PCA CASE NO. 2013/4

IN THE MATTER OF AN ARBITRATION UNDER THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW 1976

- between -

ACTIVE PARTNERS GROUP LIMITED
("**Claimant**")

- and -

THE REPUBLIC OF SOUTH SUDAN
("**Respondent**", and together with Claimant, the "**Parties**")

FINAL AWARD

Arbitral Tribunal
Mr. Richard Omwela
Mr. Karel Daele
Mr. Philippe Pinsolle (Presiding Arbitrator)

January 27, 2015

CONTENTS

LIST OF ABBREVIATIONS

AMSys	A.M. Sys Limited, a subsidiary of the Claimant
Appointing Authority	the designated appointing authority for all purposes under the UNCITRAL Rules, Professor Hans van Houtte
Claimant	Active Partners Group Limited
Conssuda	Conssuda Southern Sudan Company
Contract Act 2008	the Contract Act of South Sudan, in force from November 28, 2008
Effective Date	the "effective date" under Clause 4.2 of the Technical Contract
EPCF	Engineer Procure Construct and Finance
Mr. Fagir	Mr. Mohamed Fagir, Managing Director of the Claimant
Final Letter of Award	the letter of award dated February 7, 2008
Finance Agreement	the Financial Agreement between the Claimant and the Ministry of Finance and Economic Planning on behalf of the Respondent dated November 18, 2008
Mr. Fuchs	Mr. Marcus Fuchs, Corporate Finance Director, Centuria Capital LLC
General Conditions	the General Conditions of the Technical Contract
GOSS. GoSS	Government of South Sudan
Hearing	the hearing held on May 6 and 7, 2014, in Mauritius
Mr. Lucas	Mr. Michael Harry Lucas, Group Projects Director and Managing Director of the Claimant's Kenya office
KCB	Kenya Commercial Bank
May Bid Contract	the Tender as it was originally floated on May 28, 2007
Notice of Arbitration	the Notice of Arbitration sent by the Claimant to the Respondent on February 20, 2012
Particular Conditions	the "Conditions of Particular Application" of the Technical Contract
PCA	Permanent Court of Arbitration
Procedural Order No. 1	Procedural Order No. 1 (Terms of Appointment) issued by the Tribunal on February 20, 2013

Procedural Order No. 2	Procedural Order No. 2 (Procedural Calendar) issued by the Tribunal on February 28, 2013
Project	Project for the construction of electric power infrastructure in eight state capital cities in what is now the Republic of South Sudan, namely, Awil, Bentiu, Bor, Malakal, Rumbek, Tori, Warrap, and Yambio
Respondent	the Republic of South Sudan
Schedule of Payments	Schedule of payments provided by the repayment formula agreed in the Finance Agreement
SSEC	Southern Sudan Electricity Corporation
Technical Contract	the Contract for Construction of Electric Power Infrastructure between the Claimant and the South Sudan Electricity Corporation on behalf of the Respondent dated October 5, 2008
Tender	Tender floated by the autonomous Government of South Sudan for the construction of electric power infrastructure in the state capitals of Awil, Bentiu, Bor, Malakal, Rumbek, Tori, Warrap and Yambio, between May 28 and July 24, 2007
UNCITRAL Rules	the 1976 Arbitration Rules of the United Nations Commission on International Trade Law

I. INTRODUCTION

A. The Parties

1. The Claimant is a Limited Liability Company registered in the Republic of Sudan with its registered office in Khartoum. Its address of service in these proceedings is

care of Mungu and Company
Advocates
Reinsurance Plaza
Podium 2
Taifa Road
P.O. Box 19414-00100 Nairobi
Kenya

2. The Claimant was represented in these proceedings by the following counsel:

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From April 8, 2014, the Claimant was also represented by:

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3. The Respondent is the Republic of South Sudan. Its address of service in these proceedings is

Ministry of Justice
Attn. Hon. Under-Secretary Jeremiah Swaka Moses
Government of the Republic of South Sudan
Juba
South Sudan

B. Background of the Dispute

4. The present dispute concerns a project for the construction of electric power infrastructure in eight state capital cities in what is now the Republic of South Sudan, namely, Awil, Bentiu, Bor, Malakal, Rumbek, Tori, Warrap, and Yambio (the **"Project"**).

5. A dispute has arisen between the Parties concerning alleged breaches by the Respondent of the Financial Agreement between the Claimant and the Ministry of Finance and Economic Planning on behalf of the Respondent dated November 18, 2008 (the "**Finance Agreement**") and under the Contract for Construction of Electric Power Infrastructure between the Claimant and the South Sudan Electricity Corporation on behalf of the Respondent dated October 5, 2008 (the "**Technical Contract**" and together with the Finance Agreement, the "**Contract**").

C. Language and Place of the Arbitration

6. Pursuant to Article 20.6 of the General Conditions of the Technical Contract together with the Conditions of Particular Applications, the language of the arbitration is English and the seat of the arbitration is Nairobi, Kenya.

II. PROCEDURAL HISTORY

A. Commencement of the Proceedings

7. On February 20, 2012, the Claimant sent a Notice of Arbitration (the **"Notice of Arbitration"**) to the Respondent pursuant to Article 3 of the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (the **"UNCITRAL Rules"**).

8. On March 13, 2012, the Claimant appointed Mr. Richard Omwela, a national of Kenya, as the first arbitrator.

9. The Respondent did not appoint an arbitrator within the thirty-day period provided by Article 7 of the UNCITRAL Arbitration Rules.

10. By letter dated June 7, 2012, the Claimant requested that the Secretary-General of the Permanent Court of Arbitration (the **"PCA"**) designate an appointing authority in accordance with Article 7(2) of the UNCITRAL Rules.

11. By letter dated June 18, 2012, the PCA acknowledged reception of various attachments from the Claimant including the Technical Contract, the Finance Agreement, and a letter dated February 20, 2012 providing Notice of Termination of the Contracts taking effect within 14 days.

12. By letter dated June 21, 2012, the PCA wrote to the Parties, inviting the Respondent to comment on the Request by July 6, 2012. On July 5, 2012, further to a request made by telephone call, the PCA emailed copies of the documents of the case to Mr. Deng (Ambassador of South Sudan in Belgium). The PCA stated its understanding that these documents would be forwarded to the relevant departments of the Government of South Sudan and recalled that comments from the Respondent were expected by July 6, 2012.

13. The Respondent did not provide comments on the Request within the indicated time period.

14. On July 5, 2012, the Claimant sent an e-mail to the PCA expressing various concerns regarding the timeliness of the Respondent's response and requesting that an appointing authority be nominated.

15. On July 12, 2012, the Secretary-General of the PCA designated as the appointing authority for all purposes under the UNCITRAL Rules Professor Hans van Houtte (the **"Appointing Authority"**).

16. On September 20, 2012, the Appointing Authority appointed Mr. Karel Daele, a national of Belgium, as the second arbitrator.

17. On October 19, 2012, Mr. Omwela and Mr. Daele appointed Mr. Philippe Pinsolle, a national of France, as the third and presiding arbitrator. Mr. Pinsolle accepted this appointment on the same day.

B. Procedural Hearing

18. By letter dated November 8, 2012, the Tribunal sent to the Parties a draft procedural order no. 1 containing the terms of appointment of the Tribunal, invited the Parties to submit their comments on the draft by December 14, 2012, and invited the Parties to indicate their availability for a one-day preliminary procedural hearing in Nairobi on January 17, 22, 23, or 24, 2013.

19. By e-mail of December 12, 2012, the Claimant confirmed its availability for a preliminary hearing.

20. By e-mail of January 2, 2013, the Tribunal thanked the Claimant for confirming its availability for a preliminary hearing and noted that the Respondent had not confirmed its availability. The Tribunal invited the Parties to provide their comments on the draft procedural order no. 1 containing the terms of appointment by January 11, 2013, and indicated that the Parties would be invited to make an initial deposit as set forth in the draft procedural order no. 1. The Tribunal noted that the hearing would only take place following full payment of the initial deposit and stated that it would revert to the Parties with alternative dates for the preliminary hearing upon confirmation of payment of the deposit.

21. By e-mail of January 10, 2013, the Claimant provided its comments on the draft procedural order no. 1.

22. By e-mail of January 11, 2013, the Respondent provided its comments on the draft procedural order no. 1.

23. By e-mail of January 11, 2013, the Tribunal thanked the Parties for their comments. Pursuant to Article 41(1) of the UNCITRAL Rules, the Tribunal invited each of the Parties to pay an initial deposit of EUR 50,000 by February 11, 2013. The Tribunal indicated that it would revert to the Parties with a suggested date for the hearing devoted to the signature of the draft procedural order no. 1 and establishment of the procedural calendar.

24. By e-mail of January 28, 2013, the Tribunal indicated its availability for an initial hearing on February 28, 2013, in Nairobi and requested each of the Parties to confirm its availability on this date, with the hearing date to be confirmed once the full deposit had been paid.

25. By e-mail of February 1, 2013, the Claimant confirmed its availability for a hearing on February 28, 2013, stated that it would make payment of the deposit well before that date, and enquired as to the procedure should one Party fail to make payment of the deposit.

26. By e-mail of February 4, 2013, the Tribunal stated that the holding of the hearing would depend on sufficient funds being available to cover the time spent by members of the Tribunal and their travel and accommodation expenses. As an alternative option, the Tribunal proposed that procedural order no. 1 be issued as soon as the Tribunal was in a position to do so and the procedural calendar be discussed with the Parties by telephone.

27. By e-mail of February 8, 2013, the Claimant withdrew its suggested amendments to draft procedural order no. 1 and stated its consent to the adoption of draft procedural order no. 1 as drafted by the Tribunal; informed the Tribunal that it was endeavouring to pay the deposit within the time period requested, but anticipated a possible delay of “a few days” due to a shortage of foreign currency in

Sudan; and stated that the Claimant would prefer the first procedural hearing be conducted by telephone conference, should the Tribunal agree.

28. On February 8, 2013, by e-mail from the Presiding Arbitrator, the Tribunal invited the Respondent to provide, by February 12, 2013, any comment it wished to make on the Claimant's request to conduct the first procedural hearing by telephone.

29. By e-mail sent on February 11, 2013, the Respondent requested an extension of the deadline for payment of the initial deposit; informed the Tribunal that it was working on transferring the deposit; and stated its disagreement with the suggestion regarding the hearing by telephone conference. By e-mail of the same date, the Claimant requested that the first procedural hearing be held by telephone if the Respondent were not to pay its share of the deposit on time.

30. By letter dated February 11, 2013, the PCA informed the Parties that the deadline for payment of the initial deposit was extended to February 15, 2013.

31. By e-mail sent on February 11, 2013, the Claimant requested a letter from the PCA confirming certain details of the case in order to secure authority from the Central Bank of Sudan to transfer the initial deposit, and requested a further extension of time to make the payment. By letter to the Parties of the same date, the PCA provided confirmation of the details requested.

32. By e-mails sent on February 13, 2013, the PCA requested that the Parties confirm and if necessary, update the contact details held by the PCA in preparation for the first procedural hearing; by e-mails of the same date, the Parties each provided their updated contact details.

33. On February 20, 2013, the Tribunal issued its Procedural Order No. 1 (Terms of Appointment) (**"Procedural Order No. 1"**). Procedural Order No. 1 *inter alia* directed the Parties to make payment of the initial deposit within thirty days of its adoption.

34. By e-mail sent on February 20, 2013, the Claimant informed the Tribunal that it was awaiting confirmation of allocation of the necessary foreign currency in order to pay the initial deposit.

35. By e-mail from the Presiding Arbitrator sent on February 20, 2013, the Tribunal informed the Parties that, no deposit having to date being received by the PCA, the first procedural hearing would be held by telephone conference and would be devoted to discussion of the procedural calendar. In the same e-mail, the Tribunal specified that the telephone conference would take place at 12 noon, Nairobi time (10 am Paris, 9 am London) on February 28, 2013, and provided the telephone number and conference code to dial into the telephone conference.

36. On February 28, 2013, the first procedural hearing took place by telephone conference at 12 noon Nairobi time (10 am Paris, 9 am London) (the **"First Procedural Hearing"**). The following persons took part in the First Procedural Hearing:

<u>The Tribunal</u>
Mr. Philippe Pinsolle (Presiding Arbitrator)
Mr. Richard Omwela
Mr. Karel Daele

For the Claimant
Mr. Gilbert Josiah Mungu

For the Registry
Ms. Fedelma C. Smith, Permanent Court of Arbitration

37. At the First Procedural Hearing, the Tribunal heard submissions from the Claimant on the schedule for the proceedings. The Respondent did not participate in the First Procedural Hearing and did not otherwise make any submissions on the schedule for the proceedings.

38. On February 28, 2013, following the First Procedural Hearing, the Tribunal adopted Procedural Order No. 2 (Procedural Calendar) (**"Procedural Order No. 2"**), which provided for the Claimant to file its Statement of Claim (with all supporting evidence including witness statements and expert reports) by April 2, 2013; the Respondent to file its Statement of Defence including any objection to the Tribunal's jurisdiction (with all supporting evidence including witness statements and expert reports) by June 3, 2013; the Claimant to file its Reply by June 24, 2013; the Respondent to file its Rejoinder by July 15, 2013; an oral hearing to be provisionally scheduled from October 1-3 inclusive, 2013. Procedural Order No. 2 provided, further, that the Tribunal would decide on any request for document production after receiving such further submissions as the Tribunal may direct.

39. By e-mail sent on March 26, 2013, the Claimant informed the Tribunal that the process of payment of the deposit was taking longer than anticipated and requested wire transfer details for payments in US dollars.

40. By letter to the Parties dated March 28, 2013, the PCA informed the Parties of the terms on which it would receive payments in US dollars towards the deposit and provided banking details for payments in US dollars.

C. Written Pleadings

41. By e-mail instructions sent on March 30, 2013, the Claimant filed its Statement of Claim and supporting documents in electronic form via a page on its web-site secured by password.

42. By letter to the Parties dated May 8, 2013, the PCA noted that it had not received any share of the deposit, either in Euro or US dollars, from either Party; invited the Parties to make payment of the initial deposit by May 31, 2013, and reminded the Parties of the relevant banking instructions. By e-mail dated May 22, 2013, following a request made by the Claimant, the PCA provided a correction to the banking instructions provided in its letter dated May 8, 2013.

43. On May 24, 2013, the PCA received the Claimant's share of the initial deposit.

44. By e-mail dated June 12, 2013, the Claimant submitted an application for leave to amend its Statement of Claim and provided a draft amended Statement of Claim.

45. By e-mail dated June 14, 2013, in response to the Claimant's application for leave to amend its Statement of Claim, the Respondent requested a new date for submission of its Statement of Defence.

46. By letter from the PCA on its behalf dated June 14, 2013, the Tribunal granted the Claimant's application dated June 12, 2013, for leave to amend its Statement of Claim, and extended the date for the Respondent's submission of its Statement of Defence to June 21, 2013.

47. By e-mail sent on June 21, 2013, the PCA informed the Respondent that the payment of its share of the initial deposit, made by the Respondent by Swift transfer on June 6, 2013, had been returned by the PCA's bank pursuant to internal regulations of the receiving bank, and requested certain details relating to the payment in order to secure clearance from the PCA's bank to receive the transfer.

48. By e-mail sent on June 25, 2013, the Claimant acknowledged receipt of the Respondent's Statement of Defence but advised that it had not received any of the exhibits thereto. By e-mail of the same date, the Tribunal directed the Respondent to indicate by return when the exhibits referred to in the Statement of Defence would be made available to the Claimant, and directed that the Claimant might apply for a short extension if this proved necessary.

49. On June 26, 2013, the Respondent filed its Statement of Defence in hard copy and by e-mail.

50. By e-mail sent on July 15, 2013, the PCA informed the Respondent that it had been granted the necessary authorization to receive payment of the Respondent's share of the initial deposit and requested that the Respondent inform it of the date on which the transfer was to be made.

51. By email instructions sent on July 15, 2013, the Claimant filed its Reply and supporting documents electronically via its web-site. In the same e-mail, the Claimant noted that the Respondent had not effected complete service of its Statement of Defence and supporting documents and that the date it received the Statement of Defence and supporting documents was June 28, 2013.

52. By e-mail sent on July 24, 2013, the Respondent acknowledged receipt of hard copies of the Claimant's Reply and supporting documents.

53. By letter from the PCA on its behalf dated August 2, 2013, the Tribunal directed the Respondent to file and serve its Rejoinder together with any supporting documents by August 14, 2013.

54. By e-mail sent on August 22, 2013, the Respondent filed electronic copies of its Rejoinder with two supporting documents.

D. Hearing on the Merits and Post-Hearing Submissions

55. By e-mail sent on August 22, 2013, the PCA reminded the Respondent that payment of its share of the initial deposit remained outstanding; invited the Respondent to make payment of the outstanding sum at the earliest opportunity and to inform the PCA of the date on which the transfer would be made; and provided the banking instructions for transfer of the deposit.

56. By telephone call from the Tribunal Secretary to Mr. Jeremiah Swaka Moses on August 30, 2013, the PCA further reminded the Respondent that payment of its share of the initial deposit remained outstanding; and invited the Respondent to make payment of the outstanding sum at the earliest opportunity and to inform the PCA of the date on which the transfer would be made; the Respondent stated that it expected the payment to be completed immediately.

57. By letter dated September 2, 2013, the Claimant requested procedural directions in respect of the hearing on the merits.

58. By letter from the PCA on its behalf dated September 2, 2013, the Tribunal invited the Parties each to pay a supplementary deposit of EUR 150,000 (EUR 75,000 from each Party) in order to ensure sufficient funds to cover the hearing on the merits, and invited the Parties to make such payment by September 12, 2013.

59. By letter dated September 3, 2013, the Claimant advised that due to additional restrictions on remittances of foreign exchange in the Republic of Sudan, the Claimant anticipated that it would require more than 30 days to make payment of its share of the additional deposit; requested an interim statement of account in respect of the fees and expenses of the Tribunal to date; and requested that the Tribunal accept payment of the deposit following the hearing.

60. By letter from the PCA on its behalf dated September 4, 2013, the Tribunal took note of the additional difficulties communicated by the Claimant; invited the Parties to effect payment of the supplementary deposit by October 19, 2013; advised the Parties that the dates for the hearing provisionally scheduled for October 1-3, 2013, would be set on consultation with the Parties following receipt of the deposit.

61. By telephone call from the Tribunal Secretary to Mr. Jeremiah Swaka Moses on September 27, 2013, the PCA was informed that the payment of the Respondent's share of the initial deposit would be executed afresh on September 30, 2013.

62. By letter dated October 17, 2013, the PCA acknowledged receipt of the sum of EUR 49,865.82 from the Respondent, representing payment net of banking charges of the Respondent's share of the initial deposit.

63. By e-mail dated October 18, 2013, the Claimant advised that it was still experiencing difficulties in making payment of its share of the supplementary deposit; requested a further 14 days to make the payment; and requested that the Respondent confirm that it intended to pay its share of the supplementary deposit.

64. By e-mail dated October 22, 2013, the PCA invited the Parties to make payment of the supplementary deposit by November 2, 2013.

65. By e-mail dated October 25, 2013, the PCA invited the Parties to provide certain further information when making payment towards the deposit in order to satisfy regulatory requirements of the receiving bank in relation to transfers of funds originating in Sudan or South Sudan.

66. By letter dated November 5, 2013, the Claimant noted that it had not yet paid the supplementary deposit due to restrictions and procedures obtaining in Sudan for remittances in foreign currency. The Claimant proposed that the hearing be held prior to payment of the supplementary deposit. In the alternative, in order to avoid additional delay in making a second transfer in the event that the Claimant be required to pay the Respondent's share of the supplementary deposit, the Claimant proposed that the Respondent be invited formally to confirm whether it intended to make payment of the supplementary deposit, and that the Claimant be formally invited to pay the full amount of the supplementary deposit should no such confirmation be received by a certain date.

67. By letter dated November 12, 2013, the PCA provided the Parties with an interim statement of account; informed the Parties that payment of the supplementary deposit would be required to ensure sufficient funds to hold the hearing; and invited the Respondent to provide written confirmation that it would make payment of its share of the supplementary deposit by November 19, 2013.

68. By e-mail dated November 14, 2013, the Respondent stated that it had made payment of its share of the supplementary deposit.

69. By letter dated November 22, 2013, the PCA reminded the Parties of the information to be provided on making bank transfers towards the deposit. In the same letter, the PCA indicated that subject to full receipt of the supplementary deposit, the Tribunal would provisionally be available to schedule the hearing on February 25-26, 2014, or April 15-17, 2014, and indicated that the hearing dates would not be fixed until full payment of the supplementary deposit was received.

70. By letter from the PCA dated November 26, 2014, the Tribunal informed the Parties that it had not received confirmation of payment by the Respondent and that if such confirmation was not received by December 2, 3013, the Claimant would be invited to pay the Respondent's share. In the same letter the Tribunal expressed its concern at the physical safety of Nairobi as a hearing venue, following certain acts of terrorism perpetrated in Nairobi in September 2013; provided information concerning the suggested alternative hearing venues of The Hague; Mauritius; and Dubai; and invited the Parties to provide any comments they may wish to make on the hearing location by December 6, 2013.

71. By e-mail dated November 28, 2013, the Claimant stated that it would revert shortly with a comprehensive response concerning the hearing location.

72. By e-mail dated December 2, 2013, the PCA informed the Parties that it had received a payment and would revert to the Parties as soon as the payment details had been verified by the receiving bank.

73. By letter dated December 10, 2013, the PCA acknowledged receipt of EUR 74,875.98 from the Respondent, representing the Respondent's share of the supplementary deposit net of banking charges.

74. By letter dated December 16, 2013, the PCA invited the Claimant to make payment of its share of the supplementary deposit by December 31, 2013, and indicated that should payment not be received by that date, the hearing dates provisionally set aside for February 25-26, 2014, would be vacated.

75. By e-mail dated December 31, 2013, the Claimant stated that it had made payment of its share of the supplementary deposit in two instalments of EUR 37,321.58 and EUR 37,678.42.

76. On January 8 2014, the PCA acknowledged receipt of the sum of EUR 37,284.26, corresponding to payment net of bank charges of the first of the instalments mentioned by the Claimant in its e-mail of December 31, 2013. The PCA informed the Parties that in the interests of avoiding delay, the Tribunal was willing provisionally to reserve hearing dates in February for a further seven days pending the further payment by the Claimant and invited the Claimant to pay the balance of its share by January 15, 2014. By the same date, the PCA invited the Parties to submit their comments on the hearing location by January 15, 2015.

77. By e-mail dated January 16, 2014, the Respondent submitted its comments regarding the hearing location and expressed a preference for Mauritius on the basis of costs. By e-mail of the same date,

the Claimant expressed a preference for The Hague on the basis of costs and requested comprehensive information regarding the costs of accommodation in The Hague and Mauritius.

78. By its letter dated January 16, 2014, the PCA acknowledged receipt of the sum of EUR 37,640.74, corresponding to payment net of bank charges of the second instalment of the Claimant's share of the supplementary deposit; informed the Parties that the hearing would be fixed for February 26-27, 2014; provided comprehensive information regarding the costs of accommodation in The Hague and Mauritius; and informed the Parties that owing to the availability of the Tribunal members travelling from Europe for the scheduled dates, the hearing would be located in The Hague.

79. By letter dated January 20, 2014, the PCA invited each of the Parties to provide the names of all counsel, witnesses, and any other persons attending the hearing on its behalf; and requested certain further details in respect of any such person in relation to whom the assistance of the PCA would be required in the arrangement of visas for entry into The Netherlands, by January 24, 2014.

