argentina, the success of the privatization is attributed in large part to the great will of the president in harnessing privatization to support his economic reforming program. His commitment and drive actually overcame some of the short-comings of the institutional framework.327

From the above experiences; one may think that the only measurement of the good performance of the privatization agencies is the independency of the privatization bodies. But, Peru’s experience clearly appears that independence of the privatization bodies is not the only measurement; the real measurement is member’s capability to resist political interference.

We have mentioned that the instability of the privatization body by creating additional bodies with contradicted authority (like in Hungary), or by frequent change of the executive privatization body (like in Poland).

It is clear that the Sudanese government has not benefited from international experience in guaranteeing reasonable stability in the structure of the privatization bodies (steering and executive committees). As we mentioned above, the instability and frequent changes in the structure of the privatization bodies make foreign and local investors hesitate to involve in the privatization program in a country. The Sudanese government committed the same bad practise of the Polish

327 - Francisco Anuatti-Neto and others, supra 1 p.230.
government. In Poland, seven privatization ministers were appointed in a period of five years.³²⁸

Box no.9 below shows the number of frequent changes in the structure of the steering (HCDPE) and executive committees (TCDPE) of the privatization in Sudan.

Table No. (9): Changes in the structure of the Privatization Bodies in Sudan (continued in the next page).

<table>
<thead>
<tr>
<th>Committee</th>
<th>President</th>
<th>Course</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>4- Dr. Mohammad Khair Elzobier</td>
<td>2001.</td>
</tr>
<tr>
<td></td>
<td>6- Abd-Elrahman Noor Eldeen.</td>
<td>2006 ……</td>
</tr>
</tbody>
</table>

Illustrated by the researcher from annual reports of HCDPE

Despite that s.3 of the Disposition of Public Enterprises Act 1990 clearly determines the steering committee (HCDPE) to exercise the mission of signing final contracts of privatization; HCDPE, TCDPE and the Vice-Governor of the central bank have interchangeably signed the final contracts. The dual authority which affected the execution of the

³²⁸ - See the foot note no. 14.
privatization program in Hungary (mentioned above), has similarly been practised in Sudan. Tableo No.10 appears such mess.

**Box no. (10): Mess in Signing the Final privatization Contracts in Sudan (Continued in the next page).**

<table>
<thead>
<tr>
<th>Privatization Contract</th>
<th>Privatization Method</th>
<th>Signature</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Real Estate Bank</td>
<td>Tender</td>
<td>Minister of Finance and National Economy (HCDPE)</td>
<td>2002</td>
</tr>
<tr>
<td>Elnilein Industrial Development Bank</td>
<td>Tender</td>
<td>Vice-Governor of the Bank of Sudan</td>
<td>2006</td>
</tr>
<tr>
<td>Atbara Cement Factory</td>
<td>Negotiated Sale</td>
<td>Minister of Finance and National Economy (HCDPE)</td>
<td>2002</td>
</tr>
<tr>
<td>Blue Nile Co. for Backing and the Afro-Asian Co. for Development</td>
<td>Negotiated Sale</td>
<td>Technical Committee for Disposition of Public Enterprises</td>
<td>2002</td>
</tr>
<tr>
<td>Fine Spinning Factory-Khartoum North</td>
<td>Tender</td>
<td>Technical Committee for Disposition of Public Enterprises</td>
<td>2005</td>
</tr>
<tr>
<td>El-Khartoum Bank</td>
<td>Tender</td>
<td>Technical Committee for Disposition of Public Enterprises</td>
<td>2002</td>
</tr>
<tr>
<td>Friendship Palace Hotel</td>
<td>Tender</td>
<td>Governor of the Bank of Sudan</td>
<td>1992</td>
</tr>
<tr>
<td>White Nile Tannery</td>
<td>Tender</td>
<td>Minister of Finance and National Economy</td>
<td>-</td>
</tr>
<tr>
<td>The Grand Hotel</td>
<td>Lease</td>
<td>higher Committee for Disposition of Public Enterprises</td>
<td>-</td>
</tr>
</tbody>
</table>
With regard to the levels of independence of privatization bodies, the privatization body in Sudan is a governmental body which functions under the supervision of the Ministry of Finance. According to the privatization law, the president of HCDPE is the Minister of Finance and National Economy, and the contracts of the privatization are signed by him. While the HCDPE is steering committee of the privatization in Sudan; the executive body of the privatization in Sudan is TCDPE which is responsible for preparation of targeted SOEs by rehabilitating them, terminating the service of their employees, winding up some of them if the situation so requires, make the required advertisement, and the like.\(^{329}\)

To compare the Sudanese case with the international experience; the following should be noted:

According to the Disposition of Public Enterprises Act 1990, TCDPE is the executive body of the privatization operations in Sudan. It is really, the entity that practically applies privatization by selling out most of the Sudanese SOEs. There are clouds of doubts about the independency of such committee, at least, at the beginnings of the execution of the Sudanese privatization program at the early ninetieths of the past century. In this period the country was in a very bad economic situation, a thing which compelled the government to intervene in the missions of TCDPE so as to foster the divestiture of SOEs. In our humble opinion, the governmental intervention strongly affected the evaluation of SOEs (see chapter 3). The ideological stream of the regime at the time of

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\(^{329}\) - See s.6 of the Disposition of Public Enterprise Act 1990.
launching the privatization operations in Sudan also affected the role of the TCDPE in the selection of buyers (see Table No.8).

TCDPE has not created any special committees or task forces for each particular SOE so as to benefit from their detailed proposal on each sales transaction. Therefore, TCDPE had been overburdened with time-consuming details of individual transactions. Therefore, TCDPE is now required to create these committees or other bodies to avoid time consumption.

TCDPE, in all the privatization operations, depended on its legal consultant (appointed as a representative of the Attorney General Chamber). Frankly speaking, the nature and size of some privatization operations are beyond the capacity of the legal consultant of TCDPE. Therefore, TCDPE should pursue efficient legal advisory body. This will provide specialized legal services on all branches of law, facilitate the legal work, and guarantee precise privatization contracts.330

(i)Fundamental Principles for the Institutional Framework:

According to international legal experts of privatization;331 strict application of principles of guarantee of the rule of law and delegation of powers strongly emanate the institutional framework of privatization.

330 - See the disputes in the privatizations operation of the Grand Hotel and Atbara Cement Factory (Chapter 3 of this dissertation).
Guarantee of the rule of the law in a country represents the first step for investors to invest in the privatised SOEs, a thing which will inevitably reflect in the success of the privatization program as a whole. Assurance of the principle of the rule of the law in a country provides many advantages for the privatization program; it provides many guarantees for investors, especially the foreigners. In addition, the delegations of powers represent the corner stone in smoothing privatization operations. Without reasonable delegation of powers, transactions of privatization will become very sophisticated and difficult, the matter that may result in reluctance of investors from participating in the privatization.

(a) Guarantee of the Rule of the Law:

The rule of the law implies certain legal concepts. For example: *Publicity of the rule of the law; which enables all parties to have access to the laws and regulations that affect their activities after privatization. *clarity and certainty of laws and regulations allow parties to understand the specific meaning of the law, and to understand which individual laws apply to their particular situation. *Predictability in the application of the rule of the law reduces the risks linked to changing interpretation, implementation, and enforcements of laws. In addition, it constitute strong guarantee for buyers that their properties will never be renationalized. *Systematic stability provides assurance that the government will not unilaterally and unfavourably change the legal and regulatory conditions that underlie investment.

Guarantee of the rule of the law also implies limitations in the power of the government to interfere in private economic activity. This means that the state redefines its role in the economy as well as its relationship with the private sector.
About the guarantee of the rule of the law in Sudan; it is better to declare our opinion frankly. The recent government in Sudan has functioned in a dictatorial environment where human rights are violated, political interference in the privatization operations usually occurs, corruption, and favouritism for the sake of the supporters of the regime are the norms. This makes institutional framework incredible and for most investors because it increases investment risks.

Our humble view is that in Sudan, what appears in the statutes does not necessarily represent the reality. It is true that all Sudanese statues are, theoretically, just and equitable, but the strict application of these statutes remains the basic challenge of achieving the rule of the law.

However, the settings in Sudan motivate us to mention the Chaudhri’s statement:

"The law at any given time and place can be best understood, not on the basis of what is written down, or what “the president” and other dignitaries of the regime say in their political pronouncements, but rather on what are the prevailing determinants of police and administrative behaviour in any particular locality." 332

(b) Delegation of Powers:

In order to be practical and effective; privatization legislation should grant wide powers to the privatization commission or agency, clearly define the responsibilities of the commission/agency and its members, addresses conflicts of interest, streamline the decision making process in order to avoid bureaucracy, and establish controls to check abuses of power.

Perhaps one of the acute problems with existing privatization structures in the least developing countries is that the executive committees of privatization have very little power and discretion because the real decision of what and to whom is exercised by the politicians.

Another problem is that, in most cases, the privatization legislation does not adequately address the issue of conflicts of interest.\footnote{Id, p. 218.}

**Conclusion:**

This chapter is basically devoted to the institutional framework of the privatization; it determines the roles, responsibilities, and authorities of all actors in privatization operations. In some countries parliaments gave themselves prerogatives to participate, even, in the execution step, a thing which leads to direct tensions with the governments. In other countries parliaments evidenced very important role in passing flexible privatization legislations without intervention in the executive steps. In other words, if the role of the parliament exceeds passing of proper privatization law to reach the executive details; this will create very sophisticated steps, a thing which implies the negative role of the parliament.

For the sake of the execution of successful privatization program, a country should adopt institutionalized program. For investors, the knowledge that certain agency or committee has a clear mandate and authority will increase their trust in the overall privatization process. The steering committee usually is an extension of the political apparatus with limited autonomy and authority. The executive agency or committee is the entity that effectively implements privatization by actually selling the SOEs. It should be established as independent agency, reporting only to the steering committee. Typically, this agency develops the guidelines for the sales, proposes which enterprises are to be sold by which legal methods, and finally controls the complete sales process until singings privatization contracts.

For the sake of executing success privatization program, a distinction should be made between the responsibilities of the two
agencies (steering and executive) to avoid the mess in exercising their
authorities. Also, the stability of the structure and personnel of the two
governmental bodies will provide the trust of the investors. Unfortunately, the Sudanese government has not benefited from the
international experience in both trends.

The important element in succeeding the privatization program is
the depoliticizing of the institutional framework of the privatization. The
obvious cause of the depoliticizing of the institutional framework is the
usual struggle between the different interested groups in the country,
therefore, liberalizing the executive bodies of the privatization from any
political pressure will lead to achieve clear privatization program without
favouritism or any other sort of corruption.

Application of some legal principles strongly assists the functions
of the institutional framework of privatization. For example, delegation of
powers assists the privatization processes at the stage of the execution of
the program or concluding the privatization contracts. Other principles,
like guarantee of the role of the law constitute important grounds for the
success of the program at the stage of prior preparation before the
implementation, and, even, in the execution stage. Therefore, both
principles are integral parts in achieving the success of the program as a
whole.
Chapter 9

Privatization of Infrastructure

The preceding chapters cover privatization operations in general without differentiation between sectors and state owned enterprises (SOEs). But in some sectors, some approaches and techniques that have to be adopted, especially in the infrastructure sectors such as power, gas, water, telecommunications, and transport. In most countries worldwide infrastructure sectors are, or were, usually thought to exhibit monopoly characteristics; that is, one operator should be able to provide these services more efficiently than could several operators acting separately.

The feasibility of the monopolistic sector has been losing its ground since the early 1980s because of many factors. The most important factor, however, is that the technological progress and the advances in economic research reduced sunk costs and, consequently, the economic causes for remaining the monopolies of the sectors. Another factor appears from that the successful demonopolization and privatization in the United Kingdom and other countries emanated this direction or, at least, the thinking of demonopolizing and privatizing these sectors (See the introductory chapter).

The movement towards demonopolization and privatization has not been uniform. One set of countries; the industrial countries (New Zealand, United Kingdom) and better-off developing countries (Argentina, Chile, Malaysia, and Mexico) privatized major infrastructure sectors relatively early on as a part of broader privatization program. In
another group; most transitional countries and poorer developing countries are still now hesitating in privatizing infrastructure sectors.\footnote{This is not a common rule that in Cote d’Ivoire that the water supplies is a private sector service. Private management of Cote d’Ivoire’s water supply has improved efficiency. The experience also reveals the limitation of management contracts and leases as long-run substitutes for private ownership and good regularity policies: see “Sunita Kikeri, John Nellis and Mary Shirley, \textit{Privatization, the Lessons of Experience} p.51, 1\textsuperscript{st} ed. 1992, World Bank Publications, Washington, DC.”}

Transferring infrastructure sectors to private investors has often been accompanied with prior restructurings. Most of restructurings (mentioned in privatization texts) are of economic nature. The most legal-relate restructure is unbundling the sector; it means dividing the infrastructure sector into number of segments so as to undergo privatization on one or more of the sector’s segments. The privatized segment may carry new legal entity, or may remain belonging to its mother sector.

This chapter, in the beginning, overviews the history of the private sector contribution in some infrastructure sectors, restructuring of sectors (namely unbundling) to be privatized will annex, and infrastructure privatization methods will be discussed at the end.

\textbf{(i) Historical Background of Infrastructure:}

As a first impression, one may think that infrastructure sectors services were initially stared as public sector activities. This is not always the reality that infrastructures in many countries were initially started as private activities. Thereafter, according to different circumstances, they were transformed into public sector activities.\footnote{It is important to bear in mind that many large infrastructure services across the world have not been always public. In few countries, infrastructure companies have always been and remain today on private hands. This is the case in the United States, which largely escaped the nationalization waves of the past century, with a few exceptions such as water supply and sanitation services (which are often run directly by municipal enterprises), some electric utilities, and some railways taken by the government following their bankruptcy, most infrastructure companies have always been private. See Foreman-Peck and Millward, \textit{Public and Private Ownership of British Industry}, 1820-1990. pp. 335-341, 1994 ed. Oxford England: Clarendon Press.} The following overview shows these circumstances.
(1) Water:
In Paris, the brothers Perrier distributed waters through wooden pipes in what was the first modern water system (1782). Thereafter, concession technique became prevalent in France in the nineteenth century, which saw the establishment of two large private water companies which still dominate the French water service; Compagnie Generale des Eaux, founded in 1853, and Lyonnaise de Eaux, founded in 1880. The fact that France, a country that has championed the cause of public services and public enterprises, is among the few countries in which this sector has remained largely private is indeed notable. Private water concessions were also granted in England and in many other European cities, such as Berlin (1856) and Barcelona (1867). 336

“In the United States of America, in 1800, private firms owned fifteen of the sixteen waterworks that has thus far been constructed to the few and small cities of predominantly ruler Unite States”. 337

Private provision of water services was not limited to industrial countries. In Morocco, for example, the water distribution system was developed on a private basis starting around 1914. But, after independence in 1956 concession with private (French) operators were not renewed and municipal utilities were set to take over the systems. A private company still provides more than one-third of Casablanca’s bulk water supply, however, based on a 50-year concession granted in 1994 and is negotiating for a concession to distribute water and power in Casablanca. 338 In Cote d’Ivoire, the water sector has been and remains private on a lease or affermage. 339

338 - Guislain, supra 3 p. 206.
339 - In 1959, the third largest French water utility (SAUR) created an Ivorian subsidiary, the Cote d’Ivoire Water Distribution Company (SODECI). In 1960 SODECI won its first competitive to operate and maintain Abidjan’s water supply system. Under a mix of affermage (lease) and management and
Argentina, Belgium, Bolivia, Chile, Guatemala, Italy, Macao, the United Kingdom, and the United States are among the countries that have private water distribution companies at present, some of them privatized recently. Malaysia and Mexico are among those with private water treatment and sewerage stations.\textsuperscript{340}

With regard to the economic situation in the period immediately following the beginning of the colonization in 1898, and through the national governance, one may think that water supplies in Sudan began as public activity. In contrast, water supplies in Sudan began as a private activity operated by the English company “Sudan Light and Power Company”.

By building some British neighbourhoods east of General Governor Palace in Khartoum, the British authorities found that it is important to provide clean water supplies in accordance with the measurement of the International Health Organization. Therefore, in 1900, the authorities drilled the first well with water-pump to supply the

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\textsuperscript{340} See Sunita Kikeri and Others in the supra footnote 6, p. 54.
Palace of the General Governor and the British neighbourhoods with clean water. After the success of the first experience, the authorities thought that it is suitable to widen water service to include the entire Khartoum. Therefore, Sudan Light & Power Company built the first Nile water sanitation station in Burri in 1924-1925 with design-capacity of 16,000 cubic meters per-day. In the years 1927-1936, Biet-Elmaal Water Station was concluded with design-capacity of 20,000 cubic meters per-day to supply Omdurman neighbourhoods. In 1954, Khartoum-North sanitation station was built with design-capacity of 12,000 cubic meters per-day to supply the neighbourhoods of the city. After the independence, the Sudanese government purchased all the shares of the English company (Sudan Light and Power Company) and, in 1957, enacted a law determining the Central Administration of Electricity and Water (public sector) to provide electricity and water services in Khartoum and some other regional cities like Wad-Madani and Sinnar. Water and electricity services in the other cities were undertook by the Ministry of Public Works. The most important development in water supply happened in the period 1964-1974 by completing the four steps of Elmugran Water Station to satisfy the whole needs of Khartoum and Omdurman cities, with design-capacity of 72,000 cubic meters per-day. During the period 1925-1954, water supplies in Khartoum-North and Omdurman was known as *Elnaggata* (*i.e.* dripping system), because of the weak stream of water supplies in this period. But such system had gradually been changed to reach the recent system of water supply in 1954.341

**(2) Energy:**

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341 Source of all information about the historical developments of water services in Sudan is booklet from Khartoum Water Corporation, titled “Life Journey” (translated by the researcher).
Gas utilities were established in the first half of the nineteenth century, primarily for lighting and heating purposes. London was the first city to install gas street lighting in 1813. The Imperial Continental Gas Association, established in 1824 in London, soon spread to the continent. In 1818 Brussels gave a concession to a private company to build the first public gas lighting system on the continent. Other cities soon followed. In addition to street lighting, gas became a major source of industrial and household energy. The strategic importance of gas industry started to decline with the advent of the power industry, only to regain some importance in the 1970s and afterward with the introduction of natural gas.342

The invention of the generator by Zenobe Gramme in 1869 and of the light bulb by Thomas Edison in 1879, as well as the introduction of alternating current by Westinghouse in the late 1880s, all contributed to the development of franchises for street lighting, electric street cars, and power distribution in the United States and Europe. In Belgium, Russia, and other countries, private tramway companies, which converted from horse-drawn or steam carriages to electric power in 1880s, used existing networks to bid for lighting and later power distribution concessions, hence becoming the pioneers of the electric power industry. Private gas distribution companies in Belgium, France, and Portugal were also quick to enter this new business, because it was a direct threat to their established franchises.343

In the early nineteenth and early twentieth centuries, most electricity companies started out private. They have to a large extent remained private in Belgium, the United States, and some other countries. Colombia (in several stages beginning in the 1930s), France (1945),

342 - Jacobson and Tarr, supra 4 p. 16.
343 - Id p.21.
Indonesia (1953) and Jamaica (1971), however, nationalized their power companies, while India and Philippines opted to nationalize some, but not all, private power companies. In Argentina, Chile, and the United Kingdom events have come full circle, their power companies were initially private, then nationalized, and finally privatized.344

Nationalizations typically either represented a response to excessive fragmentation of the electric power industry, which prevented integration of networks and achievement of technically feasible economies of scale, or resulted from a failure in regulation or from ideological or nationalistic trends. The recent privatization came about for a number of reasons, headed by the huge investment in this sector, estimates at over $100 billion a year for the developing countries alone, requirement that exhausted public treasuries cannot afford to finance.345

As well as the water services, electricity industry in Sudan began in 1908 to supply the Palace of the General Governor, some neighbourhoods eastern the palace, and some governmental units by a private company; that is Sudan Light and Power Company which was English company. As we have previously mentioned, the Sudanese government purchased all shares of this company in 1957 (See footnote no 8).

The intervention of the public sector in the electricity industry in Sudan happened gradually by building Sinnar Dam in 1926 by the government. Sinnar Dam was basically built to supply the main channel of the Jazeera Agricultural Scheme. Two years after, the dam began to generate limited electricity power. The most important intervention of the public sector in the electricity industry was by the establishment of AL-Rusairis Dam in the era of the President Ismiel Al-Azhari in the second

344 - Id p.25.
democracy (1966). In the same year, the Act of the Central Electricity and Water Corporation was enacted.