80. By e-mail dated January 21, 2014, the Respondent informed the Tribunal that owing to a situation of very serious violence that had arisen in South Sudan on December 15, 2013, resulting in widespread loss of life and displacement of persons, the Respondent faced difficulty in presenting its case owing to an inability to secure the attendance of key witnesses, namely, Professor Ajuai Majok, former Chair of the South Sudan Electricity Corporation; Engineer Taban Youzel, former Director General of the then Ministry of Energy; and the Hon. John Luk Jok, the former Minister of Energy. The Respondent requested an adjournment of the hearing for at least three weeks in order to allow it to secure the attendance of its witnesses.

81. By letter dated January 21, 2014, the PCA invited the Claimant to provide its comments on the Respondent's request for an adjournment by January 24, 2014.

82. By e-mail dated January 22, 2014, the Claimant submitted its "Reply to the Respondent's Application for Deferment of the Hearing". The Claimant, *inter alia,* contested the facts stated by the Respondent as to the availability of its witnesses; objected to the admissibility of the proposed witness evidence; and opposed the application for an adjournment.

83. By letter dated January 24, 2014, sent by the PCA on the Tribunal's behalf, the Tribunal informed the Parties that, having considered their submissions, it was minded to adjourn the hearing to May 6-8, 2014 on condition (i) that the Respondent give an undertaking, by January 27, 2014, that if the hearing were adjourned to those dates, it would attend with its witnesses irrespective of any further armed hostilities that may take place in South Sudan; (ii) that the Respondent by January 31, 2014, file and serve a complete list of the names of all witnesses on whose evidence it intended to rely; (iii) that the Respondent by March 19, 2014, file and serve the sworn written statements of each such witness; and (iv) that no further adjournment would be granted. In the same letter, the Tribunal took note of the cease-fire agreement that had been announced the same day, and noted that the success of that agreement would take further time to ascertain.

84. By letter dated January 28, 2014, the Claimant reiterated its objections to an adjournment of the hearing.

85. By e-mail dated February 3, 2014, the Respondent stated that it "[has] accepted the condition in the decision of the court and undertake[s] to attend the hearing of the case in May 6-8 2014 as decided by the court regardless of any conditions which might come by in the course of time".

86. By letter dated February 5, 2014, sent by the PCA on the Tribunal's behalf, the Tribunal, taking into account the submissions of the Parties, and taking into account the need to give each Party a full opportunity of presenting its case as provided by Article 15(1) of the UNCITRAL Rules, and taking account of the Tribunal's availability, issued its decision on the request for an adjournment. The Tribunal: (i) adjourned the hearing to May 6-8, 2014; (ii) directed the Respondent to file and serve its list of witnesses by February 10, 2014; (iii) directed the Respondent to file and serve the witness statements of its witnesses by March 19, 2014; and (4) decided that no further adjournment of the hearing would be granted.

87. By e-mail dated February 14, 2014, the Respondent stated that it would call as witnesses the following individuals: "(1) Dr. Ajuai Magot Chol the former Chair of Southern Sudan Electricity Corporation who was the government representative in signing of the contract the subject of the arbitration; (2) Mr. Salvatore Garang Mabior dit the 1st Under Secretary Ministry of Finance, Commerce and Economic Planning who signed the financial part (Repayment schedule) of the contract and (3) Mr. Wani Buyu Dyori the Under Secretary (Planning) in the Ministry of Finance, Commerce and Economic Planning."

88. By e-mail dated March 19, 2014, the PCA noted that it did not appear to have received any of the statements of the above witnesses and requested that the Respondent file such statements by March 21, 2014.

89. By e-mail dated March 20, 2014, the Respondent informed the PCA that it would not rely on Mr. Salvador Garang Mabior Dit or Mr. Wani Buyu Dyori as witnesses and submitted the witness statement of Prof. Ajuai Magot Chol.

90. By letter dated April 8, 2014, the Claimant gave notice of the appearance of Eric Z. Chang International Arbitration Law Firm as co-Counsel on behalf of the Claimant; expressed its preference for Mauritius as the venue for the hearing; and requested clarification of certain matters in relation to the content and sequence of events at the hearing. The Claimant requested clarification, *inter alia*, of the questions whether the Tribunal intended to consider or address any issues other than witness testimony at the hearings and whether the Tribunal wished to receive further submissions discussing the parties' legal arguments.

91. By e-mail dated April 9, 2014, the Respondent presented its objections to the appearance of additional co-Counsel on behalf of the Claimant.

92. By e-mail from the Presiding Arbitrator dated April 9, 2014, the Tribunal provided the following directions in respect of the hearing:

> The hearing will commence by a brief opening statement from each party. The Claimant's witnesses will be first examined, followed by the Respondent's witness. There will then be a brief closing statement by each party. The Arbitral Tribunal would like to reserve, at this stage, the question of potential post-hearing briefs.
>
> The parties are invited to indicate which witness they intend to cross-examine by 15 April 2014.
>
> Regarding the hearing location, the Arbitral Tribunal is flexible but wishes that this location be determined as early as possible.

93. By e-mail dated April 10, 2014, the Claimant informed the Tribunal that Mr. Marcus Fuchs, by reason of travel commitments, would need to give evidence by way of video-conference and requested that facilities for such video-conference be provided; reiterated its preference for Mauritius as the venue of the hearing; and informed the Tribunal that of its intention to submit a short pre-hearing brief by or before April 30, 2014.

94. By e-mail from the Presiding Arbitrator of the same date, the Tribunal took note of the Claimant's request to file a pre-hearing brief by April 30, 2014 and invited the Respondent to indicate by April 15, 2014 whether it agrees to a simultaneous exchange of pre-hearing briefs on April 30, 2014.

95. By e-mail on behalf of the Tribunal dated April 11, 2014, the PCA informed the Parties of the estimated expenses of holding the hearing in The Hague or Mauritius, respectively, and informed the Parties that unless the Parties agreed otherwise at or before the close of business, Nairobi time on April 14, 2014, the hearing would be located in Mauritius.

96. By e-mail sent on behalf of the Tribunal dated April 14, 2014, the PCA confirmed that the hearing would be located in Mauritius.

97. By e-mail dated April 16, 2014, the Claimant reiterated its intention to submit its pre-hearing brief and requested that the Tribunal order GOSS to submit any briefing simultaneously by close of business Nairobi time on April 30, 2014.

98. By e-mail from the Presiding Arbitrator dated April 16, 2014, the Tribunal directed as follows:

> In view of the parties' positions, the Arbitral Tribunal will allow the submission of a pre-hearing brief by 30 April 2014.
>
> The Arbitral Tribunal is not minded to give a page limit or otherwise regulate the content of such pre-hearing brief. That being said, the parties should be informed that the Arbitral Tribunal would be assisted by the submission of pre-hearing brief in the form of skeleton arguments with precise references to the legal principles applicable as well the evidence in support of the factual allegations.
>
> In relation to the legal issues, the Arbitral Tribunal would welcome the parties' views on the applicability of the Contract Act of South Sudan that entered into force on 28 November 2008.
>
> The pre-hearing submissions shall not include any new factual evidence save with the prior leave of the Arbitral Tribunal. Legal sources may be produced if necessary.

99. By e-mail dated April 24, 2014, the PCA informed the Parties that it was in the process of arranging, *inter alia*, the presence of an appropriate observer with Mr. Fuchs during his testimony. By e-mail dated April 25, 2014, the Claimant proposed in the interests of saving costs that Mr. Fuchs testify without the presence of an observer. In support of its proposal, the Claimant stated that "Mr. Fuchs

will be testifying under oath, and the undersigned Counsel will ensure that Mr. Fuchs will adhere to proper protocol before and during his testimony . . . If Respondent insists on an observer, Claimant would be amenable to the extent that Respondent takes on any additional costs. Otherwise, Claimant maintains its request to the Tribunal to forego an observer."

100. By e-mail on behalf of the Tribunal dated April 25, 2014, the PCA informed the Parties that in order to avoid unnecessary cost to the Parties, and having mind to the undertakings set forth by the Claimant in its e-mail below, the Tribunal was minded to agree to the Claimant's proposal that Mr. Marcus Fuchs give evidence without the presence of a third-party observer; before issuing its decision, the Tribunal invited the Respondent to submit its comments on the proposal on or before Monday, 28 April 2014. The Respondent did not provide any comments on the Claimant's proposal within the given period.

101. By e-mail dated April 28, 2014, the Claimant requested the Tribunal's leave to submit approximately 12 or fewer additional exhibits in support of its brief, specifying that "[t]he majority of these exhibits will be documents that detail and support Claimant's quantified damages. One additional exhibit will relate to the issue of the payment guarantee; it is a document issued by Respondent and therefore should not generate any surprises or controversies. Another exhibit pertains to the issue of the performance guarantee; this document was copied to Respondent at the time and once again should not generate any surprises or controversies. Finally, Claimant wishes to exhibit a World Bank report on South Sudan's infrastructure and terrain conditions."

102. By e-mail of the same date, the Tribunal invited the Respondent to provide its response to the Claimant's request. By e-mail of the same date, the Respondent objected to the submission of additional documents by the Claimant and stated: "If allowed then we would need time to examine them so as to prepare ourselves. May I get a decision as soon as possible so as to cancel our reservation." By further e-mail of the same date, the Claimant maintained its request to submit the additional documents but stated that to the extent the Tribunal would only accept the production of new exhibits subject to a postponement, the request would be withdrawn. By further e-mail of the same date, the Tribunal invited the Respondent to clarify what it meant by "May I get a decision as soon as possible so as to cancel our reservation."

103. By e-mail dated April 29, 2014, the Claimant offered to give the Tribunal and Respondent the opportunity to view the proposed additional exhibits prior to the submission of the Pre-Hearing Brief. By e-mail of the same date, the Tribunal invited the Claimant to show the exhibits to the Respondent and directed that "the Respondent shall then inform the Arbitral Tribunal whether its objection is maintained." The Tribunal directed further that the submissions were to be sent to the Respondent only and invited the Respondent to provide its response by 12 noon Paris time on April 30, 2014.

104. By e-mail dated April 30, 2014, the Respondent confirmed that it had reviewed the additional documents and did not object to their submission by the Claimant. By e-mail of the same date, the Tribunal confirmed that the additional exhibits would be admitted into the record.

105. By e-mail dated April 30, 2014, the Tribunal circulated a tentative schedule for the hearing.

106. By e-mails dated May 1 and 2, 2014, and via its web-site, the Claimant submitted its Pre-Hearing Brief and supporting exhibits.

107. By e-mail dated May 3, 2014, the Tribunal confirmed the schedule for the hearing as follows:

Tuesday 6 May 2014

09.30 *Hearing opened.*
Introductory remarks by the Presiding Arbitrator

09.45 Opening Statement by the Claimant

10.30 Opening Statement by the Respondent

11.15 *Break*

11.45 Direct Examination of Mr. Mohamed Fagir limited to 10 minutes

11.55 Cross-examination (if any) of Mr. Fagir
Questions to Mr. Fagir (if any) from the Tribunal

13.30 *Lunch break*

14.30 Direct Examination of Mr. Michael Harry Lucas limited to 10 minutes

14.40 Cross-examination (if any) of Mr. Lucas

16.00 *Break*

16.30 Cross-examination (if any) of Mr. Lucas
Questions to Mr. Lucas (if any) from the Tribunal

18.00 *Adjournment for the day*

Wednesday 7 May 2014

09.00 Direct Examination of Mr. Marcus Fuchs (by video-conference) limited to 10 minutes

09.10 Cross-examination (if any) of Mr. Fuchs
Questions to Mr. Fuchs (if any) from the Tribunal

10.30 *Break*

11.00 Direct Examination of Professor Ajuai Magot Chol limited to 10 minutes

11.10 Cross-examination (if any) of Prof. Chol
Questions to Prof. Chol (if any) from the Tribunal

13.00 *Lunch break*

14.00 Closing statement by the Claimant

14.30 Closing statement by the Respondent

15.00 Closing remarks by the Presiding Arbitrator

15.30 *Hearing adjourned.*

108. In accordance with the schedule, the hearing was held at the InterContinental Hotel, Balaclava, Mauritius, on May 6 and 7, 2014 (the "Hearing"). The following persons participated in the Hearing:

Tribunal

Mr. Philippe Pinsolle, Presiding Arbitrator
Mr. Karel Daele
Mr. Richard Omwela

Claimant

Counsel
Mr. Eric Z. Chang, Counsel, EZC Law
Mr. Gilbert Mungu, Counsel, Mungo & Co. Advocates
Ms. Aurelie Huet, Consultant, EZC Law

Representative s and Witnesses
Mr. Mohamed Fagir, Chairman and Chief Executive Officer, Active Partners Group Limited
Mr. Michael Lucas, Managing Director and Group Projects Director, Active Partners Group Kenya

Witness
By videoconference: Mr. Marcus Fuchs, Managing Director, Arch International Group; formerly Corporate Finance Director, Project Finance Centuria, Dubai

Logistical assistant
Mr. Khalid Ahmed, Logistical support personnel, Active Partners Group Limited

Respondent

Counsel
Hon. Undersecretary Mr. Jeremiah Swaka Moses, Ministry of Justice, Republic of South Sudan

Witness
Professor Ajuoi Magot Chol Acieu, Chairperson, Engineering Council of Southern Sudan; formerly Chairman, Southern Sudan Electricity Corporation

Court Reporters

Ms. Diana Burden
Ms. Laurie Carlisle

Registry

Fedelma Claire Smith, Legal Counsel, Permanent Court of Arbitration

109. A verbatim transcript of the hearings was prepared in real time and circulated the same day to the Parties and Tribunal on each day of the Hearing.

110. At the close of the hearing, upon consultation with and agreement of the Parties, the Tribunal directed that:

(1) Each Party file a post-hearing brief, addressing any subject it consider appropriate within the confines of the case, including the final restated prayer for relief, and not including any new documents or new evidence save for those documents requested by the Tribunal, by June 6, 2014;

(2) Each Party file its submission of its costs incurred in the arbitration, namely, counsel fees, expenses, and any expert fees deemed appropriate, and including the reasons for any request that the Tribunal order that costs be paid by the other Party; and

(3) Each Party make its comments if any on the costs submissions of the other Party by June 16, 2014.

111. By e-mail dated May 21, 2014, the Claimant requested certain corrections to the hearing transcript. By e-mail dated May 28, 2014, the PCA invited the Respondent to provide its corrections to the hearing transcript by June 3, 2014. The Respondent did not provide corrections within the given time period.

112. The Respondent and Claimant submitted their Post-Hearing Briefs by e-mails dated June 6 and 7, 2014, respectively. By its e-mail of June 7, 2014, the Claimant submitted its Submission on Costs.

113. By letters dated July 23, 2014 and September 29, 2014, the Tribunal invited the Parties to advance a supplementary deposit of EUR 50,000 (EUR 25,000 per Party). On October 15, 2014, the Claimant paid its share of the supplementary deposit. By e-mail dated October 20, 2014, the Respondent acknowledged receipt of the Tribunal's request. On December 2, 2014, the Claimant advanced the Respondent's share of the supplementary deposit.

III. FACTUAL BACKGROUND

114. In 2007, the autonomous government of South Sudan invited interested qualified parties to participate in a tendering process for the construction of electric power infrastructure in the state capitals of Awil, Bentiu, Bor, Malakal, Rumbek, Tori, Warrap and Yambio, by an Engineer Procure Construct and Finance (**"EPCF"**) tender dated May 28, 2007[1] and July 24, 2007 (the "Tender").[2]

115. The Claimant submits that the Tender was originally floated on May 28, 2007 (the **"May Bid Contract"**).[3] The May Bid Contract was re-floated on July 1, 2007 and posted on the World Bank website as project No. WB2150-705/07 and on other international bidding websites, with the closing date posted as July 10, 2007, and later extended to July 24, 2007.[4]

116. A joint venture formed by a subsidiary of the Claimant, A.M. Sys Limited (**"AMSys"**), with Conssuda Southern Sudan Company (**"Conssuda"**) on the basis of an agreement signed on July 22, 2007 (**"Joint Venture"**),[5] made a bid for the works on December 1, 2007. By letter dated November 1, 2007, the Respondent, through its consultant in the proposed project, Kwezi V3 Engineers of Southern Africa, notified the Joint Venture that it was one of the entities shortlisted for the Tender and that once a decision was reached, the successful bidder would promptly be handed

[1] Statement of Defence, para. 3.
[2] Statement of Claim, para. 3.
[3] Reply, para. 2 (i).
[4] Reply, para. 2 (ii).
[5] Reply, para. 2 (v).

over the sites after receipt of the final letter of award, after which the contract would be formally signed.

117. According to the Claimant, by a conditional letter of award from the Ministry of Housing, Lands and Public Utilities dated January 4, 2008, the joint venture was notified that it was the successful bidder for the works.[6] The conditional award was in respect of eight state capitals and was for the construction price exclusive of the cost of finance, amounting to USD 197,863,146. The notification was subject to pending negotiations on the financing details.

118. Prior to signing of the formal contract, the Respondent requested a meeting with the financers of the project, Centuria Capital LLC in Dubai, United Arab Emirates.[7] The meeting was held on February 2, 2008. The costs of the meeting were borne by the Claimant.[8]

119. The final award was made by letter dated February 7, 2008 (the **"Final Letter of Award"**). Upon the final award, the Respondent handed over to the Claimant the eight sites for the Claimant to survey. The Claimant surveyed the sites in all eight capitals from March 19 to 21, 2008, and made a report on March 23, 2008.

120. According to the Claimant, before the formal contract had been signed, the GOSS modified the award and removed three capital cities, leaving only five capitals.[9] When the award was thus modified, the Claimant had already carried out surveys of all eight sites on two occasions at its own cost.[10]

121. A further meeting was held between the Claimant and Southern Sudan Electricity Corporation on May 23, 2008, at which the conditions and duration of the technical contract were discussed.[11]

122. The contract was approved by the Council of Ministers of the Government of Southern Sudan at a meeting held on September 26, 2008.[12] The Claimant and the GOSS formally signed a Technical Contract dated October 5, 2008, with a value of USD 140,430,722.75 exclusive of cost of finance. According to the Claimant the contracts were approved by the Ministry of Finance by letter dated November 3, 2008 and by the Bank of Southern Sudan by letter dated January 27, 2009.[13] The Respondent states that the Bank of Southern Sudan did not approve or endorse the contracts.[14]

123. On November 16, 2008, the Claimant and the GOSS signed a Finance Agreement with a value of USD 196,603,011.85, covering the total value of the project on an EPCF basis including the cost of construction and cost of finance. The GOSS undertook in the Finance Agreement to pay the Claimant the sum of USD 196,603,011.85 on an agreed repayment formula which was to start three years from the effective date and handing over of the site and the letter of guarantee.

[6] Statement of Claim, para. 7.
[7] Statement of Claim, para. 8.
[8] Statement of Claim, para. 8.
[9] Statement of Claim, para. 11; Transcript, Day 1, p. 12, lines 4-23.
[10] Statement of Claim, para. 11.
[11] Statement of Claim, para. 8.
[12] Statement of Claim, para. 12.
[13] Statement of Claim, para. 13.
[14] Statement of Defence, para. 13.

124. In preparation for execution of the works, the Claimant purchased equipment, conducted surveys, signed contracts with suppliers and sub-contractors, and made payments for materials in preparation for the Project.

125. Around the end of 2009 and 2010, the GOSS asked the Claimant to secure finance from financial institutions other than the financer agreed in the Finance Agreement.[15] It is the Claimant's case that the Respondent did not provide the guarantee required under the Finance Agreement.[16]

126. The Respondent acknowledges that "the bank guarantee could not be secured by the respondent."[17] The Respondent further states that "th[is] submission by the Claimant is undisputed".[18]

IV. POSITIONS OF THE PARTIES ON THE APPLICABLE LAW

127. In its e-mail directions issued prior to the Hearing on April 16, 2014, the Tribunal invited the Parties' views on the applicability of the Contract Act of South Sudan that entered into force on November 28, 2008 (the "**Contract Act 2008**").

A. The Claimant's Position

128. The Claimant submits that Sudanese law is the proper law applicable to the Parties' dispute. According to the Claimant, the Contract Act 2008 does not apply to the Contract, because this Act came into force on November 28, 2008 and the Contract was concluded on October 5, 2008.[19] The Claimant submits that the Contract Act 2008 therefore does not apply *ratio temporis* to the Contract. Rather, because Southern Sudan did not enact any legislation relevant to contract law between 2005 and the adoption of the Contract Act 2008, Sudanese law is the proper applicable law,[20] including the Civil Transactions Act 1984 and the Sudan Contract Act 1974.[21]

129. According to the Claimant, the relevant provisions of Sudanese law are Section 128(1) of the Civil Transactions Act 1984 and Sections 57(1), 74, 75(d), and 79 of the Contract Act 1974.[22]

130. Further, the Claimant notes, "the parties' Contract specifically envisaged the applicability of Sudan's Contract Act 1974, as well as English case law. The Tender itself cites to the law of Sudan, on or before 1974, as the applicable governing law, and '[i]f this law does not cover certain contractual cases, relevant section of the UK law shall apply [sic]'."[23] Thus, according to the Claimant, pursuant to the Contract and under the applicable Sudanese law, English law is also applicable to the Contract and the Parties' dispute. First, by referring to "UK law" which is "a misnomer and logically refers to

[15] Statement of Claim, para. 28.
[16] Statement of Claim, para. 34.
[17] Respondent's Post Hearing Brief, p. 5.
[18] Respondent's Post Hearing Brief, p. 6, section 1.
[19] Claimant's Pre-Hearing Brief, para. 208; Claimant's Post-Hearing Brief, paras. 302-05.
[20] Claimant's Pre-Hearing Brief, para. 208.
[21] Claimant's Pre-Hearing Brief, paras. 209-15.
[22] Claimant's Post-Hearing Brief, paras. 217-18.
[23] Claimant's Pre-Hearing Brief, para. 216; Claimant's Post-Hearing Brief, para. 313, referencing Exhibit 76.

English law"[24] the Tender specifically points to English law as a gap-filling device.[25] Second, Sudanese courts apply English case law in their judicial reasoning as "persuasive authority".[26]

131. In support of the argument that the Contract Act 2008 does not apply *ratio temporis* to the Contract, the Claimant refers to Section 4.3. of the Contract Act 2008, which reads: "The Provisions of this Act shall apply to contracts made on or after the date of its coming into force of this Act."[27] Section 4.4 of the Contract Act 2008 provides: "In relation to contracts made before the enactment of this Act, these provisions shall apply subject to modification of those contracts."[28] The Claimant submits that the effect of these two sections is that contracts made before such enactment must be modified so as to indicate that the Contract Act 2008 applies.[29]

132. The Claimant submits that even if the Contract Act 2008 applies to the Contract, the Respondent has materially breached its obligations and Claimant is entitled to its damages under the Act. The applicable provisions of the Contract Act 2008 are Section 75 for the assessment of breach, and Sections 93(1), 93(10) and 94(4) as the grounds for the requested damages.[30]

133. Section 75 of the Contract Act 2008 reads: "[w]here a contract consists of reciprocal promises to be performed simultaneously, the promisor shall not perform his or her promise unless the promisee is ready and willing to perform his or her reciprocal promise."[31] Section 93(1) provides that "[w]here there is a breach of contract, the party who suffers the breach shall be entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her, which arose in the usual course of business from the breach or which the parties knew when they made the contract, to be likely to result from the breach."[32] This Section, according to the Claimant, confirms the principle of expectation damages and the principle of consequential damages.[33]

134. Further, section 93(10) is in the view of the Claimant broad enough to permit recovery of its expectation damages, out-of-pocket losses, consequential losses, and interests, costs and fees.[34] Finally, providing that, "[t]he amount stipulated by a contracting party in the contract as payable upon a breach, shall only be payable by the party in breach if the amount is reasonable in the circumstances, that is, where the amount represents a genuine pre-estimate of probable loss…",[35] Section 94(4) "codifies the traditional test, developed in English law, that the liquidated damages must represent a genuine pre-estimate of probable loss of the breach covered by the clause in order to be upheld."[36]

[24] Claimant's Post-Hearing Brief, para. 313.
[25] Claimant's Pre-Hearing Brief, paras. 245-46.
[26] Claimant's Pre-Hearing Brief, paras. 247-49; Claimant's Post-Hearing Brief, paras. 314-18.
[27] Claimant's Pre-Hearing Brief, para. 196.
[28] Claimant's Pre-Hearing Brief, para. 197.
[29] Claimant's Pre-Hearing Brief, para. 198.
[30] Claimant's Pre-Hearing Brief, paras. 201.
[31] Claimant's Pre-Hearing Brief, paras. 201-207.
[32] Claimant's Pre-Hearing Brief, para. 204.
[33] Claimant's Pre-Hearing Brief, para. 204.
[34] Claimant's Pre-Hearing Brief, para. 205. (Provision not reproduced in the Claimant's Pre-Hearing Brief.)
[35] Claimant's Pre-Hearing Brief, para. 206.
[36] Claimant's Pre-Hearing Brief, para. 206.

B. The Respondent's Position

135. In its Post Hearing Brief, the Respondent submits that the applicable law is the law of South Sudan, as set forth in the Contract Act 2008. According to the Respondent, "[a]t the time of signing the contract, the legislative Assembly had passed the Contract Act"[37] and the Act awaited only "the last formality", namely, the signature of the President of South Sudan.[38] The "right and reasonable inference is that the parties intended to be bound by the laws of Southern Sudan, in this case the Contract Act, 2008 which was in the making".[39]

136. Further, the Respondent submits that "the applicable law is normally the law at the time the cause of action arises" and here "[t]he cause of action arose in 2012 when the Claimant resorted to arbitration" after rescission of the contract.[40]

137. Concerning Section 4.4 of the Contract Act 2008, the Respondent submits that the Claimant's interpretation is "misconstrued". According to the Respondent, the modification referred to by Section 4.4 "can only take place when a contract signed before coming into force of the Act has provisions which contravene the law (Contract Act 2008). The fact that the parties did not modify any provision in their contract meant that there were no provisions demanding any necessary modification."[41]

138. The Respondent adds that the reference in the Tender to the laws of Sudan on or before 1974 as the law governing the contract "cannot override the express terms the parties subsequently agreed to in the contract" namely Part II GC 1.4 of the Particular Conditions of Application and Article 5(6) of the Financial Agreement, which provide for the application of the law of South Sudan.[42]

139. As to the applicable legal principles concerning conditions precedent, the Respondent also makes submissions in the alternative, namely, "[e]ven if English Common law is applied to [fill] gaps in the laws of Southern Sudan, English law recognizes contracts with conditions precedent."[43]

V. POSITIONS OF THE PARTIES ON JURISDICTION

A. The Respondent's Position

140. The Respondent's Statement of Defence states that it is "[n]ot disputed" that the Tribunal has jurisdiction to hear and determine the present dispute.[44] In the same Statement of Defence, the Respondent raises two objections to the present proceedings.

141. First, the Respondent submits that:

[37] Respondent's Post Hearing Brief, p. 8, section 5.
[38] Respondent's Post Hearing Brief, p. 8, section 5.
[39] Respondent's Post Hearing Brief, p. 8, section 5.
[40] Respondent's Post Hearing Brief, p. 8, section 5.
[41] Respondent's Post Hearing Brief, p. 8, section 5.
[42] Respondent's Post Hearing Brief, p. 8, section 5.
[43] Respondent's Post-Hearing Brief, pp. 2-3.
[44] Statement of Defence, para. 48.

> There are two different dispute resolutions mechanisms. Under Article 5.8 of the Financial Agreement arbitration is preceded by friendly consultations and negotiations between the parties. Under clause 20.3 and 20.5 of the Technical Contract arbitration should be preceded by adjudication and an amicable settlement before the arbitration.[45]

142. Secondly, the Respondent submits, further, that "the notice [of appointment of an arbitrator] was issued after the lapse of contract due to passage of time".[46]

143. The Respondent does not make further submissions concerning the jurisdiction of the Tribunal at the Hearing or in its Post-Hearing Brief.[47]

144. Further, the Respondent does not raise any jurisdictional objection in its prayer for relief. [48]

B. The Claimant's Position

145. The Claimant submits that the Finance Agreement and the General Terms and Conditions of Contract contained an arbitration agreement that required any dispute under both agreements to be submitted to arbitration.[49] It submits that the arbitral tribunal has jurisdiction to hear and determine the present dispute.[50]

146. The Claimant invokes Article 5(8) of the Finance Agreement; Sub-clause 20.6 of the General Conditions of the Technical Contract (**"General Conditions"**); and Clause GC20.6 of the Particular Conditions of the Technical Contract (**"Particular Conditions"**).

147. Article 5(8) of the Finance Agreement provides:

> All disputes in relation to the contract or its execution shall be solved through friendly consultations and negotiations between the Parties. In case of a dispute not solved within 90 days after the first consultation, it shall be referred to arbitration in accordance [with] the Technical contract arbitration rules and governing law.

148. Sub-clause 20.6 of the General Conditions provides:

[45] Statement of Defence, para. 43.
[46] Statement of Defence, para. 44.
[47] Transcript, Day 1, pp. 27-40 (Respondent's Opening Submissions); Transcript, Day 2, pp. 314-23 (Respondent's Closing Submission).
[48] Statement of Defence, para. 50.
[49] Statement of Claim, para. 43.
[50] Statement of Claim, paras. 44, 48.

> Any dispute in respect of which:
>
> (a) the decision, if any, of the Dispute Adjudication Board has not become final and binding pursuant to Sub-Clause 20.4, and
>
> (b) amicable settlement has not been reached,
>
> shall be finally decided by international arbitration. The arbitration rules under which the arbitration is conducted, the institution to nominate the arbitrator(s) or to administer the arbitration rules (unless named therein), the number of arbitrators, and the language and place of such arbitration shall be as set out in the Appendix to Tender. The arbitrator(s) shall have full power to open up, review and revise any decision of the Dispute Adjudication Board;

149. Clause GC 20.6 of the Particular Conditions provides (original emphasis):

> a) Arbitration rules **shall [be] in accordance with the (UNCITRAL) rules for Arbitration.**
> b) Number of Arbitrators **shall be 3 (three) Arbitrators.**
> c) Language of arbitration **shall be English.**
> d) Place of arbitration **shall be Nairobi, KENYA.**

150. As to the first objection raised by the Respondent, the Claimant contends that the requirement of Sub-Clause 20.6 (a) has been fulfilled, because the Respondent failed to nominate a member of the Dispute Adjudication Board within the time period established by Sub-Clause 20.3 of the General Conditions, and, pursuant to Sub-clauses 20.4 and 20.8 of the General Conditions, if the nomination is not duly made, the appointment of the Dispute Adjudication Board expires and the dispute shall be finally settled by arbitration.[51]

151. The Claimant states that it "went through all the phases to try and resolve the issue including nominating their member to the Dispute Adjudication Board provided under the agreement which was inoperational because the Respondent never nominated its representative and further held various consultative meetings with the respondent which never bore fruit as promises were never kept. All efforts were frustrated by the Respondent and the Respondent cannot be heard to complain at the late hour of the process."[52]

152. The Claimant denies that the notice was issued after the lapse of the contract due to passage of time.[53]

VI. POSITIONS OF THE PARTIES ON THE MERITS

A. Validity of the Contract and the alleged insolvency of the Claimant

The Claimant's Position

(i) Authority of the Claimant to enter the contracts on behalf of the Joint Venture

153. The Claimant submits that it was the successful bidder for the Project, and denies the Respondent's contention that the successful bidder was Conssuda.[54] According to the Claimant, the first agreement

[51] E-mail from Claimant to the PCA dated June 25, 2013.
[52] Reply, para. 40.
[53] Reply, para. 41.
[54] Claimant's Pre-Hearing Brief, para. 93, citing Exhibits 9 and 83.

between Conssuda and AMSys Ltd, signed on July 17, 2007, provided that the parties would form a joint venture for the purpose of submitting a joint bid for the Project.[55] Conssuda and AMSys concluded a further contract on July 22, 2007, with a view to meeting the requirements of the Tender.[56] AMSys subsequently assigned its rights under the contract to the Claimant and that assignment was explained to the Respondent in a meeting in Dubai and later by letter.[57] The act of assignment by AMSys was formalized by contract dated January 27, 2008.[58]

154. According to the Claimant, the agreement of May 19, 2010, referred to by the Respondent,[59] "was as a result of blackmail whereby some of the shareholders in Conssuda were trying to extort more money from the Claimant with the help of some Government officials from the Respondent";[60] according to the Claimant the May 19, 2010 agreement is irrelevant to the present proceedings and does not contradict any of the terms of the previous agreements.[61]

155. The Claimant argues that the Respondent's allegation that it signed the Technical Contract and Financial Agreement without authorization from the Joint Venture "is demonstrably false, and is a red herring argument that relies on a misinterpretation of a document dated 19 May 2010".[62]

156. The Claimant submits that the issues raised by the Respondent as to the Claimant's authority to enter the contracts are raised in bad faith and believes that such allegations "are being raised by Counsel for malicious reasons as he was, at the time of bidding for the tender, a broker or agent of one of the unsuccessful bidders and was totally aware of the tender and contractual requirements".[63]

157. Moreover, to support the position that it was authorized to enter into the Contract, the Claimant notes that "[t]throughout the life of the project, GoSS entered into contractual documents with APG, and conducted business with APG without complaint."[64]

158. In its Post-Hearing Brief, the Claimant notes that the Respondent seems to have abandoned its previous argument that the Claimant purportedly signed the Technical Contract and Finance Agreement without authorization from the Joint Venture.[65] The Claimant notes that the Respondent did not pose any relevant questions to Prof. Chol in direct examination nor to Messrs Fagir or Lucas in cross-examination. Concerning the questions put by the Respondent to Mr. Fagir concerning Mr. Abdulwahab Saad, who signed the Technical Contract, the Claimant submits that "the questions and answer failed to demonstrate anything".[66]

[55] Reply, para. 2(iv).
[56] Reply, para. 2(v).
[57] Reply, para. 2(vi), citing Exhibits 9 and 11.
[58] Reply, para. 2(vii).
[59] Statement of Defence, p. 1.
[60] Reply, para. 3.
[61] Reply, para. 3; Claimant's Pre-Hearing Brief, para. 92.
[62] Claimant's Pre-Hearing Brief, para. 92.
[63] Reply, paras. 2(ix)-(x).
[64] Claimant's Pre-Hearing Brief, para. 94.
[65] Claimant's Post-Hearing Brief, para. 112, citing Transcript, Day 1 at 40-41.
[66] Claimant's Post-Hearing Brief, para. 112.

(ii) Authority of Signatory to sign contracts on behalf of the Claimant

159. In response to the contention by the Respondent that the signatory of the contract, Mr. Michael Harry Lucas, lacked authority from the Claimant to do so,[67] the Claimant states that it "does not admit" that Mr. Michael Harry Lucas had no authority to sign the Finance Agreement on behalf of the Claimant and "will put the Respondent to strict proof thereof".[68]

160. According to the Claimant, Mr. Michael Harry Lucas was duly authorized to sign the Financial Agreement on behalf of APG by a board resolution of November 10, 2008.[69] The Agreement was subsequently authenticated by the Ministry of Legal Affairs, properly sealed and signed by the Undersecretary.[70]

161. The Claimant submits that the GOSS's purported proof of Mr. Lucas' lack of authorization results from inaccurate interpretation of a letter sent by APG to the Ministry of Energy dated March 1, 2010. That letter, according to the Claimant, was not an admission of Mr. Lucas' lack of authorization but was sent "as a housekeeping matter" to avoid "any confusion between Active Partners Group (Sudan), which was GoSS's contracting partner, and Active Partners Group (Kenya), which is a separate entity."[71]

162. In its Post-Hearing Brief, the Claimant notes that the Respondent seems to have abandoned its previous argument that Mr. Mike Lucas, who signed the Financial Agreement on behalf of the Claimant, was not authorized to do so, noting that the Respondent "failed to put a single question to Mr. Lucas on the issue".[72]

(iii) Alleged Insolvency of the Claimant

163. In response to the submission by the Respondent that it lacked the financial solvency required by the Technical Contract and Finance Agreement,[73] the Claimant denies that it was insolvent and states that the allegation that it was looking for financing of the project for reasons of insolvency "is based on total lack of knowledge of the nature of the tender and an allegation based on such misunderstanding is misplaced and should be ignored by the Honourable Tribunal."[74]

164. The Claimant submits that the Respondent fundamentally misunderstands its own Tender requirements and the Contract.[75] In essence, it argues that the Respondent's defense "conflates two separate and distinct requirements under the Tender."[76] "First, the Tender required bidders to

[67] Statement of Defence, p. 1.
[68] Reply, para. 5, citing Exhibit S91.
[69] Claimant's Pre-Hearing Brief, para. 107, citing Exhibit 91.
[70] Claimant's Pre-Hearing Brief, para. 107, citing Exhibit 34.
[71] Claimant's Pre-Hearing Brief, para. 108.
[72] Claimant's Post-Hearing Brief, para. 113
[73] Statement of Defence, p. 1; Rejoinder, p. 1, para. 1, citing letter of notification of award dated February 7, 2008 and Exhibit 12 to the Statement of Claim.
[74] Reply, paras. 5-6.
[75] Claimant's Pre-Hearing Brief, paras. 110-113.
[76] Claimant's Pre-Hearing Brief, para. 110.

demonstrate their financial stability."[77] "Second, and separate from the issue of financial solvency, the Tender required bidders to present a financial bid and arrange for financing of the project."[78]

165. In its Post-Hearing Brief, the Claimant notes that the Respondent appears to have dropped its argument that the Claimant was not financially solvent and did not raise this argument at the Hearing.[79]

The Respondent's Position

(i) Authority of the Claimant to enter the contracts on behalf of the Joint Venture

166. The Respondent submits that the Claimant lacked authority from the Joint Venture to enter the Contract.[80] The Respondent submits that the successful bidder for the Project was AMSys/Conssuda.[81] In due course, and before the signing of the contract, Conssuda and AMSys established a joint venture. According to the Respondent, when the Claimant signed the Technical Contract on October 5, 2008, it did so without authorization from the Joint Venture, since the alleged authorization took place on May 19, 2010.[82] The fact that the authorization was signed after the Claimant had already signed the Finance Agreement and the Technical Contract means that the Claimant had signed the latter contracts without authority.[83] The Respondent contends that this renders the alleged agreement dated May 9, 2010, null and void.[84] The Respondent refers to the agreement dated July 17, 2007, according to which Conssuda disclaimed and assigned all its rights and duties in the contract to AMSys.[85]

167. The Respondent maintains that the agreement dated July 2, 2008, between the Claimant and Conssuda[86] has no effect and is null and void because "all the rights of Conssuda in the project were already disclaimed/assigned by Conssuda to AMSys in the Agreement in Arabic dated July 17, 2007".[87] The Respondent submits that "an assignment in such contracts must always be by the three parties or on a written "No objection" from one party to the original agreement which is not in this case".[88] On this ground, the Respondent maintains that "exhibit 78 in the Reply with its English version as exhibit 79 does not assign any rights to the Claimant nor does the agreement of 2nd July 2008 between the Claimant and Conssuda [have] any effect".[89]

[77] Claimant's Pre-Hearing Brief, para. 111.
[78] Claimant's Pre-Hearing Brief, para. 112.
[79] Claimant's Post-Hearing Brief, para. 114.
[80] Statement of Defence, p. 1; Rejoinder, p. 1, para. 1, citing letter of notification of award dated February 7, 2008 and Exhibit 12 to the Statement of Claim.
[81] Statement of Defence, p. 1.
[82] Statement of Defence, p. 1.
[83] Statement of Defence, para. 9.
[84] Statement of Defence, para. 9.
[85] Rejoinder, p. 1, para. 2.
[86] Reply, Exhibit S80. Exhibit 80 refers to two dates. First: "On this date July 2nd, 2008 …" (p. 1). Second: "Issued under my hands and seal this day 2/6/2008" (p. 3).
[87] Rejoinder, p. 1, para. 3.
[88] Rejoinder, p. 1, para. 3.
[89] Rejoinder, p. 1, para. 3.

168. The Respondent states that the Claimant's Reply refers to an agreement dated July 27, 2008, but exhibits an agreement dated July 2, 2008.[90] According to the Respondent, there is no agreement dated July 27, 2008.[91]

169. In response to the Claimant's allegation of bad faith on the part of the Respondent's Counsel,[92] Counsel for the Respondent states that at the time of bidding for the tender he was an employee of the United Nations in Khartoum (Sudan).[93]

(ii) Authority of Signatory to sign contracts on behalf of the Claimant

170. In its Statement of Defence, the Respondent contends that the signatory of the contract lacked authority from the Claimant.[94] The Respondent submits that Mr. Michael Harry Lucas, who signed the Finance Agreement on behalf of the Claimant, was not authorized to do so by the Claimant.[95]

171. In its Post-Hearing Brief, the Respondent does not make further submissions on the above issues (i) and (ii). On the contrary, it submits that the contracts are binding on both parties:

> "Admittedly, the contract (Technical and Financial) between the parties was binding on both parties." [96]

(iii) Alleged Insolvency of the Claimant

172. According to the Respondent, the Claimant was required by the Technical Contract and the Finance Agreement to be financially solvent, but the fact that the Claimant went seeking finances after having signed both those contracts, proves that it was not financially solvent.[97] According to the Respondent, "the Claimant was, according to the terms of the Technical Contract and the Financial Agreement to be financially solvent. But as it turned out after having signed both the contract and the agreement with Respondent, the Claimant went seeking finances for the project which proves that the Claimant was not solvent."[98]

B. Content and Scope of Contractual Obligations

The Claimant's Position

(i) Relationship of Finance Agreement and Technical Contract

173. The Claimant submits that the Finance Agreement was part of the Technical Contract according to Clause 4.[99] The Claimant does not dispute the Respondent's submission that it was the Technical

[90] Rejoinder, p. 2, para. 5, citing Reply, Exhibit S80.
[91] Rejoinder, p. 2, para. 5.
[92] Reply, paras. 2(ix)-(x).
[93] Rejoinder, p. 2, para. 1.
[94] Statement of Defence, p. 1; Rejoinder, p. 1, para. 1, citing letter of notification of award dated February 7, 2008 and Exhibit 12 to the Statement of Claim.
[95] Statement of Defence, p. 1.
[96] Respondent's Post-Hearing Brief, p. 1.
[97] Statement of Defence, p. 1; Rejoinder, p. 1, para. 1, citing letter of notification of award dated February 7, 2008 and Exhibit 12 to the Statement of Claim.
[98] Statement of Defence, p. 1.
[99] Statement of Claim, para. 16.

Contract that was part of the Finance Agreement according to Article 5(4) of the Finance Agreement.[100]

174. At the Hearing, the Claimant added that during the financing negotiations, the Parties agreed on a financing structure whereby Centuria Capital would loan directly to the Claimant.[101] The Claimant submits that the minutes of the meeting held in Dubai on February 2, 2008 are "part of the overall contract" between the Parties.[102]

(ii) Requirement to issue bank guarantee

175. The Claimant submits that the Finance Agreement required the Respondent to issue a bank guarantee from a commercial bank acceptable to the Claimant and approved in writing by the Claimant to cover the schedule of payments provided by the agreed repayment formula (the **"Schedule of Payments"**).[103] According to the Claimant, the Finance Agreement was the foundation upon which the entire contract for the construction was premised and the conditions therein had to be fulfilled first before the funds could be released by the financier.[104] In other words, "proper allocation and disbursement of the funds, and therefore commencement and orderly progress of the works, were preconditioned upon GoSS issuing an acceptable payment guarantee to APG."[105]

176. The purpose of the meeting in Dubai on February 2, 2008 was to discuss and agree on the financing structure of the Project, including on how two guarantees (repayment guarantee and performance guarantee) would work within such a financing structure.[106]

177. In response to the Respondent's argument that the issuance of the payment guarantee operated as a condition precedent, the Claimant notes that this argument was not raised prior to the Hearing.[107]

(iii) Effective date

178. According to the Claimant it was obliged by Clause 4.2 of the Technical Contract to provide the Financier with a performance security within 28 days from the "effective date" (the **"Effective Date"**).[108] The Parties disagree as to the determination of the Effective Date. The Claimant submits that the Effective Date "is determinable only upon the reading together of the Financial Agreement and the Technical Contract" and "could only be determined after the fulfillment of Clause 4(3) of the Financial Agreement".[109]

179. The Claimant states that the Technical Contract must be read with the Finance Agreement and not in isolation, and for this reason the Effective Date "can only be when both agreements would become

[100] Reply, para. 22.
[101] Claimant's Pre-Hearing Brief, paras. 7-10, 13-23.
[102] Transcript, Day 1, p. 46, lines 12-22 (Direct Examination of Mr. Fagir); Transcript, Day 2, p. 282, lines 6-18 (Closing Submission); Claimant's Post-Hearing Brief, paras. 76-77.
[103] Statement of Claim, para. 19; Claimant's Pre-Hearing Brief, paras. 27-30; Claimant's Post-Hearing Brief, para. 77.
[104] Statement of Claim, para. 17.
[105] Claimant's Pre-Hearing Brief, para. 30.
[106] Transcript, Day 1, p. 46, line 3 to p. 48, line 22 (Direct Examination of Mr. Fagir).
[107] Claimant's Post-Hearing Brief, para. 120.
[108] Statement of Claim, para. 21.
[109] Statement of Claim, para. 22; Claimant's Pre-Hearing Brief, para. 81.

operational which in this case was after 16th November, 2008".[110] The Claimant states that the Respondent has admitted that the Effective Date was after signature.[111] "While the Technical Contract was entered into on 5 November 2008,[112] the Financial Agreement […] was entered into on 16 November 2008. Thus, the effective date was 16 December 2008."[113]

(iv) Obligation to commence works

180. According to the Claimant, "[i]t was a condition in the Technical Contract that the Respondent would give a guarantee for the payment of the cost of the project to the Claimant and it was only after furnishing of the guarantee that the Claimant would commence actual works within 30 days".[114] The Respondent undertook the obligation to issue a payment guarantee in the Finance Agreement.[115]

181. In response to the Respondent's submission that the Claimant was required to nominate a commercial bank to whom the guarantee should be furnished and failed to do so,[116] the Claimant avers that it was for the Respondent to nominate a commercial bank acceptable to the Claimant.[117]

(v) The Parties' respective bargaining positions

182. In the negotiation of the Contract, the Claimant submits that the Respondent was in a dominant bargaining position in relation to the Claimant and was thus able to impose terms that were disadvantageous towards the Claimant.[118]

183. The Claimant had "little to no room to negotiate"[119] and had to agree to such contract terms as "highly punitive liquidated damages clause amounting to 5 per cent of the contract price per day of delay"[120] and Clause 5.3 of the Financial Agreement, absolving the Respondent from an obligation to repay the extended loan to Centuria Capital in the event of contractor delay or non-performance.[121] The Respondent had the greater bargaining leverage, such that it imposed the Project as an emergency,[122] with extremely tight deadlines, including an 18-month period for completion[123] and an obligation to issue a works program and a set of design drawings within 30 days of the Letter of Acceptance.[124]

184. The Claimant submits that the Respondent abused its dominant position to disregard its material obligations under the Contract, such as, for example, when it awarded the project to the Claimant on the basis of eight towns, in the knowledge that it might later unilaterally reduce the scope of the

[110] Reply, para. 27.
[111] Reply, para. 39, citing Statement of Defence, para. 22.
[112] Transcript, Day 1, p. 158, lines 11-12; p. 188, lines 1-6.
[113] Claimant's Pre-Hearing Brief, para. 81.
[114] Statement of Claim, para. 23.
[115] Claimant's Pre-Hearing Brief, paras. 42-45, 146.
[116] Statement of Defence, para. 23.
[117] Reply, para. 29.
[118] Claimant's Post-Hearing Brief, paras. 1-36.
[119] Transcript, Day 1, p. 14, line 15.
[120] Transcript, Day 1, p. 14, lines 21-23. According to the Claimant, this clause is even "unconscionable", Transcript, Day 1, p. 301, lines 20-24.
[121] Transcript, Day 1, p. 14, line 24 to p. 15, line 2; testimony of Mr Fagir, Transcript, Day 1, p. 48, lines 12-24.
[122] Claimant's Post-Hearing Brief, paras. 20-21.
[123] Claimant's Post-Hearing Brief, paras. 22-27.
[124] Claimant's Post-Hearing Brief, paras. 28-33.