(3) Transport:

In the United Kingdom, private companies built and operated the railways under charters of the parliament. Horse traction was initially used until the Stockton and Darlington railway, inaugurated in 1825, introduced steam Locomotives; it was also the first to carry freight as well as passengers and to operate as a common carrier railway open to all shippers. The railways were nationalized in 1914 for war-relate reasons, privatized in 1921, renationalized in 1948 under British Rail. The US railways were developed in the nineteenth century by private industrialist, and they are mostly still private. A few were nationalized as a result of bankruptcy of private operators; of those, Conrail has since been privatized again, and Amtrak is still state-owned. Many concessions in the Austro-Hungarian Empire were granted to the private sector from 1836 onward, but the sector was nationalized in 1891 by the Hungarian government and in 1891 by the Austrian government.346

In France, railway lines were also developed and operated by private interests in the nineteenth and early twentieth centuries, but were based on a national system established by the state as early as 1842. The basic infrastructure of the main lines was planned and financed by the state, whereas the superstructure (including ballast, tracks, signalling system, and stations was provided and financed by the private companies operating under concession scheme. The whole system was nationalized in 1937, when the Societe Nationale des Fer Francais was established. In

346 - Jacobson and Tarr, supra 4 p. 31.
Belgium, private investors were the dominant players in the early stages of railroad development, but the state gradually took over.\textsuperscript{347}

In Argentina, the railways were by and large built and financed by the British and French companies starting in 1854, when the first concession was granted; they were nationalized against compensation by the Peronist regime in 1946-47 and reprivatized beginning 1991.\textsuperscript{348}

A number of African railways were privately developed and operated, including the Benguela railways in Angola, completed in 1928 based on a 99-years concession granted in 1902 by the Portuguese government.\textsuperscript{349}

In Sudan, one of the most important transportation infrastructures is the railways. Sudan is a very wide extended country; its area equalizes a continent area. Until 1897, there are no paved or, even, gravel roads (Which were widely spread around the world at that era). All roads in Sudan before 1897, if existed, were earth roads or dirty tracks.

The Sudanese railway was firstly established in the last three decades of the nineteenth century (in 1873) in the era of the Turkish-Egyptian governance by establishing Halfa-Karma line, but the line stopped at Saras (54 km. South of Halfa) because of the deficit of the budget of the line. The beginnings of Sudanese railways continued again by the ends of the nineteenth century (in 1897) to supply the British army to re-colonize Sudan from the hands of Al-Mahadia Revolution which liberalized Sudan from the Turkish-Egyptian colonization in 1885. Most of the Sudanese railways were completed by 1930. However, after the re-colonization in 1898, railways strongly imposed itself in the Sudanese life

\textsuperscript{347} Guislain, supra 3 pp. 207-8.
\textsuperscript{349} Gerald Bisong Tanyi, Designing Privatization Strategies in Africa: Law, Economics and Practice p. 161, 1\textsuperscript{st} ed. 2004, Praeger Publishers, USA.
because it remained, and for a long period of time, the exclusive transporter in the country whether in passengers or cargo activities.

In the era of May regime (1969-1985) in, politics involved and destroyed the good role of the Sudan Railways Corporation in the Sudanese life economically and socially. After the famous dispute between the railways labourers and May regime (1981), President Numairi decided to weaken such sector. President Numairi separated the Ports Corporation, River Transport Corporation, and Hotels Administration with all their assets from their mother corporation (Railways Corporation). It is important to note that the whole assets of the separated corporations were initially built and financed by the Railways Corporation. The second step to weaken the Railways Corporation was by reducing the subsidy of the state, and the transfer the location of the head quarter of the administration from Atbara city to Khartoum, despite the fact that all the important departments like spare-parts stores, and repair centres were located in Atbara.

The recent Sudan railway is one of the longest railways in Africa. It operates a 4578 Km. The railway’s main route extends from Port Sudan via Atbara to Khartoum with an alternate line between Haya and Sinnar via Kassala. There are branch lines north to Karima and Wadi Halfa. The latest extensions include new lines for transportation of Sudanese crude oil constructed between Al-Mujlad and Abujabra (53 km.), and between the refinery in Abu-Khiraiz and Al-Obied station (10 km.), and Marawi Dam branch line from Al-Ban station, all completed between the years 1996 and 2002.\(^{350}\)

\(^{350}\) - Source of all information about the history of the railways in Sudan is a booklet, titled “Sudan Railways Corporation: Facts and Figures 2007”. Published by Sudan Railways Corporation.
Despite the governmental nature of building and operating the railways in Sudan, some features of privatization have appeared in the Sudanese railways (mentioned in another part of this chapter).

(4) Telecommunications:

In USA, the first telegram was sent in 1844 from Baltimore, Maryland, to Washington DC, by Samuel Morse. In England, private companies established telegraph links beginning in the mid-nineteenth century and telephone links toward the end of the nineteenth century. The period 1849-50 saw the birth of at least half a dozen private companies whose purpose was to link different countries by telegraph cable laid under the English Channel, between England and Ireland.\(^{351}\)

Most international telegraph concessions awarded in the second half of the nineteenth century were for an unlimited duration, but included fixed-term exclusivity rights. Whereas development of international network was undertaken mainly by the private sector, in many countries domestic telegraph links were run by a state entity from the start.\(^{352}\)

The telephone was patented by Alexander Graham Bell in March 1876. By 1887, only a decade after its commercial introduction, this new communications device was already in use in many countries; there were over 150,000 phones in the United States, 26000 in the United Kingdom, 9000 in France, and 700 in Russia, among others. While many communications services were launched by private companies, others were provided by the public sector (as in Japan, for example). Private telecommunications companies were often subsequently nationalized, as well as the case in China and France, and in some cases finally


\(^{352}\) - Id p. 12.
reprivatized, as in Argentina, Chile, Jamaica, Mexico, and the United Kingdom. Some countries, however, including the United States and Philippine, have never nationalized their telecommunications sector.353

Sudan has recognized telecommunications since the mid of the nineteenth century. The first telegraph line linked Jeddah with Sawakin was established in 1859 during the Turkish Governance. Thereafter, in 1910 after the invention of the telephone, and in the era of the British-Egyptian rule, the law on Postal and Telecommunications was issued. In the same year the Postal and Telegraph and Telephone Utility was established with monopoly for such activities in Sudan.

In the era of the liberalization of economy at the beginning of the nineteenth of the past century (Salvation era), the decision of HCDPE was issued in December 14th 1990 to transform the Telecommunications Corporation into public company (see Chapter 3). Under the light of HCDPE’s decision, the privatization operation of the corporation began depending on gradual program.354 The Republican Decision for the privatization of the corporation, in Paragraph (a) reads:

“The Public Telecommunications Corporation shall be acquired by the Sudanese Telecommunications Company (Sudatel) in a date not exceeding December 1995.”

Nowadays, the new company is presenting very advanced information and telecommunication services according to international standards.

(ii) **Unbundling Sector as the First Step Towards Privatization:**

According to the typical big size of the infrastructure sectors, the international experience indicates that there is a fundamental step prior to privatizing the infrastructure sector; this is unbundling the infrastructure

354 - See chapter 3 of this dissertation.
sector. Unbundling the sectors deduces that infrastructure sector should be divided into separate units to simplify its privatization. One reason for unbundling the infrastructure sector is to enable the private sector, which is poor in most of developing and least-developing countries, to contribute in privatizing such sectors. Another reason appears from that it eases the control of regulators over the privatized units and facilitates their mission in observing the competition of the new operators for the benefit of the citizens (yardstick competition).

For example, unbundling railways sector may lead to separation in responsibilities of railway lines (the infrastructural segment of the sector), and transport services. Therefore, in Sudan, the Conference for Rescue the Sudanese Railways (1991), under the sponsorship of the Vice-President of the Republic, advised that:

(*) The infrastructure segments (railway lines, telecommunications, and traffic signs) should be separated from the operation segments.

(*) The state shall adopt building and developing the infrastructure of the Sudanese railways (lines, telecommunications, and traffic signs).355

(1) Unbundling the Water Sector:

Water sector is probably the most monopolistic of all infrastructure sectors. The water sector activities can be divided into three segments: production, transport, and distribution, and the commercial businesses (selling and collection of tariff). Unbundling water sector may be carried out horizontally by unbundling the sector depending on geographical basis by fracturing the sector into geographic areas; thereafter, all the segments of water service in one or more of these areas could be transferred to a private body. Also, unbundling can take a horizontal

355- In the following parts of this chapter, we will note that all the privatization the Sudanese railways haven’t included infrastructure segment such like: steel ways, the internal telecommunications, traffic signs and the like.
shape by separating the sector’s segments (production, transportation, and commercial segments); thereafter, one or more of these segments could be transferred to a private body (company or otherwise entity).\textsuperscript{356} England and Argentina adopted the first type of unbundling water sector (horizontally on a geographic basis):

\begin{quote}
“In the United Kingdom, water supply before 1989 was accomplished by the ten water companies of England and Wales. These companies were called statutory water companies. The 1989 privatization was preceded by far-reaching restructuring that gave rise to independent, regional companies for water and sanitation. Water companies were allowed to increase their rates by more than that rate of inflation, so that they could make the huge investment required to upgrade capacity and bring water and sanitation quality up to the standards set by the European Commission directives on drinking water quality, bathing beaches, and urban waste water treatment. Water prices therefore rose sharply in the first five years following privatization” \textsuperscript{357}
\end{quote}

\begin{quote}
“In 1993, after an international competitive bidding process, Argentine authorities privatized the Buenos Aires water supply company. Five international consortia, each headed by a strong European water operator, were prequalified. Two of them joined forces, and four bids were eventually received. The consortium led by Lyonnaise de Eaux, having bid a price 27 percent below the tariff charged by the former SOE, was awarded the contract. All water supply and sanitation assets of Greater Buenos Aires were winning consortium; Aguas Argentinas, the concessionaire company formed by the winning consortium; Aguas Argentinas holds a concession for thirty years, after which the sector, including the new investments made by the private operator, would revert to the owner, the Argentine government”. \textsuperscript{358}
\end{quote}

In Sudan, despite that HCDPE has not listed the water sector for privatization; Khartoum Water Corporation Act of 2002, which repealed the old law of 1995; in s (5), allowed the Corporation to operate its services depending on real costs. Moreover, the same section gives the Corporation new step towards privatization by providing that the new

\textsuperscript{357} - Id. p. 192.
technological developments and rehabilitation of the old net shall be considered in estimating the tariff. The above section implies indirect direction towards privatization in that:

- The first step towards implementing privatization program is the liberalization of prices so as to make the sector (to be privatized) functions on real costs.
- Operating on real costs constitutes the first defence line on the face of the public opposition against privatization.

Another pointer for the tendency for privatizing water sector in Sudan is shown by the big number of licenses which were granted to the private sector to produce drinking water (bottled water) which is locally known as (health water).

The only experience of privatization of water sector in Sudan has been exercised in one segment in Khartoum Water Corporation (the commercial segment). Despite the fact that the collection of water tariff has, for a long period of time, been practised by certain department in the Corporation, some contracts were concluded with some private companies to exercise such activity. Although we have not been permitted to see samples of these contracts, the legal adviser of the Corporation gave us some information about the nature and terms of these contracts. Followings are some features:359

- All contracts are limited by geographic scopes.
- All private companies are obliged (by the contract) to treat equally with all consumer without any discrimination.

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• All the private companies are obliged to collect the arrears of tariff, although these arrears were payable before concluding the contracts with these companies.

• All the collected tariffs and arrears shall be deposited in a joint account in a bank. The Corporation has the right to disburse from such account to limit of %50 without waiting the end of the month (the time of account settlement between the private Company and the Corporation).

• The consideration (for the company) will be %10 from the whole collected amount.

• The private company shall be delegated to exercise some Corporation’s authorities; for example, to disconnect the supply from any default consumer.

• The private company shall present financial-guarantee from approved bank works in the Republic of Sudan.

• Any company shall present its work-plan before concluding the contract.

• The Corporation may, without causation, terminate the contract at any time.

• The Corporation has the right to terminate the contract in the event of Company’s failure to collect %50 from the monthly agreed-upon amount of collection.

• The company shall first (before signing the contract) deposit to the Corporation %10 from the foresee amount of 6 months collection.

• The Corporation may terminate the contract in case of any abuse of authority committed by any of the personnel of the Company.
• Disputes between the Corporation and the Company should be solved amicably.

The personnel of the Khartoum Water Corporation claim that one of objectives of involving the private sector is to provide high levels of tariff collection to upgrade the capacity and quality to reach the international standards of drinking water. It seems that the main objective of involving the private sector has not been achieved.  

(2) Unbundling Energy Sector:

To instil competition, mobilize private capital, and take advantage of recent technological advances, many countries have decided to unbundle their power sectors. Recent international experience demonstrated that it is possible to introduce privatization in the generation segment. In the other segments, distribution in particular, the case for the natural monopoly may appear stronger, though unbundling can be introduced by separating the commercial (selling) function from the wire or transport business. 

In the United Kingdom, breaking up generation into only two large private companies controlling nearly 90 percent of generating capacity (the next largest producer being British energy, the nuclear producer privatized in 1996) has not introduced sufficient competition in the market. Because he considered prices to be excessively high, the director general of electricity supply has been trying to boost competition in

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360 - In a meeting with Mr. Khalid Ali Khalid (Eng.), Executive Manager of the Khartoum Water Corporation, he said: "The current price of water supplies in Khartoum, and in Sudan as a whole, doesn’t efficiently assist the Corporation to upgrade water services to cope with the international measurements. In Sudan, the real costs of water services are not applied equally between all citizens. Water tariff is divided into three classes (regardless the real consuming) as follow: 1- SG.45 for the first-class citizen. 2- SG.25 for the second-class citizen. 3- SG.15 for the third-class citizen. According to this categorization, the first-class citizen subsidized the third-class citizen by SG.14 every month." 14. 8. 2008. at 11: p.m.

361 - Hunt, Lester supra 23 p. 213.
power generation in England and Wales. In his 1995 five-year review, the regulator imposed a one-time reduction of 11 percent in electricity distribution prices, while limiting future increase to 2 percentage points below the inflation rate.\textsuperscript{362}

Hungary opted to unbundle its power sector into seven nonnuclear power generation companies whose privatization was initiated at the end of 1995. A transmission company (MVM), which also operates the country’s only nuclear plant and is slated for privatization in 1997; and six distribution companies were privatized in late 1995.\textsuperscript{363}

In Sudan, some small privatization contracts in the electricity sector were concluded. All these contracts were concluded in the transmission, wire transport, and commercial “selling” activities. Despite the fact that S.1 of the new Electricity Act of 2002 permits private involvement even in electricity generation, no contract for generation has been concluded in such activity. However, followings are two samples of contracts which were concluded between the National Electricity Corporation and some private companies:

*In 2003 the National electricity Corporation concluded a contract with Sieteet Engineering Company to commence wire transport of electricity to far Khartoum-North villages, and to collect the tariff from the customers.\textsuperscript{364}

*In 2007 the National Electricity Corporation concluded a contract with Wad-Tabtoub Engineering Company to undertake wire transport, and collection the electricity tariff from the customers of Northern-Aljazeera area.\textsuperscript{365}

\begin{footnotes}
\textsuperscript{362} - Id p. 215.
\textsuperscript{363} - Id p. 218.
\textsuperscript{364} - Contracts of privatization of some activities in electricity will be mentioned verbatim in other part of this chapter.
\textsuperscript{365} - Source: Contracts presented to the researcher by the Legal Affairs Department in the National Electricity Corporation.
\end{footnotes}
(3) Unbundling the Transport Sector:

With the rail industry converted worldwide, regulations of the sector should remain simple and flexible to protect its share of transportation markets.

In privatizing railways, different approaches were presented in unbundling the sector. These approaches differ in the scope with regard to the expected privatization. For example, Argentina opted (in some regions) to privatize all segments of railways including the railways lines (the infrastructure segment). So, the government adopted wide unbundling depending on geographic basis. With regard to the limited scope of their privatization, some countries opted to start with limited vertical unbundling in the segments of the sector other than the infrastructure segment (railway lines) by granting some concessions or leases.366

In addition to unbundling the segments of railways; revising laws and other regulations affecting railways, reducing staff, and deciding how much property the state should sell and how much it should remain are of big importance in preparing railways for privatization. However, most countries achieved the objectives of stopping the industry’s drain on the state resources. Likewise the new owner companies succeeded in raising levels of productivity.367

According to economic principles, prices of railway transport services should match the costs of providing them so as to make the most

367 - Id p. 181.
efficient use of the economy’s resources. But, at the same time the private investor in railway should not be free to abuse the citizens.\textsuperscript{368}

“However, in the new environment which separating infrastructure from services, pricing principles must be put into practise by means of concrete rules within the contract. Because rail concessionaires are now able to set prices relatively freely, the concession contract should include a procedure to control the prices set by the operators.”\textsuperscript{369}

The first restructure of pricing policy of railways in Sudan came from the Conference for Rescue the Sudanese Railways 1991, under the supervision of the Vice-President of the republic. One of the most important recommendations of such conference is that the authority to setup prices should be the mission of Sudan Railway Corporation. Such authority, before the Conference, was conferred on the Ministry of Finance. We consider this step as the first step to organize using of concessions, leases, or any other sort of contracting between the Railways Corporation and private parts. In other words, such recommendation enabled the Railways Corporation to achieve some progress in the performances of its different segments and, at the same time, prevent the new transporters (concessionaires) from abusing the customers.\textsuperscript{370}

Separating infrastructure segment (railway lines) from the other services or activities is the corner stone of the success of the rare privatization operations which were occurred in this sector. The voice for separating infrastructure (the railway-line) from other segments and activities came from the Workshop of Sudan Railway 1998. The recommendations of the Workshop were approved by the decision of the Council of Ministers on 31. 12. 1998. Thereafter, the Railway

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{368}] Id p.188.
\item[\textsuperscript{369}] Id p.189.
\item[\textsuperscript{370}] Siddig Gasmallah Ali, Role of Private Sector in Increasing Efficiency of Operative Performance: Sudan Railways Corporation Case Study p.26, a Research presented as Partial Fulfillment for Membership of Sudan Administrative Sciences Academy, 2007.
\end{itemize}
\end{footnotesize}
Corporation Administration began to transform the recommendation into real plans within a transitional period (1999 – 2001). Features of theses plans include the ideal measurements of performance of the Railway Corporation during the transitional period, invitation of experienced and specialized houses to prepare the technical, economical and financial studies. The fundamental plan, and may be the corner stone of the Workshop as a whole, is to furnish considerable portion for the private sector in the Railways activities.\textsuperscript{371}

Sudan Railways Corporation succeeded to attract considerable number of private companies to invest in its activities depending on BOT system, especially BLT formula (\textit{Build, Lease, and Transfer}). Permitting the private sector enabled Sudan Railways Corporation to:

- Provide new locomotives and railway-carriages.
- Rehabilitate old locomotives and railway-carriages which were totally stopped.
- Finance infrastructural requirements necessarily for repairing the railroads.

Moreover, to attract the private sector to participate in its activities, the Corporation in 2007 signed some agreements with international companies. For example:\textsuperscript{372}

- A contract with Transtech Company of China for financing and construction of a new railway line parallel to the existing line of Port Sudan-Khartoum according to modern international specifications.
- Provision of finance by Giad Company for agricultural Machineries for construction of a new railway line parallel to

\begin{flushright}
\textsuperscript{371} - Id, p. 38-39.
\textsuperscript{372} - Source: Sudan Railways Corporation, booklet titled: (Sudan Railways Corporation: Facts and Figures 2007.).
\end{flushright}
the existing line Babanousa-Nyala phase one Babanousa-ELdaien with cost which amounts to US$120 millions.

- Provision of finance by Giad Company for the purchase of 550 freight locomotives from china. The first batch of it which constitutes 100 locomotives is expected to arrive during the first quarter of 2008.

- Because of successful agreements, The Council of Ministers approved in June 2007 the Strategic Plan for Development of Railroad Transport, which covers the period 2007-2026.

Table No.11: Contribution of Private Sector in the Sudanese Railways Activities by (BOT).

<table>
<thead>
<tr>
<th>Company.</th>
<th>Scope of contribution</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shiekho Transport company</td>
<td>Passengers and cargo: (provided 18 passengers cars, 3 locomotives)</td>
<td>1991.</td>
</tr>
<tr>
<td>Omm-Gamala Company.</td>
<td>Cargo only: (rehabilitated 3 locomotives and 70 cargo car.)</td>
<td>2004.</td>
</tr>
<tr>
<td>Dandodio Company.</td>
<td>Cargo only: (rehabilitated number of cargo cars “uncertain”)</td>
<td>2002.</td>
</tr>
<tr>
<td>Free Zones Corp.</td>
<td>Cargo: (rehabilitated 5 locomotives and 200 cargo cars)</td>
<td>2003.</td>
</tr>
<tr>
<td>Saar Company.</td>
<td>Cargo: (provided 10 locomotives and 70 cargo cars)</td>
<td>2006.</td>
</tr>
</tbody>
</table>

Source: Siddig Gasmallah Ali, supra 37, pp.32-35

(iii) Ordinary Methods of Privatizing Infrastructure:
One of the features of infrastructure privatization is the priority that needs to be given to the methods of the privatization. These methods should be selected with regard to that many of infrastructures are strategic and the total divestiture should be the last solution.

(1) *Divestiture:*

“Divestiture” and “privatization” are often wrongly used interchangeably. While divestiture involves the transfer of whole or part of ownership of existing enterprise to private party, which runs it at its own risk; privatization has wider meanings than divestiture; it includes many arrangements mentioned in chapter 3.

(2) *Concession or License:*

We have noted that in most of international texts of privatization, the terms “license” and “concession” are often used interchangeably. “Concession” often refers to contract that grants an operating license, but it also includes a range of other special features. In many countries, concession gives the private operator only limited rights over the sector assets. Concessions and licenses represent the solution where, for constitutional, legal, political, or other reasons, it is not possible to transfer ownership of strategic sector assets to private parties.

The concession (or license) entitles the holder to provide a public service under defined terms and conditions, including price. The terms of concession should define the rights and obligations of the concessionaire (or licensee) and limit the possibility of arbitrary or political interference in the day-to-day management. They should clearly specify the scope of the license (services covered, time period, and so on). However,
following are the recommendations of World Bank’s experts about the important features of a concession contract: 373

- The contract governs the relationship between the concession-granting authority and the private concessionaire. The concession-granting authority is the government, an interministerial commission, or less common and least appropriate the regulatory agency (see the institutional framework in chapter 8).
- The concession is awarded for a limited but potentially renewable period. During this period the concessionaire enjoys the exclusive right to use the assets, exploiting existing facilities, and develop new ones. The contract determines the conditions and prices at which the concessionaire provides the service and uses these facilities, which continue to be publicly owned.
- The concessionaire is responsible for all investments and for developing all new facilities; many of which are specified in the contract, under the supervision of the state or regulator. The concessionaire retains control and use rights over the new assets until they are handed over at the expiration of the contract. The contract might contain a clause specifying compensation for investment not fully authorized by the end of the concession period, and clause specifying causes and remedies for early termination of contract and stating penalties and fines for noncompliance with agreed-upon terms.
- The concessionaire is remunerated based on contractually established tariffs (with appropriate guidelines for review and

adjustment) collected directly from users. These prices are typically regulated through rate-of-return or price-cap mechanisms, usually driven by the principle of “efficient financial equilibrium”, allowing the firm to earn a fair rate of return on its investments.

Advantages and disadvantages of concessions as as pattern of privatization of infrastructure sector were estimated by the experts of the World Bank as follow:

“1- Concession of infrastructure sectors offers several advantages. First, they allow private participation in sectors in which private ownership is constitutionally, legally, or politically untenable. Second, if awarded competitively (which tends to be the case), concessions enable competition for the market (as opposed to competition in the market) and ought to dissipate monopoly rents, ensuring the most efficient operator and, in principle, facilitating regulatory oversight. Third, concessions can encourage cost efficiency, particularly when granted under price-cap regulation or rate-of-return regulation if cost referential benchmarks are used. Under price-cap regulation, concession contracts specify maximum prices for set quantities of goods and services, permitting cost savings to accrue to the concessionaire, at least between tariff reviews. Finally, concessions can achieve optimal pricing even when sunk costs rule out contestability, because competition occurs before firms commit to investment programs.

2- Disadvantages of concession include the need for complex design and monitoring system when multiple targets are involved, the inability to cover every conceivable contingency, the difficulty in enforcing contract (and limiting incentives to renegotiate), the need to account for poor service quality, and the lack of investment incentives towards the end of the concession period because of the fixed-term nature of contract and the inability to commit to price adjustment over the life of the concession. Government’s inability to be credible in the commitment to no renegotiations creates opportunities to use and abuse renegotiation, raising doubts about the initial price bid on which a concession is awarded.
Incentives for concessionaires to maintain transferred assets properly can be strengthened by compensating them at the end of the concession period or to investments not yet depreciated. Bidding for concessions remains an attractive approach if properly designed, and if abuses after the award are contained, enforcement is appropriate, and (especially) if repeated bidding is practical.374

(3) Joint venture:

Creating a new independent company by combining the efforts of two or more parties. For example, in some cases, one firm supplies technology and know-how, with another has knowledge of market opportunities and customer contacts. For good example for joint venture privatization, see the privatization operation of the telecommunications in Sudan (see Chapter 3). As we previously mentioned, in Sudan, joint venture was used as transitional device to privatize the telecommunications sector. The government gradually sold its shares in some international stock-exchanges to some international specialized companies in the field of telecommunications (see Chapter 3).

(4) Management Contracts:

Introducing private participation in a public sector is, simply, by contracting out the sector management. In this situation, the government is the owner of the infrastructure, but a private firm can provide a more commercial approach to operations. The public sector in this case faces both investment and risks, because managers do not invest their own capital in the sector.

In Sudan, management contracts have been used in rare cases. Because of the small size and scope of management contracts in Sudan, one may not put big attention to feasibility for these contracts.

374 - Id pp. 31-32.
(5) **Leasing:**

Governments authorities simply renting infrastructure assets (land or may be equipments) to private operator for a fixed period to obtain income from contracts fees, contrary to concessions contracts, firms that lease are usually not required to make investment, therefore they only assume commercial risk. (see Chapter 3 of this thesis).

(6) **Public floatation:**

A large number of infrastructure companies have been privatized by a means of public floatation to the general public. Most of these were relatively well-run telecommunications companies of industrial countries such as Nippon Telegraph and Telephone (NTT) (see chapter 3), British Com (privatized in three tranches between 1984 and 1989), and Koninklijke PTT Nederland (KPN, two tranches in 1949 and 1995).\(^{375}\) In Sudan, we have not illustrated any use for this method.

(7) **Privatization of infrastructure by methods of BOT System:**

The concept of building, operating, and transferring according to the definition of United Nation Committee for International Commercial Law, is a shape of schemes financing, whereby, certain government grants, for a period of time, one of the private financial unions (named: the scheme company) a prorogation to execute certain scheme. Thereafter, the scheme company builds, operates and manage such scheme for fixed period of time. The scheme company returns its costs and achieves interests by operating the scheme and exploiting it on commercial basis. At the end of the prerogative period, the ownership of the scheme returns to the government.\(^{376}\)

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375 - Pierre Guislain, supra note 3 pp. 255-56.
The above definition includes number of different contractual arrangements which, as a whole, fall under the big title of the BOT system.

Table No: (12): Different Methods of BOT system.

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Meaning</th>
</tr>
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<tbody>
<tr>
<td>BOT</td>
<td>Build, Operate and transfer</td>
</tr>
<tr>
<td>BOT</td>
<td>Build, Own and transfer</td>
</tr>
<tr>
<td>BOO</td>
<td>Build, Own and Operate</td>
</tr>
<tr>
<td>BOR</td>
<td>Build, Own and Renewal of Concession</td>
</tr>
<tr>
<td>BOOT</td>
<td>Build, Own, Operate and Transfer</td>
</tr>
<tr>
<td>BLT</td>
<td>Build, Lease and Transfer</td>
</tr>
<tr>
<td>BRT</td>
<td>Build, Rent and Transfer</td>
</tr>
<tr>
<td>BT</td>
<td>Build and Transfer</td>
</tr>
<tr>
<td>BTO</td>
<td>Build, Transfer and Operate</td>
</tr>
<tr>
<td>DBFO</td>
<td>Design, Build, Finance and Operate</td>
</tr>
<tr>
<td>DCMF</td>
<td>Design, Construct, Manage and Finance</td>
</tr>
<tr>
<td>MOT</td>
<td>Modernize, Own/Operate and Transfer</td>
</tr>
<tr>
<td>ROO</td>
<td>Rehabilitate, Own and Operate.</td>
</tr>
<tr>
<td>ROT</td>
<td>Rehabilitate, Own and Transfer</td>
</tr>
</tbody>
</table>


BOT system presents solution for infrastructure finance, whereby, the government can gain infrastructural scheme without relying on borrowing from the banking system or burdening the public budget big deficits. Moreover, this system presents scientific attitude to achieve privatization of public sector (the large economic stream in the recent time).

Generally, BOT system cannot be considered as a modern innovation; that its roots refer to the era of what known as prerogative contracts, which formerly spread in France and other countries in ends of
the nineteenth century. France used these contracts to execute railways schemes, stations of electricity generation, and water supplies. Egypt recognized this system in the fortie th of the past century when New-Egypt neighbourhood was supplied by electricity, drinking water, and tram-lines according to this system. In eightieth of the past century, namely in 1984, two important developments happened in application of such system. In this year, The Channel Tunnel Convention, which connected England with France, was signed between British and French governments from one side, and Eurotunnel Company on the other. Invitation of the former president of Turkey (Turgot Ozal) to use this system in execution the infrastructure in Turkey (Phosphor Bridge, and electricity station) represented the second development.377

BOT system does not present any new technological innovation in what related to execution the infrastructural scheme, as it presents new shape of the contractual framework for executing infrastructure scheme in certain organizational and administrative aspects. In other words, by BOT system the investor (company of scheme) is burdened the designing and constructing liabilities. In the classic systems of constructing and executing infrastructure schemes, these liabilities are, classically, burdened on different bodies. In addition, in the BOT system the investor is burdened the financing liabilities, which are classically burdened by the government. The direction of joining designing with constructing operations is increasingly adopted all over the world because of the good results which were achieved in saving the courses of schemes execution and in supplying designers by good experiences of developers.378

In Sudan, we have illustrated two applications for the BOT system. One is in some privatization operations in the Sudan Railway
Corporation. As we have mentioned, the recommendations of the Workshop of Railways of 1998 which were confirmed by the decision of the Sudanese Council of Ministers on 31.12.1998, were concentrated on granting considerable role to private sector to rescue the Sudanese railways. Sudan Railways concluded some contracts with private parties to invest in railways transportation. Despite that these contracts were concluded under different titles, in fact they were concluded under the BOT system; namely the BRT formula (Build, Rent and transfer). The main feature of these contracts is that they were concluded in a narrow scope. So, wording of such contracts makes them appear just like ordinary rent contracts. But from the obligation of the tenants in these contracts, we find that they were included obligations on the tenants like rehabilitation of locomotives and gas tank-wagons, and railway-carriages instead of reducing the ton-price, a thing which constitute BOT system (see Table No.12 above). Following is a good example for such contracts:

This agreement is made on ........ Between Sudan Railway Corporation ........
Represented by ..... (hereinafter referred to as: the First Party), and ........
(hereinafter referred to as: the Second Party).

Whereas the Second Party is interesting to transport gas to ........, and,
whereas the First Party is the exclusive owner of gas tank-wagons, the two parties
agree to the following:

Firs/ Duration of Contract:
The two Parties agree that the duration of the contract shall be ........ Beginning
in...... ending in.........

Second/ First Party Obligations
The first party is obliged to:
A/provide the agreed upon ........... (number) of gas tank-wagons and put them on the
agreed-upon loading areas.
B/tow and the wagons, after loading operations are completed.
C/repair and rehabilitate parts of wheels.
D/ not to make any arrangements in the rehabilitated gas tank-wagons by any of transactions during the duration of this agreement, unless by written consent of the Second Party.
E/ reduce the freight fees by %10.

Third/Second Party obligations
The Second Party shall be obliged to:
A/ rehabilitate the agreed-upon …………………. (number) of gas tank-wagons to be ready for carrying gas, under the supervision of the First Party.
B/ pay a sum of …………. as insurance.
C/ The method of payment is the deferred payment which shall not exceed the 15th day of the next month.
D/ present all documents and certificates required by the concerned authorities.
E/ complete all loading and pouring operations within the period stipulated in the Railway Regulations of 1999 (Transportation Conditions), or any other regulations.
F/ pay for every delay for loading or pouring according to the provisions of the Railway Regulations of 1999.
G/ load wagons-tanks according to method determined by the First Party, to balance the shipment on the wagon; the First Party may, at anytime, require the presence of his representative to monitor this operation.
H/ pay for the regular maintenance, which will be from …………. To …………
I/ comply with all laws which organize the treatment of the flammable petroleum materials.
K/ pay for taxations, levies or any other financial costs imposed by the state.
L/ pay for any increase in the operational costs if imposed by the state with accordance to the policies of the Ministry of Finance on ported-ton fee. In such a case the First Part is obliged to inform the Second Part one week before any amendment of ported-ton price. In turn, in the event that the operational costs reduced as result for policies of the Ministry of Finance; the Second Party shall be entitled to such reduction of ported-ton price.

Fifth: General Rules:
A/ This contract is subject to the Transportation and Storing Conditions which are provided in Railway Regulation 1999 or any other regulations replace the 1999 Regulations.
The agreed-upon freight fees belongs to the First Party without taxations or any other fees imposed by the state; therefore, the Second Party is obliged to pay for any taxations or other sorts of fees.

The second BOT privatization process is in the infrastructure sector of water services between the Sudanese Government and the Islamic Bank for Development in 10.5.2000; this is Khartoum Water Transportation and Sanitation Scheme. This operation assures that one of the most important merits of the BOT system in the infrastructure sectors is that it presents solution for infrastructure finance that the government can achieve infrastructural scheme without relying upon borrowing from the banking system, and without burdening the public budget big deficits. The big cost of execution of such scheme ($14.775.000) shows the necessity of this system. On the other hand, it is quite clear that the financial and technological parts in this operation are of great necessity; therefore, joining the two capacities (technical and financial) will result in good performance.

Despite that the agreement was made under the title of “Istisn’aa” contract[^379], the formula of the contract appears it as one of methods of contracting according to one of the formulas of the BOOT system; this is BT (Build and Transfer). (see Table No. 12).

The agreement is very long; therefore, we will mention some of its important terms:

**Agreement for Execution of the Constructional Works of Khartoum Water Transportation and Sanitation Scheme**

This agreement is made on 10\textsuperscript{th} of May, 2000, between Sudan Government (thereinafter referred to as the “Purchaser”), and the Islamic Bank of Development (thereinafter referred to as the “Seller”).

**Whereas:**

[^379]: One of the formulas of Islamic contracts.
A/ the Buyer required the Seller to execute the constructions described in appendix no. 1 of this agreement (thereinafter, referred to as the “Constructions”), by the method of “Elistisn’aa”, in the scheme described in the appendix no. 2 of this agreement;

B/ the Seller consented to execute the Constructions for amount not exceeds $14.574.000, and to sell them to the Purchaser on a price to be determined according to this agreement within (12) years, after primary grace period (3) years, be considered as preparations period.

C/ the Purchaser have been informed by the conditions and rules mentioned in paragraph (B).

Third Section:

3-2 the Seller’s obligation to execute the scheme depends on the obligation of the Purchaser to delineate the boundaries of lands on which the scheme will be executed, and, on granting the required permissions to the Seller to execute the scheme on these lands.

3-3 the Purchaser shall be represented by Khartoum Water Corporation in all concerns related to the execution of this agreement.

3-4 to avoid any future ambiguity, the Purchaser agrees to permit the Seller to execute the constructions by means of sub-contracting with agreed upon developer.

Thirteenth Section:

Ownership and depreciation

The ownership and depreciation of the constructions shall, automatically, be transferred to the Purchaser at the time of handover.

Fifteenth Section:

Sales-Price Payment

15-1 the sales-price shall be equal to the wholly costs, in addition to %5.5 annual margin of interest.

15-2 the Purchaser agrees to pay the sales-price as 24 half-year instalments.

15-3 in the event of the Purchaser paying two of the instalments in or before the fixed date, he shall be entitled to reduction of %15 from the margin of interest of such two instalments.

15-5 Any amount due in accordance to this agreement, including the sales-prise amount, will be considered as actually paid to the Seller, when one of the following banks confirms that such amount is deposited in any of the following accounts:
1- Payment in American Dollar:
   Account No. 001591.11 – Saudi International Bank
   99 Bishops gate, London EC 2M 3TB
   Telex numbers: 8812261- 8812262.
   Account No. B 10507.
   Arab Banking Corporation – P.O. Box: Manama, Bahrain.
   Telex Numbers: 9385 9431/2/3. 9442 ABCBAH BN.

2- Payment in French Frank:
   Account No.96965.9.00.00
   Union De Banques Arabes Et Fransaises (U.B.A.F)
   190 Avenue Charles De Gaulle
   92523 Neuilly Cedex, France
   Télex Number : 610334 UBAFRA

3- Payment in Sterling Pound:
   Account No.70872
   Gulf International Bank
   2-6 Canon Street, London EC 4M 6XP
   Telex Numbers: 8813326 8812889.

Golden Shares in Privatizations of Infrastructure:

   After the privatization of the infrastructure, the government will inevitably find itself in need to keep sort of control over the privatized infrastructure sector that most of the infrastructure activities are of strategic necessity.

   The U.K privatization has, as a rule, used “the golden share”. Generally speaking, a golden share gives the government the right to intervene to block changes in sector or enterprise control, takeovers, and foreign participation. Samples of golden shares appear from the cases of Cable & Wireless, British Telecom, British Gas and British Airways. For these, and for power generating and transmission companies, the golden share has no expiration date. In other instances, it expired on a specific
date: December 31, 1994, for the regional water distribution companies, and March 31, 1995, for regional electricity distribution companies. The main motivation for indefinite golden shares was often national security.\textsuperscript{380}

**Conclusion:**

The earlier private beginnings of infrastructure sectors indicate that there is no any barrier on their road to be re-privatized. Another indicator for the possibility of the private sector to undertake the former infrastructure sectors appears from that France, a country that has championed the cause of public services and public enterprises is among the countries in which this sector has remained largely private. The two large companies, Compagine Generale des Eaux, founded in 1853, and Lyonnaise de Eaux, founded in 1880) are still now occupying big share in water sector in France and in some other places out side France. Moreover, in some developing countries like Cote de’ Ivories, in which the basic service should be freely or cheaply presented; the private sector is still now undertake providing this service.

In the early nineteenth and early twentieth century, most electricity companies started out private. In many countries they have to large extent remained private, like Belgium and the United States. Furthermore, Nationalizations which underwent in the first quarter of the nineteenth century and in the meds of the same century were just response to war-relate circumstances.\textsuperscript{381} The railways have a similar history for private nature, and the same war-relate circumstances in nationalizations.

\textsuperscript{380} - Pierre Guislain, supra note 3 p. 260.
\textsuperscript{381} - Some of the Nationalizations in the mentioned century were exercised depending on ideological basis. For example, Nationalizations in the former Soviet Union, some South American countries and many Marxist-Liniest countries in the different continents of the world, were not constituted a good evidence for the bad performance of the private sector as they reflected ideological direction (See chapter 3).
Nowadays, when most of the countries opted to privatize or re-privatize their infrastructure sectors; features of infrastructure sector have led to the adoption of special reform to prepare these sectors for privatization. Most of these reforms are economic in nature. Others are of legal nature. The most important legal restructure is unbundling the sector. Importance of unbundling the sector come from that it put many options on the table of the government. For example, a government may select to unbundle the sector as a whole depending on the geographic basis so as to minimize the cost of private contribution in the targeted sector. On other option, government may opt to fracture the targeted sector into separate segments matching its essential activities. Thereafter, these separated segments may be transformed into companies or otherwise legal entities. Of course, in some of these segments, the state will inevitably remain maintaining its complete ownership to impose some regulations which serve social, economical, and political purposes.

Infrastructure segments in sector, like railways line and general distribution grid in electricity and water services, should remain as state ownership because it enables the government to prevent new operator’s abuse.

Despite the fact that it is possible to use all the methods of privatization of SOEs (mentioned in Chapter 3) for privatization infrastructure sectors; concessions and licenses (used interchangeably in most of privatization texts) remained the preferred methods of privatization. The reason for such preferring appears from that, in most cases, infrastructure sectors are closely related to everyday-needs of peoples; therefore, total divestiture of such sectors will weaken the role of the state in the event of new owner misuses his property rights.

It is obvious, while the methods of privatization (mentioned in this chapter) are used for privatizing existed infrastructure, BOT system (save
in rare formulas of the system) is used for building infrastructure activities. BOT system presents solution for infrastructure finance, whereby, the government can gain infrastructural sectors without relying upon borrowing from the banking system and without burdening the public budget with big deficits.
Chapter 10

Privatization and Labour

Despite its importance, labour is one of the least addressed issues in privatization. It is a universal concern that privatization will result in major job losses as new owners of privatized SOEs terminate excess labour to improve efficiency and to minimize costs regardless of the social reflections. Fearing unemployment and the loss of benefits, state enterprise workers and unions are often among the most organized opponents of privatization; they usually take actions to delay or block privatization. In many countries the difficulties are compound by the absence of social safety nets and functioning labour markets. These factors have often led governments to delay privatization, particularly of large state enterprises like infrastructure and heavy industries where major labour adjustment may be needed. With regard to the great importance of privatization in this era, and the political and social sensitivities involved, it is important that governments find ways to labour adjustment and to develop strategy that wins labour support for privatization and creates efficient social safety net for laid-off workers.