Contract to five towns.[125] The Claimant notes that the reduction in scope from eight towns to five was protested by the Claimant in meetings at the time, but the Claimant felt it had no choice but to sign the contract, lest it be exposed to legal action by the Respondent for default under the Final Letter of Award.[126]

185. The Claimant contends that in spite of the Respondent's actual dominant position, at the hearings, the Respondent "attempted to portray itself as a weak, unsophisticated party who did not impose the contractual terms […]".[127] However, the Claimant submits that the Respondent was advised by reputable, internationally recognized consultants;[128] and that it was the Respondent that drafted the contractual documents "and imposed most of the terms therein".[129]

The Respondent's Position

(i) Relationship of Finance Agreement and Technical Contract

186. There is in fact no practical difference between the position of the Respondent and that of the Claimant.[130]

(ii) Requirement to issue bank guarantee

187. The Respondent submits that it was not under an obligation to issue a bank guarantee because the Claimant "neither introduced an acceptable commercial bank nor assigned a third party as a financier to whom a letter of guarantee should be given in accordance with article 4(3) of [the Finance Agreement]".[131] The Respondent contends further that "[t]here is only one letter of guarantee covering the total of the electrification costs which is USD 140,430,722.75 and cost of finance of deferred payments which is USD 56,172,289.10."[132]

188. The Respondent submitted at the Hearing that the issuance of the bank guarantee stipulated by Article 4(3) of the Finance Agreement was a condition precedent for the commencement of works under Clause 2.2 of the Technical Contract.[133] Thus, the Respondent argues that the Claimant should have not commenced the works before the Respondent issued the bank guarantee. In its Post-Hearing Brief, the Respondent elaborated this argument as follows:

> "Admittedly, the contract (Technical and Financial) between the parties was binding on both parties. However, its implementation and execution was subject to conditions precedent. In Article 4(3) of the Financial Agreement, the Respondent is to issue a bank guarantee from a commercial bank acceptable and approved in writing by the Claimant or its assignee. In the technical contract, Clause 8.1 of the Technical Contract states that "the contractor shall commence the design and execution of the Works as soon as is reasonably possible after the receipt of a notice to this effect from the GOSS Representative……."

[125] Claimant's Post-Hearing Brief, paras. 37-45.
[126] Claimant's Post-Hearing Brief, paras. 42-44.
[127] Claimant's Post-Hearing Brief, para. 2; Transcript, Day 2, p. 313, lines 8-15.
[128] Claimant's Post-Hearing Brief, paras. 5-8; Transcript, Day 1, p. 119, lines 3-6.
[129] Claimant's Post-Hearing Brief, paras. 10-18.
[130] *See* above, para. 173.
[131] Statement of Defence, para. 17.
[132] Statement of Defence, para. 19.
[133] Transcript, Day 1, pp. 29-30.

> In Part 11 of the Technical Contract (CONDITIONS OF PARTICULAR APPLICATION)(page 158 of the Statement of Claim) Clause GC 8.1 states that "the date for the commencement of works is (30) days after the receipt of letter of guarantee from the Government of Southern Sudan. Read together, these paragraphs show clearly that the Claimant can only start the execution of the contract after the receipt of the commencement notice from the Respondent and that the notice could only be issued and communicated to the Claimant upon the Respondent securing a bank guarantee in favour of the Claimant or a financier.
>
> Even if English Common law is applied to [fill] gaps in the laws of Southern Sudan, English law recognizes contracts with conditions precedent. Claimant was to start the performance of the contract after having been served with the notice of commencement by the Respondent's representative and after securing a bank guarantee. Performance in contracts with condition precedent is hinged to the conditions and the sequence of performance run in the order of condition(s) precedent.
>
> . . .
>
> In view of the conditions precedent, Claimant was not under duty to undertake any activity with regard to the execution of the contract until the commencement notice was duly issued and communicated to it by the Respondent's representative, and an interest-free advance payment given to it for mobilization and design. Commencement of preparations by the Claimant in lieu of the bank guarantee, a notice of commencement and an interest free advance payment from the Respondent was in breach of the express terms of the contract and as such cannot be borne by the Respondent."[134]

189. The Respondent argues that "the submission by the Claimant that it undertook preparations undermines the express terms of the contract. The contract states clearly that the Claimant will start the execution of the contract with mobilization and design after having received interest-free advance payments from the Respondent."[135]

(iii) Effective date

190. According to the Respondent, "the Effective Date is the date on which the contract was signed which is 5th October 2008".[136] The Respondent contends that "[t]he Effective Date as defined in clause 1.1.3.2 of the General Conditions is the date on which the contract entered into legal force and effect and the Performance Security under Clause 4.2 of the General Conditions is to be delivered to the financier within 28 days after the Effective Date".[137]

(iv) Obligation to commence works

191. The Respondent submits that the guarantee required by the Technical Contract "was to be given to a commercial bank acceptable and approved by the Claimant or a third party assigned by the Claimant" and that "the Claimant did not notify the Respondent of any commercial bank or a third party to whom the guarantee should be furnished".[138]

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[134] Respondent's Post-Hearing Brief, pp. 1-3, citing E. McKendrick, *Contract Law, Text, Cases and Materials* p. 941; *Bentsen v. Taylor Sons & Co* (1893) 2 QB 274, 481.
[135] Respondent's Post-Hearing Brief, p. 3, citing Clause 13.2 of the Technical Contract.
[136] Statement of Defence, para. 22.
[137] Statement of Defence, para. 22.
[138] Statement of Defence, para. 23.

(v) The Parties' respective bargaining positions

192. The Respondent disputes that it was in a dominant position vis-à-vis the Claimant and disputes that the Claimant had no option other than to sign the Contract after the reduction of the scope of the project from eight towns to five.[139] According to the Respondent:

> "The Claimant was at liberty to turn down the counter offer by Respondent for (5) towns only. The Claimant's 1st witness Mr. Fagiry expressed and acted on a self imposed and baseless fear that if the Claimant did not sign the contract for the five towns, it would lose the entire contract. Mr. Fagiry's allegation was not supported by any evidence . . . It is worth noting that the Claimant was, at the time of signing the contract a free entity represented by free persons who knew their actions. After having freely, voluntarily and consciously signed the contract for five towns, the Claimant should not be heard otherwise."[140]

Thus, the Respondent maintains that the Claimant freely signed the Contract and, further, that the Contract contemplated a possibility of extension beyond the 18 months period, pointing to Clause 8.3 of the Technical Contract.[141]

193. The Respondent submits, further, that it acted in good faith at all times before and after signing the Contract.[142]

C. The Alleged Breaches of the Technical Contract and Finance Agreement

The Claimant's Position

194. In its Statement of Claim, the Claimant submits that the Respondent failed to fulfil its obligations under the Technical Contract and the Finance Agreement in that it: "(i) Failed to furnish Bank Guarantee; (ii) Failed to take any or any reasonable steps to make the contracts operational whereas it had capacity to do so; (iii) Was grossly negligent; (iv) Unilaterally modified the award by reducing the number of towns from 8 to 5; (v) Unilaterally and without the Claimant's consent had a 3rd Party carry out the works in 2 of the remaining 5 contracted Cities."[143]

195. In its further submissions, the Claimant particularizes the Respondent's breach of the Technical Contract and the Finance Agreement as follows:

195.1. The Respondent materially breached the Contract by failing to issue a payment guarantee within 30 days of the signing of the Finance Agreement, and by failing to issue such a guarantee at all.[144]

[139] Respondent's Post-Hearing Brief, p. 1.
[140] Respondent's Post-Hearing Brief, p. 1.
[141] Transcript, Day 1, p. 30, lines 18-15 (Respondent's Opening Submission); Transcript, Day 1, p. 37, line 12 to p. 38, line 1 (Questions to the Respondent from the Tribunal).
[142] Respondent's Post-Hearing Brief, pp. 6-7.
[143] Statement of Claim, para. 34 (Particulars of Breach).
[144] Claimant's Pre-Hearing Brief, paras. 146-52; Transcript, Day 1, p. 10; Transcript, Day 2, pp. 275-76; Claimant's Post-Hearing Brief, paras. 59-64.

195.2. The Respondent materially breached the Contract when it failed to issue the notice of commencement of works.[145]

195.3. The Respondent breached the Contract by unilaterally altering the scope of works under the Contract.[146]

195.4. The Respondent materially breached the Contract by failing to give the Claimant site access,[147] in breach of the Respondent's "duties of cooperation and good faith."[148]

195.5. The Respondent materially breached the Contract due to its delays and prolonged suspension,[149] in breach of the Respondent's "duties of cooperation and good faith".[150]

195.6. The Respondent materially breached the Contract by repudiating the agreed financing by Centuria Capital,[151] in breach of the Respondent's "duties of cooperation and good faith".[152]

196. As a general matter, the Claimant argues that the Tribunal may rely solely on the contract terms to determine that the Respondent materially breached the Contract.[153] According to the Claimant, "[t]he principle that the contract law is the law of the parties is universally recognized"[154] and "[t]he Tribunal need not look further than the terms of the Contract to determine parties' duties and responsibilities"[155] because "[i]n the present case, the Contract obligations were unambiguous and clear."[156] In these circumstances, the Claimant submits that it was permitted to terminate the Contract, and Respondent is obligated to compensate the Claimant under the Contract.[157]

(i) Alleged failure to furnish bank guarantee and failure to make contracts operational

197. According to the Claimant, the Respondent was required by the Finance Agreement to issue a bank guarantee from a commercial bank acceptable to and approved in writing by the Claimant, to cover the schedule of repayments to be made by the Respondent (Schedule of Payments).[158]

(a) Financing Arrangement and Bank Guarantee

198. The Claimant submits that the Respondent failed to provide the bank guarantee required by the

[145] Claimant's Pre-Hearing Brief, paras. 153-55; Transcript, Day 1, pp. 11-12; Transcript, Day 2, pp. 284-86; Claimant's Post-Hearing Brief, paras. 103-04.
[146] Claimant's Pre-Hearing Brief, paras. 173-79; Transcript, Day 1, pp. 12-13; Transcript, Day 2, pp. 288-92; Claimant's Post-Hearing Brief, paras. 91-97.
[147] Claimant's Pre-Hearing Brief, paras. 156-59; Transcript, Day 1, pp. 11-12; Transcript, Day 2, p. 284; Claimant's Post-Hearing Brief, para. 98.
[148] Claimant's Pre-Hearing Brief, paras. 132, 159.
[149] Claimant's Pre-Hearing Brief, paras. 160-65; Transcript, Day 1, pp. 10-11; Transcript, Day 2, pp. 276-82; Claimant's Post-Hearing Brief, paras. 65-75.
[150] Claimant's Pre-Hearing Brief, paras. 132, 165.
[151] Claimant's Pre-Hearing Brief, paras. 166-72; Transcript, Day 1, p. 11; Transcript, Day 2, pp. 282-84; Claimant's Post-Hearing Brief, paras. 76-90.
[152] Claimant's Pre-Hearing Brief, para. 172.
[153] Claimant's Pre-Hearing Brief, II.A.1.
[154] Claimant's Pre-Hearing Brief, para. 143.
[155] Claimant's Pre-Hearing Brief, para. 145.
[156] Claimant's Pre-Hearing Brief, para. 145.
[157] Claimant's Pre-Hearing Brief, paras. 180-91.
[158] Statement of Claim, paras. 18-19.

Finance Agreement.[159] According to the Claimant, in late 2009 and in 2010, the Respondent "toyed with the idea" of having the project financed by financial institutions other than Centuria Capital LLC, beginning with Stanbic Bank of Kenya.[160] The Respondent asked the Claimant to secure finance that would only require the Respondent's guarantee, despite the fact that the Respondent was not yet a sovereign and could not issue a sovereign bank guarantee.[161] At the Respondent's request, the Claimant introduced it to Dubai Bank of Kenya and United Capital Bank of Sudan.[162] The Respondent failed to fulfil the requirements put forward by those banks.[163] The Claimant contends that although the Respondent's requests were a violation of the Finance Agreement, the Claimant nevertheless sought to comply with the requests, despite such violation, in order to mitigate their losses.[164]

199. The Claimant argues that Respondent's letter dated June 3, 2009, in which it represented that the relevant guarantee would be issued by July 15, 2009, served to reassure the Claimant, in reliance on which it continued to implement the project.[165] According to the Claimant, the Respondent continued to delay in meeting its obligation to provide the guarantee, despite many meetings with and reminders by the Claimant; however the Claimant remained hopeful that the Respondent would eventually act.[166]

200. In response to the Respondent's contention that it did not formally introduce Centuria Capital LLC as required,[167] the Claimant denies the allegation[168] and avers that "after the conditional award, the Respondent sent a high powered delegation to Dubai to meet with Centuria Capital for purposes of negotiating financial terms and conditions".[169] The Claimant does not admit that the Respondent had no knowledge of the agreement between the Claimant and Centuria Capital LLC.[170] According to the Claimant, "from the very beginning, Centuria Capital was presented as the financier for the project"[171] and the Parties agreed at the Dubai meeting on February 2, 2008 that Centuria Capital LLC would provide funding pursuant to the agreed terms.[172]

201. The Claimant submits that the Respondent breached its obligations under the Contract by rejecting the financing arrangement with Centuria Capital and replacing it with Stanbic Bank of Kenya.[173] The Claimant first learned that the Respondent was contemplating financing the project through Stanbic Bank of Kenya on June 3, 2009.[174]

202. In response to the Respondent's allegation that the Claimant neither introduced an acceptable commercial bank nor assigned a third party as a financier to whom a letter of guarantee should be

[159] Transcript, Day 1, p. 51, lines 15-16 (Direct Examination of Mr. Fagir).
[160] Statement of Claim, para. 28.
[161] Statement of Claim, para. 28.
[162] Statement of Claim, para. 28.
[163] Statement of Claim, para. 28.
[164] Statement of Claim, para. 29.
[165] Statement of Claim, para. 24.
[166] Statement of Claim, paras. 30-31.
[167] Statement of Defence, para. 17.
[168] Reply, para. 20, citing Exhibits 31 and S83.
[169] Reply, para. 21.
[170] Reply, para. 26.
[171] Claimant's Pre-Hearing Brief, para. 6.
[172] Transcript, Day 1, p. 10, lines 16-19.
[173] Claimant's Pre-Hearing Brief, para. 54, referencing Witness Statement of Mr. Fagir, para. 38.
[174] Claimant's Pre-Hearing Brief, para. 53, referencing Exhibit 55 (Letter sent by the Ministry of Energy and Mines).

given in accordance,[175] the Claimant denies the allegation.[176] The Claimant states that it introduced the financier on submitting its bid for the Tender and the commercial bank was to be nominated by the Respondent;[177] the Respondent upon visiting the financiers in Dubai carried out due diligence and discussed and agreed the terms of the finance including issue of bank guarantee and requested for a draft of the form of guarantee which was given to them.[178] According to the Claimant, Article 4(3) of the Finance Agreement required that the Respondent nominate a commercial bank to issue a guarantee to the Claimant, who had to approve the nominated bank.[179] The Claimant refers, further, to Article 9(2) of the Finance Agreement as to the beneficiary of the letter of guarantee.[180]

203. The Claimant submits that the Respondent's pleadings amount to "gross misunderstanding" of the Contract.[181] According to the Claimant, "Centuria Capital was the Claimant's financiers, introduced to the Respondents as required by the tender, and the contract demanded that the respondent gives a guarantee for the finance. The guarantee was to be given by Central Bank of Sudan or from a Commercial Bank acceptable to the claimant. The Respondent opted for a Commercial Bank to issue the guarantee. The Respondent's allegation that the Claimant was insolvent in the circumstances of the project is therefore misplaced and is premised on a complete misunderstanding of the financing model of the project and the obligations of the Respondent."[182]

204. The Claimant adds that "it was only when the Respondent could not raise the necessary guarantees from any commercial bank that it requested the Claimant to seek other financiers who would accept local guarantees and the Claimant thereafter entered into discussions with United Capital Bank and Dubai Bank who were willing to enter into negotiations to provide finance based on local guarantees. The discussions with the Respondent once again came to nought as the Respondent still failed to meet its obligations to these new financiers."[183]

205. At the Hearing, Claimant's witness explained that the financing structure of the Projected consisted of two guarantees. Payment guarantee was to be issued from GOSS to the Claimant to cover the risk of repayment of the loan to Centuria Capital in case GOSS defaulted.[184] Performance guarantee, in turn, was to be issued, according to Clause 5.3 of the Finance Agreement, from the Claimant to Centuria Capital.[185]

(b) Notice to Commence and Commencement of Works

206. The Claimant submits that by letter dated June 3, 2009, after the relevant sites had been handed over to the Claimant, the Ministry of Energy and Mines "purported to notify the Claimant to commence actual works".[186] The Claimant contends that the notice "was superfluous in that Claimant had already

[175] Statement of Defence, para. 17.
[176] Reply, para. 23.
[177] Reply, para. 24(i), citing Exhibit S83.
[178] Reply, para. 24(ii), citing Exhibits 9 and 15.
[179] Reply, para. 24(iii).
[180] Reply, para. 24(iv).
[181] Reply, para. 34.
[182] Reply, para. 34.
[183] Reply, para. 35.
[184] Transcript, Day 1, p. 47 line 24 to p. 48, line 9 (Direct Examination of Mr. Fagir).
[185] Transcript, Day 1, p. 48 lines 12-15 (Direct Examination of Mr. Fagir).
[186] Statement of Claim, para. 24; Claimant's Pre-Hearing Brief, para. 53.

commenced the project" and had made payments in respect of equipment, material and designs; carried out surveys; and signed contracts with suppliers and sub-contractors.[187]

207. In response to the Respondent's submission that it had not commenced works on the Project,[188] the Claimant submits that it had already started making preparations.[189] According to the Claimant, the letter of June 3, 2009, "was in part to prepare to commence works as the guarantee was expected to be in place by the 15th July, 2009".[190] The Claimant states that it "never claimed to have commenced actual works on the project" as alleged by the Respondent and reiterates that making of preparations to commence the works under the Contract, as required by FIDIC documents,[191] had a cost which the Respondent has to bear.[192]

208. The Claimant contends that pursuant to Clause 8.1 of the Technical Contract the Respondent had a contractual duty to issue a notice of commencement.[193] In the Claimant's view, this contention was not addressed or rebutted by the Respondent at the Hearing,[194] therefore, according to the Claimant, failure to issue a notice of commencement is uncontroverted.[195]

(c) Suspension and Termination of Technical Contract

209. The Claimant contends that the Respondent's inaction amounted to suspension of the implementation of the contract works; that such suspension persisted for more than 84 days and affected the entire works; and "therefore Clause 8.6, 16.2, and 16.4 of the Technical Contract became applicable".[196] The Claimant submits that the Respondent delayed complying with its obligations under the Finance Agreement, despite the Claimant's attempts, through meetings and reminders, to cause the Respondent to comply with its obligations,[197] and despite having the capacity to fulfil its obligations under the contracts,[198] as well as despite being assisted by the Claimant in its "financing efforts to get funding in place".[199]

210. As to the Respondent's capacity to fulfil its obligation under the contracts, the Claimant argues that GOSS had sufficient funding to issue a payment guarantee, but it made a conscious decision to use its funds for other purposes.[200]

211. The Claimant submits that once its attempts to bring about compliance by the Respondent had proved unsuccessful, it issued to the Respondent 14 days' Notice of Termination of the Technical Contract for the works on February 20, 2012, as provided under Clause 16.2(c) and (d) of the General Conditions

[187] Statement of Claim, para. 25; Claimant's Pre-Hearing Brief, para. 75.
[188] Statement of Defence, para. 24.
[189] Reply, para. 30; Claimant's Pre-Hearing Brief, para. 74.
[190] Reply, para. 30.
[191] Transcript, Day 1, p. 136, lines 15-21 (Cross-Examination of Mr. Lucas).
[192] Reply, para. 31.
[193] Claimant's Post-Hearing Brief, para. 99;
[194] Claimant's Post-Hearing Brief, paras. 101-102.
[195] Claimant's Post-Hearing Brief, paras. 103-104.
[196] Statement of Claim, para. 32; Claimant's Pre-Hearing Brief, para. 163.
[197] Statement of Claim, para. 30.
[198] Statement of Claim, para. 34; Claimant's Pre-Hearing Brief, para. 42.
[199] Transcript, Day 1, p. 14, lines 5-8.
[200] Claimant's Post-Hearing Brief, paras. 46-52.

of the Contract and also the Finance Agreement.[201] The Claimant contends that the Respondent's actions amounted to a breach of contract.[202]

212. In response to the Respondent's submission that it was the Claimant's delay and failure to provide funds which caused the non-execution of the contract,[203] the Claimant submits that the delay was caused by the failure of the Respondent to meet its obligations[204] whereas the Claimant met its own obligations on the issue of finance.[205]

213. According to the Claimant, under Sudanese case law, the Respondent materially breached the Contract when it failed to issue the payment guarantee.[206]

(d) Correspondence

214. The Claimant submits that "it remained hopeful that the Respondent would carry out its obligations under both agreements as the Government Ministries concerned kept pressing the Ministry of Finance and Economic Planning to act".[207] In particular, the Claimant contends that the Ministry of Finance "delayed and obstructed financing of the project".[208]

215. The Claimant submits that it has made a formal demand for payment of the sums claimed[209] and states that the Respondent "has failed to respond to any of the demands and Notices issued to it by the Claimant".[210]

216. The Claimant alleges that the Respondent "has variously admitted in writing that it was responsible for the delay in having the project fully implemented" and submits that such admissions amount to an admission of liability.[211]

(ii) Alleged unilateral modification of award

217. The Claimant submits that the Respondent breached the terms of the award by unilaterally modifying the scope of works through the removal of three of the eight state capitals (Yambio, Bor and Rumbek)[212] for which the infrastructure was to be provided.[213]

[201] Statement of Claim, para. 33; Claimant's Pre-Hearing Brief, para. 180; Claimant's Post-Hearing Brief, para. 363.
[202] Statement of Claim, para. 35.
[203] Statement of Defence, para. 30.
[204] Claimant's Pre-Hearing Brief, para. 163.
[205] Reply, para. 37.
[206] Claimant's Pre-Hearing Brief, paras. 220-21.
[207] Statement of Claim, para. 32; Claimant's Pre-Hearing Brief, paras. 60-61, 65.
[208] Claimant's Pre-Hearing Brief, para. 61.
[209] Statement of Claim, para. 46; Reply, para. 41.
[210] Statement of Claim, para. 47.
[211] Statement of Claim, para. 42; Claimant's Pre-Hearing Brief, para. 62, referencing Exhibits 44, 50 and 68; Claimant's Post-Hearing Brief, paras. 67-71; Transcript, Day 1, p. 210, lines 9-18 (Cross-Examination of Prof. Chol).
[212] Claimant's Post-Hearing Brief, para. 41
[213] Statement of Claim, para. 11; Claimant's Pre-Hearing Brief, paras. 66-68; Claimant's Post-Hearing Brief, paras. 348-62.