Generally speaking, depending on illustrations of international experts, discussion about the privatization affection on labour and the remedies required will be focused under four titles. First, how privatization affects labour is the first question that should be answered. Of course, too many employees, the generous pay and benefits and the restrictive labour contracts during the former governmental ownership (before privatization) will be the targets for the new private owners.

Second, reemployment, or creation of new jobs for the laid off workforce remains the main challenge for governments. Third, dealing with the workforce to participate with them in decision-making, assists in winning their encouragement for privatization, a thing will, inevitably, assist in achieving a smooth application of the privatization program as a whole. Fourth, some international finance institutions have widely involved adjusting labour force; mainly by assisting the “generous severance pays”. This chapter will be devoted for the above titles.

(i) Impacts of Privatization on Labour:

The subsidy and other governmental protection conferred on SOEs usually lead them to involve many sorts of irrational practices such like overstaffing. In many countries, SOEs often pay their employees’ wages and benefits higher than in the private sector counterparts. Often, employees of public sector are governed by rigid labour contracts. Usually, new owners do their best to avoid such treatment and privileges.

(1) Too Many Employees:

Governments all over the world have employed too many workers in their enterprises. Many of these enterprises were in fact designed as vehicles for job creation to attain political support for governments and absorb public opposition. Levels of overstaffing in big number of countries clearly justify the sharp affection of privatization on labour.

“In India and Turkey, for example, state enterprises were estimated to be overstaffed by nearly 35 percent in the early 1990s. Of 120,000 people employed in Sri Lanka’s state enterprises, 40-50 percent is estimated to be laid off. In Ghana and Uganda estimates of overstaffing levels commonly run to 20-25 percent. Over staffing

383 - However, this is not the case in Sudan. It is true that in the Sudan, in the period immediately followed the colonization and during the national governance until the early seventieth of the past century, the public labour was granted very good service conditions; therefore, they were occupied a good situation over the private labour. Nowadays, because of the great levels of overstaffing, and the poor of the country, private labour have been largely over public labour.
in some Egyptian steel companies reached 80 percent in 1991. Turkey’s loss-making steel enterprises were overstaffed by as much as 30 percent. In Brazil about 20,000 employees of the 42,000 of the railways enterprises were surplus with lower productivity levels than those in industrial countries as well as neighbouring countries such as Argentina and Chile. Power utilities in many African countries, as well as in India and Pakistan are severely overstaffed, with fewer than 50 customers per employee (compared with more than 200 in countries such as Chile, Indonesia, and South Africa). In Pakistan’s water system for Islamabad, for example, there are 45 staffs per every 10,000 water supply connection, compared with 3 staff per 1000 water connection in efficient water companies in Latin America. Overstaffing usually occurs in administrative and clerical positions, not in the more technically skilled jobs for which there is high demand.

With regard to the above statistics of overstaffing, one comes out with the following:

- Overstaffing in the intensive capital enterprises such as steel industries (as in Egypt and Turkey) seems to be greater than in other enterprises.
- There are many measurements for levels of overstaffing, for example; by the number of connections (customers or consumers) compared with the number of staff undertaking the public service.
- Overstaffing usually occurs not in the most important activities of the enterprise like the more technically skilled jobs, a thing which supports the new owners to lay-off the overstaffed labour.

(2) Generous Pay and Benefits:

Because of week wages and salaries in many countries, some of these countries conferred further benefits on its workers such as bonuses

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384 - Sunita Kikeri, supra 1, pp. 3-4.
to degree that in some countries wages and basic salaries have greatly been eroded if compared with these benefits. Such practise, in the event of privatization will, of course, lay burdens on the new investors.

In Bangladesh and Egypt, where wages and salaries have eroded, special allowance and bonuses are offered to state employees to compensate week wage and salaries. In the absence of wider social safety nets, state enterprises in many countries also provide, at great expense, services such as housing, health care, education, and transportation. In 1980s these nonwage benefits were equivalent to 20 percent of wages in Africa, 20-35 percent in Asia, and 24-37 percent in Latin America. Among a sample of 361 Mexican state enterprises privatized between November 1983 and June 1992, extreme benefits in many companies tripled the wage bill.\(^{385}\) According, new investors after privatization will do their best to drop down such benefits. In some countries, governmental enterprises pay their lower-skill labours much better than in their private sector. In Turkey, for example, workers in loss making state-owned textile, iron, and steel firms earn three times more than people doing equivalent works in the private sector, a thing which, in the event of privatization, will be unacceptable for the new private owners.\(^{386}\)

The generous payment and benefits in Sudan are inherent sequences for the weak wages and salaries. The current government in Sudan, to avoid paying high levels of wages and salaries, opted to grant many other facilities and benefits like bonuses, transportation, and performance incentives on public labour. The justification is that growing of basic wages and salaries burdens the state much more costs than growing of bonus and benefits. A high level of wage or salary means

\(^{385}\) - Sunita Kikeri, supra1, p.4.
\(^{386}\) - Id p.4.
increase of different rights that counted as fixed percentage from the basic sum of wage or salary.

(3) Restrictive Labour Contracts:

In some countries, rigid labour contracts come as a response for the ideological stream. Under the light of that many programs of privatization have been executed in the former socialist or Marxist-Leninist countries, where labour is extremely protected, and rigid labour contracts are faced by great tendency to break up these contracts by the new private owners. In addition to the high job security (including guaranteed life time employment in some cases) enjoyed by state enterprises workers, such contracts often place restrictions on the right of the employer to hire and fire. Private investors, especially the foreigners, usually come from liberal economies where hire and fire is fundamental right on the hands of the employer. The strong evidence for problems caused by such type of contract obviously appears in infrastructure sectors where strong unions often succeed to impose such anti productivity provisions.387

(ii) Employment After Privatization:

Given these distortions in state enterprise labour market, many observers fear that privatization will have a negative effect on labour as governments prepare enterprises for sale, and as new investors strive to raise productivity. Labour force reductions have often accompanied privatization; but many enterprises, particularly those already operating in competitive markets without governmental subsidy, have been sold with their labour force.

387 - Id p.4.
(1) Labour Force Reduction:

In general, privatization has a minimal effect on employment in countries that carried labour reforms before privatization. Chile, for example, began extensive labour market reforms in the early 1970s by rationalizing state enterprises employment and wages and changing labour market regulations regarding the hiring and firing workers. Those reforms led to significant employment reductions by the early 1980s in both public and private firms. As a result, the second round of privatization that began in 1985 and involved large firms and sectors such as communications and electricity resulted in no layoffs. In fact employments in these firms increased by 10 percent as a result for overall improvements in the economy and also for the investments that accompanied privatization.388

However, large employment reductions have often accompanied the privatization of state enterprises that were, in past, heavily subsidized and protected from competition. In steel railways and energy enterprises, overstaffing often lead to employment reductions before privatization as governments prepare the companies for sale and after as privatized companies continue to shed labour. The following review illustrates labour force reduction in some countries.389 This review will be mentioned with comparison to the situation in Sudan. One paragraph states:

*In Argentina, a recent review of five major privatization transactions (telecoms, electricity, water and sanitation, and energy) found that close to 30 percent of employees in the five enterprises lost their jobs by the time privatization took place. The reductions ranged from 3 percent in telecoms to 72 percent in energy. Severe employment cuts were also made in other sectors, including railways and steel. Low productivity and interference by labour unions in management decisions had made

388 - Id, p.10.
389 - Id, pp. 5, 6 and7.
the cost of keeping loss-making enterprises in the state sector so high that the
government was willing to undertake the necessary employment reforms to facilitate
privatization. The cuts were made through transfers of staff to other parts of the
government, early retirements, voluntary departures, and lay-offs; some workers were
even sent home with 50 percent of their salaries.

In Sudan, privatization has been accompanied by a big number of
laid off employees. For example, by privatizing 22 units in the industrial
sectors such as Atbara Cement Factory, Rabak Cement Factory, and Sata
Shoes Factory; 5,504 workers were laid off. By privatizing some units in
the banking sector, 2,098 have lost their jobs. By privatizing some of the
governmental transportation units, 3,803 were laid off. The following box
illustrates the number of the laid-off employees in different sectors in
Sudan until 2005:


<table>
<thead>
<tr>
<th>Sector</th>
<th>Units</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Industrial</td>
<td>22</td>
<td>5505</td>
</tr>
<tr>
<td>Transportation</td>
<td>4</td>
<td>3803</td>
</tr>
<tr>
<td>Banking</td>
<td>6</td>
<td>3098</td>
</tr>
<tr>
<td>Tourist</td>
<td>10</td>
<td>2207</td>
</tr>
<tr>
<td>Agricultural</td>
<td>21</td>
<td>14310</td>
</tr>
<tr>
<td>Energy and Petroleum</td>
<td>1</td>
<td>234</td>
</tr>
<tr>
<td>Variant</td>
<td>17</td>
<td>3329</td>
</tr>
<tr>
<td>Total</td>
<td>81</td>
<td>32485</td>
</tr>
</tbody>
</table>

Sources: TCDPE annual report 2005 p. 58.

Another paragraph in the mentioned review reads:

“In Bangladesh, more than 22,000 workers in the state’s jute corporations
were retrenched between 1990 and 1993 as part of the restructuring and privatization
program. In little number of state enterprises new jobs opportunities increased to
meat the new market requirements.”
In rare cases in Sudan, the number of employees of the privatized enterprises has increased as a result of privatization. It is obvious that increasing in the number of the work force has resulted from that the new investor has capacity and future plans that require maintaining the former employees. A good example for such increasing in the labour levels is the Sudanese Company for Telecommunications (Sudatel). Labour force in this firm was 2100 in 1994 (before privatization), increased to 2974 in 2004 (after privatization), with increasing- percentage of %42.390

With regard to paragraphs of the mentioned review, we have illustrated that in some countries there is a sort of rational differentiation between the different jobs of the privatized firms. In other words, high-skill jobs are differentiated from the low-skill jobs; in the event of privatization, most of the new owner to maintain the high-skill worker to benefit from their former experiences.

In Sudan, the annual reports of TCDPE illustrated the number of the terminated jobs regardless of their types, whether high-skill or otherwise.

(2) *Changes in Terms and Conditions of Services:*

The productivity gains from employment termination often result in wage improvements for employees who remained with the privatized enterprise. In Argentina the real wages and salaries of employee of Entel and the Buenos Aires water concession increased by 45 percent in the three years following privatization. In Chile new owners of the electricity companies (Chillgener and Enersis) increased wages and introduced profit-sharing schemes. Malaysia’s Port Kelang workers who remained with the partly privatized company received compensations increases average 12 percent. In Mexico wages in a sample of privatized firm

increased far in excess of rates elsewhere in the economy, with the mean annual wage rising from $14.952 before privatization to $26.348 in 1993. In Ghana salary levels in privatized textiles and printings companies increased to 10-15 percent above industry standards.  

In exchange for higher wages, rigid labour contracts often have been revised. In Latin American countries, for example, rigid work rules and condition of services were renegotiated to provide managers greater flexibility with respect to decisions on content and pace of working conditions. In Argentina’s Entel and Segba (electricity company) the new collective bargaining agreement increased the work week from thirty five to forty hours, linked wages to productivity, and eliminated certain types of overtime and leave.

In Sudan, in the absence of information about the circumstances of employees who are remained with the private firms, it is difficult to determine whether the new service conditions or contracts have achieved situation better than that in the former state owned firms. The annual report of TCDPE of 2005 mentioned only one privatized firm wherein the new contracts achieved better service conditions for the remained employees; this is Sudatel. The annual report of 2005 mentioned the follow:

"1- One of the Advantages of privatization policy in Sudan is that it widened job opportunities for the employees as a result for additive fields or finance in the firms which have been directly or indirectly privatized. The Sudanese Telecommunications Company (Sudatel) is a good example.

2- The remained employees in the privatized firms have enjoyed better service conditions and good work environment, a thing which positively reflects in their life levels."

391 - Sunita Kikeri, supra 1 pp.7-8
392 - Id, p. 8.
(3) New Job Creation:

Abstractly, while privatization often results in employment reductions it also creates new jobs; jobs are created when private operators used assets more productively and made new capital investment that might not have been made in the absence of privatization.

(iii) Dealing with Labour Issues:

To facilitate privatization, governments need to deal with the labour issues early before executing privatization operations. Because of varying conditions in economic and legal and political environment, the ways in which the labour issues are dealt vary from one country to another and from one enterprise to another.

(1) Role of Employees’ Participation:

Workers opposition to privatization involved because governments often fail to involve labour unions and address their concerns early before beginning privatization operations. By contrast, Labour tensions could significantly be reduced when governments recognize the constructive role that labour can play; make explicit efforts to inform unions and workers about privatization, and involve them in the process through employee ownership schemes and the like (see the introductory chapter and Chapter 3).

Efforts to explain the government’s privatization plans, assure labour that their interests are fairly represented, and assure them that their sacrifices will be balanced by sufficient measures to allow workers to share in the benefits of privatization. The government should:

“*Explain the rationale, costs and benefits of privatization, and the costs of non-privatizing. In countries such like Argentina, Uganda and many others, workers supported privatization when they understood through the government’s communication efforts that privatization is needed to obtain capital for new
investments and improve access to services, and that closure of the loss of even more jobs often is the only alternative for privatization.

*Enhance their understanding of the timing and methods of privatization. In many cases labour unions recognize that the time for change has come but their position stems from lack of information about the government’s plans for privatization.

*Describe the incentives and social safety net measures being put in place. Often, the lack of information about the severance policy and supporting measures, has created uncertainties for workers and increased their opposition to reform. Particularly, in developing economies with share ownership and weak capital markets, employee share ownership programs require a comprehensive information program to educate employees on the meaning and benefits of share ownership. Such a program needs to explain such concepts such as property rights, shares as an alternative to bank deposits, the difference between interest and dividends, the impact of retained earnings, the impact of inflation, the difference between an investment with a predetermined value and one whose value could change based on supply and demand, and understanding balance sheets and profit and loss statements.

*Inform them about the regulatory and other arrangements being designed to protect consumer and labour interests. Often, labour unions concerned not only about job privatization, but also about the broader social, environmental, and gender impacts of privatization. The more governments can explain their plans in these areas the more the chances are of winning labour support. “393

The Sudanese labour Union mentioned that it had been consulted and participated in the first Conference of Economic Reforming at the beginning of the eightieth of the past century. In this conference, the main features of liberalization of economy and privatization policy were agreed. 394

In a country like Sudan, especially in the beginnings of the National Salvation era, it is difficult to determine whether labour union actually represented the real opinion of labours. However, in a paper

393 - Id, pp. 20-21.
presented in the Workshop of the Sudanese labour Union titled: (Privatization: the Theory and Application)\(^{395}\) the reporter mentioned:

“The Syndicate movement in Sudan achieved reasonable contribution in the first economy reforming conference. In this conference the Sudanese syndicate movement, despite the great sufferance, sacrifices and burdens on labours, decided to assent and to support the privatization and the economy liberalization policy. The Sudanese syndicate movement considered the circumstances which compelled the government to involve this trend such as the war in the southern Sudan, the prejudicial international surrounding, and the new global economic system.

The Sudanese syndicate movement and the Council of Ministers, represented by the Higher Committee for Disposition of Public Enterprise, agreed the following basis for privatization:

1-Privatization should be executed depending on patient studies and the concerned syndicate should actively be contributed.

2-Privatization operations decisions should be issued from the Council of Ministers.

3-Privatization order should not be issued unless by the consent of the Sudanese Labour Union.

4-Consent for paying employees’ rights should be issued by the National Pension Fund and the National Insurance Fund before privatizing any state owned enterprise.”

Indeed, the above report appears that Sudanese government has followed the international experts’ recommendations in communicating with employees before and during privatization.\(^{396}\)

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\(^{395}\) Id, p. 23.

\(^{396}\)-The recent speeches of the President of the Sudanese Labour Union imply that the former contribution of the labour union was just a device to absorb the labour opposition. The sufferance of labours remained and has been expressed by many of labour leaders, for example, the President of Labour union said:

“The Union is not against privatization operations in the country, in the same time labours should be benefit from the positive affections of privatization and avoided from the negative affections. Our mission is to protect the country and labour. The new administrations of the privatized enterprises haven’t complied with the conditions which were formerly agreed before privatization. As a result, labours suffered bleeding injure by the frequent lay-off of labours. We are still supporting the privatization program in the country, provided that lay-off of labours should not be the only result of privatization.”

(Source: Akhir Lahza newspaper, 26/10/2008.)

Another evidence for that contribution of labour was used just a device to absorb labours opposition appears from that many labour syndicates have declared that they haven’t been adjusted after privatization. The Postal Labour Syndicated of Khartoum state declared that, despite the
(2) **Pensions and Social Insurance Implications:**

In countries where pensions and insurance systems are weak, the major concern is that the early retirements accelerate pension liabilities and so exaggerate the financial strains on pensions systems and other components of the social security system.

In countries such as Turkey, early retirement policies clashed with the recommendation to increase the retirement age to resolve the pension’s crisis. In low-income countries, however the problem is often reversed: weak social security systems impede early retirement because no worker will want to take retirement knowing that the system will not be able to honour its obligations. For this reason, Congo and Uganda among others are exploring the option of creation independent, privately-managed pension funds that would receive debts owed to the social security system by state enterprises. These funds could then be used to pay employees taking early retirement.397

In Sudan, and in the light of that the most commonly used method to downsize labour force is through early retirement, the National Pensions Fund and the National Social Insurance Fund, who are required to provide the rights of the laid-off workforce have involved big difficulties. The National Pensions Fund has suffered a lot because of the early retirement policy that S. 5(8) of the Public Service Pensions Act 1993 (as amended in 2004) provides that in the case of employee being referred to early retirement as a result for cancellation of job; such employee shall be entitled to application of a formula adds one year to his pension service instead of every five years remaining between the agreement between the government and the Labour Union which was agreed in the Economic Reforming Conference in 1990 which provided that labour union should consulted, and labour’s adjustment should be settled before execution of any privatization operation; the President of the Technical Committee for Disposition of Public Enterprises declared that the Committee is only responsible to fulfil the legislative rights of labour regardless any syndicator claims.

(Source: Akhir Lahza newspaper, 25/11/2008).

397 - Adil Mohammad Salih Bashir, supra 13, p.18.
employee’s age at the time of job cancellation and the obligatory pension age (60 years). For example, “A” is a fourty-ager; his pension service is 20 years; in the event of job cancellation, A’s pension service will be counted as 25 years.

In a meeting with Mr. Makkawi Jaielani Al-Tiriefi, Directorate of States’ Affairs in the National Pensions Fund, he said:

“National Pensions Fund has been affected by the consequences of privatization that:

a- Voluminous number of payers of pension’s instalments has been referred to early retirement, a thing which results in reduction of the financial sources of the Fund.
b- Pensions Fund liabilities have largely increased because of the voluminous number of the early-retired employees as a consequence for cancellation of jobs”.

In the light of that part of the laid off workforce is entitled to take social insurance rights (part of SOEs employees are employed on private basis); the liabilities of the Fund have largely increased because of the big numbers of the laid off work force. The big number of the insurance instalments payers who were laid off minimized the Fund’s financial sources and at the same time widened the number of persons who are entitled to insurance payments. Furthermore, big number of the privatized firms do not pay the monthly instalments of their private employees, a thing which resulted in difficulties in fulfilling the insurance rights of the laid off employees.

In a meeting with Mr. Adil Diab, official in the National Social Insurance Fund, he said:

“In many cases, failure to pay the monthly instalments of the social insurance of SOEs compelled the fund to accept some assets owned by these SOEs as payment for the social insurance instalments.”

398 - National Pensions Fund building. Khartoum, 8.10.2008 at 10 AM.
Main issues of the laid off work force in Sudan can be analyzed under the followings: 400

1- S.4 of the Disposition of Public Enterprises Law 1990 provides: notwithstanding any acquired post-service rights, HCDPE has the right to exercise any legal procedure to terminate the service of the employees of the targeted SOE.

2- The Council of Ministers, by the Ministerial Decision No.46/2003, decided instant payment for the laid off work force rights after privatization decision and before the actual execution. The ministry of finance and national economy is obliged to pay these rights without waiting for the proceeds of the privatized SOE. The ministerial decision hasn’t been fairly executed in all privatized SOEs. Work force of some SOEs benefited from the precise application of the ministerial decision; others found many difficulties by delaying the application of such ministerial decision.

3- Some inequitable settings may occur as a result for cancellation of job. For example, in the event of employee being laid off before the obligatory age of pensions (60 years), he may find a job in the private sector; consequently, he will be entitled to social insurance rights. As a result, the laid off employee will enjoy dual-right (pensions and insurance). By this treatment the terminated employee will have preferentiality over the remained employee (pension’s rights).

(3) Generous Severance Payment:

In countries where the need to reward labour is strong and the social safety nets are lack, governments have restored to voluntary lay off (departure lay off) by providing generous severance payment that have

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400 - Source of all information in the analysis is the annual report of TCDPE, 2005 and Adil Mohammed Salih Bashir supra 13.
exceeded legally mandated requirements. The size of payments has varied widely between countries, and within one country between enterprises in different sectors, depending on legal and contractual obligations and the strength of labour unions.

Argentina, for example, reduced employment on a voluntary basis largely through generous severance pays (two to three year’s salary) The Argentinean approach succeeded because basic salary in Argentina was too low, a thing which made the post-services rights such like pensions and social insurance also too low. Moreover, in Argentina the advanced age of many workers made generous severance pay equivalent to a generous retirement bonus. Large-scale reduction in Bangladesh’s jute labour force between 1990 and 1993 were possible largely because of severance payments that averaged about three years’ wages (and even more in other sectors with strong unions); in 1990 some 9,000 workers applied for the scheme of severance payment, compared with normal retirement of 700 a year. In Peru, most of the 20,000 to 30,000 cut in the state enterprise employment in the early 1990s were achieved through severance payment schemes.401

Our humble opinion, the main challenge facing the voluntary retirement through generous severance pays lies in devising a severance policy that is both attractive to workers and financially feasible in the short run.

In some cases inadequate funds have forced governments to delay severance payments, which in addition to imposing social difficulties and reducing the value of severance has seriously eroded government credibility. In Argentina, one of the labour reduction program’s main concerns was credibility that is, whether the government, in the midst of

severe fiscal crisis, would be able to pay the generous amounts it had promised to pay. However, severance payment can be financed by: 402

- Allotting privatization proceeds of the privatized firms for severance payment for their laid off labours, as in Turkey and Tunisia. 403

- Setting aside budgetary funds, as in Argentina and Peru where World Bank adjustment operations tied the release of loan funds to designation of budgetary fund for paying severance.

- Privatization proceed of certain enterprise may be used to satisfy severance payment for labours of other enterprise. Malaysian sold shares of profitable enterprises to generate proceeds that could subsequently be used for financing severance in future transactions.

- Sharing the burden with the new buyers, as in Argentina and Pakistan.

Despite the weakness in the social security net in Sudan, generous severance payment hasn’t been exercised. It is true that some privatized enterprises were sold at lower prices. But, other were sold at high prices. For example, privatization operation of Atbara Cement Factory and Fine Spinning Factory resulted in $45.000.000. 404 Such amount could constitute great source to finance big number of severance payments in many following privatizations operations. Also, new private owners haven’t been requested to contribute in the severance payment of labours of their privatized enterprises.

As we have mentioned above, some international institutions have strongly contributed in financing generous severance payment (see the

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402 - Id, p.17.
403 - In low-income countries like Sudan, however, this option is limited because proceeds from sales are often not sufficient to cover severance costs. In many cases enterprises have been sold at low prices with long repayment periods and default rates have been high (see chapter 3 of this dissertation).
404 - See chapter 3 of this dissertation.
contribution of the World Bank below). In Sudan, a scheme for establishing safety net to treat the negative affection of the privatization was proposed by HCDPE. Therefore, HCDPE at the beginnings of the eightieth of the past century, requested UNIDO to contribute in this scheme. UNIDO accepted and sent an international expert to Sudan. The expert attended and prepared a report to UNIDO, but the political circumstance at that time created a barrier on the face of this international contribution.405

(iv) Contribution of World Bank:406

Since 1991 the World Bank has increasingly involved in supporting labour market reforms more broadly, as well as in the specific context of enterprise restructuring and privatization. Between 1991 and 1995 the Bank approved 156 projects with components aimed at improving the functioning of the labour market to enhance efficiency, welfare, and poverty reduction. These operations supported the development and strengthening of labour market information and monitoring, employment services, training, pensions system reform, labour code revision, women’s labour market issues, public works, micro-enterprises, and social safety net programs including unemployment insurance.

In addition, the Bank has approved close to 50 operations with a component supporting labour adjustment in the specific context of privatization and state enterprise reform. Most of the operations are concentrated in transition economies and Latin America, but other regions are seeing rising support as privatization become part of the reform agenda. To date such support has primarily included institutional support for the preparation and implementation of labour adjustment

405 - See Adil Mohammad Salih Bashir, supra 13, p.12.
406 - Sunita Kikeri, supra 1, p-p. 32-36.
programs. More recently, the Bank has moved from indirect to direct financing for severance pay. In addition, support to redundant state enterprise workers is also being provided in the context of broader poverty alleviation programs.

Bank’s operations have financed technical assistance for a range of institutional support activities. A number of operations have provided assistance to help governments develop a strategy and action plans for labour adjustment, both for the overall privatization program (as in Argentina, Ghana, and Peru) as well as for specific enterprise (as in Argentina railways, Mozambique railways and ports, and Pakistan power). Argentina’ public enterprise reform execution loan, for example, is providing technical assistance for the development and implementation of a labour rationalization program focusing on concrete programs for staff reduction and redeployment including detailed estimates and targets of labour redundancies, and reform of labour contracts focusing on the redesign and renegotiation of collective labour agreements. In the railway sector, the project financed technical assistance to help the Railway Employee Management Unit evaluate the railway’s labour force, analyze work rules and propose changes, and develop and manage a program for labour reduction that considered buyouts, early retirement, and retaining options. Increasingly, Bank operations are also providing support for the design of severance pay package and programs, as in Kenya, Tunisia, Venezuela and Yemen.

These components have frequently been combined with support for active labour market programs such as retaining and job search assistance. Such programs are the most frequently occurring labour component in Bank operations and have been supported across a wide range of countries in Africa (Cote D’Ivoire, Ghana, Guinea, Zambia),
Asia (Bangladesh and India), and Latin America (Brazil, Costa Rica, Mexico and Peru).

Active labour programs are widely supported in transition economies, including in Armenia, Macedonia, Poland and Russia. In addition to such support, in many countries the Bank has assisted governments and municipalities deal with pervasive problem of social assets during state enterprise restructuring and privatization. In China, for example, the Bank has helped municipalities develop market-based housing systems of social safety nets to free enterprises of their direct welfare responsibilities. Similarly, operations in Kazakhstan and Kyrgyz Republic are supporting pilot programs to facilitate the transfer of social assets such as housing, health care, and education from restructured enterprises to local governments. In sectors and regions that are undergoing major restructuring, the Bank has provided the full range of institutional support for labour adjustment to speed up the restructuring of enterprises and improve the delivery of benefits. In Russia, for example the Coal Sector Restructuring Adjustment Loan (1996) helps commercialize and demonopolize the coal sector and eliminate subsidies while ensuring that laid-off workers receive a variety of assistance package. An innovative feature is the temporary redirection of subsidies to the sector to establish a safety net for redundant workers. The support includes counselling, severance and disability payments, and community employment programs. Agreements with the government stipulated that counterpart funding would be used to finance these measures.

In the past, the World Bank involved only indirectly in financing severance pay, with government using the counterpart funds generated by adjustment operations to finance severance. Close to thirty retrenchment programs supported by the Bank financed severance in this way. A notable example is Argentina, where severance for laid-off state
enterprise employees was financed largely by Bank-generated funds from the Public Enterprise Reform Adjustment loan (1991). The loan conditions stipulated that a certain amount of budgetary funds be set aside for severance. They also required the authorities to certify the names, other identifications, and voluntary arrangements for the departure of a certain number of workers. In the particular case of the railways, $300 million of the total severance of $1 billion was financed with counterpart funds of the adjustment operations; the rest was funded directly by the government. Annual wage savings for the state enterprise sector as a whole were calculated at $1 billion a year, with $239 million a year in the railways sector. In the Kyrgyz Republic, where more than 30,000 state enterprise workers have been laid off during restructuring, the Bank helped design a severance package and reached an agreement with the government that counterpart funds from the Privatization and Enterprise Sector Adjustment Credit (1993) would be used to finance severance pay. At the same time the Social Safety Net Project (1995) supported the provision of employment services, including training and temporary income support for laid off workers as well as development of government capacity to monitor labour markets and poverty indices.

In the past the Bank was not allowed to directly finance pay because it was not considered a productive investment. There were also concerns about the effectiveness of retrenchment schemes and the bank vulnerability to accusation of supporting and financing unemployment. But a number of factors led the Bank to decide in February 1996 to allow direct Bank financing for severance pay as part of investment operations. These included the importance of large-scale restructuring and privatization, the potential obstacles arising from lack of financing for labour shedding prior to sale, the growing evidence on the economic and financial returns to severance pay, and the limitations of adjustment
lending. As a result, finance of severance pay can now be provided for individual state enterprises or groups of enterprises throughout the reform process than that are, from corporatization to restructuring prior to privatization.

**Conclusion:**

Termination of labour force service is inevitable sequence for privatization in most of countries all over the world. While numbers of countries haven’t taken reasonable methods to settle labours problems during or before the execution of privatization program, others adopted accurate procedures to settle their grievances, and consequently mitigated public opposition.

It is true that the governments, especially in the mids and the last quarter of the past century, hired excessive number of peoples in the governmental enterprises according to political-relate reasons. Also, the states issued different labour legislations which granted restrictive contracts. The restrictive contracts of work force made the right of the state to terminate labour service very difficult, a thing which created considerable difficulties after implementing privatization. But, the above practises should not be justifications for any prejudicial treatment in the event of termination because of privatization.

Save in rare cases, new owners of the privatized enterprises opt to reduce the number of labours. Privatization usually results in limitation of the protection conferred on workers in concern of the authority to layoff them. On its counterpart, privatization may result in creation of new jobs. Creation of new jobs can only be achieved if the new owners of the privatized enterprises opt to enlarge the activities of these enterprises.

The international experience indicates that the role of employees’ participation in determining the ideal methods of termination should not be underestimated. Dealing with employees before privatization mitigates
their opposition to the limit that they may be converted to become supporters for the privatization program. The support of work force for privatization can only be achieved if the safety net (social insurance and pensions) is strongly enhanced to create better future for the terminated workers.

In Sudan, the two integral parts of the safety net have been burdened a lot because of many factors. Early retirement, in addition to the excessive burden of the new terminated workers resulted in great dropping in the finance resources of the safety net (the monthly instalments).

In a country with weak safety net, other options are preferable such as generous severance pay for laid off workers. By the generous severance pay, the terminated workers can establish private business; these businesses may extract their incomes, a thing which may encourage other employees in the candidate enterprises to support privatization.

The World Bank opted to participate in supporting retrenchment programs in big number of countries. Many countries like China, Argentina, Mexico and Peru have enjoyed World Bank support to finance their labour adjustment programs, a thing which assisted them to achieve remarkable success in their privatization programs. Also, many of the least developing countries like the African countries (Mozambique, Ghana, Cote d’Ivoire, Guinea and Zambia) have relied upon the World Bank assistance to finance programs related to their laid off workers.

In Sudan, we have not illustrated any contribution by the World Bank in privatization program as a whole. The internal political situation in Sudan in the last twenty years has resulted in total absence for the role of the World Bank in the various economic activities.
Conclusions and Recommendations

The privatization program involves a big number of preparations in a country’s legal and economic settings. It requires lawyers and economists of a country to prepare a precise privatization strategy before implementing privatization processes.

The main challenge facing privatization executers is the application of ideal legal methods of privatization to achieve the objectives of the strategy of privatization.

Efforts of lawyers should also be concentrated on amending some provisions of constitutions and legislations whenever these provisions are standing as barriers on a country’s road towards privatization. In addition, efforts of lawyers should be concentrated in provisions of conventions, treaties, and bilateral agreements to which a country is, or may become a party to ascertain and solve the difficulties that may face implementing of privatization program.

Since competition is considered as important tool for success of privatization program, rules of the competition should be preserved in the different legislations and in decisions of governments of a country.

Many countries have not specific law or specialized bodies with exceptional authorities to implement their privatization program; in such a case their public-sector management legislations should be efficient to execute their privatization program. Privatization law, if enacted, should include the institutional framework of the privatization program; organize the execution of the program, and determine the roles and authorities of the different actors in privatization.

In addition to state-owned enterprises, a privatization program may be extended to include some sectors with special features like
infrastructure, the matter that requires more preparative legal procedures before implementing privatization.

Laid-off work force is an important issue before implementing privatization program. Absence of efficient social safety net (pensions and insurance funds) often results in strong opposition for privatization. So, some other alternatives have to be therefore solving the problems of retrenched employees.

Followings are the conclusions and recommendations:

_The Privatization strategy:_

Before implementing privatization operations in a country, a clear strategy for application of such program should be prepared to determine the scope of the privatization operations. The privatization strategy is a comprehensive plan which forms the integral parts of privatization operations economically and legally.

Preparing the governmental productive firms and sectors for privatization requires repealing, amending, and enacting many laws. Regarding its legal part, launching privatization strategy prior privatization greatly facilitates avoidance of different problems after privatization. For example, implementation of privatization operations in certain state-owned enterprise without undergoing the required revision on the legislation that formerly established such enterprise will, inevitably, result in big problem for both government and new owners of the privatized firms. Another example, labour settings should precisely be analyzed to specify the ideal methods to treat with them before implementing privatization operations, a thing which smoothes the privatization program and absorb the public opposition during and after privatization.

Ranking of clear privatization objectives facilitates selection of suitable legal methods to execute privatization program. For example, if
the key objective of privatization is to improve public finance by using the proceeds of the sale of state owned enterprises to reduce the public debts; efforts of lawyers in a country should be concentrated in preparing accurate divestiture (selling) contracts. In the other types of privatization like management, lease, and concession; sale contracts become unfeasible. As a common feature in Africa, privatization objectives were declared just to mitigate the public opposition or to create a sort of euphuism for privatization; the real objectives were not declared. In Sudan, however, the declared objectives of privatization do not contradict the applied legal methods of privatization, a thing which gives some credibility for the Sudanese privatization program.

One of the most important purposes of preparing privatization strategy is that it enables the government to put some safeguards and to benefit from the former experiences. For example, good privatization strategies in some former socialist countries created some sort of rational graduation in executing privatization program; they opted to enact two-stage legislations of privatization by focusing first on small privatizations before moving on to larger operations. The Sudanese government hasn’t made a distinction between the large and small enterprises in the privatization operations. Large-scale and small-scale enterprises have coincidently been privatized.

While a long-term privatization strategy implies patient preparation for planning and implementation of privatization program, Short-term privatization strategy implies irrational deluge of privatization legislations and operations during short period of time.

However, the short-term strategy as well as long-term strategy has its feasibility as a tool to achieve quick privatization program. In Sudan, the government has not determined dead time to finish the privatization operations. Close to twenty years were spent and the Higher and
Technical committees for disposition of public enterprises are still now exercising their tasks.

Under the light of that in Sudan the bigger part of the targeted enterprises for privatization (%60) have not been privatized, small-scale enterprises should be privatized before the large-scale ones to benefit from the disadvantages at lower costs.

**Patterns of Privatization:**

Despite the common notion that privatization is a transfer (selling) of governmental ownership to private party, there are many other legal methods which can be considered as privatization. In general, government can either initiates a partial or full transfer of ownership through some type of sales agreements, or to maintain ownership while involving private operators through other legal methods like management contract, lease, and concession arrangement.

Negotiated (direct) sales come first in countries with low level of transparency that such countries are often governed by dictatorial regimes. The most dangerous thing in concluding negotiated sales contracts is that price and terms of the contract of the privatized SOE are agreed behind closed doors. The only safeguard for application of such agreements is the confidence of the state on its public officials. In exercising their tasks to negotiate with private parts, public official usually face pressure to sell for certain persons or interest groups. Politicians’ intervention in the direct negotiated sales may either be motivated by financial interests or by ideological interests. For example, in Sudan most of direct and negotiated sales contracts were concluded with Islamic financial institutions. These contracts were concluded to privatize considerable number of the most attractive public enterprises like Atbara Cement Factory, Rabak Cement Factory, and Sata (formerly
Bata) for shoes production. The bad thing is that the prices of these attractive firms were considered as repayments of former debts to Daar Al-Imaal Al-Islami. It is clear that government was not in good negotiation situation to impose strong terms on the direct sale contracts, a thing which created clouds of doubts over these privatization operations. Negotiated and direct sales contracts may form good results in countries with good mechanism to monitor different sorts of corruption and favouritism like in England and other Western Europe countries.

Auction, despite it is usually used for privatizing small businesses (like retailing shops), reflects high levels of transparency that SOE assets are sold to the highest bidder in open bidding. Auctions have contributed in privatizing one of the loss-making Sudanese enterprise; the Public Corporation for Printing and Publication. Despite the fact that auctions are often used for the privatization of small enterprises, it remains as one of the ideal legal methods for creation of high levels of transparency.

The only difference between auctions and tenders is that auction as a rule is exercised to dispose of the assets of SOE in the event of liquidation; governments often use tender to divest the going concern SOEs. In privatization by tenders, investors in certain SOE submit their bids in sealed envelopes which are opened publicly on announced time and place. In Sudan, one of the important privatization operations was executed through tender; this is Elnilein Group for Industrial Development operation in 2006. High level of transparency was applied, good ranking for legal preparations, legal consultation prior involvement, clear tender announcement in newspapers, and efficient privatization agreement have presented one of the good examples. Also, Bank of Khartoum, Real Estate, and Friendship Palace Hotel privatization operations presented good examples for the privatization through tenders.
A public offering of SOE’s shares means the sale of all or part of the government’s holdings in a company to peoples through domestic or international stock markets. The price of the shares can be fixed by the government. Beyond doubt, this type of privatization methods, if properly exercised, reflects a good level of transparency. In addition to the weak public awareness about the feasibility of investment in the public companies, former bad performance of these companies minimized the contribution of the public offering in the current privatization operations in Sudan. Also, in Sudan and in many of the least developing countries, investors have individualism tendency, a thing which limits public offering of shares as privatization method.

In many countries, vouchers become a well-known method of privatization. In mass privatization programs, governments give all the peoples of the country vouchers of the former governmental enterprises free of charge. These vouchers could then be exchanged into shares at special auctions. The main advantages of this method appear from that the process of privatization gains speed by simplifying the task of divesting a large number of SOEs. In Sudan this method of privatization hasn’t been used that the mentality of the Sudanese government is a collective one. The Sudanese government wants all the proceeds of the privatization entre in its treasury without tendency to investigate the feasibility of the different legal methods of privatization.

Joint-venture reflects the need for a strong investor to contribute in the shares of the governmental enterprises. The outside investor brings new capital and technology, while the SOE provides existing physical assets. In many countries, such method have been exercised as a transitional step towards complete privatization that he sudden transfer of the public enterprise to private body may create many of bad reflections. In Sudan, Joint-venture method was exercised as a transitional step in the
privatization operation of the former Public Telecommunications Corporation. The Sudanese Government attracted some local and foreign investors to establish a joint-venture company. After establishing such company, the Sudanese Government began gradual withdrawal from the company by listing the governmental shares in the internal and international stock markets.

In a lease agreement, a private investor rents an asset or enterprise from the government for a specified period of time and retains the enterprise’s profits for its management services. A concession agreement is similar in that the concessionaire pays either a fixed fee or a percentage of profits for the right to operate a facility or to provide a service, keeping the rest of the proceeds. Lease and concessions all over the world are used for large-scale enterprises such as infrastructure sectors. In Sudan, lease operation was exercised in privatizing hotel activities; the Grand Hotel.

Under a management contract, a private operator takes over the management of the enterprise in exchange for a fee, while the government remains the enterprise’s owner. However, the new investor will not risk his own capital for any restructuring or future investments. In Africa, management contracts are mostly used in infrastructure areas such as the water supply in Abidjan (Cote d’Ivories) and Guinea. In Sudan we have not illustrated any use for such type of privatization contracts.

In many cases, governments, especially in the small-scale enterprises, give the management and employees the right to make an offer for their enterprise before the privatization. In Sudan we have illustrated two uses for this method; the White Nile Agricultural Corporation and the Blue Nile Agricultural Corporation. An agreement was concluded between HCDPE and Al-Janien for Agricultural and
Animal Production to lease the lands and machineries of former White and Blue Nile agricultural corporations. This contract resulted in a dispute between the Sudanese government and the farmer of the two corporations. The government decided to transfer the ownership of the two corporations to their farmers.

BOOT (build-own-operate, and transfer) agreements are used mainly for large energy and infrastructure projects. The investors provide the finance and build and operate the facility for a fixed period of time. They recover their initial capital outlay plus a reasonable return by charging user fees. At the end of the contract, ownership reverts to the government. BOT system, save in narrow scope, is used for privatization of governmental activities not existing enterprises. Nowadays, in Sudan the railways sector has contracted with some private companies according to some formulas of BOT system, namely RLT (rehabilitate, lease, and transfer) formula.