218. The Claimant denies the Respondent's allegation that it consented to the removal of some towns from the Project[214] and states that its continuing with the Project as amended by the Respondent was an attempt out of necessity to try to mitigate its losses.[215] The Claimant argues that because of the unilateral reduction of the scope of the Project, which it had no choice but to accept, it suffered additional costs.[216] The Claimant also emphasizes the allegedly dominant position of the Respondent, making the latter feel "comfortable breaching its obligations under the Contract, without fear of repercussion".[217]

219. With respect to the removal of the three towns from the scope of the Project, Claimant's witnesses (Mr. Fagiry and Mr. Lucas) testified at the Hearing that although between the May Bid Contract and the Tender the Respondent was aware that the Government of Egypt might offer to pay for the electrification of these towns, the Respondent never officially confirmed that.[218] The Claimant submits that "due to the uncertainty, [it] prepared two draft tenders, one for 5 towns and one for 8 towns."[219]

220. The Claimant further alleges that the Respondent covertly contracted a third party to carry out the electrification infrastructure in two of the five contracted capital cities, Malakal and Bentiu, without the Claimant's consent, and replacing those towns with two others, Yirol and Akobo, thus undermining the already binding contract that was already in place.[220] The Claimant submits that the Respondent has admitted this breach of contract in its Statement of Defence.[221]

221. According to the Claimant, according to Sudanese case law, the Respondent materially breached the Contract when it unilaterally reduced the scope of the Contract.[222]

The Respondent's Position

222. The Respondent initially disputed that the contract was validly concluded, for the reasons summarized above.[223] However, the Respondent in its latest submissions admits that the Contract is binding on both parties.[224]

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[214] Statement of Defence, para. 11.
[215] Reply, para. 37; Transcript, Day 1, p. 12; Transcript, Day 2, pp. 288-90.
[216] Claimant's Post-Hearing Brief, para. 45.
[217] Claimant's Post-Hearing Brief, para. 37.
[218] Claimant's Post-Hearing Brief, paras. 38-39; Transcript, Day 1, p. 12, lines 10-23 (Claimant's Opening Submission); Transcript, Day 1, p. 53, lines 14-22 (Direct Examination of Mr. Fagiry); Transcript, Day 1, p. 153, lines 20 to p. 154, line 9 (Questions to Mr. Lucas from the Tribunal).
[219] Claimant's Post-Hearing Brief, para. 38; Transcript, Day 1, p. 53, line 14 to p. 54, line 7 (Direct Examination of Mr. Fagiry).
[220] Statement of Claim, para. 27; Witness Statement of Mr. Fagir, paras. 37, 42-43; Claimant's Pre-Hearing Brief, paras. 69-71; Transcript, Day 1, p. 13; Transcript, Day 2, pp. 290-92; Claimant's Post-Hearing Brief, n. 12 at p. 8.
[221] Reply, para. 33, referring to Statement of Defence, para. 27 and letter dated April 19, 2010.
[222] Claimant's Pre-Hearing Brief, paras. 222-25.
[223] *See* above, paras.166-172.
[224] Respondent's Post-Hearing Brief, p. 1: "Admittedly, the contract (Technical and Financial) between the parties was binding on both parties." See also Respondent's Prayer for Relief in its Post-Hearing Brief: "Claimant was not under duress or any form of imposition from the Respondent and willingly signed the contract."

223. In this context, the Respondent presents its substantive response to the Claimant's submissions on breach of contract.

224. The Respondent's position on the alleged breaches of Contract as presented at the Hearing can be summarized as follows:

224.1. The Contract was frustrated, not breached, because the Respondent lacked the funds to be able to obtain a bank guarantee.[225]

224.2. Performance of the Contract was subject to a condition precedent, namely, the requirement that the Respondent issue a notice of commencement prior to the undertaking by the Claimant of any acts in preparation for the project.[226]

(i) Alleged failure to furnish bank guarantee and failure to make contracts operational

(a) Financing Arrangement and Bank Guarantee

225. The Respondent contends that "[n]either the Financial Agreement nor the Technical Contract has any reference to Centuria Capital LLC"[227] and that there "was no […] formal introduction of Centuria Capital LLC by the Claimant to the Respondent in accordance with Article 4.3 of the Finance Agreement".[228] According to the Respondent, the "self introduction by Centuria Capital LLC was even before the signing of both the Technical and Financial Agreements".[229] The Respondent submits that it "had no knowledge of the agreements between the Claimant and Centuria Capital LLC".[230]

226. The Respondent submits that the Claimant "neither introduced an acceptable commercial bank nor assigned a third party as a financier to whom a letter of guarantee should be given in accordance with Article 4(3) of the Finance Agreement".[231]

227. According to the Respondent, the Claimant in both Agreements is both contractor and financier.[232] The Respondent maintains that it only later realized that it had been misled because the Claimant turned out not to be solvent as provided in the Contract; by reason of such discovery, the Respondent endeavoured to find an alternative financier.[233] The Respondent submits that there "was no coercion in the process of securing financing for the project" and "[h]ad it not been for the misrepresentation by the Claimant that it was solvent, the Respondent would have not endeavoured to attempt to look for financiers".[234]

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[225] Transcript, Day 1, p. 34, lines 22-24 (Respondent's Opening Submission); Transcript, Day 2, p. 321, lines 20-21 (Respondent's Closing Submission); Respondent's Post-Hearing Brief, pp. 4, 6, 9.
[226] Transcript, Day 1, p. 30, lines 8-25 (Respondent's Opening Submission); Transcript, Day 2, p. 315, line 24 to p. 316, line 20 (Respondent's Closing Submission); Respondent's Post-Hearing Brief
[227] Statement of Defence, para. 28.
[228] Statement of Defence, para. 14.
[229] Statement of Defence, para. 14.
[230] Statement of Defence, para. 20.
[231] Statement of Defence, para. 17.
[232] Statement of Defence, para. 28, citing Letter from the Ministry of Energy and Mining dated February 16, 2010; Rejoinder, p. 2, para. 4, citing paragraph (2) of the Agreement of July 2, 2008 between the Claimant and Conssuda Southern Sudan.
[233] Statement of Defence, para. 28, citing Letter from the Ministry of Energy and Mining dated February 16, 2010.
[234] Statement of Defence, para. 29.

228. In its Post-Hearing Brief, the Respondent, arguing that it did not accept Centuria Capital as the Project's financier, adds:

> "The claim that Centuria Capital and the Respondent have accepted and agreed on the format for financing the project is not true. Though the representative of Centuria Capital was introduced to the Dubai meeting, the attached minutes of the meeting do not carry a paragraph supporting the allegation. There is nothing to show that the entire agreement was premised upon the terms of financing by Centuria Capital, otherwise the Claimant would not have continued searching for a financier from the Bank of South Sudan, KCB and Stanbic bank as testified by Respondent Witness Professor Chol. In his statement, professor Chol stated that it was the Claimant's representative who brought Stanbic Bank representative to Juba to discuss the financing of the project and the terms of the bank guarantee. Indeed Respondent was unable to provide the bank guarantee because of the intervening factors which adversely affected the financial ability of Respondent to perform the obligations in the contract, in particular the provision of the bank guarantee."[235]

(b) Notice to Commence and Commencement of Works

229. The Respondent disputes that it issued any letter of commencement of actual works to the Claimant and submits that the letter dated June 3, 2009, "was not from the appointed representative of the Respondent which [was] Southern Sudan Electricity Corporation for the purpose of this contract".[236] According to the Respondent, the Claimant "never commenced any works on the project".[237] According to the Respondent, "[c]ommencement of works is regulated by clause 8.1 of the Technical Agreement. Notice was not therefore given to the claimant by the Respondents appointed representative. Therefore any works or obligations incurred by the Claimant before commencement of the works is to be borne by the Claimant."[238]

230. In the Respondent's view, the Claimant, by choosing to undertake actual works before the issuance of the notice of commencement, went beyond the preparatory phase of the Contract, effectively entering the "mobilisation" phase, which requires authorization.[239] Although pursuant to Clause 2.2 of the Technical Contract the Claimant was provided with access to the sites, this right of access did not justify "mobilization".[240]

231. In this context, the Respondent puts forward that it did not issue the notice of commencement because of the impossibility to secure a bank guarantee due to the lack of sufficient amount of money to set aside.[241] It is its interpretation that "the issuance of bank guarantee and the notice for the commencement of works were conditional to the performance of the contract by the Claimant".[242]

232. The Respondent submits that whether the Effective Date was November 16, 2008, or as is provided in the Technical Contract, the commencement date of the Contract was not communicated to the

[235] Respondent's Post-Hearing Brief, p. 7.
[236] Statement of Defence, para. 24.
[237] Statement of Defence, para. 24.
[238] Statement of Defence, para. 24.
[239] Transcript, Day 1, p. 182, line 5 to p. 183, line 10 (Direct Examination of Prof. Chol).
[240] Respondent's Post-Hearing Brief, p. 7.
[241] Respondent's Post-Hearing Brief, p. 6.
[242] Respondent's Post-Hearing Brief, p. 7.

Claimant by the Respondent.[243] According to the Respondent, the Claimant "cannot begin the implementation of the contract in one way or the other before the commencement date is communicated to it".[244]

(c) Suspension and Termination of Technical Contract

233. According to the Respondent, "[t]here was no delay by the Respondent" but rather "the Claimant was the one who failed to provide the funds for the project",[245] as it was "[t]he contractor [who] was to finance the project".[246] The Respondent submits that the Contract "has not entered into execution and therefore clauses 8.6, 16.2 and 16.4 of the Technical Agreement is not applicable".[247] According to the Respondent, "[t]he failure of the Claimant to provide funds for the project and the inter conflict in the Active Partners Group Limited enormously contributed to the delay".[248] When the Claimant issued the Notice of Termination dated February 20, 2012, the contract "has already lapsed due to non execution and passage of time".[249] According to the Respondent, "the misrepresentation by the Claimant that it was solvent is the sole cause for non execution of the contract".[250]

(d) Correspondence

234. The Respondent submits that the Claimant "has no privity to intergovernmental correspondence".[251] The Claimant submits that such allegation is irrelevant as all the Respondent's correspondences were given to the Claimant by the Respondent's Ministers and Officials.[252]

235. The Respondent denies that it wrote letters accepting delays. It submits that the correspondence of April 2, 3, and 7, 2008 was "prior to the signing of both the Technical Contract and the Financial Agreement" and submits that "delay in the implementation of a contract does not give rise to admission of liability per se".[253]

236. The Respondent denies that the Claimant has made a formal demand for the amount set forth in the Statement of Claim.[254]

(ii) Alleged unilateral modification of award

237. The Respondent denies that the modification was a breach, on the grounds that by signing the Finance Agreement for funding the electrification of five towns, the Claimant consented to the modification.[255] In this context, the Claimant failed to prove that the reduction of the scope of the works was unilaterally imposed by the Respondent.[256]

[243] Rejoinder, p. 2, para. 1.
[244] Rejoinder, p. 2, para. 1.
[245] Statement of Defence, para. 30.
[246] Transcript, Day 1, p. 28, line 1 (Respondent's Opening Submission).
[247] Statement of Defence, para. 32.
[248] Statement of Defence, para. 34.
[249] Statement of Defence, para. 33.
[250] Statement of Defence, para. 35.
[251] Statement of Defence, para. 32.
[252] Reply, para. 38.
[253] Statement of Defence, para. 42.
[254] Statement of Defence, para. 46.
[255] Statement of Defence, para. 11.
[256] Respondent's Post-Hearing Brief, p. 1.

238. Concerning the further reduction in the scope of works by the replacement of two of the five remaining cities, the Respondent denies that the Contract was being executed at that time.[257] It states that, having "received information that the state authorities of Malakal and Bentiu were able to use their own resources to electrify their towns" the Respondent "replaced Malakal and Bentiu with the towns of Akobo and Yirol and this was made known to the Claimant who responded with its letter dated 19th April 2010".[258] Respondent's Witness (Prof. Chol) also testified during the Hearing that these two towns carried out the electrification themselves.[259]

D. Frustration of Contract

The Claimant's Position

239. In response to the argument that the circumstances in which the Respondent failed to provide a bank gurarantee amounted to a frustration of contract, the Claimant submits that the Respondent had sufficient funding to issue a payment guarantee, but made a conscious decision to use its funds for other purposes.[260] The Claimant submits further that the Respondent's submission regarding the "dura saga"[261] amounts to an argument that the Respondent's own corruption should excuse its contractual obligations towards the Claimant.[262]

The Respondent's Position

240. At the Hearing, the Respondent submitted that the Contract was frustrated.[263] According to the Respondent, "at the time of signing the contract onwards, we have faced problems, serious problems".[264] Such problems included war in the eastern part of Jonglei State; war in the North near Bentiu, resulting in the closing down of tome of the oil wells in Heglig; and drought at the end of 2007, resulting in famine affecting 90% of the population and leading to the "dura saga" concerning which the Respondent is involved in separate legal proceedings in the High Court of Uganda.[265] As a result, the Respondent submitted that "all of this rendered us unable to find a bank guarantee . . . In fact, the contract is frustrated – on our side this contract is frustrated."[266]

[257] Statement of Defence, para. 27.
[258] Statement of Defence, para. 27, attaching copy of letter dated April 19, 2010.
[259] Transcript, Day 1, p. 222, line 22 to p. 223, line 11 (Cross-Examination of Prof. Chol).
[260] Claimant's Post-Hearing Brief, paras. 46-52.
[261] According to the Claimant, the "dura saga" involved "a GoSS program to build food stores across all 10 states in Southern Sudan and fill them with government-purchased dura (sorghum wheat), in anticipation of a significant food shortage in 2009. Massive government corruption ensued: no stores were built, and no sorghum was ever delivered to alleviate the coming famine. Over USD $4 Billion disappeared, stolen by GoSS officials; President Salva Kiir Mayardit went so far as to issue a letter to his own government officials asking for the return of the stolen funds." Claimant's Post-Hearing Brief, para. 55. The Claimant states that these facts have been widely reported and are publicly available. *Ibid.*
[262] Claimant's Post-Hearing Brief, paras. 53-58.
[263] Transcript, Day 1, pp. 34-35; Transcript, Day 2, pp. 319-21.
[264] Transcript, Day 2, p. 319.
[265] Transcript, Day 2, pp. 319-20.
[266] Transcript, Day 2, p. 321.

241. In its Post-Hearing Brief, the Respondent develops the argument that the Contract was frustrated, rather than breached.[267] The Respondent submits that the Claimant "has failed to adduce any evidentiary proof that failure or delay in securing the bank guarantee was due to reasons within the Respondent's control. The contract was signed on the assumption that security across the country would remain stable and government revenue would remain the same or steadily increase. However, insecurity increased fluctuations in oil prices and disagreements between Khartoum and Juba affected oil flow, and subsequently government revenues (90% dependent on oil revenue)."[268]

242. The Respondent's written submissions on the frustration of the Contract are follows:

> "The contract between the parties did not start because the pre conditions were not executed. In particular the bank guarantee could not be secured by the respondent. Obviously a bank guarantee is similar to a letter of credit. A financial institution will not issue a bank guarantee unless the entity requesting it has deposited the amount for which the bank guarantee is sought. In the contract, the Respondent signed the contract at the time signs of a nation-wide food gap were already being felt and seen. By the month of September 2008, the Ministry of Agriculture and the World Food Programme Juba office raised an alarm; there was a crop failure due to drought and floods. The Ministry of Finance and Economic Planning was directed by the President of Government of Southern Sudan to urgently procure cereals to fill the food gap. In the following years, the focus was on hunger aversion.
>
> At the same time, there were military confrontations between the SPLA and Sudan Armed forces with its proxy militias at the northern borders of the then Southern Sudan, in particular in Abyei and Heiglig areas. In Jonglei state, the government was facing a rebellion by the South Sudan Democratic Movement, Cobra Branch which was led by YauYau. In early 2012 the fight in the northern border, where the oil is being extracted, caused and resulted into the closure of the oil wells, in Heiglig. At the time of signing the contract, the Respondent did not know that the conflict would escalate and the food gap – hunger would become extensive. The resources from the oil were directed to address the demanding security concerns and the food gap.
>
> GOSS (Respondent) could not therefore have financial resources to put aside for securing the bank guarantee in favour of the Claimant or a financier. These unforeseen and intervening circumstances which continued to date frustrated the contract."[269]

243. The Respondent relies upon Section 92(9) of the Contract Act 2008, which provides: "A contract may be deemed to be frustrated where as a result of unforeseen contingencies or events, the performance of the contract becomes physically impossible or here such events radically change the nature of the obligations undertaken under the contract."[270]

E. Gross negligence

244. In its Statement of Claim, the Claimant contends that the Respondent was grossly negligent.[271] According to the Claimant, the Respondent had the capacity to fulfil its contractual obligations "but was deliberately and unreasonably not willing do so".[272] In its Statement of Defence, the Respondent

[267] Respondent's Post-Hearing Brief, pp. 3, 5, 6, 9.
[268] Respondent's Post-Hearing Brief, p. 3, citing *Hall v. Wright* EB&E 746, 749.
[269] Respondent's Post-Hearing Brief, p. 5.
[270] Respondent's Post-Hearing Brief, p. 9.
[271] Statement of Claim, para. 35.
[272] Statement of Claim, para. 34.

denies any negligence and submits that the sole cause for the non execution of the contract is "the misrepresentation by the Claimant that it was solvent".[273]

245. The Parties did not elaborate further at the Hearing or in post-hearing submissions on the Claimant's allegation of gross negligence.

VII. QUANTUM

The Claimant's Position

246. The Claimant claims that it has suffered loss and damage under the following heads:

246.1. costs incurred in survey and design, including office rental and hotel accommodation; air charter; survey and design; salaries and remuneration; and advance payments towards camp equipment and materials, concrete poles, tools, machinery, and vehicles, amounting to USD 12,138,000);[274]

246.2. anticipated profits in the construction project under Clause 16.4 of the Technical Contract calculated at 35% of the cost of the works, amounting to USD 69,743,256[275] (or, in the, alternative USD 49,280,973);[276] the total contract price amounts to USD 197,863,146;[277]

246.3. liquidated damages under Clause 8.6 of the General Conditions of Contract. In its Statement of Claim and Reply, the Claimant quantifies this claim at the rate of 5% of the contract price per day from the period October 5, 2008 to February 28, 2012;[278] In its Pre-Hearing Brief, the Claimant considers that this 5% value is "unconscionable and punitive in nature"[279] and instead "seeks recovery for delays under the original Tender provision for liquidated damages set at 0.1% of the contract price per day, with a ceiling of 10% of the Contract Price. [T]he delays lasted from 16 December 2008 to at least 16 December 2010 – a total of 1,479 day delay, which easily reaches the 10% Contract Price ceiling. In this case, the 10% ceiling amounts to USD $19,786,314.60 for the total contract price for the 8 towns, and alternatively USD $14,043,072.20 for the contract price for the 5 towns."[280]

246.4. liquidated damages under Clause 5.1 of the Finance Agreement at the rate of USD 100 per day from December 16, 2008 to February 28, 2012;[281]

[273] Statement of Defence, para. 35.
[274] Claimant's Pre-Hearing Brief, paras. 129, 205. Previously quantified at USD 12,208,400: Statement of Claim, para. 36.
[275] Claimant's Pre-Hearing Brief, para. 185. Previously quantified at USD 69,252,101: Statement of Claim, para. 37.
[276] Claimant's Pre-Hearing Brief, paras. 126, 128, 205.
[277] Claimant's Pre-Hearing Brief, para. 124.
[278] Statement of Claim, para. 38.
[279] Claimant's Pre-Hearing Brief, paras. 133, 188.
[280] Claimant's Pre-Hearing Brief, paras. 134, 188.
[281] Statement of Claim, para. 39.

246.5. interest under Clause 13.8 of the General Terms and Conditions of the Technical Contract at the rate of 3% above the discount rate of the Reserve Bank of the United States of America;[282] and

246.6. loss of business and profits from other projects in the region, namely, projects "worth USD 800,000 odd"[283] in which the Claimant had partnered with Hyundai Heavy Industries and Centuria Capital LLC, and which projects "were eventually terminated in circumstances that were solely attributable to the Respondent's breach of the contracts the subject matter of the present claim,"[284] amounting to USD 120,000,000 based on a profit margin of 15%.[285]

247. The Claimant elaborated its factual submissions regarding quantum of loss at the Hearing and in its Pre- and Post-Hearing Briefs.[286] The Claimant submits, first, that it did not receive the benefit of the bargain and thus lost its expected profits for eight towns under the Contract.[287] Secondly, the Claimant submits that it spent USD 12.4 million in out-of-pocket expenses incurred when it partially performed the Contract.[288] The Claimant submits that its claim for costs incurred is not duplicative of its claim for expected profits, on the grounds that the calculation of Gross Profits (USD 69,743,256) already takes into account the projects direct costs (USD 128,119,890).[289] Thirdly, the Claimant submits that its suffered losses due to the Respondent's delay and other breaches, and in reliance on the negotiating history of the Technical Contract, the Claimant claims that such losses are liquidated under Clause GC 8.6 of the Technical Contract.[290] Fourthly, the Claimant submits that it suffered consequential losses due to the Respondent's breaches, including USD 120 million in lost profit on the Hyundai/NEC project,[291] and in the alternative, the Claimant claims losses for delay under its liquidated damages claim as consequential losses, which Clause GC 8.6 of the Technical Contract was intended to quantify.[292]

The Respondent's Position

248. The Respondent disputes the Claimant's claim for loss of costs incurred in survey and design.[293] The Respondent's position is that the Claimant was not entitled to carry out preparations without having first received a notice of commencement from the Respondent.[294] The Respondent submits further that at a meeting held in Juba on March 18, 2008, "it was agreed that APG and their experts carry out the site survey of the (8) towns at their own cost".[295]

[282] Statement of Claim, para. 40; Claimant's Pre-Hearing Brief, para. 191.
[283] Statement of Claim, para. 41.
[284] Statement of Claim, para. 41.
[285] Statement of Claim, para.41.
[286] Claimant's Pre-Hearing Brief, paras. 185-91; 226-55; Transcript, Day 1, pp. 19-24; Transcript, Day 2, pp. 293-308.
[287] Claimant's Post-Hearing Brief, paras. 152-203.
[288] Claimant's Post-Hearing Brief, paras. 204-45.
[289] Claimant's Post-Hearing Brief, para. 240; Transcript, Day 1, p. 20, lines 21-25 (Claimant's Opening Submission).
[290] Claimant's Post-Hearing Brief, paras. 246-90.
[291] Claimant's Post-Hearing Brief, paras. 291-97.
[292] Claimant's Post-Hearing Brief, paras. 298-301.
[293] Statement of Defence, para. 36.
[294] Respondent's Post-Hearing Brief, p. 3.
[295] Respondent's Post-Hearing Brief, p. 5, citing Exhibit 16.

249. The Respondent denies each of the Claimant's claims in respect of loss of anticipated profits; liquidated damages under the General Conditions of Contract and under the Finance Agreement; and interest, on the grounds that the execution of the Technical Contract did not commence in accordance with Clause 8.1 of the Technical Contract, and as a result Clauses 8.6, 13.8, 16.4, and 19.6 of the Technical Contract and Clause 5.1 of the Finance Agreement are not applicable.[296]

250. Concerning liquidated damages, the Respondent submits that "the Claimant is aware that the contract between the parties was not operational in the first place due to non performance of the condition precedent resulting from unforeseen factors which frustrated the contract".[297] The Respondent submits further that "[a]ccording to Clause 8 of the Technical Contract liquidated damages can only arise from delays in the implementation of the contract. Since the contract has not been implemented, and the contract does not provide for liquidated damages the claim for liquidated damages . . . should not be accepted by the tribunal."[298] According to the Respondent, under Section 94(4) of the Contract Act 2008, liquidated damages "must represent genuine pre-estimates of probably loss when there is a breach". The Respondent submits that it "has all along maintained that the contract is not breached but frustrated by unforeseen factors".[299]

251. The Respondent denies the Claimant's claim for loss of profits in respect of other projects in the region. The Respondent contends that "[n]either the Technical Contract nor the Financial Agreement prevents the Claimant from entering into contracts or agreements with other parties" and that "it is the failure by the Claimant in providing finances that led to non execution of the project".[300] According to the Respondent:

> "Claimant has no proof that it lost the business with these companies because of its failure to secure the implementation of the project with the Government of Southern Sudan. Instead there is evidence that Claimant lost these projects because it offered high prices. The Claimant bid (proposal) for KILO ASHARA Electricity Project which was in principle accepted by the Sudan National Electricity Corporation (NEC) was subject to review due to high prices quotation and deviation from the guidelines of the Sudan Ministry of Finance .. . The Claimant failed to provide further evidence that the price quotation was later reviewed and finally accepted by the Sudan National Electricity Corporation."[301]

VIII. WITNESS EVIDENCE

A. Witness Evidence presented by the Claimant

(i) Mohamed Abdulrahman Mohamed Fagir

252. Mr. Fagir is the Managing Director of the Claimant.[302] In his Witness Statement, Mr. Fagir testifies that AMSys, a subsidiary of the Claimant, and Conssuda, formed the Joint Venture and made a bid on December 1, 2007.[303] AMSys and Conssuda signed three agreements:

[296] Statement of Defence, paras. 37-40.
[297] Respondent's Post-Hearing Brief, p. 6.
[298] Respondent's Post-Hearing Brief, p. 6.
[299] Respondent's Post-Hearing Brief, p. 9.
[300] Statement of Defence, para. 41.
[301] Respondent's Post-Hearing Brief, p. 9, referring to Exhibit 26.
[302] Mr. Fagir testified at the hearing on May 6, 2014. Transcript, Day 1, pp. 45-115.

252.1. An agreement in Arabic dated July 17, 2007, which set forth in detail the roles each party was supposed to play and their rights in the joint venture; set certain jobs and payments to be given to Conssuda; and stated that all rights related to the tender and contract would be given exclusively to AMSys.[304]

252.2. An agreement in English dated July 22, 2007, which was a general joint venture agreement, intended to be presented to the GOSS according to the requirements of the latter.[305]

252.3. An agreement in English dated July 2, 2008, which was signed after the making of the bid and obtaining the Final Letter of Award from the GOSS, which contained the entire agreement of July 17, 2007, and contained further clauses as to the rights of the parties especially after the value of the contract had been determined.[306]

253. The Joint Venture was notified that it had been shortlisted as one of two preferred bidders by letter dated November 1, 2007, from Kwezi V3 Engineers of South Africa.[307] The Joint Venture received notification by conditional letter of award dated January 4, 2008 from the Ministry of Housing, Lands and Public Utilities, that it was the successful bidder for the works pending negotiations on the financing details.[308]

254. On February 2, 2008, a meeting took place in Dubai, United Arab Emirates, between representatives of the GOSS, its Consultants, the Claimant, and the financer, Centuria Capital LLC, a subsidiary of Dexia Banking Group.[309] At the Hearing, Mr. Fagir testified that the Dubai meeting was held at the request of the Respondent for the purpose of discussing agreeing the financing terms, performing due diligence and other checks on Centuria Capital.[310] The GOSS and its consultant asked the Claimant to extend its bid in order to enable the procedures for the signing of the formal contract to be met.[311] The minutes of the meeting were signed and agreed to form part of the formal contract.[312]

255. At the Hearing, Mr. Fagir testified that the Dubai meeting "was a long meeting. There were too many scenarios discussed, but the final solution was that APG is to borrow the funds from Centuria on behalf of GoSS, and then to extend the loan to GoSS to implement the project."[313] There were two guarantees in the structure agreed by the Parties: first, the repayment guarantee for the loan, which "was supposed to be issued from GoSS to APG, because APG now is bearing the risk of repayment of the loan to Centuria in case of GoSS's default."[314] Second, there was the performance guarantee, which was to be issued "from the contractor to Centuria themselves, the financier, and because of the structure and the conditions that GoSS has put in the financing model, the total risk of non repayment

[303] Witness Statement of Mohamed Fagir, para. 5.
[304] Witness Statement of Mohamed Fagir, para. 5(i).
[305] Witness Statement of Mohamed Fagir, para. 5(ii).
[306] Witness Statement of Mohamed Fagir, para. 5(iii).
[307] Witness Statement of Mohamed Fagir, para. 7.
[308] Witness Statement of Mohamed Fagir, para. 8, citing Exhibit 4.
[309] Witness Statement of Mohamed Fagir, para. 9, citing Exhibit 1; Exhibit 9.
[310] Transcript, Day 1, p. 46. *See also* Transcript, Day 1, pp. 71-72 (Questions from the Tribunal).
[311] Witness Statement of Mohamed Fagir, para. 10, citing Exhibit 9, p. 3, para. 3.1(d); Exhibit 11.
[312] Witness Statement of Mohamed Fagir, para. 11.
[313] Transcript, Day 1, p. 47.
[314] Transcript, Day 1, p. 47-48.

was upon Centuria basically and also APG."[315] The payment guarantee "was the foundation for the funds to be available for the project, and without the payment guarantee there was no other guarantee for mitigation of any other risks related to GoSS non payment;" without the payment guarantee, "no financier would allocate or disburse any funds."[316]

256. Following issue of the Final Letter of Award, the GOSS handed over the eight sites to the Claimant and the Claimant conducted surveys of the eight state capitals from March 19 to March 21, 2008 and reported on the survey by report dated March 23, 2008.[317]

257. Before signing the formal contract the GOSS notified the Claimant that they had decided to remove three towns and sign a contract for five towns only, which Mr. Fagir states the Claimant had no option but to accept.[318] At the Hearing, Mr. Fagir stated that such notification was received around August 2008, just before the resolution of the Council of Ministers, and that upon learning of the removal of three of the towns, the Claimant objected, because it had already incurred costs in surveying the eight sites.[319] During the tendering process, the Claimant had been made aware informally, but never formally, of the possibility that the Egyptian Government might give a donation for three of the eight towns.[320]

258. Concerning the Claimant's awareness during the tendering process of the potential reduction in scope of the bid to five towns, Mr. Fagir stated that if the Claimant had bid for five towns instead of eight, it "would have been disqualified, because the tender was for 8 towns, not for 5 towns."[321] Mr. Fagir explained that "the award was in February, some time in August is when we were told that GoSS decided to reduce, to change the letter of award . . . for us it was simply take it or leave it . . . Despite the fact that the award was for 8 towns you either accept for 5 towns, or you just lose everything. So basically what we lose as APG is what we spent for the 3 towns that we are losing already because of the reduction, and maybe also the other 5 towns. If we don't accept to sign the contract for them, we would also lose the 5 towns."[322] Mr. Fagir added that the Claimant would have been at risk of losing the contract for 5 towns even if it had only gone so far as to make a reservation of its rights or send a letter of protest.[323]

259. On May 23, 2008, at the request of the GOSS, the Parties held a further meeting to discuss final technical issues relating to the project before signing of the Contract.[324]

260. On September 26, 2008, the Council of Ministers approved the Contract.[325] The Technical Contract was formally signed on October 5, 2008 and sealed by the Ministry of Legal Affairs on November 5, 2008.[326] On November 3, 2008, the Ministry of Finance issued a letter approving the

[315] Transcript, Day 1, p. 48.
[316] Transcript, Day 2, p. 49-50.
[317] Witness Statement of Mohamed Fagir, para. 16, citing Exhibit 16.
[318] Witness Statement of Mohamed Fagir, para. 17.
[319] Transcript, Day 1, p. 52.
[320] Transcript, Day 1, p. 53-54.
[321] Transcript, Day 1, p. 62 (Cross-Examination by Mr. Moses).
[322] Transcript, Day 1, p. 63 (Cross-Examination by Mr. Moses). *See also* Transcript, Day 1, p. 69-70.
[323] Transcript, Day 1, pp. 106-07 (Questions from the Tribunal).
[324] Witness Statement of Mohamed Fagir, para. 17, citing Exhibit 23; Exhibit 25.
[325] Witness Statement of Mohamed Fagir, para. 18.
[326] Witness Statement of Mohamed Fagir, para. 19, citing Exhibit 31.

construction contract.[327] The Finance Agreement was formally signed between the Ministry of Finance and the Claimant on November 16, 2008 and sealed by the Ministry of Legal Affairs on November 18, 2008.[328]

261. The GOSS was obliged within 30 days of signing of the Finance Agreement to issue a letter of guarantee from a commercial bank guaranteeing repayments of the costs of the project and to seek written approval of the Claimant before issuing such guarantee.[329] By letter dated April 13, 2008, the Claimant approved the Central Bank of Sudan or Kenya Commercial Bank (the **"KCB"**).[330]

262. The GOSS made a request to the KCB by letter dated January 7, 2009 and a further letter, from the Bank of South Sudan, dated January 27, 2009.[331] The Claimant did not receive any response from either the GOSS or the KCB on that request.[332]

263. The Claimant wrote to the financier expressing its readiness and ability to issue the Performance Guarantee required by Clause 4.2 of the Technical Contract, once the GOSS had fulfilled its obligations under the Finance Agreement.[333]

264. By letter dated June 3, 2009, the GOSS notified the Claimant that it had commenced negotiations with Stanbic Bank of Kenya; that it expected to finalize the issuance of the guarantee; and that it was confident the project would start by July 18, 2009.[334] In reliance on that letter, the Claimant instructed all suppliers and sub-contractors to ensure their readiness by the new proposed date and completed all other outstanding preparations including staff and machineries and other mobilization requirements.[335]

265. Stanbic Bank agreed to finance the entire project and made an offer in writing in May 2009.[336] The GOSS failed to fulfil the conditions set out in the offer and the arrangement was not concluded.[337]

266. Following collapse of the Stanbic Bank arrangement, the GOSS "in many of the many unminuted meetings instructed the Claimant to arrange for another financier for the project" and requested a financier that would accept a guarantee from the Bank of Southern Sudan despite the fact that Southern Sudan was not then a sovereign state.[338] The instructions were made in a way which "clearly showed that we had no choice in the matter if we wanted the project to be completed".[339]

267. The Claimant arranged for another syndicated finance through Dubai Bank Kenya against 20% deposit and a guarantee from the GOSS Ministry of Finance for the balance.[340] In the same period the

[327] Witness Statement of Mohamed Fagir, para. 20, citing Exhibit 33.
[328] Witness Statement of Mohamed Fagir, para. 21.
[329] Witness Statement of Mohamed Fagir, para. 25.
[330] Witness Statement of Mohamed Fagir, para. 25.
[331] Witness Statement of Mohamed Fagir, para. 26, citing Exhibit 19; Exhibit 20; Exhibit 48.
[332] Witness Statement of Mohamed Fagir, para. 27.
[333] Witness Statement of Mohamed Fagir, para. 28, citing Exhibits 37 and 49.
[334] Witness Statement of Mohamed Fagir, paras 33-34, citing Exhibit 55.
[335] Witness Statement of Mohamed Fagir, para. 35.
[336] Witness Statement of Mohamed Fagir, citing Exhibit 39.
[337] Witness Statement of Mohamed Fagir, para. 39.
[338] Witness Statement of Mohamed Fagir, para. 40.
[339] Witness Statement of Mohamed Fagir, para. 40.
[340] Witness Statement of Mohamed Fagir, para. 41, citing Exhibit 66.

Claimant arranged finance with United Capital Bank in Sudan.[341] The GOSS approved the Dubai Bank option by letter dated January 22, 2010.[342]

268. By letter dated February 16, 2010, the Ministry of Energy requested a meeting to discuss the new funding.[343] Through that letter, the Claimant learned that part of the work contracted to it, namely the electrification of Malakal and Bentiu, had been given to and implemented by another company.[344]

269. By letter dated August 31, 2010, the Ministry for Energy requested that the Ministry of Finance speed up the finance from Dubai Bank in Kenya and complained of the delay.[345] The Ministry of Finance did not respond.[346]

270. The Claimant continued to receive assurances from various agencies of the GOSS that all was going to be well.[347] The Claimant eventually lost patience and it decided to make a final attempt to exhaust all available means through a meeting the Vice-President of Sudan, which took place in October 2010.[348] At that meeting the Claimant informed the Vice-President of its intention to initiate arbitration; the Vice-President informed the Claimant that he had met with the Ministers concerned and that the project would proceed in the first quarter of 2011.[349] The Vice-President stated, "I give you my word on this".[350]

271. On December 16, 2010, the Claimant submitted a formal demand to the GOSS informing of its intention to commence legal proceedings unless it received a firm written assurance that payments for the project would start by January 2011.[351] For one year following that letter, the Claimant received "verbal promises from various officials" of GOSS and copies of inter-department correspondence dated April 19 and May 6, 2011, asking for the project to be speeded up.[352]

272. At the Hearing, Mr. Fagir testified that "APG did not receive the payment guarantee at the time stipulated in the financial agreement, and until the time of terminating the contract due to the breach we never received the payment guarantee, neither even at least the source of the payment guarantee which also they were required to provide in the financial agreement."[353]

273. Mr. Fagir states that the Claimant invoked the arbitration clause in the Contract once it became apparent that the GOSS had reneged on the Contract.[354]

274. The Contract required the entire Project to be completed within 18 months of notification to commence works.[355] The GOSS was eager to have the Project completed quickly and insisted on

[341] Witness Statement of Mohamed Fagir, para. 41, citing Exhibits 64 and 65.
[342] Witness Statement of Mohamed Fagir, para. 42.
[343] Witness Statement of Mohamed Fagir, para. 42, citing Exhibit 61.
[344] Witness Statement of Mohamed Fagir, para. 43.
[345] Witness Statement of Mohamed Fagir, para. 45.
[346] Witness Statement of Mohamed Fagir, para. 45.
[347] Witness Statement of Mohamed Fagir, para. 46.
[348] Witness Statement of Mohamed Fagir, para. 47.
[349] Witness Statement of Mohamed Fagir, para. 47.
[350] Witness Statement of Mohamed Fagir, para. 47.
[351] Witness Statement of Mohamed Fagir, para. 48, citing Exhibit 69.
[352] Witness Statement of Mohamed Fagir, para. 49, citing Exhibits 70 and 71.
[353] Transcript, Day 1, p. 51.
[354] Witness Statement of Mohamed Fagir, para. 51.

onerous penalties for delays.[356] Whereas in the original tender documents the penalty for delays was 0.1%, the GOSS insisted that such penalty be increased to 5% per day on the basis of urgency of the project.[357]

275. In order to ensure the timely delivery of the contract, the Claimant put in place a mechanism where it placed orders to suppliers, made payments to some suppliers, and signed agreements with sub-contractors and other suppliers.[358]

276. In his Witness Statement, Mr. Fagir states that the Claimant's losses included the following:

276.1. USD 12,000,000 expended towards implementation of the project.[359]

276.2. USD 69,252,101 in loss of expected profits in respect of the project, at 35% of the cost of the project.[360]

276.3. USD 120,000,000 in loss of expected profits[361] arising out of the following projects that were cancelled by reason of the delay in implementation of the Finance Agreement:

276.3.1. A "business" with National Electricity Corporation in the Republic of Sudan estimated at USD 749,817,000 for construction of a power plant named Kilo-X Diesel Power Plant with a capacity of 250MW.[362]

276.3.2. A "dealing" with Elsewedy Company in Egypt to construct factories in Ethiopia, Kenya, and South Sudan for the manufacture of pre-paid electricity meters.[363]

277. At the Hearing, Mr. Fagir testified further as to the Claimant's calculation of the costs of the project[364] and of its profit margin;[365] the Claimant's expenditure for the supply of materials;[366] and the value of the Hyundai and El Sewedy projects.[367] Concerning the Claimant's position vis-à-vis third-party suppliers, Mr. Fagir testified that:

> "all our preparations were based on the fact that this contract should follow a certain sequence and we had allowed for delays, but just the normal delays that can happen in any contract. But when the delays continue for all these years, even with our suppliers we entered into a situation where

[355] Witness Statement of Mohamed Fagir, para. 29.
[356] Witness Statement of Mohamed Fagir, para. 30.
[357] Witness Statement of Mohamed Fagir, para. 12, citing Exhibit 76, p. 364, Clause 8.7; Exhibit 9, p. 7, para. 5.3(C).
[358] Witness Statement of Mohamed Fagir, para. 31, citing Exhibits 35, 36, 38, 39, 40, 41, 42, 43.
[359] Witness Statement of Mohamed Fagir, para. 52(i).
[360] Witness Statement of Mohamed Fagir, para. 52(v).
[361] Witness Statement of Mohamed Fagir, para. 52(iv).
[362] Witness Statement of Mohamed Fagir, para. 52(ii), citing Exhibits 26 and 27.
[363] Witness Statement of Mohamed Fagir, para. 52(iii), citing Exhibits 21 and 29.
[364] Transcript, Day 1, pp. 73-75, referring to Exhibit S-101; 79-82, referring to Exhibit S-102; 91-96, referring to Exhibit 31; 111-15, referring to Exhibit 101.
[365] Transcript, Day 1, pp. 75-78, referring to Exhibit S-101; pp. 107-11, referring to Exhibit S-101.
[366] Transcript, Day 1, pp. 84-90, referring to Exhibits 38, Pre-Hearing Brief, para. 130.
[367] Transcript, Day 1, pp. 97-105.

> we were threatened with legal action by our suppliers, and we wanted to try to reach—not a settlement, but at least to stop them from commencing legal action based on this contract."[368]

278. In particular, Mr. Fagir explained that the equipment and supplies for the setting up of camps had to be in place before any other activity could be carried out, therefore the suppliers were responsible because "if the camps are delayed everything else will be delayed" moreover the camps are designed according to the site and cannot be used elsewhere.[369] The Claimant therefore continued making payments to its suppliers in order to safeguard its position as best it could, until he end of 2009, when it became clear that "continuing on payment for us was not an option".[370]

(ii) Michael Harry Lucas

279. Mr. Michael Harry Lucas is the Group Projects Director and the Managing Director of the Kenya Office of the Claimant.[371] Mr. Lucas has some 39 years' experience in the engineering industry.[372]

280. Mr. Lucas was involved in the project from the outset, when the initial bids were cancelled and new bids requested to include project finance.[373] In 2007, when the invitation to tender was published, Mr. Lucas approached the Claimant's head office and asked them to finalize arrangements with a finance partner in order to meet with the requirements of the new bid documents.[374] The new bid documents were released to the Claimant by the consultants Gibb Africa, through their partners, KV3 Consulting Company, a South African company.[375] Under supervision of Mr. Lucas, a technical team prepared new documentation including a technical submission and a financial submission, as required by the Instructions to Bidders in the tender documents.[376] The Claimant submitted its technical and financial documents in July 2007.[377]

281. Mr. Lucas states that after the meeting held in Dubai on February 2, 2008, and the issue of the Final Letter of Award dated February 7, 2008, the technical team embarked on a programme to finalize arrangements for the purchase of equipment and material.[378] The technical team had regard to the following "major concerns": this was an emergency project; the penalties for delays were strict; the lack of road infrastructure meant that large hauls could not be moved in the rainy season; the window for movement of large machinery and equipment in South Sudan was a narrow one of 3-4 months; South Sudan being landlocked with the nearest port being Mombasa, 1,975km away; and lack of basic requirements, such as water, at many of the sites.[379] The nature of the sites as "hardship areas" and the punitive contractual conditions required that the Claimant commence preparation early and exercise a cautious approach.[380]

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[368] Transcript, Day 1, pp. 85-86.
[369] Transcript, Day 1, pp. 87-88.
[370] Transcript, Day 1, pp. 89-90.
[371] Witness Statement of Michael Harry Lucas, para. 1. Mr. Lucas testified at the Hearing on May 6, 2014. Transcript, Day 1, pp. 122-74.
[372] Transcript, Day 1, pp. 122.
[373] Witness Statement of Michael Harry Lucas, para. 2.
[374] Witness Statement of Michael Harry Lucas, para. 3.
[375] Witness Statement of Michael Harry Lucas, para. 3.
[376] Witness Statement of Michael Harry Lucas, para. 3.
[377] Witness Statement of Michael Harry Lucas, para. 4.
[378] Witness Statement of Michael Harry Lucas, para. 6.
[379] Witness Statement of Michael Harry Lucas, para. 6; Transcript, Day 1, pp. 123-25.
[380] Witness Statement of Michael Harry Lucas, para. 17; Transcript, Day 1, pp. 127-28.

282. At the Hearing, Mr. Lucas testified further on the special circumstances applying to the project. According to Mr. Lucas:

> "Generally in contracts of this nature, which is based on FIDIC . . . upon the letter of acceptance, a contractor is supposed to prepare for the contract. The one reason, or several reasons, why we made advance preparation was . . . first, it was an emergency project. Secondly, the infrastructure in South Sudan, which are the roads and conditions, were lacking and we had to prepare in advance so as to be able to have things in place when we are ready to mobilise. And third was the inclement weather in South Sudan. South Sudan had a very narrow window in a year to be able to move machinery and equipment to sites . . . We had a window of about four months in a year to be able to move equipment because if it rained or we were caught out during the rains, no vehicles, equipment or machinery could be moved on those roads."[381]

283. Mr. Lucas explained the difference between "preparation" and "mobilization" as follows: "Preparations includes placing orders, confirming orders and, if necessary, if the suppliers and manufacturers insist on payments or down payments, for us to hold our prices or to meet manufacturing time, yes, we made the necessary deposits as part of the preparation . . . Mobilisation is when everything is available and ready to go to site … when machinery, equipment, campsites and everything is ready to go to site to commence works."[382]

284. Concerning the "emergency" status of the project, Mr. Lucas clarified at the hearing that

> "[T]he tender itself . . . called it an emergency project. The reason being that they wanted to kickstart development in Southern Sudan and, therefore, it was treated as an emergency project to have power so that industry, development could start. That's why it was an emergency project. That's why it was an emergency project."[383]

285. Mr. Lucas states that in reliance on issue of the Final Letter of Award and on a letter dated November 1, 2007,[384] the Claimant immediately charted a fixed-wing aircraft between March 19 and 21, 2008, to carry out a survey of the sites to ascertain their suitability, assess shortcomings and difficulties in construction, and locate the best sites for camps and stores.[385] The Claimant carried out these surveys because the Tender required that the Claimant carry out surveys and prepare designs to be submitted to the Government and the Claimant could not start construction until its designs were approved.[386]

286. During the site surveys, the Claimant's technical staff were accompanied by a senior member of the Southern Sudan Electricity Corporation which represented the GOSS and made introductions to officials on the ground including State Governors of the various States, and by the locally-based site engineer representing "the [Respondent's] Consultants".[387] Mr. Lucas made some road trips to areas that were within 200km, accompanied by representatives from the Southern Sudan Electricity Corporation and some of the Claimant's sub-contractors from Korea.[388]

[381] Transcript, Day 1, pp. 123-24.
[382] Transcript, Day 1, pp. 137-38.
[383] Transcript, Day 1, pp. 124.
[384] Witness Statement of Michael Harry Lucas, para. 7, referencing Exhibits 3 and 12.
[385] Witness Statement of Michael Harry Lucas, para. 7.
[386] Transcript, Day 1, p. 126.
[387] Witness Statement of Michael Harry Lucas, para. 7.
[388] Witness Statement of Michael Harry Lucas, para. 7.