Liquidation and asset sale can be considered as one of the privatization methods. In the case that public enterprise is in a particularly bad financial condition with high liabilities, a direct sale and other types of privatization might prove impossible. In such a case, the government might opt to liquidate the enterprise and sell its assets. The Sudanese government used this method in privatizing the highest loss-making corporations like the Mechanical Transportation Corporation; many of the fuel stations owned by this corporation, with their assets, were sold to private bidders. (See chapter3).

After performing the different privatization methods we recommend that negotiated and direct sales should be limited or, at least, exercised in narrow scope. Absence of transparency in exercising these contracts, especially in the large-scale enterprises has bad reflections on the credibility of the privatization program as a whole.
Abstractly, tenders and auctions privatization provides high level of transparency in the execution of privatization processes. In addition, many of the most successful privatization operations in Sudan were executed through tenders and auctions such like Elnilein Industrial Group Bank privatization, Bank of Khartoum, and Real Estate Bank. Therefore; notwithstanding the other legal methods of privatization, we invite the Sudanese government to widen the use of this legal method.

Privatization and Constitution and International Law:

Despite the fact that, during the period from the beginnings of the ninetieth of the past century until the beginnings of the current century, economies of most of the former socialist and Marxist-Linient countries were liberalized, many constitutional barriers on the face of privatization remained. Some of these constitutional provisions limit the scope of privatization for example, Portugal’s 1976 constitution declared irreversible the nationalizations that followed the April 1974 revolution. Therefore the constitution had to be amended to authorize the privatization of these SOEs. In Sudan, the Permanent Constitution of 1974 did not include any strict provision for prohibition of privatization. On other hand, some Articles of such constitution included signs for the nature of the Sudanese economy that minimize the role of the private sector in the national economy:

Article 30: The socialist system shall be the foundation of the economy of the Sudanese society so as to realize sufficiency in production and fairness in distribution, and to introduce decent living for all citizens and prevent any form of exploitation and injustice.

Article 31: The Sudanese economy shall be directed to realize the objectives of the development plans in order to achieve the society of sufficiency and justice and the state shall own and manage the fundamental means of production in the economy.

Article 32: The Sudanese economy shall consist of the activities of the following sectors:
The public sector, which shall be pioneer sector and shall lead progress in the fields of the purpose of the development, shall based on public ownership and be subject to people’s control.

The Co-operative sector, which shall be based on the collective ownership by all members participating in co-operative societies. The state shall care for the co-operative and the law shall regulate their formation and management.

The private sector, which shall be based on non-exploiting private ownership. The state shall protect and encourage it and organize its formation to play a positive and active role in the national economy.

From the above provision, we can note that Article 31 directly provides for socialism as the economic policy in Sudan. Article 32 ranked the private sector at the end of the list of the productive sectors; after the public and the cooperative sectors.

In some countries, the constitution may provide that any privatization operation must be approved by parliament. This is the case with Article 34 of the French constitution of 1958. With regard to that privatization is in need for smooth applications without tension between the executive and the legislative authority, such provisions create barriers for privatization.

Constitutional provisions may also limit the extent of the government’s discretionary power. For example, while valuation of the enterprise to be privatized in England is a government’s discretion, in France the Constitutional Council which is responsible for verifying the constitutionality of laws, ruled that the constitutional principles of equality among all citizens and Article 17 of the Universal Declaration of Human Rights which mandate the payment of just compensation when property is confiscated, prohibit the transfer of public assets at less than the real value. Also the control of constitutionality of privatization legislation may also delay the execution of the privatization operations. In many countries such like France; the constitutional court may review
legislation before it comes into force. Therefore, the frequent suits by labour unions usually delay the execution of the privatization program.

The conduct of privatization transactions in a given country can also be affected by the international treaties and agreements to which such a country is a party. Most of the international treaties and conventions, although they do not frankly provide privatization, they do not provide for any preferential treatment for the public or the governmental sector. For example, EU treaty is very significant, even though the treaty itself is neutral regarding type of ownership. The abolition of customs barriers, the liberalization of former monopolistic markets, and the imposition of common competition rules on private as well as public enterprises all foster the entry of private operators.

Sudan is a member of many international commercial conventions and treaties like COMESA which includes countries of east, central, and southern Africa. Provisions of such a treaty eliminate custom barriers between the member countries regardless of the sector of producer (public or private). In addition, many of the member countries of COMESA are also member in WTO. Accordingly, they comply with WTO’s provisions which include liberalization of economies. Also, Sudan is a member of Arab Free Trade Area (GAFTA). In the light of that many of the member countries of GAFTA are, at the same time, members of WTO, wherein the private sector has great portion in the national economy; the private sector in Sudan should be given considerable contribution in the national economy activities.

Bilateral agreement also has important affection on the privatization, especially in the events of privatization of airlines. Before privatization, routes of airlines are often governed by bilateral agreements between governments as owners of the airlines companies. After privatization, the ownership of airlines will become private ownership;
therefore, for protection purposes, governments often put some safeguards in the privatization contracts to maintain their rights in these routes.

Current conventions, bilateral agreements, and treaties on trade, although most of them do not frankly provide for the liberalization of national economies, they are implicitly concerned with creation of economic climate favourable for liberalization and wide contribution of the private sector in the economy. The Government of Sudan has involved some bilateral agreements which created monopolistic climate (like the Exclusive Agency for Sudanese live-stock and Meats between Sudan and Saudi Arabia), a thing which make investors, especially the foreigners, fear to invest in Sudan.

For the above we can say, that since that the current constitution in Sudan is an interim or transitional one; we recommend that the provisions of the permanent constitution should not include any provisions for economical ideology. Furthermore, we recommend that any legislation or governmental order should not provide for any monopolistic treatment for the sake of governmental or private body. Lastly, the Sudanese government is required not to implement any commercial convention, treaty, or bilateral agreement if it creates monopolistic or preferred treatment for the sake of any private or governmental body.

Privatization and Competition:

Many privatization writers consider the level of competition in a country a measure of the success of the privatization program in such a country. Furthermore, part of international economists considers competition as determinant element in achieving not only successful privatization program, but rather a measurement for the performance of the economy as a whole. Professor George Yarrow stated (see chapter 5):

“Competition is likely to be more important determinant of economic performance
than the ownership”. In other words, if public productive enterprise had initially been established on competitive bases, they would have never presented disappointed performance.

The importance of the adoption of fair competition appears from that in a country launching privatization program, a considerable number of potential investor are foreigners and part of them come from liberal economies where public enterprises are not granted preferred treatment over the private ones. Therefore, any preferential treatment for the sake of the public enterprises will narrow the participation of the foreign investment in privatization program.

In many countries (Sudan among them), legislations protecting competition exist, but the main challenge to achieve successful privatization program is to prohibit anticompetitive treatment between the different actors in the market before, during, and after the execution of the privatization operations. To achieve successful privatization program, non-discrimination between the private and public sectors in the market is a declared policy in many countries. In Brazil, for example, guarantees of non-discrimination are, even, found in the constitution. Article 173 of the 1988 of Brazilian constitution provides that public corporations, joint venture companies, and other public entities that engage in economic activity are subject to the same legal system as private companies.

It is irrational to use the privatization itself as a device to create monopolies. The Sudanese government committed this mistake by granting long-term monopoly for the new owners of the former National Telecommunications Corporation. Again, in the privatization contract of Atbara Cement Factory, the Sudanese government agreed some uncompetitive provisions. A letter from the Secretary General of Taxation Chamber to President of Higher Committee for Disposition of Public Enterprises on 15/10/2002, mentioned these provisions:
Terms 5/11 to 5/14: are not constitutional and against the international agreements, they prejudice the rights of the states and the other similar factories such like Rabak Cement Factory. In addition they are monopolistic and contradict the economy liberalization policy.

SS. 13, 20, 22, 37 contradict the Additive Value Tax Act in concern the imported commodities, and permission of sale without issuing sale invoices. The exemption from the additive value tax is only issued by legislative order from the Minister of Finance and National Economy after the recommendation of the General Secretary of Taxation Chamber.

For the above, the Sudanese legislative authority and government are required not to issue any legislation or order which creates sort of preferential treatment for the sake of one investor over the others. In addition, Sudanese government or the Higher and the Technical committees are required not to consent to any term of contract provides for any uncompetitive treatment.

Privatization and Public-sector Management:

Public-sector management has important role in the privatization, especially in countries with French influence in their legal system. In France, privatization hasn’t been exercised by a special governmental body (committee or agency). Absence of such body means absence of a special authority facilitates overriding laws which stand as barriers on the face of the privatization.

In Sudan, although there are federal governmental bodies to execute the privatization program (the Higher and the Technical committees), some difficulties have faced the execution of the privatization program. Identifying legal owner is standing as strong barrier in the face of TCDPE that some of assets of the public enterprise to be privatized may be owned by other public entity. In addition, the privatization program was launched in the period where the governance is central. After application of the federal governance, TCDPE (federal
committee) faced many problems in transferring ownership and concessions of the privatized enterprise to the new investor.

The ambiguity in determining the boundaries of authorities between the different governmental units also has big affection in smoothing execution of privatization program. For example, the privatized cement factories like Atbara Cement Factory have suffered a lot to renew their concessions of quarries of lime stone. For example, a dispute was launched between the Geological Research Authority of the Sudan (GRAS) and the new owners of Atbara Cement Factory. GRAS refused to renew the concessions of lime stone quarries to the new owners. The new owners of the factory claimed that the authority for renewing the concessions is for the Ministry of Investment of River Nile State. However, the dispute was amicably solved.

For solving property problems, we repeat what Mr. Hassan Alkhier, Head of Department of Investment Promotion in the Ministry of Investment (mentioned in Chapter 6) said:

“1- Most of the investment lands which were formerly granted to the governmental productive units in the fortieth, fiftieth, and, seventieth of the past century, specially those were granted outside Khartoum, have no records in the lands authorities. Therefore, after their privatization in the past and the current century; governmental bodies of these productive units failed to determine boundaries of these lands, a thing which resulted in many problems for the government and the new investors.

2- The former governmental management bodies of units which were granted these lands are presumed to be responsible for such negligence. They are the persons who were responsible to pursue surveying and registering these lands under the names of these units.

3- The governmental management bodies have to inform TCDPE that these lands have not yet been registered under the name of the targeted SOE. Informing TCDPE enables it to solve problems of surveying and registration before privatizing the targeted SOE.
4- TCDPE, now, is required to register all lands of the targeted SOES, (listed in the schedule of the Disposition of Public enterprises Act 1990), under its name. Such registration will enable TCDPE to exercise the privatization operations as the owner not as a representative; a thing which will emanate its negotiating position.

**The Privatization Law:**

While most countries legally implement their privatization programs by passing law on privatization which specify the scope of the program, establishes the institutional authority to conduct the privatization program, and define the most important elements of the process; other countries consider existing legislations as sufficient to conduct the privatization program. However, if privatization law is required, it must define what is to be privatized, list governmental enterprises that will be sold, and specify the entities responsible for the execution of the privatization program.

Many countries launched their privatization programs without specific law that such countries were in bad need for implementing argent privatization programs. On the other hand, there is also the danger of major delays through the long-time political debates in the parliament of prior to passing a privatization law. In addition, enacting privatization legislation may require major changes bigger than the ordinary parliament debates; it may require amendment in the constitution of the country.

In the absence of a specific legislation to privatization, and where the government does not want to be involved in the complicated procedure of enacting a specific privatization law; using some sorts of creativity, lawyer can circumvent the amendment of number of legislations that stand as barriers for privatization. For example, In Vietnam (former communist state), the ownership of SOE’s land can not be transferred to private enterprise. The problem has been solved by
establishing joint-venture companies whose public sector partner held the rights to land use granted long leases. Another example, in Nicaragua, the state’s ownership titles to certain assets are imprecise or disputed. This made the sale of these assets to private enterprise very difficult. The problem was solved by that the state concluded lease-sale contracts allowed assets to be transferred without immediate sale; lessee was given an option to purchase these assets at the end of the contract.

Privatization law may be a general one which places all the required powers for privatization in the hand of certain committees. On the other hand, in many countries despite that privatization is exercised depending on a specific law; such law may be restrictive in some authorities, followings are examples:

- The law may list SOEs to be wholly or partially privatized; therefore, government’s authority is limited to these listed SOEs.

- All too often that privatization laws and regulations prescribe the authorized privatization methods.

- Some privatization laws put restrictions on entity of the buyer such as prohibition of public entities to involve as buyers in the privatized enterprises. The Sudanese privatization law doesn’t include such restriction and the government sold many of the privatized enterprises to other public entities. Box no.6 in this dissertation appears that among 25 transfers of public enterprise to other public entities, 12 transfers are considered as failed operations.

- Some privatization laws put restrictions on foreign participation in the privatization operations, for example, in Burkina Faso, Article 10 of Ordinance no. 91-0040/PRES of July 1991 empowers the minister responsible for SOE supervision to reserve in priority a share of each privatization for Burkinabe nationals. In Brazil, Article 13 of Law No.
8031 of April 1991 limited holding by foreigners to 40 percent of voting shares.

- Privatization law in many countries provides for the golden share in privatization contracts. The golden share enables the government to veto some decisions or share transfers; this technique remains a state’s control beyond privatization. In Sudan many privatization contracts included golden share for the government. For example, the privatization contract of Atbara Cement Factory includes that the new owner cannot amend the objectives of the company of the factory. In addition, the purchaser agrees to transform the Company of the factory from private to public five years after privatization. Moreover, the purchaser is obliged not to sell the Factory at any time, but has the right to involve any co-ownership in a sense not affecting the terms of the agreement.

For the above, the public enterprise should not be transferred to other public entities. Also, there must be rational balance between the portion of local and foreign investors in the privatization operations.

**The Institutional Framework of Privatization:**

Determination of the institutional framework of privatization requires the definition of the roles, responsibilities and authorities of the various actors in the privatization operations such like the legislature, government, individual ministries, and the transactions body.

The role of the parliament is fundamental in the institutional framework of privatization. International experience of privatization shows that relations between parliament and government can be strained at any stage of privatization process even where the government is in a bad need for enacting the privatization legislation. The bad face of the intervention of the parliament appears from that it may constrain the privatization from the first step (enacting the required legislation). Delays attributable to intervention by parliament may be more detrimental in
smoothing the privatization program. On the other hand, consent of parliament in any privatization operation gives many advantages for such operation and the privatization program as a whole.

Countries adopt different institutional frameworks characterized by varying degrees of independence of the privatization body (committee or agency) from the political apparatus. The common institutionalization of privatization bodies is by the appointment of two agencies or committees. One is a supervisory committee which sets the main policy of privatization and sign final privatization contracts. The second is an executor committee that operates under the supervision of the first committee; its missions are to make all the preparative steps before the privatization like rehabilitation, valuation, and termination of service of employees of state-owned enterprise. Strict separation of authorities of the two committees provides smooth application of privatization program. In Sudan we have illustrated some contraction of powers between the two committees, the Higher and Technical committees (see Table No.10 in chapter 8).

Part of privatization writers mention that some principles of law in a country are better determinant for the institutional framework of privatization than the sections of laws do. Guarantee of rule of law and delegation of powers principles come first in these determinant principles.

It is a common notion that “capital is coward”, therefore, without guarantee of the rule of the law in a country both foreign and local investors will not join any privatization operation. Guarantee of the rule of the law includes, among other things;

- The publicity of the rule of the law; which enables all parties to have access to the laws and regulations that affect their activities.
- Predictability in the application of the rule of the law reduces the risks linked to changing interpretation, implementation, and enforcements of laws.

- Systematic stability provides assurance that the government will not unilaterally and unfavourably change the legal and regulatory conditions that underlie investment.

- Fairness, possibility of legal resource, and due process provide access to independent recourse and dispute settlement mechanisms.

There are clouds of doubts about the real application of this principle in almost all countries that are dictatorially governed.

Assurance of the principle of delegation of powers is also required to achieve successful privatization program in a country. Proper application of such principle creates good impression on the investors that privatization operations are smoothly applied without unnecessary delays in completing sales and handovers procedures. Delegation of powers also requires the members of privatization agencies or committees to be excluded from investing in the privatized firms.

For the above, the followings are advisable:

- In the application of the privatization program, there must be strict application for the principles of the guarantee of the rule of the law and the delegation of powers.

- Since the current law of privatization in Sudan was enacted in a period of moratorium of the constitution and the parliament, the government is now required to request passing of privatization law by the parliament. Beyond the doubt the consent of the parliament will reflect high level of credibility on the privatization program as a whole.

- The Minister of Finance and National Economy (President of the Higher Committee of Disposition of Public Enterprises) should monitor
and prohibit the contradiction of authorities between the two privatization bodies.

**Privatization of Infrastructure:**

Infrastructure sectors are, or were, usually thought to exhibit monopoly characteristics; that is, one operator should be able to provide these services more efficiently than could several operators acting separately. Infrastructure sectors are intensive capital activities; therefore, one may think that all the activities of the infrastructure sectors had initially been practised by the governments. By vestigial research in the history of the public sectors it appears that, save in rare countries, most of infrastructure activities were initially started as private sector activities. Thereafter, because of war-related circumstances, governments nationalized these activities. In addition, because of the same war-related circumstances, former private owners bankrupted, a thing which compelled governments to undertake the responsibility of producing and presenting services of infrastructure sectors.

According to the big size of the infrastructure sectors, a fundamental step before privatizing the infrastructure sector is required. Unbundling the sector is the required step; it implies that the internal components or segments of the infrastructure sector should be divided into separate units so as to simplify the privatization operations. Enabling the individual investor whether local or foreign to contribute in the privatization operations stands as the first justification for unbundling the sector. Another justification appears from that unbundling eases the regulators’ control over the privatized units and facilitates their mission in benchmarking the competition of the new operators. Any of the divided segments can carry a legal entity to facilitate the privatization, or it may be privatized without carrying legal entity.
Methods of the privatization of infrastructure resemble the methods of privatization of state-owned enterprises. Privatization by BOT system (Build, Own, and Transfer) implies that privatization by this method is a privatization for activities which were formerly reserved for the public sector. But, some formulas of BOT system can even be used for privatization of existing infrastructures, for example, RLT (Rehabilitate, Lease, and Transfer) which is widely used in the contracts of the Sudanese Railways Corporation.

Because of its feasibility, BOT system should widely be used that it provides good source for financing infrastructure schemes without burdening the public budget by huge amounts of money.

**Privatization and Labour:**

Labour rights have great importance before, during, and after the execution of privatization operations in a country. Despite its importance, labour is one of the least addressed issues in privatization. It is true that the former practice of government resulted in excessive number of labour in the governmental enterprises.

The past bad experience should not underestimate the necessity of efficient guarantees of laid-off labour’s rights. The first guarantee of labour can be achieved by dealing with them before privatization, and the government should explain the rationale, costs and benefits of privatization, and the costs of non-privatizing. Experience of some countries like Argentina and Uganda appears that workers supported privatization when they understood the advantages and necessities of privatization through government communications. In Sudan, the labour union frequently declares that it was actively consulted during the first Conference for Economic Reform 1990 (where privatization policy was recommended). But, the frequent grievances and protestations of labour
syndicates denote that they have not been well informed with regard to privatization feasibility.

In countries where the pensions and insurance systems are weak, the problem is that the early retirements enlarge liabilities of pension funds and the social security system, a thing which results in delaying payment of laid off labour rights and, consequently, the credibility of the state.

With regard to the above, we recommend that the communication with employees through the Labour Union is a fundamental device to win their support for the privatization program. Also, assuring that Pensions and Social Insurance Funds are ready to pay the rights of laid-off workforce before implementing privatization is a good guarantee for smoothing the privatization. Pensions and social insurance funds should be subsidized to fulfil the laid-off employees’ rights without waiting for the payment of instalments of sales. Lastly, generous severance payment for the laid-off workforce is advisable as it guards them against complicated procedures of the Pensions and Social Insurance Funds.
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Appendixes

Chapter 3:

(1) Memorandum of Understanding of Bank of Khartoum Privatization Operation.

“This agreement is made the.........407 day of July 2005 between:
(1) The Bank of Sudan whose registered office is at Khartoum –Sudan (the ‘Vendor’) and
(2) Dubai Islamic Bank PJSC whose registered office is at Dubai- United Arab Emirates and which shall include all assigns and transfers of Dubai Islamic Bank PJSC, including without limitation any third party to whom Dubai Islamic Bank PJSC transfers any shares acquired by Dubai Islamic Bank PJSC pursuant to the terms of this agreement as (the ‘Purchaser’).
WEREAS, the Vendor has agreed with the Purchaser for the sale of 7,086,000 fully paid shares in the Bank of Khartoum Public Limited Company (the ‘Company’) being a company registered in the Republic of the Sudan.
NOW, THEREFORE, IT IS HEREBY AGREED AS FOLLOWS:

1. Definitions
For the purposes of this agreement:
‘Balance Sheet’ means the balance sheet and profits and loss statements for the company or 12 months period ending on the balance sheet date;
‘Balance Sheet Date’ means December 31 2004;
‘Business Day’ means any day on which banks are open for business in the Republic of the Sudan;
‘Business hours’ means 9-am-5pm inclusive on any business day;
‘Completion’ means the process of completing the sale and purchase of shares in accordance with cl 7;
‘Completion Date’ means the date specified in writing by the Purchaser as being the date on which the purchaser wishes to complete the purchase contemplated by this agreement;
‘Due Diligence End Date’ means the date falling 60 days from the date hereof;
‘Existing Commitments’ means all contracts of the Company on the Completion Date and bids by the Company outstanding on the Completion which subsequently become binding contracts upon the terms contained in those bids;
‘Loss’ or ‘Losses’ any and all liabilities, losses, costs, damage (including special, indirect and consequential damage), penalties and expenses (including reasonable legal fees and expenses and reasonable costs of investigation and litigation). In the event of any foregoing are indemnifiable pursuant to schedule Three, the terms ‘Losses’ shall also include any and all reasonable legal fees and expenses and reasonable costs of investigation and litigation incurred by the Purchaser in enforcing such indemnity;
‘Person’ means an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, or association, two or more of any of the foregoing having a joint or common interest, or any other legal or commercial entity or undertaking; and ‘Persons’ shall be construed accordingly;

‘Purchase Price’ is US$ 57,000,000 (fifty seven million);

‘Requisite Consent’ is defined in cl 3.4;

‘Share’ means the 7,086,000 ordinary shares of 1000 Sudanese Dinars each of the Company;

‘Sub-Contracts’ means the sub-contracts entered into in order to enable the performance of, or otherwise in connection with, the Existing Commitments;

‘Tax’ includes (but is not limited to) income tax, corporation tax, advance corporation tax, capital gains tax, development land tax, development gains tax, social security and earnings related contributions, income tax payable by way of pay-as-you-earn deductions, estate duty, inheritance tax, capital transfer tax, stamp duty and value added tax, and all costs, charges, interest, penalties, surcharges and expenses related to any disallowance of relief or claim for taxation;

‘Warranties’ means the warranties set fourth in schedule 1; and ‘Warranty’ shall be construed accordingly;

in this agreement reference to a ‘day’ means a period of twenty-four hours ending at twelve midnight, reference to a ‘month’ means a calendar month, and reference to a ‘Year’ means any period of twelve months;

All references to a statutory provision shall be construed as including references to;

(a) Any statutory modification, consolidation or re-enactment (whether before or after the date of this agreement) for the time being in force;

(b) Any statutory provisions of which a statutory provision is a consolidation, re-enactment or modification;

Unless otherwise stated, a reference to a clause or schedule is a reference to a clause of or a schedule of this agreement; the schedule and appendixes to this agreement constitute an integral part thereof.

The headings in this agreement are for convenience only and shall not constrain or affect its construction or interpretation in any way whatsoever;

References to days or dates (including without limitation the completion date) which do not fall on a Business day shall be construed as references to the day or date falling in the immediately subsequent Business Day;

Whatever in this agreement a period of time is referred to, the day upon which that period commences shall be the day after the day from which the period is expressed to run, or the day after the day upon which the event occurs which causes the period to start running;

Where the context so admits, any reference to the singular includes the plural, any reference to the plural includes the singular, and any reference to one gender includes all genders; and

Any reference to a ‘Party’ means the Vendor or the Purchaser and references to the ‘Parties’ shall be construed accordingly.

2. Sale and Purchase of Sales

The Vendor has agreed in principle and subject to contract to sell with full title guarantee and the Purchaser has agreed in principle and subject to contract to purchase the shares for the sum of US$ 57,000,000 (fifty seven millions), completion to take place on the Completion Date.
3. Completion is subject to:

A legal report (including but not limited to those matters set out in schedule 3 (legal due diligence) on the affairs and business of the company satisfactory to Purchaser being received by the Purchaser not later than the Due Diligence End Date, which investigation shall be commenced forthwith upon the signature hereof and in respect of which the Vendor shall extend all necessary co-operation to the Purchaser and the Purchaser’s legal advisors;

A audit report (including but not limited to detailed analysis of all non-performing loans) stating the financial condition of the Company as at June 30 2005, (addressed to the Purchaser and jointly signed by the Companies auditors and auditors selected by the Purchaser) being received by the Purchaser not less than the Due Diligence End Date, which investigation shall be commenced forthwith upon the signature hereof and in respect of which the Vendor shall extend all necessary co-operation to the Purchaser and Purchaser’s auditors;

A technical report (including but not limited to internal banking compliance and IT issues) satisfactory to Purchaser being receipt by the purchaser not later than the Due Diligence End Date, which investigation shall be commenced forthwith upon the signature hereto and respect of which the Vendor shall extend all necessary co-operation to the Purchaser and the Purchaser’s technical banking team; and

Granting of all necessary governmental and other consents including without limitation (i) a determination of Finance and National Economy approving the acquisition and (ii) evidence satisfactory to the Purchaser that the proposed share transfer is in accordance with the Khartoum Exchange Act 1994.

Save as required by law each party shall keep confidential and shall not make a public announcement or other disclosure in respect of this agreement or the transaction contemplated herein without consent of the other party.

The parties shall agree upon the most efficient and cost-effective method of structuring the transaction detailed above, and the parties further undertake to review and, if necessary, to negotiate any materially affected terms and conditions of this agreement if for valid and substantial the transactions are structured so as to cause serious deviations from the original intent.

In consideration of the Purchaser (a) agreeing to enter into this agreement and to negotiate in good faith with the Vendor concerning the transaction detailed herein, and (b) putting in hand the investigation and audit reports referred to in cl 3, the Vendor hereby agrees with and undertakes to the Purchaser the following obligations, each of which shall be a separate obligation, legally binding upon the Vendor and separately enforceable by the Purchaser as follows:

The Vendor will ensure that the directors, officers, representatives, and the agents of the Company (including the Company’s auditors) afford the purchaser and its representatives, including its lawyers and auditors, such access to the Company’s records, premises, accounts and management personnel, during business hours, as the Purchaser and its representatives may reasonably require so that the Purchaser may perform a purchase investigation of the Company’s business, financial and legal condition; and

If Completion does not occur within six months from the date hereof the Vendor shall pay to the Purchaser an amount equal to all costs incurred by the Purchaser in connection with this agreement, including but not limited to all costs associated with the legal investigation and financial audit.

3. Completion
1- Completion shall take place on the Completion Date at 10 am at the registered office of the Company if in the opinion of the Purchaser the conditions specified in cl 3 have been satisfied.

2- At Completion, The Vendor deliver to the Purchaser duly executed transfers in favour of the purchaser, or if the Purchaser so directs, in favour of nominee of the Purchaser, in respect of the shares together with the current shares certificates relaying to the shares;

3- The Vendor shall deliver to the Purchaser or any person whom the Purchaser may nominate such of the following as the Purchaser may require:

4- The statutory books of the Company (which shall be written up to but not including the Completion Date), its certificate of incorporation and any certificates of incorporation on change of name, and its common seal (if any); all books of accounts, cheques books, paying in books and unused cheques of the Company;

5- Resignation of the Directors or the Secretary from their respective offices in the Company confirming that they have no outstanding claims of any kind against the Company;

6- Resignation of the existing auditors of the Company confirming that they have no outstanding claims of any kind against the Company; appropriate to amend the mandates given by the Company to its bankers;

7- The Vendor shall procure that a meeting of the Board of Directors of the Company shall be at which: Such persons as Purchaser may nominate shall be appointed as additional Directors of the Company with immediate effect;

The existing directors of the company shall be appointed as additional directors of the Company and such negotiations shall be accepted;

The secretary of the Company shall resign and acknowledge that they have no claims against the Company, such resignation shall be accepted, and a person nominated by the Purchaser shall be appointed as secretary, with immediate effect;

The registered company shall be changed to a new location;

The share transfer referred to in cl 7.2.1 shall be approved for registration (subject to stamping);

All existing mandates to bank shall be revoked and new instruction shall be given to such banks in such form as the Purchaser may direct; and

The registration of Company’s auditors shall be accepted in favour of the persons who shall thereupon be appointed as auditors of the company with immediate effect;

The Purchaser shall procure that the additional directors to be appointed pursuant to cl 7.2.3.1 attend the said meeting of the board of directors and accepted office;

Should any person whose resignation from the office the Vendor is obliged to procure bring a claim against the Company by reasons of that Person’s resignation from office the Vendor shall indemnify the Company against such claim and against all Losses incurred by the Company in connection with such claim.

To the extent that they shall not already have done so on Completion, and to the extent that the same is within the possession and/or the control of the Vendor, the Vendor shall (for a period of 24 months after the Completion Date) make available to the Company copies of such information, records and data as are necessary for the operations of the Company as are requested by the Purchaser by notice in writing to the Vendor.

The first instalment of the purchase price shall be paid to the Vendor in immediately available funds on the Completion Date.
Subject to the occurrence of Completion:

- on the first anniversary of the date hereof the Purchaser shall pay to the Vendor US$ 19,000,000 (nineteen millions) and;
- on the second anniversary of the date hereof the Purchaser shall pay to the Vendor US$ 19,000,000 (nineteen millions).

4. Warranties

The Vendor hereby warrants to the Purchaser, in terms of warranties, as of the date of this agreement and as of the Completion date (as if the warranties were remade on the Completion Date), and acknowledgments that the Purchaser has entered into this agreement in reliance upon the warranties and the undertaking contained in this agreement. Each of the warranties shall be separate and independent and claims may be made whether or not the Purchaser knew or could have discovered (whether by any investigation by it or in its behalf into the affairs of the Company or otherwise) that any of the warranties has not been complied with or carried out or is otherwise untrue or misleading.

The Vendor undertakes to disclose to the purchaser promptly any thing which comes to its notice which is materially inconsistent with any of the warranties.

The Vendor undertakes not to make any claim against the Company or its employees in respect of the matter giving rise to such claim.

In the event of any warranty given by the Vendor herein is shown to incorrect or inaccurate, the Vendor shall indemnify the Purchaser in respect thereof in accordance with schedule 2 (Indemnification).

9. Assignment

This agreement shall not be assignable by either of the parties hereto without the prior written consent of the other party hereto. Notwithstanding the foregoing, the Purchaser shall have the right to transfer any or all of the shares it owns now or in the future to third parties of the Purchaser’s choosing. Any third party who becomes an owner of any shares following such a transfer by the Purchaser shall be entitled to rely upon and enforce any terms of this agreement against the Vendor as if that third party had been a signatory to this agreement.

10. No press release, notice or other public announcement concerning the transaction set out herein shall be made or issued (other than to the extent required by the law) by one party hereto without the prior written approval of the other.

11. Costs and expenses

Other than specified in cl 6.2 and cl 8.4, each party shall pay its own costs in relation to the negotiations leading up to the sale of the shares and to the preparation, execution and carrying into effect of this agreement and of all other documents referred to in it.

Without prejudice to the generality of cl 11.1 the Vendor shall be responsible for the stamping of the transfers of the shares delivered by the Vendor pursuant to cl 7.2.1 and for the payment of the relevant stamp duty.
12. Survival of warranties
The warranties, and all undertakings or representations contained in, or obligations imposed by, this agreement, shall survive Completion and continue in full force and effect notwithstanding Completion, except for those obligations to be performed on or prior to Completion but only to the extend that they have been so performed.

13. Arbitration
Any dispute to any provision of this agreement shall be referred to a single arbitrator in London to be agreed between the parties. Failing such agreement within seven days of the request by one party to the other that such a question or difference be referred to arbitration in accordance with this clause such reference shall be to an arbitrator appointed by the President for the time being of the Law Society of England and Wales. The decision of such arbitrator shall be final and binding upon the parties. Any reference under this clause shall be deemed to a reference to arbitration within the meaning of the Arbitration Act 1996.

14. Service of notice
14.1 Any notice and certificate permission consent license approval or other communication or authorisation to be served upon or delivered or given or communicated to one party hereto by the other (in this clause called a ‘communication’) shall be in the form of a document in writing including without limitation a telex or telegram but not a facsimile or an electronic mail massage.
14.2 All communications shall be made to the Vendor at its location addresses or its telex number, and shall be (for the attention of: ‘the Company Secretary’). And to the Purchaser at the location addresses or to its telex number and shall be (for the attention of: ‘the Company Secretary’).
14.3 A communication shall be delivered by hand during business hours or sent by telegram or telex or registered post (where possible by airmail).
14.4 A communication shall have effect for purposes of this agreement and shall be deemed to have been delivered to and received by the party to whom it was addressed:
14.4.1 If delivered by hand upon receipt by relevant person for whose attention it should be addressed as provided above, or upon receipt by any other person then upon the premises at the relevant address who reasonably appears to authorised to receive post or other massages on behalf of the relevant party;
14.4.2 if sent by telex upon the transmission of the communication to the relevant telex number and receipt by the transmitting telex machine of an answer-back code showing that the telex massage has been received properly by the telex machine to which it was transmitted; and
14.4.3 if sent by telegram twenty four hours after the text of the cable has been given to the relevant telegraph company or other authority for transmission unless before the expiry of that period an advice of inability to deliver is received by the party make the communication;
14.4.4 if sent by registered post seven days from the date upon the registration receipt provided by the relevant post authority.
14.5 Each party shall be obliged to send a communication to the other in accordance with this clause notifying any changes in the relevant details set out in the second paragraph of this clause, which details shall then be deemed to have been amended accordingly.

15. Termination
15.1 if the requisite contents are not obtained within a period of six months from the date hereof, then (unless the parties otherwise agree and subject to cl 15.2) neither the Vendor nor the Purchaser shall be obliged to complete the purchase and sale of the shares, this agreement shall automatically terminate upon the expiry of the said period and neither party shall be under any liability to the other by reason of such termination, other than obligation on the Vendor contained in cl 6.2.

15.2 If Completion has not taken place within a period of six months from the date hereof neither the Vendor nor the Purchaser shall be obliged to complete purchase and sale of the shares, this agreement shall automatically terminate upon the expiry of the said period and neither party shall be under any liability to the other by reason of such termination, other than obligations on the Vendor contained in cl 6.2 and 8.4.

16 Set-off
Whenever under this agreement or any other agreement or contract binding upon the parties any some of money shall be recoverable from or payable by one party hereto (the ‘paying party’) to the other party (the ‘receiving party’), the same may be deducted from any some then due or which at thereafter may become due to the paying party from the receiving party under this agreement or any other agreement or contract between the paying party and the receiving party.

17 Governing law
The construction, validity and performance of this agreement shall be governed by the laws of England. The parties submit to the non-exclusive jurisdiction of English courts.”

(2) Privatization contract of the Grand Hotel – Khartoum:

Contract for the Lease, Renovation, and Rehabilitation of the Grand Hotel – Khartoum

“1-This agreement is made and entered into by and between the Government of the Sudan represented by the Minister of Finance and National Economy, hereinafter referred to as the “Land Lord” and Lanka-Suka Hotels and Resorts SDN BHD, a company registered in Malaysia, or its duly nominated subsidiary as the second duly authorized, (power of attorney, Annex A), hereinafter referred to as the “Tenant”.

2- Whereas the Land Lord is offered to lease, renovate and rehabilitate the mentioned hotel.

3- And whereas the tenant is interesting to lease, renovate and rehabilitate the mentioned hotel.

4- The Tenant has agreed to lease and renovate and rehabilitate the mentioned hotel according to the following conditions:

5- The tenant has no right to change the purpose of the hotel unless by a written consent of the Land Lord.

6- Payments shall be as follow:
a- The first year, after the rehabilitation; the Tenant shall pay US$180,000 to the Land Lord.

b- For the second year the Tenant shall pay a sum of US$180,000.

c- From the third to the fifth years the Tenant shall pay US$ 220,000 in addition to 2.5% from the revenue to the Land Lord, for every year.

d- From the sixth to the tenth years the Tenant shall pay US$220,000 in addition to 2.5 from the revenue for every year.

e- From the eleventh to the twentieth years the Tenant shall pay US$308,000, in addition to 3% from the revenue and 5% from the net profits for every year.

f- From the twenty first to the twenty five years the Tenant shall pay US$350 in addition to 3% from the revenue and 5% from the net profits.

g- The payment for every year shall not exceed two months from the beginning of the accounting year.

h- The Tenant shall pay 50% from the agreed-upon amount of the first year at the time of signing this agreement, and the other 50% shall be immediately after the handling over of the Hotel.

7- The Land Lord has agreed to deliver all the related concessions, facilities and all the exemptions granted by the Encourage of the Investment Act 1996.

8- The lease period will be 25 years commencing twelve (12) months from the date of taking over the Hotel from the actual completion of the rehabilitation which ever is the earlier, with an option to the Tenant to renew the lease period for a further 15 years upon a written request made by the Tenant not less than twelve (12) months before the expiry of the initial Twenty five (25) years period subject to the consent of the Land Lord.

9- The tenant should bear all the costs of the rehabilitation.

10- The Tenant has the right add any facilities or extra buildings in the Hotel premises in order to increase its capacity subject to the consent of the Land Lord.

11- The Land Lord agrees to hand over the Hotel to the Tenant free from any liabilities to any other party and with its present condition and contents as mentioned in the list of contents. The Tenant has to hand over back the Hotel in good condition at the termination of the contract without responsibilities or liabilities, which may accrue during the contract period.
12- Any extensions, rehabilitation or maintenance or renewal in the Hotel will be the property of the Land Lord at the time of termination of the contract period for any reason whatsoever or at the end of the lease period.

13- The Tenant should be responsible for any damage or loss in the Hotel or its contents during the contract period and he has to compensate the Land Lord for such damage or loss.

14- The Tenant shall be responsible for any damage or loss or negligence caused by his sub contractors.

15- The Tenant shall not transfer any of his rights or liabilities in the contract wholly or partly to any third party without prior written consent of the Land Lord.

16- The Tenant has the right to dispose of any tool, material or movable property which he has placed, provided that the replacement shall be of a better quality and shall be the property of the Land Lord.

17- In the event of the Tenant’s fails to pay the annual rent agreed in the contract in the time specified in this contract, or in the event of the breach of any of his responsibilities and liabilities, the Land Lord shall issue a notice in writing specifying the default and requiring the Tenant to remedy the default within 30 days and if after 30 days without the breach complained being remedied, the Land Lord shall have the option to terminate his contract without referring the matter to the court and to restore the Hotel without prejudice to all other legal rights, provided all ways such breach of contract default are not caused by any of the followings:

i- War or civil commotions.

ii- Political or labour unrest.

iii- Force majeure

18- In the case of any dispute between the two parties regarding this contract, they agreed to settle it amicably, and in the case of their failure, the dispute shall be referred to arbitration according to the civil and binding and the venue of arbitration shall be the city of Khartoum. Procedures Acts 1983 and the award of arbitration shall be final.

19- This contract shall be subject to the laws of the Republic of the Sudan.

Signatures:

Abd-Elwahhab Osman                                Dato Ahmed Sebi
Minister of Finance and National Economy.                                General Manager of Lanka-Suka Hotels Company.
INTRODUCTION:
“This agreement is made and entered into force on August 27th 2002 by and between:
* The Government of the Republic of the Sudan, represented by Mr. Alzobier Ahmed Alhassan, Minister of Finance and National Economy.
* Sudanese African Company for Trading and Investment, thereafter referred to as ‘the second party’
* Where as the Sudanese Government is debited for the Sudanese African Company for Trade and Investment by $41,000,000, and whereas Atbara Cement Factory Company “registered under the provisions of the Sudanese Companies Ordinance 1925, under registration no. C 2785” is, with all its shares and portable assets, fixed assets, goodwill, trademarks and intellectual property rights, owned by the first party; the first party offered the sale of company’s shares to the second party.
* The second party accepted to sell the offered shares of Atbara Cement Factory Company.

Therefore, the two parties agree to the following:
(1) The introduction and schedules of this agreement are inherent parts of the agreement, and
the agreement shall be concluded accompanied with the followings:
  a- The presidential decree of consent.
  c- The memorandum of association of Atbara Cement Factory Company.
  d- Memorandum of the second party.
  e- Plan for rehabilitation of the Factory; prepared by the second party and approved by the first party.
  f- Power of attorney from the Bank of Khartoum to HCDPE for selling its share in Atbara Cement Factory Company (only one share).
  g- Power of Attorney from the second party to his representative.
  h- Copy of the agreement which signed in May 9th 1990 between the Sudanese Government and the second party.

SALES:
(2) Sales are:
  a- Atbara Cement Factory Company, free of any former obligations, legally and financially, and this includes 10,000 fully-paid shares.
  b- Brick Factory in Atbara.
  c- All assets and lands owned by Atbara Cement Factory Company ltd.
  e- All lands and estates owned by Atbara Cement Factory Company ltd., as mentioned in the fourth schedule of this agreement.
  g- Fixed and portable assets as mentioned in the balance sheet in 30-6-2002.
  h- All the intellectual property rights of Atbara Cement Factory Company ltd, and this includes; goodwill, business names, patents and any other evaluated property owned by the sold company at the day of this agreement.