287. Under cross-examination concerning the conditions prevailing in the relevant areas, Mr. Lucas affirmed that during none of the visits or surveys undertaken by the Claimant did he witness any fighting or tension.[389]

288. Following the initial surveys, Mr. Lucas undertook to employ a skeleton team to manage logistics and project management, took a team of design engineers and surveyors to survey each site to allow the designers to produce construction designs, and set up an office in Juba to oversee local requirements and liaise with the GOSS bodies involved.[390]

289. Following the formal signing of the contracts, Mr. Lucas initiated and finalized discussions with all of the Claimant's suppliers to ensure the timely manufacture and delivery of orders.[391] At this time there were drastic fluctuations in the price of copper according to the London Metal Exchange.[392] The Claimant was forced to confirm orders and make down payments to guarantee manufacture and timely deliveries.[393] At the Hearing, Mr. Lucas testified further as to the costs incurred by the Claimant during this period. He stated:

> "When we are talking about the indirect costs here, we are actually talking about the management costs, the four offices that we were running. Because we had an office in Khartoum, an office in Dubai, an office in Nairobi and an office in Juba."[394]

290. In his Witness Statement, Mr. Lucas states that after the award, he was approached by the Director General – Energy in the Ministry of Housing and Public Utilities and the Chairman/General Manager of the Southern Sudan Electricity Corporation and informed that the project had been down scaled from eight to five towns, as a result of which Mr. Lucas made alterations of some items in the bill of quantities which were approved by the Southern Sudan Electricity Corporation.[395] At the Hearing, Mr. Lucas testified that the Claimant did not receive any communication from the Government of South Sudan that the number of sites had been reduced to five, until "much after the award".[396]

291. Media coverage of the contract including the public signing ceremony placed additional pressure on the Claimant to perform the contract.[397]

292. For a period of several months, Mr. Lucas attended various meetings with banks and senior members of the GOSS and the Bank of South Sudan to try to finalize the bank guarantee arrangements required by the Finance Agreement.[398] Mr. Lucas wrote letters and e-mails to various authorities emphasizing the need to finalize the bank guarantee as a matter of urgency[399] and received many promises made by

[389] Transcript, Day 1, pp. 146-48.
[390] Witness Statement of Michael Harry Lucas, para. 8.
[391] Witness Statement of Michael Harry Lucas, para. 10, citing Exhibits 45, 47.
[392] Witness Statement of Michael Harry Lucas, para. 10.
[393] Witness Statement of Michael Harry Lucas, para. 10, citing Exhibits 21, 46, 47, 35, 36, 38, 39, 40, 41, 42, 43.
[394] Transcript, Day 1, p. 163.
[395] Witness Statement of Michael Harry Lucas, para. 11.
[396] Transcript, Day 1, pp. 153-58.
[397] Witness Statement of Michael Harry Lucas, para. 12.
[398] Witness Statement of Michael Harry Lucas, para. 14.
[399] Witness Statement of Michael Harry Lucas, para. 14, citing Exhibits 24, 44, 50.

the relevant authorities.[400] By reason of those promises Mr. Lucas committed the Claimant into signing agreements with and making payments to suppliers.[401]

293. At the Hearing, Mr. Lucas testified that the time period for implementing the project was 18 months from the commencement date to the handover date.[402] Had the guarantee been issued by the Respondent, the Claimant "would have started and completed the project on time. In fact, my design was to try and finish it ahead of time."[403] Under cross-examination, Mr. Lucas affirmed that the Contract did not commence.[404]

294. Mr. Lucas testified further at the Hearing regarding the Claimant's calculation of the costs of the project[405] and of its profit margin.[406] According to Mr. Lucas, in order to cater for eventualities and risks, the Claimant adopted a 35% mark-up in its bid as opposed to the industry norm of 15 to 20%.[407] According to Mr. Lucas, the 35% profit margin "must have been acceptable because in any contract where there are consultants employed by an employer [a]n engineer's estimate is usually given by the consultant well in advance. And if you are way out of the engineer's estimate, too low or too high, it wouldn't be considered. So obviously we were within the engineer's estimate."[408]

295. Mr. Lucas clarified at the Hearing that the indirect costs of the Project, such as the overhead expenses of running offices in Dubai, Nairobi, and Juba, which were not included in the Bill of Quantities of the project, could be estimated generally at between 10 and 15%.[409]

(iii) Marcus Fuchs

296. Mr. Marcus Fuchs is an economist who was serving in 2007 and 2008 as the Corporate Finance Director for the Dubai-based arm of Group Finance Centuria (**"Centuria"**),[410] project financing and structuring partners of the Claimant.[411] In October 2007, Mr. Fuchs was detailed to service the Claimant who had requested structuring for finance for a project in South Sudan.[412]

297. At the Hearing, Mr. Fuchs explained that Centuria's concerns in relation to the Project with regard to the credit rating and geopolitical risk of South Sudan, and Centuria was "more confident in the creditworthiness of APG".[413] For these reasons, it was agreed that Centuria would give a loan to the Claimant; the Claimant "would receive a payment guarantee certificate from the Government of Southern Sudan and Active Partners would issue a security to us in the form of performance."[414] Mr. Fuchs explained that a performance security is "essentially a security against the non performance of a

[400] Witness Statement of Michael Harry Lucas, para. 15, citing Exhibits 61, 68, 70, 71.
[401] Witness Statement of Michael Harry Lucas, para. 16.
[402] Transcript, Day 1, pp. 129.
[403] Transcript, Day 1, pp. 131.
[404] Transcript, Day 1, pp. 145.
[405] Transcript, Day 1, pp. 159-61, referring to Exhibit S-101.
[406] Transcript, Day 1, pp. 161-70, referring to Exhibit S-101.
[407] Witness Statement of Michael Harry Lucas, para. 17.
[408] Transcript, Day 1, p. 128.
[409] Transcript, Day 1, p. 171-72.
[410] Witness Statement of Marcus Fuchs, second para. Mr. Fuchs gave evidence at the Hearing by video link on May 7, 2014. Transcript, Day 2, pp. 257-73.
[411] Witness Statement of Marcus Fuchs, third para.
[412] Witness Statement of Marcus Fuchs, third para.
[413] Transcript, Day 2, p. 258.
[414] Transcript, Day 2, pp. 257-58.

project" and is "a risk management tool . . . used to ensure that the contractor or developer can perform".[415]

298. In his Witness Statement, Mr. Fuchs states that after the Claimant had been awarded the contract, the GOSS requested a meeting with Centuria together with the Claimant.[416] At the meeting, which was held in Dubai on February 2, 2008, the agenda included discussion of all financial details in respect of the project, and the GOSS representatives expressed their satisfaction after which they confirmed agreement to sign the contracts with the Claimant.[417]

299. After the meeting in Dubai, Centuria received a letter from the Claimant's bank in Kenya stating their readiness to issue the performance security, once funds allocation was finalized, and Centuria then waited for the GOSS to specify their source of the Letter of Guarantee, which never occurred.[418] Mr. Fuchs left Centuria and continued following the project finance as an independent consultant until the end of 2010.[419] During his involvement up to December 2010, Mr. Fuchs never saw the GOSS issue the requisite guarantee to the Financier nor did they specify their source for this letter of guarantee.[420]

300. At the Hearing, Mr. Fuchs testified further concerning the Hyundai project for the construction of power plants in Sudan. Mr. Fuchs stated that Centuria was involved in the early stages of the project and "met with some of the Hyundai executives in Dubai to discuss the projects that they were collaborating on with APG".[421] Mr. Fuchs stated that Centuria pulled out of this project because "We just didn't see the first project that we were working on with APG going anywhere, and we just lost confidence in Sudan as a market".[422] According to Mr. Fuchs, Centuria would have continued to work with the Claimant on the NEC project, had the GoSS been able to provide the bank guarantee in relation to the electrification project.[423]

301. Mr. Fuchs added that for Centuria, things were "complicated" by the geopolitical events in the country and that after the financial crisis came to Dubai in 2009, "the focus was to stick on the core businesses in Dubai essentially".[424] Concerning the NEC project, Mr. Fuchs stated that "it's likely we would have continued on with that project if we had confidence in the market" and that the electrification project was a "primary factor" for Centuria.

B. Witness Evidence presented by the Respondent

(i) Professor Ajuai Magot Chol

302. Professor Ajuai Magot Chol was the General Manager of Southern Sudan Electricity Corporation (the **"SSEC"**) from January 17, 2007 until November 10, 2011.[425]

[415] Transcript, Day 2, pp. 259-60.
[416] Witness Statement of Marcus Fuchs, third para.
[417] Witness Statement of Marcus Fuchs, third para.
[418] Witness Statement of Marcus Fuchs, fifth para.
[419] Witness Statement of Marcus Fuchs, sixth para.
[420] Witness Statement of Marcus Fuchs, sixth para.
[421] Transcript, Day 2, p. 260.
[422] Transcript, Day 2, p. 261.
[423] Transcript, Day 2, pp. 261-62.
[424] Transcript, Day 2, p. 269 (Questions from the Tribunal).
[425] Witness Statement of Prof. Ajuai Magot Chol, para. 1. Prof. Chol gave evidence at the Hearing on May 6, 2014. Transcript, Day 1, pp. 176-247.

303. According to Prof. Chol, the electrification of the five states capitals (Aweil, Warrap, Torit, Bentieu and Malakal) as a project was brought under the jurisdiction of SSEC as per the minutes of 23rd of May, 2008 held at SSEC Headquarters in Juba. Prof. Chol states:[426]

> "In the meeting of 23rd of May 2008, I reiterated that certain issues were to be ironed out before the contract which was awarded to Active Partners Group is signed. These include:
> – Re-evaluation of the project cost (originally 192 million United States Dollars)
> – Proper capability assessment of Key project implementers, particularly contractors to be.
> – Where to source materials equipment, plant, type and quality of the plant
> – Engagement of local consultants etc."

304. Prof. Chol states that the technical contract amounting to USD 140, 0430,722.75 was signed on October 5, 2008, between SSEC and Active Partners Group.[427] The technical contract signed was dependent on financial contract[428] which in turn depended on the securing of a bank guarantee.[429] The SSEC, as the sole Government of Southern Sudan's agent to oversee the execution and implementation of the project, was to sign a letter of commencement of work after the issuance of the bank guarantee was ascertained.[430]

305. According to Prof. Chol:

> "Unfortunately the bank grantee could not be secured. It is worth mentioning that the contract commencement date depends on the bank grantee, I as the sole government representative in the contract did not communicate the commencement date of the technical contract to the contractors."[431]

306. At the Hearing, Prof. Chol testified as to the nature of the Project, and stated that the Project was not an emergency.[432] Prof. Chol testified further as to the process undertaken by the Government in the implementation of the Contract, and stated as follows:

> "[A]fter . . . we signed the contract with Active Partners Group . . . This was submitted then to the Minister of Finance for them to do this other financial contract. The original conditions for that, there was a 4 per cent annual – what do you call the profit, or the charge on the original principal, that is 140 million, so there was 4 per cent annual charge on the principal. That was calculated by the Minister of Finance. It came to be 5.6 million annually, and for whatever reasons best known to Active Partners Group representatives and the Minister of Finance then, that amount was multiplied by ten years, which came to be 56 million. 56 million was to be added on top of the 140, and that is why I think in the financial contract you had 196 million.
>
> After that the thing was submitted to the bank, by then the Central Bank of Southern Sudan, which was a branch of the Central Bank of Sudan by then. It was when we were taken there to go and look for – because the financial contract was dependent on securing a bank guarantee, so in order to get the bank guarantee a submission was made to the Central Bank of South Sudan.
>
> It was then that a problem was found. The Central Bank governor then said "There is no money". The interpretation of what you call contract financing – because this project was about contract financing where by implication the contractor sourced the finances to implement the project. Perhaps it was

[426] Witness Statement of Prof. Ajuai Magot Chol, para. 3.
[427] Witness Statement of Prof. Ajuai Magot Chol, para. 4.
[428] Transcript, Day 1, p. 203, line 21 to p. 204, line 5.
[429] Witness Statement of Prof. Ajuai Magot Chol, para. 5; Transcript, Day 1, p. 204, lines 11-14.
[430] Witness Statement of Prof. Ajuai Magot Chol, para. 6.
[431] Witness Statement of Prof. Ajuai Magot Chol, para. 6.
[432] Transcript, Day 1, p. 177.

> understood to mean if there is any guarantee at all it will not be in terms of liquidity at the time. It will just be a statement from the bank that, you know, we are going to pay you back should anything happen.
>
> But then it was interpreted by the governor of the bank to mean money might be put aside; the money might be held, you know, for that period of implementation. So it became very difficult. Then there was no money earmarked for this project, so there was a stumbling block.
>
> Following that, people went to look for another bank that would give the bank guarantee. KBC we saw, then the Stanbic bank, and so on and so forth. All this fell because all of them wanted the money to be put aside.
>
> There was an attempt to get the money from the Minister of Finance, who was one of the people who presented in the Council of Ministers on behalf of the Minister. By then the Minister had gone to Khartoum and approval was got for 140 million plus USD from Council of Ministers, but as time went on the money was not forthcoming, for many reasons, the governor was engaged somewhere with many difficulties, so even when that 140 was approved it could not be realised." [433]

307. Prof. Chol added that after this point, the Claimant started dealing with the Minister of Energy, and the South Sudan Electricity Corporation was not involved.[434] Prof. Chol testified that he was involved in the Technical Contract, and negotiated the Bill of Quantities, but was not involved in the negotiation of the Financial Agreement.[435]

308. Prof. Chol testified further concerning the difficulties encountered by the Government of South Sudan in securing funding, including the issue of the "dura saga" and fighting over oil in the Heglig area.[436]

309. Prof. Chol was cross-examined concerning the reduction in scope of the Contract from eight towns to five;[437] the timing of the Contract;[438] the sequence of the Parties' respective obligations including the issuance of the bank guarantee;[439] and the time taken by the Government in issuing the bank guarantee.[440] He was further cross-examined concerning his knowledge of the Respondent's dealings with the Stanbic Bank.[441]

IX. COSTS

The Claimant's Position

310. The Claimant prays that the costs of the arbitration be borne by the Respondent.[442] In its submission on costs, the Claimant submits that its claim to recover costs as the prevailing party accords with the UNCITRAL Rules 1976,[443] Sudanese law,[444] Kenyan law, as the law of the seat of the arbitration,[445] and international arbitral practice.[446]

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[433] Transcript, Day 1, pp. 179-81.
[434] Transcript, Day 1, p. 181.
[435] Transcript, Day 1, p. 235 (Questions from the Tribunal).
[436] Transcript, Day 1, pp. 183, 185-86.
[437] Transcript, Day 1, p. 188-94.
[438] Transcript, Day 1, pp. 194-98.
[439] Transcript, Day 1, pp. 199-207, referring to Exhibit 34.
[440] Transcript, Day 1, pp. 207-16, referring to Exhibits 44 and 50.
[441] Transcript, Day 1, pp. 219-221, 236-39, 240-44.
[442] Statement of Claim, para. 54.
[443] Claimant's Submission on Costs, paras. 3-4.
[444] Claimant's Submission on Costs, para. 5, citing Exhibit LA 5.

311. The Claimant submits, in the alternative, that the Tribunal may exercise its discretionary power to award the Claimant all its costs and legal fees, taking into account the circumstances of the case, including the Respondent's "significant disregard" for its contractual obligations and its "dilatory tactics, which delayed the proper conduct of the arbitral proceedings".[447]

312. The Claimant particularizes its costs as follows:

> (i) €125,000 corresponding to two deposits for Arbitrators' fees and expenses
> This amounts to $170,534 (applying USD$1.364 to €1 exchange rate).
>
> (ii) $13,142 of travel expenses:
> These travel expenses correspond to the airfare that APG has paid for the trip of its legal counsel from California to Nairobi, as well as the airfare for the trip of its legal counsel, witnesses and one APG logistics assistant, from Nairobi to Mauritius. These expenses also include $200 of visa fees.
>
> (iii) $13,222 of hotel accommodation expenses:
> These expenses correspond to the costs of accommodation of its legal counsel in Nairobi, and the costs of accommodation of its legal counsel, its witnesses and one APG logistics assistant, in Mauritius where the Hearings were held.
>
> (iv) $859 of office disbursements:
> These expenses represent costs of printing, photocopying and binding incurred in preparation for the arbitration hearings.
>
> APG's total costs amount to **$197,757**, exclusive of interest.[448]

The Respondent's Position

313. The Respondent prays that the Tribunal dismiss the Claimant's claims "with costs for lack of cause of action and failure to prove its case".[449] The Respondent does not provide further particulars as to its costs.

X. FINAL PRAYERS FOR RELIEF

The Claimant

314. In its Post-Hearing Brief, the Claimant presents its final prayer for relief as follows:

> Having regard to the facts and law set forth above and in Claimant's prior submissions, Claimant respectfully requests the Tribunal to issue the following relief:
>
> 1. To declare that Respondent has materially breached the Contract;

[445] Claimant's Submission on Costs, para. 6, citing Exhibit LA 36.
[446] Claimant's Submission on Costs, para. 7, citing Exhibits LA 38 and LA 39.
[447] Claimant's Submission on Costs, paras. 8-14.
[448] Claimant's Submission on Costs, paras. 16-17.
[449] Respondent's Post-Hearing Brief, p. 10.

2. To declare that Claimant was entitled to terminate the Contract;

3. To maintain jurisdiction over the parties and the dispute, to the extent necessary to adjudicate any issues relating to calculation of interest, as well as any other payment related issues;

4. To condemn Respondent to pay to Claimant the following Damages:

i. **Expectation Damages / Lost Profits** in the amount of **$69,743,256**, representing APG's Gross Profits on the Contract Price of $197,863,146 (for 8 towns);
or, in the alternative, expectation damages in the amount of $49,280,973 representing a 35% profit margin on the contract price of $140,430,722 (for 5 towns);

ii. **Special Damages / Updated Out-of-Pocket Losses** in the amount of **$12,419,505**;

iii. **Liquidated Damages** for delay, at the rate of 0.1% of the contract price per day, with a ceiling of 10% of the contract price, as stated in the Bidding Documents, from 5 November 2008 to 20 February 2012, amounting to **$19,786,314.60**, representing 10% of the contract price of $197,863,146 (for 8 towns);
or, in the alternative, $14,043,072.20, representing 10% of the contract price of $140,430,722 (for 5 towns);

iv. **Consequential Damages** in the amount of **$120,000,000** for the loss of the Hyundai/NEC project;
or, in the alternative, such amount as the Tribunal may deem fair and equitable;

v. **Total Damages (Principal Only, 8 Town Scenario) = $221,949,075.60**

vi. *in the alternative*, **Total Damages (Principal Only, 5 Town Scenario) = $195,743,550.**

5. To condemn Respondent to pay Claimant Interest on its Damages:
vii. Interest on the granted relief at points (i) to (iv) above, at the rate of 3% per annum above the Discount Rate of the Reserve Bank of the United States, currently set at 0.75%, for a total of 3.75% (monthly compound), and totaling **$248,518,537** (8 Town scenario, exclusive of pre- and post-award interest which the Tribunal may grant);
viii. *In the alternative*, **$218,556,798** (5 Town scenario)

6. To condemn Respondent to pay Claimant its Costs, including interest:

ix. Costs of the claim, plus interest on the Costs at 3.75% compound interest, in the amount of **$198,375** (exclusive of pre- and post-award interest which the Tribunal may grant);

7. To condemn Respondent to pay Claimant its Legal Fees:

x. Attorneys' fees, in the amount of **$255,085,015** [8 Town scenario, EZC 1.5% contingency];

xi. *In the alternative*, Attorneys' fees in the amount of $251,815,412 [8 Town scenario, EZC hourly rate];

xii. *In the alternative*, Attorneys' fees in the amount of $224,673,851 [5 Town scenario, EZC 1.5% contingency];

xiii. *In the alternative*, Attorneys' fees in the amount of $221,848,673 [5 Town scenario, EZC hourly rate]

xiv. Interest on Attorneys' fees, at 3.75% compound interest from the date of the Award until payment in full;

8. Further and all other relief to which Claimant is entitled, and that the Tribunal may deem fit to grant.[450]

The Respondent

315. In its Post-Hearing Brief, the Respondent presents its final prayer for relief as follows:

1. Respondent reiterates its defense submission that the contract between the parties was for five towns and not eight towns as claimed. Claimant was not under duress or any form of imposition from the Respondent and willingly signed the contract.

2. That the contract between the parties had conditions precedent which is the issuance of an acceptable bank guarantee and a notice of commencement of works by the Respondent to the Claimant before commencement of works. And that the Contract Act, 2008 which is the applicable law expressly states that when such a condition is fixed in the contract, performance of obligations in the contract shall be in order of the promises therein.

3. That the applicable law freely chosen by the parties to the contract is the Southern Sudan Contract Act, 2008 which covers contracts entered into prior to the coming into force of the Act. Further, the Respondent maintains that the cause of action arose when the law was already in existence.

4. That the contract was not breached, but frustrated by unforeseen events and factors which were not in the knowledge of both parties at the time of signing the contract. These intervening factors adversely affected Respondent's source of revenue and made the Respondent unable to provide a bank guarantee at the time. The armed conflict which persisted and threatened Southern Sudan security and the exercise of referendum.

5. That the Claimant is not entitled to claims of out of pocket expenses of USD 12,138,000, expectation damages of USD 49,280,973, liquidated damages of USD 19,786,314.60 or USD 14,043,072.20 and consequential damages of USD 120,000,000 for the reasons stated above.

XI. THE TRIBUNAL'S CONSIDERATION OF THE MERITS

A. Applicable Law

316. The Claimant contends that the applicable law is the law of Sudan on the grounds that the Contract Act 2008 did not enter into force until after the signature of the Contract. Prior to the entry into force of the Contract Act 2008, South Sudan applied the laws of Sudan to contract matters. According to the Claimant, for these reasons, Sudanese law is the proper law applicable to the Parties' dispute.[451] The Claimant submits that the applicable legislation is the Civil Transactions Act 1984 and the

[450] Claimant's Post-Hearing Submission, pp. 74-75.
[451] Claimant's Pre-Hearing Brief, para. 208; Claimant's Post-Hearing Brief, paras. 302-305.