PRICE AND PAYMENTS:
(3) The two parties agree that the purchase price shall be an aggregate amount of $41,000,000., and the second party shall pay the purchase price in the following manner:
  a- By a deposit of $20,500,000, upon the execution of this agreement, half of the deposited sum shall be paid in cash, the another half shall be considered as a repayment for the debts of the first party to the second party (see the introduction).
  b- $20,500,000 shall be paid as five instalments of $4,100,000 each. The period of the payment of the instalments shall be as follow:
First, the first instalment shall be paid one year after the handover of the factory, $2,050,000 shall be considered as a repayment of first party’s debts (mentioned in the introduction).
Second, the second instalment, ($4,100,000); shall be paid two years after; $2,050,000 shall be paid as a repayment of the first party’s debts (mentioned in the introduction). Third, the
third instalment ($4,100,000) shall be paid three years after, 4,050,000 shall be paid as
repayment of the first party’s former debts (mentioned in the introduction). Fourth, the fourth
instalment, ($4,100,000) shall be paid three years after; $2,050,000 shall be paid as repayment
of the first party’s debts (mentioned in the introduction). Fifth, the fifth instalment of
$4,100,000 shall be paid after five years; $2,050,000 shall be paid as a repayment for the first
party’s debts (mentioned in the introduction).

FIRST PARTY OBLIGATIONS:
(4-1)-The first party agrees that he has presented all the required information which motivated
the second party to join this agreement, and assure the following:

a- All information which is presented to the second party is true.
b-The first party is authorized and took all the required procedures to satisfy his obligations.
c- The first party is the sole owner of the transferred shares.
d-The first party has been allotted the shares in a proper way.

(4-2)-The first party agrees that he shall not acquire any of the shares which may be issued by
the second party in the future, with or without consideration.

(4-3)-The first party agrees to declare anything that constitutes a breach of any of his
obligations related to this agreement, or any other thing which may constitute cause the
second party to terminate this agreement.

(4-4)-In the case of the first party’s non-fulfilment of any of the mentioned guarantees; the
second party will have the right to claim any of the followings:

a-He has the right to claim an amount of money to the extent that puts him in a neutral
position, as if the first part did not commit such breach.
b-He has the right to claim an amount of money to the extent that covers any liability or
obligation resulting from the first party’s non-fulfilment.

(5-1)-The first party agrees to hand over the sales to the second party free of any legal
obligations; this includes termination of employees and labours service contracts, or and any
other acquired rights.

(5-2)-The first party agrees to transfer the ownership of Atbara Cement Factory Company and its
properties into the name of the second party; therefore, the first party agrees to pay all the
fees of the transfer of lands, and taxations (VAT, and sales tax or any other type of taxations).

(5-3)-The first party agrees to issue extraordinary decision from extraordinary meeting of the
company to increase the nominal capital (which is registered in the registrar office) to become
$41,000,000, divided into 10,000 shares, and to present a document whereby such increase of
capital is exempted from any fees.

(5-4)-The first party agrees to renew all leases, concessions and licences for a period not less
than fifty years; this includes machineries, lands, quarries and any other type of ownership.

(5-5)-The first party agrees to transform all the agricultural lands owned by the Factory to
become industrial lands.

(5-6)-The first party agrees to register El-Tina Quarry (800,000 SQ.M), located in the east of
the Factory, under the name of the Factory.

(5-7)-The first party agrees to guarantee that any conflict about the ownership of Factory’s
lands will not occur in the future.

(5-8)-The first party agrees to register EL-Akad Quarry (11,904,760 SQ.M) under the name of
the Factory.

(5-9)-The first party agrees to register the Plaster Quarries in Port Sudan, which are owned by
the company, under the name of the second party.

(5-10)-The first party agrees to grant an agricultural land to the second party, to contribute in
the development of the area around the Factory.

(5-11)-The first party agrees to grant the price-level protection for the local cement instead of
imported cement for five years.

(5-12)-The first party agrees to grant a preferential treatment over the imported cement after
the expiry of the above five years price-level protection.

(5-13)-The first party agrees, for purposes of the price-level protection, to pay all the
regionalist fees.
(5-14)-The first party agrees to grant the second party the right to import 120,000 tons from the Clinker (an assistant row-material of cement production) with 50% exemption from all taxations and other fees.
(5-15)-The first party agrees that the Company, until completing the transaction, shall:
a- Continue to commence its commercial activity to keep its goodwill.
b- Not involve any new contract, amend or terminate any contract for bringing any subjects to the Company, or any other contract.
c- Not terminate any part of its commercial activities.
d- Execute all contracts to which the company is a party.
e- Not involve in any new assets whether by lease, leasing-sale or otherwise method.
(5-16)-The first party agrees that the Company shall remain enjoying the position of “New Strategic Investment Project” which is provided by the Investment Encouragement Act 1999, for a period not less than fifteen years, and shall remain enjoying all the recent merits, in addition to any other merits which may be granted to any other investor in the same field in the future.
(5-17)-The first party agrees not to use the name “Atbara Cement Factory Company”, or any other similar name, which may result in misleading on the minds of the current, or expected customers of the Company.
(5-18)-The first party agrees not to use or disclose any secret information, and not to enable any other person to use such information.
(5-19)-The first party agrees to inform the second party by any secret information.
(5-20)-The first party agrees to pay all stamp-duties required for this agreement.
SECOND PARTY OBLIGATIONS:
(6-1)-The second party agrees to start production processes operating within period not exceed six months after the handover.
(6-2)-The second party shall comply with the environmental laws or any other relative legislations.
(6-3)-The second party shall not change the objects of the Factory.
(6-4)-The second party agrees to transform the Factory Company into public company five years after the beginning of production.
(6-5)-The second party agrees not to sell the Factory at any time; but, has the right to participate with a partner in a manner not affects the terms of this agreement.
HANDOVER:
(7)-The handover shall be after six weeks from signing this agreement and the first party shall give the second party the following documents:
First: The documents of the transfer of the ownership.
Second: Documents of the ownership of the first party.
Third: Documents of renewing all the concessions, licences and leases of Atbara Cement Factory Company.
Fifth: A list contains all the assets; and the first party shall be responsible to pay any deficit in the listed assets, between the time of signing of the contract and the time of the handover.
(8)-The second party shall, in the case of non-satisfying his obligations, be responsible to return all the assets, document, and any other thing delivered to him by the first party.
(9)-A breach of any term in this agreement may lead to the termination of all its terms.
GOVERNING LAW:
(10)-This agreement shall be governed by, and construed in accordance with, the laws of the Republic of the Sudan.

4- Privatization Contract of Elnilein Development Group. (Translated by the researcher)

Shares Sale Agreement
This agreement is made on November 11th 2006 and entered into by and between Sudan Central Bank (thereinafter referred to as “the Vendor”), represented in this agreement by Mr. Bader-Alden Mahmud Abbas, Vice-Governor of Sudan Central Bank, and Al-salaam
Bank group (thereinafter referred to as the “Purchaser”), represented in this agreement Mr. Hussein Mohammed Salem Al-miza, and on the address of the Vendor and the Purchaser referred to in S. 13 of this agreement.

Section (1): Introduction
Whereas Elnilein Industrial Development Bank Group is a bank established under the provisions of Elnilein Industrial Development Group Act 1994 and its main office in Khartoum- Republic of the Sudan, to exercise the purposes detailed in s.5 of mentioned Act, and whereas the nominal capital of the Bank is SD. 5,000,000,000 (five billions Sudanese dinar). The Purchaser owns 99%, and the Ministry of Finance and National Economy owns 1% of its shares. And whereas the Vendor offered to sell 60% of its shares in the mentioned Bank, and whereas the Purchaser offered and accepted to buy these shares with absolute knowledge for the financial situation of the mentioned Bank in 31.12.2005, and thereafter the Vendor has agreed the Purchaser’s offer. Both parties have agreed the following:

Section (2):
In this agreement, unless the context otherwise requires; following words and expressions means:
“Vendor”: thereinafter means the Central Bank of Sudan.
“Bank”: thereinafter means Elnilein Industrial Development Bank Group
“Agreement”: thereinafter means this agreement.
“Closing”: thereinafter means the date of Purchaser’s fulfilling purchase of shares according to S.(6) of this agreement.

Section (3): Documents of the Agreement
The following documents agreement are inherent part of it:
1-Publication in the newspapers and TCDPE, for qualification of candidates.
2-The offer presented by the Purchaser for buying shares.
3-The main accounts of the Bank.
4-Closing Accounts in 15 November 2006.
5-Guarantee for Vendor’s ownership of the shares.
6-Decision of the Ministry of Finance and National Economy and the HCDPE, delegates Mr. Bader-Eldeen Mahmud Abbas, Vie-Governor of the Central Bank of Sudan to sign in this agreement.
7-Decision of the Minister of Finance and National Economy and HCDPE, for the consen of the sale.
8-The Frame-work plan presented by the Purchaser.
9-Power of Attorney whereby, the Purchaser delegates Mr. Mohammed Salem Al-miza to sign this agreement on behalf of him.
10-An approval from Mr. Hussein Mohammad Salem Al-miza whereby; Iemaar Estates Co delegated him to sign this agreement on behalf of the Co.

Section (4): Agreement of Sale and Purchase
1-According to the law and conditions of this agreement; the Vendor shall sell 60% (sixty percent) of his shares of the capital of the Bank, which were legally registered under his name with all rights and liabilities on these shares according to the financial lists audited in 15.11. 2006, the sale shall come into force in the date of closing these lists.
2-Subject to this agreement; the Vendor shall make surrender to the Purchaser for any other rights related to the shares subject to this agreement.
3-The Purchaser has agreed the continuousness of the Bank according to the same provisions of the law as developmental commercial bank until these provisions are repealed or amended to transform the Bank into company works under the provision of the Sudanese Companies Ordinance 1925.
4-The Purchaser has agreed the full compliment of frame-work plan presented by him as it mentioned in the appendix no. (3) of this agreement.
Section (5): Shares price
The full price of the purchased shares shall be $80,000,000 (eighty millions American Dollars).

Section (6): Payments
The Purchaser shall pay the price of the purchased shares in this agreement as follow:
1- %50 (fifty percent) of the total amount; in the time of signing this agreement.
2- %50 (fifty percent) of the total amount after the Vendor completed the transference and receipt a registration certificate, within a period not exceed six months after signing this agreement.

Section (7): Purchase Preparations
(1) The two parties have agreed that the Vendor shall present the audited accounts of the financial year which ended on 31.12.2005, and any other information to audit the closing accounts, and the certificates related to the property of the different assets. This shall be within a period not exceeding 30 days from preparing these accounts on 15.11.2005.
(2) The two parties have agreed that the purchase in this agreement is concluded depending on that all decisions, consents and other procedures required to conclude this agreement were in accordance with the laws of the Republic of the Sudan.
(3) The two parties have agreed that, all the rights in the Bank’s administration shall be transferred to the Purchaser according to the same percentage of shares owned by him according to this agreement. The Bank shall be work under the provisions of the Sudanese Companies Act 1925.

Section (8): Termination
1-The Vendor is entitled to terminate this agreement in the event of Purchaser’s failed to fulfil his obligations of payment or, in representing frame-work plan.
2-The Purchaser shall be entitled to terminate this agreement, by written warning if, within six months of closing; the Purchaser is of opinion that any of the guarantees, information mentioned in this agreement are not correct.

Section (9): Disclosure of information
The two parties have agreed to keep the secrecy of all information and documents related to this agreement in all periods of negotiations, after negotiations and signing and, not to disclose them to any third party.

Section (10): Transactions
Any party of this agreement is not entitled to transfer any of his rights or obligations to any third party, unless by written consent by the other party, until the Bank is transformed into a company under the provisions of the Sudanese Companies Ordinance 1925.

Section (11): Governing Law
The governing Laws of this agreement shall be the Sudanese laws.

Section (12): Arbitration
In the event of any conflict between the two parties of this agreement about the application or interpretation of the provisions of this agreement; solving such conflict shall be amicably by direct negotiations between the two parties. In case of failure; the solution shall be in reliance to arbitration. The applicable law in such a case shall be The Sudanese Arbitration Law 2005.

Section (13): Notifications
All notifications and correspondences between the two parties shall be to the addresses of the parties as follows:
1-Vendor’s address:
Khartoum-Sudan
P.O. Office: 313.
Fax: 00249-183-780273.
E-Mail: sabir@bankofsudan.org.
1- Purchasers address:
United Arab Emirates-Dubai
P.O. Office: 120180- Dubai
Fax: 009714-3193114 /or/ 009714-3673156.
E-mail: djabr@amlakfinance.com /or/ Djab@leadercapital.com
Parties:
* Vendor: Central Bank of Sudan, represented by Bader El-din Mahmud Abbas
  Vice-Governor of Central Bank of Sudan.
* Purchaser: Al-salaam Bank Group, represented by Hussein Mohammad Salem Al-miza
Witneses:
1- Abd-Elrahman Nooreddeen, The president of TCDPE.
2- Abdu Mahmoud Mohammad Khalil, General Manager of Al-salaam Bank.

5- Privatization contract of the Real Estates Bank.
“This contract is made in Khartoum in December 4th 2002 between:
(a) The Government of the Sudan; thereinafter referred to as (First Party), represented by the
Minister of Finance and National Economy (The President of HCDPE).
(b) Eljumaa Company for Trade and Investment Company; (registered under the Sudanese
companies Ordinance 1925, by registration certificate No. (C.17153) on 27.8.2001., the
company’s head office is in; Elfaihaa Building, Fifth Floor, Khartoum-Sudan, and Elshiekh
Jumaa Bin-Fahd Bin-Mubarak Eljumaa. Thereinafter referred to as the (the Second Party),
represented by the President of the Board of Directors of Jumaa Eljumaa for Trade and
(1) Whereas the First Party offered to sell the Sudanese Real Estates Bank including all its
branches and the Sudanese Real Estates for Investment & Trade co. ltd, and all the Bank’s
shares in all other companies, and all its registered fixed assets (according to the accompanied
lists), and its portable assets (according to the accompanied lists), for a price of USA $ 15,500,000 (fifteen millions and five hundreds thousand USA Dollars), according to his
authorities by S.(4-A) of Disposition of Public Enterprises Law 1990. And;
(2) Whereas the Second Party accepted to purchase the described above Bank, by the
determined price; the two Parties have agreed the follow:
(3) The introduction, lists of fixed and portable assets, the certificate of registration of the
Sudanese Real Estates Company, Shares certificate (determined in the accompanied lists), and
the following documents; shall be considered as inherent part of this agreement:
(a) The consent of Council of Ministers for the sale of the Real Estates Bank.
(b) The decision of the HCDPE No (123) – 8.11.2002.
(c) Registration Certificate, issued by the Registrar of Lands, approves the property of the real
estates of the bank (accompanied on the list of fixed assets).
(d) The list of portable assets.
(e) A power of attorney from the Governor of the Bank of Sudan to the representative of the
First Party, to transfer his 1% shares, to the Second Party.
(f) A consent document of the Ministry of Finance and National Economy for the transfer of
its 99% shares.
(g) A consent document from the Sudanese Company for Building and Construing for the
transfer of its 1% shares.
(h) A power of attorney delegates the Second Party’s representative to sign on behalf of him.
(i) A plan for Development and modernization of the sold Bank.
(j) The Memorandum of Eljumaa Company for Trade and Investment.
(4) The First Party has agreed to sell to the Second Part; the Real Estates Bank, the Sudanese
Real Estates Company for Trade and Investment, all the fixed and portable assets (mentioned
in the accompanied list), and all the shares owned by the Bank in the other companies
(mentioned in the accompanied list).
(5) The Second Party accepted the purchase of such Bank and the price amounted USA $ 15,500,000 (fifteen millions and five hundreds thousands American Dollars).
(6) The First Party is obliged by the follow;
First: To deliver the Second Party the sold Bank within not more than on 31.12.2002.
Second: Providing all the required documents to conclude the contract.
Third: Providing the consents of the Bank of Sudan and the Council of Ministers to enable the
private company which shall be established by the first party to exercises banking activities.
Fourth: Termination of service of the Bank’s employees, and also termination of the service of the employees of the Sudanese Company for Investment and Trade, and pay all their post service rights, and any other financial or legal rights according to the Labours Law or any other relevant laws, this shall be within the time agreed-upon by both parties. The Second Party shall have the right to keep on service any employee/or employees according to new services contracts.

Fifth: The First Party shall deliver the Real Estates Bank, free of any financial or legal liabilities

(7) The Second Party is obliged by the followings;

First: Payment of USA $ 15,500,000 (fifty millions and five hundreds thousands American Dollars) in cash, at the time of signing this contract.

Second: Transformation of the Real Estates Bank into private shares company, and then into public shares company five years after the transformation into private one.

Third: Presentation of frame-work plan for development and modernization the Bank. The Second party shall be obliged to apply such plan in the performance of the new private shares’ company which will be established at the time of signing this contract, and the other public one which shall be established after five years from the date of signing this contract, according to the provisions of this contract.

Fourth: The second Party shall increase the capital of the bank to fulfil the Central Bank’s decisions about the specialized banks, and to work with compliance to the laws, regulations and policies which organize banking activities in the Sudan.

Fifth: The activities of the company shall be as follow:

(a) Transactions in the real estates and building and constructing.

(b) Encourage of using advanced technologies for development of construction of buildings, and reduction of costs and time.

(c) Contribution in financing house complexes and gathering the required financial sources from the savings of the beneficiaries and the other financers (banks, corporations, organizations and companies).

(d) Exercising all banking activities and commercial investment banks.

(e) Exercising business on commercial bases.

(f) Contribution in increasing the national income by increase the production and promotion of productivity.

(g) Contribution in increase the exports by creation new channels for exportation.

(8) Any party has the right to terminate this contract in the case of other party’s non-compliance or non-execution of his obligations mentioned in this contract. In the event of termination this contract; the First Party is obliged to repay the delivered amount, and he is entitled to reduce 10% from the delivered amount. The Second Party is entitled to terminate this contract in the case of non-fulfil of the First Party for any of obligation mentioned in this contract.

(9) This contract shall be subject to the Sudanese laws, and shall be executed and interpreted according to the Sudanese law.

(10) Any conflict between the Parties of this contract shall be solved through direct negotiations between the two parties. In case of failure; the governing law shall be the Civil Procedures Act 1983.

Signatures:

* First Party: Dr. Hassan Ahmed Taha: representative of the Minister of Finance


Chapter 4:

Article 17 of the Universal Declaration of Human Rights:

(1) Every one has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.
### Privatization and labour force reduction in Argentina


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<td>7,500</td>
<td>0</td>
</tr>
<tr>
<td>SEGBA</td>
<td>20,271</td>
<td>15,806</td>
<td>-22</td>
</tr>
<tr>
<td>YPF (oil)</td>
<td>37,400</td>
<td>10,600</td>
<td>-27</td>
</tr>
<tr>
<td>FAA (railways)</td>
<td>92,500</td>
<td>18,000</td>
<td>-81</td>
</tr>
<tr>
<td>SOMISA (steel)</td>
<td>12,000</td>
<td>6,000</td>
<td>-50</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>224,283</strong></td>
<td><strong>111,087</strong></td>
<td><strong>-50</strong></td>
</tr>
</tbody>
</table>

### Severance payments in selected developing countries


<table>
<thead>
<tr>
<th>Country</th>
<th>Sector/enterprise</th>
<th>Average length of severance payment</th>
<th>Average amount per workers</th>
<th>Financing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Argentina</td>
<td>Railways (FA)</td>
<td>2 year’s salary</td>
<td>$12,000</td>
<td>Government, donors</td>
</tr>
<tr>
<td></td>
<td>Telecoms(Entel)</td>
<td></td>
<td>$15,000</td>
<td>Government, donors</td>
</tr>
<tr>
<td></td>
<td>Steel (Somissa)</td>
<td></td>
<td>$20,000</td>
<td>Government, donors, Commercial Banks, donors</td>
</tr>
<tr>
<td>Bangladesh</td>
<td>Jute (BJMC)</td>
<td>3 year’s salary</td>
<td>$5,000</td>
<td>Government, donors</td>
</tr>
<tr>
<td>Brazil</td>
<td>Railways</td>
<td>18 month’s salary</td>
<td>$15,000</td>
<td>Government, donors</td>
</tr>
<tr>
<td>Ghana</td>
<td>General Food processing (TFCC)</td>
<td>52 month’s salary</td>
<td>$1423-2486</td>
<td>Government, donors</td>
</tr>
<tr>
<td></td>
<td>Textiles (GTP)</td>
<td>6 moth’s salary</td>
<td>$744</td>
<td>Government</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>$2,2258</td>
<td></td>
</tr>
</tbody>
</table>