Contract Act 1974 of Sudan.[452] Relying on the applicable law stipulated in the May Bid Contract and principles of Sudanese law, the Claimant contends further that English case law is applicable as persuasive authority.[453]

317. According to the Respondent, the applicable law is the Contract Act 2008 of South Sudan. The Respondent submits that applying Sudanese law would operate against the express wishes of the Parties. At the time of signing the Contract, the legislative Assembly had passed the Contract Act there remained only the last formality, the President's signature, before the Act came into force. The "right and reasonable inference is that the parties intended to be bound by the laws of Southern Sudan, in this case the Contract Act, 2008, which was in the making."[454]

318. The Respondent appears to agree on the relevance of English case law as persuasive authority, since it refers to English case law and academic commentary in its submissions on the interpretation of the Contract.[455]

319. The Parties differ with regard to the effect of section 4(4) of the Contract Act 2008, which provides: "In relation to contracts made before the enactment of this Act, these provisions shall apply subject to modification of those contracts." Section 4(3) provides: "The Provisions of this Act shall apply to contracts made on or after the date of its coming into force of this Act."

320. According to the Claimant, a plain reading of Section 4(4) together with Section 4(3) "requires parties to contracts made prior to the Contract Act 2008 to modify their agreements to provide for the application of the Contract Act 2008".[456] In the present case, the parties "did not modify the governing law provisions of the Contract" therefore the 2008 Act does not apply.[457]

321. According to the Respondent, the modification referred to in Section 4(4) "can only take place when a contract signed before coming into force of the Act has provisions which contravene the law (Contract Act 2008). The fact that the parties did not modify any provision in their contract meant that there were no provisions demanding any necessary modification."[458] The Respondent adds that the provisions of the tender documents, which refer to the laws of Sudan on or before 1974, "cannot override the express terms the parties subsequently agreed to in the contract."[459]

322. Pursuant to Section 29(1) of the 1995 Kenya Arbitration Act applicable to the present dispute as the law of the seat, the "arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute."

323. In the present case, the parties submit that such rules of law should either be (i) the laws of Sudan together with English case law (Claimant's position) or (ii) the laws of Southern Sudan (Respondent's position).

[452] Claimant's Pre-Hearing Brief, paras. 209-216; Claimant's Post-Hearing Brief, paras. 306-313.
[453] Claimant's Post-Hearing Brief, paras. 245-249; Claimant's Post-Hearing Brief, paras. 314-318.
[454] Respondent's Post-Hearing Brief, p. 8.
[455] Respondent's Post-Hearing Brief, pp. 2-3.
[456] Claimant's Pre-Hearing Brief, paras. 196-198.
[457] Claimant's Pre-Hearing Brief, para. 199.
[458] Respondent's Post-Hearing Brief, p. 8.
[459] Respondent's Post-Hearing Brief, p. 8.

324. The Arbitral Tribunal finds that the meaning of Section 4(3) of the Contract Act 2008 is plain. It provides: "The Provisions of this Act shall apply to contracts made on or after the date of its coming into force of this Act." The relevant date is therefore the date of entry into force of the Act, that is November 28, 2008.[460]

325. As the Contract was made prior the entry into force of the Contract Act 2008, this Act, by its own terms, does not apply to the Contract. It applies only to modifications of the Contract (per Section 4(4) of the Contract Act 2008). The fact that the Contract Act 2008 was in the making at the time of signature of the Contract is irrelevant in this regard. It was open to the parties to provide that this Act would become applicable when it would be enacted if they so wished. They did not. Similarly, they could have modified the applicable law to the Contract after the Contract Act 2008 entered into force. They did not make such modification either.

326. As a result, the Tribunal concludes that the Contract is governed by Sudanese law and, in particular, the Civil Transactions Act 1984 and the Contract Act 1974 of Sudan.

327. Moreover, as both parties rely on English law in their legal analysis,[461] the Tribunal concludes that English law is also relevant to interpret Sudanese law, not as a primary source, which remains Sudanese law, but as external persuasive authority.

B. Scope of the Contract

328. The Claimant contends that the Parties entered into a valid contract for eight towns between the Final Letter of Award and the signing of the Technical Contract.[462] According to the Claimant, the Respondent exerted economic pressure onto the Claimant into signing the Technical Contract for five towns and it cannot now rely on that Contract to ratify a project of reduced scope.[463]

329. The Respondents contends that the Claimant has failed to provide any proof that the contract for five towns was imposed on the Claimant and argues that the Claimant was at liberty to turn down the counter offer for five towns. The Respondent underlines that "the Claimant was, at the time of signing the contract a free entity represented by free persons who knew their actions" and who "freely, voluntarily and consciously signed the contract for five towns".[464]

330. Mr. Fagir stated at the hearing that the Claimant took the decision to sign the contract for five towns in order to avoid incurring further losses in addition to the expense it had incurred in surveying the three towns that were removed from the scope of the project.[465] He confirmed that the Claimant did not make any reservation of its rights or formally protest the reduction in scope.[466]

331. The Tribunal therefore finds that the Contract between the Parties was for the electrification of five towns, not eight.

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[460] *See* Contract Act 2008, Exhibit LA 3: "This Act may be cited as "The Contract Act, 2008" and shall come into force on the date of its signature by the President. Signed on 28th November, 2008."
[461] *See* Respondent's Post-Hearing Brief, pp. 2-3.
[462] Claimant's Post-Hearing Brief, paras. 349-355.
[463] Claimant's Post-Hearing Brief, paras. 356-362.
[464] Respondent's Post-Hearing Brief, p. 1.
[465] Transcript, pp. 69-70.
[466] Transcript, pp. 106-107.

C. Termination of the Contract

332. The Claimant contends that the Respondent failed in its contractual obligations in that it (i) failed to issue a payment guarantee as it was required to do under the Financial Agreement; (ii) significantly delayed the Project; (iii) rejected the Centuria Capital financing deal; (iv) unilaterally reduced the scope of the Contract; and (v) failed to issue the Notice of Commencement of Works. The Claimant submits that by reason of the Respondent's breach of the Technical Contract and Finance Agreement, the Claimant was entitled to terminate the Technical Contract under Clause 16.2(c).

333. Clause 16.2(c) of the Technical Contract provides:

> "[i]f the GOSS … (c) consistently fails to meet the GOSS's obligations under the Contract … then the Contractor may terminate his employment under the Contract by giving notice to the GOSS, with a copy to the GOSS's Representative. Such notice shall take effect 14 days after giving of the notice."[467]

334. The Claimant sent its notice of termination to the Respondent on 20 February 2012.[468]

335. Clause 16.4 of the Technical Contract provides:

> "After termination under Sub-Clause 16.2, the GOSS shall return the performance security and shall pay the Contractor an amount calculated and certified in accordance with Sub-Clause 19.6 plus the amount of any loss or damage including loss of profit, which the Contractor may have suffered in consequence of termination."[469]

336. The Respondent accepts that it failed to secure a bank guarantee.[470] At the Hearing, the witness presented by the Respondent, Professor Chol, agreed that issuance of the payment guarantee was fundamental to the proper allocation of funds for the Project, and that allocation of funds was fundamental to the implementation of the Project.[471] He testified that the Respondent failed to issue the payment guarantee due to lack of funds.[472]

337. The witnesses presented by the Claimant testified at length as to the delay caused by the Respondent. Messrs Fagir and Lucas testified in detail that the delay significantly affected the Claimant's logistical planning and necessitated constant revisions to the logistics, in order to ensure that the Claimant could meet the contractual deadlines should the Project commence.[473] Mr. Fagir explained in particular the measures that the Claimant took, including maintaining ordering of supplies and materials for extended and uncertain periods of time, in order to ensure that the Claimant remained ready to commence works as soon as it was required to do so.[474]

338. The documentary evidence provided by the Claimant also supports the allegation that the GOSS failed to meet its obligation to provide a performance guarantee and that such failure was "consistent" during

[467] Exhibit 31 at p. 39.
[468] Exhibit 74.
[469] Exhibit 31 at p. 40.
[470] Respondent's Post-Hearing Brief, p. 6: "The Respondent reasonably failed to secure a bank guarantee due to frustration of the contract. The submission by the Claimant is undisputed. However the Respondent maintains that it did not in any way breach the contract as stated earlier but rather the contract was frustrated."
[471] Witness Statement of Prof. Ajuai Magot Chol, paras. 5-7; Transcript, Day 1, pp. 203-205.
[472] Transcript, Day 1, pp. 204, 31-32, 179-180, 183-184, 229; Transcript, Day 2, pp. 318-320.
[473] Transcript, Day 1, pp. 50-51, 85-86, 135-137.
[474] Transcript, Day 1, pp. 85-6, 87-89, 91-98.

the period from the signing of the Contract to the date of termination of the Technical Contract by the Claimant. The evidence before the Tribunal thus demonstrates the existence of a consistent state of affairs during this period, namely, (i) the failure by the GOSS to issue the bank guarantee, and (ii) the absence of any notification by the GOSS that such obligation would not be met.

339. The Tribunal notes that the Respondent has not contested either its failure to pay or its failure to provide such notification. The evidence presented by the Claimant demonstrates that documents emanating from the Respondent conveyed the opposite impression. According to documents presented by the Claimant, in October 2008, Mr. Youziel of the Ministry of Energy assured APG that the payment guarantee "should not be a problem at all."[475] In January 2009, the Ministry of Finance requested Kenya Commercial Bank to issue a payment guarantee, implying that the project would soon be funded; that letter is referenced in the Bank of Southern Sudan's approval on the issuance of the guarantee on 27 January 2009.[476] In January 2010, in a letter from the Ministry of Energy to Deputy Governor Central Bank of Sudan/President Bank of Southern Sudan, the Ministry stated that Dubai Bank was willing and able to finance 100% of the project, with GOSS providing a bank guarantee.[477]

340. According to the Claimant, from 2010 onwards, GOSS officials gave APG copies of "numerous internal correspondences" showing that discussions were ongoing to fund the Project and "numerous internal correspondences" showing the allocation of funds for the project for the electrification of the five towns and suggesting that the Government intended to pursue the project, which the Claimant says were communicated to it from 2010 onwards for the purposes of keeping it committed to the Project.[478]

341. The Respondent does contest the Claimant's reliance on such documents in its written pleadings. However, the Respondent has not adduced any evidence to show that it communicated to the Claimant, either by the procedures envisaged in the Technical Contract or otherwise, that it was not in a position to issue the payment guarantee.

342. Finally, the Tribunal notes that during the period in which issuance of the payment guarantee was believed to be a possibility, the Claimant incurred additional costs in meeting its contractual obligations to third parties for the supply of equipment and materials. Mr. Fagir explained the necessity of such costs at the Hearing.[479] The Claimant communicated to the Respondent the difficulties posed to it by the Respondent's delay in issuing payment.[480]

343. The witness presented by the Respondent, Prof. Chol, admitted that the Financial Agreement required that the payment guarantee be issued within 30 days of the signing of that agreement and that the Respondent failed to issue the payment guarantee within this deadline.[481] Prof. Chol's contemporaneous correspondence acknowledged the Respondent's delays in issuing the payment

[475] Exhibit 32.
[476] Exhibit 48.
[477] Exhibit 59.
[478] Exhibits. 61, 68, 70, 71; Claimant's Pre-Hearing Brief, para. 61, Witness Statement of Mr. Fagir, para. 46.
[479] Transcript, pp. 85-6, 87-89, 91-98.
[480] Exhibit 44; Exhibit 50; Transcript, Day 1, pp. 211-214; Claimant's Pre-Hearing Brief, para. 131.
[481] Transcript, Day 1, pp. 207-216.

guarantee.[482] In his testimony, Prof. Chol conceded that there was a significant delay in the commencement of the Project because of the Respondent's failure to issue the payment guarantee.[483]

344. On the basis of the above, the Tribunal is satisfied that the Respondent "consistently failed to meet [its] obligations under the Contract". [484]

345. The Respondent contends that by its failure to issue the bank guarantee, the Contract was frustrated rather than breached.[485] The Respondent argues that the Claimant has failed to prove that failure or delay in securing the bank guarantee was due to reasons within the Respondent's control.[486]

346. The Respondent submits that the Contract was signed on the assumption that security across the country would remain stable and government revenue would remain the same or steadily increase. However, insecurity increased fluctuations in oil prices and disagreements between Khartoum and Juba affected oil flow, and subsequently government revenues (90% dependent on oil revenue).[487] Referring to a nation-wide food gap caused by crop failure and security concerns caused by military confrontations in the Heglig and Abyei areas, the Respondent contends that "the resources from the oil were directed to address the demanding security concerns and the food gap" and that it "could not therefore have financial resources to put aside for securing the bank guarantee in favour of the Claimant".[488]

347. Concerning the legal basis for its claim, the Respondent relies on Section 92(9) of the Contract Act 2008, which provides: "A contract may be deemed to be frustrated where as a result of unforeseen contingencies or events, the performance of the contract becomes physically impossible or where such events radically change the nature of the obligations originally undertaken under the contract." As indicated above, this Act is not applicable. In any event, even if it were, the argument would fail.

348. In considering this argument, the Tribunal has taken into account Clause 17 of the Contract, in which certain contingencies are identified as "the GOSS's risks". Clause 17.4 of the Contract, which sets forth the consequences of the GOSS's risks, provides for the Contractor to be entitled (i) to extensions of time and (ii) to add the cost of any resulting delay or additional cost incurred to the Contract Price. Under Clause 17.3 of the Contract, the "GOSS's risks" include:

> "(a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies
>
> (b) rebellion, revolution, insurrection, or military or usurped power, or civil war,
>
> […]"

and

[482] Transcript, Day 1, pp. 207-216; Exhibit 44; Exhibit 50.
[483] Transcript, pp. 215-216.
[484] Exhibit 31 at p. 39.
[485] Respondent's Post-Hearing Brief, p. 6: "The Respondent reasonably failed to secure a bank guarantee due to frustration of the contract. The submission by the Claimant is undisputed. However the Respondent maintains that it did not in any way breach the contract as stated earlier but rather the contract was frustrated."
[486] Respondent's Post-Hearing Brief, p. 3.
[487] Respondent's Post-Hearing Brief, p. 3.
[488] Respondent's Post-Hearing Brief, p. 5.

> "(g) any operation of the forces of nature against which an experienced contractor could not reasonably have anticipated."

349. In light of the contractual provision which expressly states that "civil war" and "operation of the forces of nature" are at the Government's risk, the Tribunal does not consider that the circumstances invoked by the Respondent were "unforeseen contingencies" such as to frustrate the Contract under Section 29(9) of the Contract Act 2008.

350. The Tribunal observes, further, that Clause 19 of the Contract specifically addresses events considered by the GOSS to constitute *force majeure*, including the circumstances identified by Clause 17 as "GOSS's risk". Clause 19 provides for invocation of *force majeure* by either Party. It further foresees the possibility that either Party may be released from its obligations by operation of law. Thus, in the event of frustration of contract, the consequences are set forth at Clause 19.7 of the Technical Contract.

351. The Respondent has not argued that Clause 19 applies in this case. Moreover, no evidence has been presented to the Tribunal to suggest that the GOSS invoked Clause 19 of the Technical Contract, whether through the procedure provided for therein or by other means, or that it invoked the plea of frustration of contract, prior to these arbitral proceedings.

352. In the Tribunal's view, the absence of any contemporaneous communication referring to an inability to issue the bank guarantee for the reasons now invoked by the Respondent detracts significantly from the argument that the Contract was frustrated rather than breached.

353. The Tribunal notes moreover that while the Respondent's position as pleaded before the Tribunal is that by reason of the armed insurrection and food crisis, it was compelled to use its resources for purposes other than the issuance of the performance guarantee, the Respondent does concede that it did have funds which it could have used in order to meet its obligations under the Contract.

354. When testifying before the Tribunal, Prof. Chol admitted that it had the funds to issue the bank guarantee, but chose to use those funds for other purposes.[489] The following exchanges took place at the hearing:

> "MR CHANG: And if there were no funds, why was GoSS negotiating with Stanbic Bank?
> PROFESSOR CHOL: That was the money that was being held there.
> MR CHANG: What is "there"?
> PROFESSOR CHOL: OK. Stanbic Bank were the ones keeping the money of the Government of Southern Sudan, but then that money was quickly used."
> MR CHANG: Quickly used?
> PROFESSOR CHOL: For other things like this issue of the war and – you know, the two wars. So it was put as the reserve. Actually the Stanbic Bank was keeping the money, reserve money, about 200 something plus million at the time. But it was quickly used."[490]

355. Prof. Chol was questioned further by a member of the Tribunal as follows:

> "MR OMWELA: […] Just so that I clear my mind, the entire issue of not issuing the Notice of Commencement was because the government didn't have funds. That is really the crux of the matter?
> PROFESSOR CHOL: Yes.

[489] Transcript, Day 1, pp. 220-221, 229-231.
[490] Transcript, Day 1, pp. 220-221.

> MR OMWELA: The government did not have funds either to put in a bank to give a guarantee or to enable the notice to be issued?
> PROFESSOR CHOL: Yes, that's true.
> MR OMWELA: Secondly, Professor, you mentioned that Stanbic Bank held money for GoSS at some point, about 200 million?
> PROFESSOR CHOL: Yes.
> MR OMWELA: But that money was then decided to be used for other more useful projects at that time?
> PROFESSOR CHOL: It went into the issue of war and --
> MR OMWELA: So the time when the government did have money it could have issued the notice, but it decided there were other priorities?
> PROFESSOR CHOL: Well, it had that money, yes, at that time, if they had decided to use it for electricity.
> MR OMWELA: Yes, but at some point the government had money that they could have used to issue the commencement notice. I just want to clear my mind.
> PROFESSOR CHOL: Yes. From the Minister of Finance, if they have released that money, yes.
> […]
> MR OMWELA: But at this point in time the government actually had the money to either pay itself or issue the notification because it had the money?
> PROFESSOR CHOL: Well, actually at the time when this project was being negotiated, right from 2007, the government had money at that time. If they had wanted, OK. And that's why I was concerned as a person – I could read the minutes of May whatever. I said why on earth would you go and get the contractor to source the money which in my view is going to be expensive – if you have the money or you go straight and borrow. Instead of going through another body. So yes, it is possible there was money at that time, 2006, 2007 to some extent, yes. But the government was preoccupied with other projects.
> MR OMWELA: Other priorities.
> PROFESSOR CHOL: Other priorities, yes."[491]

356. In his closing submissions, Counsel for the Respondent stated that because of the drought in 2007, "[t]he whole money that we had went into the Dura for the hungry people."[492]

357. The Respondent has thus in essence argued that it was constrained by circumstances beyond its control to make a decision not to allocate the necessary resources for the performance of the Contract.

358. While the Tribunal is mindful of the seriousness of the circumstances which according to the Respondent, necessitated the Respondent allocating resources to other matters, making the issuance of the payment guarantee more financially burdensome for the Respondent, the Tribunal does not consider that the underlying circumstances were "unforeseen contingencies". On the contrary, as noted above, Clause 17 of the Contract assigns certain matters to the GOSS's risk, including "insurrection" and "forces of nature". Moreover, Clause 19 of the Contract specifically addresses the possibility of *force majeure* rendering performance impossible and provides for the steps to be taken in such event.

359. In light of the terms of the Technical Contract, the Tribunal is not persuaded that the performance of the Respondent's obligation to issue the payment guarantee had become "physically impossible" or "radically changed in nature" under Section 29(9) of the Contract Act 2008. The Tribunal understands that the issuance of the payment guarantee had become more financially burdensome for the Respondent than previously anticipated. However, the obligation remained of the same nature: to issue a bank guarantee for a stipulated amount.

[491] Transcript, Day 1, pp. 229-231.
[492] Transcript, Day 2, p. 320.

360. The Respondent did not invoke Clause 19 of the Contract either at the time or in these proceedings. The Tribunal notes that rather than taking the steps foreseen in Clause 19, which would have formally released the Claimant from its obligations under the Contract, the evidentiary record shows that the Respondent failed to comply with its obligation to issue the payment guarantee and failed to communicate to the Claimant that it was prevented from doing so by lack of funds.

361. For the foregoing reasons, the Tribunal finds that the termination of the Contract by the Claimant was valid and that the Claimant is entitled to damages under Clause 16.4 of the Technical Contract.

XII. THE TRIBUNAL'S CONSIDERATION OF THE QUANTUM OF DAMAGES

A. Lost profit

362. Clause 16.4 of the Technical Contract, the Claimant is entitled to recover its "lost profits". Under this head, the Claimant claims gross lost profit. It argues that its gross profit is reasonable because it "forms part of the winning tender of USD 197,863,146", which should be deemed to have been accepted as competitive by the GoSS.[493] The Claimant submits that because its bid of USD 197,863,146 was accepted by the GoSS, "the GoSS implicitly accepted APG's gross profit as the most competitive".[494]

363. The Respondent submits that the Claimant is not entitled to expectation damages of USD 49,280,973. The Respondent has not specifically addressed the Claimant's claim for gross profit.

364. The Tribunal notes that the Technical Contract does not make express reference to "gross profit". In light of this, in ascertaining the "lost profits" due under Clause 16.4, the Tribunal considers that it should seek to put the Claimant in the position it would have been in had the Contract been performed. Had the Contract been performed, it is to be presumed that any taxes payable would have been paid out of the contract price. Accordingly, the Tribunal finds that under Clause 16.4 of the Technical Contract, the Claimant is entitled to recover its "lost profit" net of tax.

365. The Claimant's calculation of its expectation damages of gross profit is as follows,[495] assuming a five town scenario (as was decided by the Arbitral Tribunal at paragraph 331 above):

Total direct costs (materials, equipment)	USD 91,149,749
Indirect costs (overheads, contingencies, financial risks)	USD 4,192,888.45
Contract value = direct costs + indirect costs + 35% net profit + corporate and state local taxes	USD 140,430,722
Gross profit = 35% net profit + total indirect costs + taxes	**USD 49,280,973**

[493] Claimant's Post-Hearing Brief, paras. 188-200.
[494] Claimant's Post-Hearing Brief, para. 188.
[495] Claimant's Post-Hearing Brief, paras. 201-203. *See also* Exhibit S110 ("Indirect Cost Summary – 5 Towns").

366. The Claimant's claim is based on the 35% profit margin that was included in the Contract price. The Tribunal has considered whether this margin is appropriate in the context of the present Award.

367. In his testimony at the hearing, Mr. Lucas explained the reasons for the 35% profit margin as follows:

> "In my years, in my experience and my years working – and I've worked in also difficult situations like in Somalia and various other regions. Normally it's based on risk/reward. Depends on the difficulty, the conditions, the unknowns, because your gross markup can be anything from 30 per cent to 50 per cent depending on what contingencies are built in. Because if there a lot of unknowns, you have to build in contingencies."[496]

368. Thus, according to the case that the Claimant itself presented, the risk involved in the Project was more than usually high. Therefore, in the context of an award of damages, the Tribunal considers it appropriate when seeking to put the Claimant in the position it would have been in had the Contract been performed, to calculate at a reasonable rate of return. The Tribunal therefore adopts the figure of 25% as the measure of a reasonable rate of return.

369. In calculating the indirect costs, given that the present calculation is for a legally binding arbitral award with the effect of *res judicata*, it is appropriate in this context to discount the figure of 3% included in the Claimant's calculation of costs for financial risks and contingencies.

370. The quantum of damages under this head is therefore calculated as follows, again assuming a five town scenario as was decided by the Arbitral Tribunal at para. 331 above:

Total direct Costs:	USD 91,149,749
Total overheads costs at 1.6% (i.e. 4.6% - 3%,[497] the 3% figure corresponding to financial risks and contingencies which are not to be taken into account):	USD 1,458,395.98
Total costs:	USD 92,608,104.98
Net profit at 25%:	**USD 23,152,026.25**

371. Accordingly, the Tribunal finds that the Claimant is entitled to damages for net loss of profit in the amount of **USD 23,152,026.25**.

B. Direct and indirect expenditure

372. The Claimant argues that because the Claimant's expenses are subtracted from the Contract price in order to determine its profit margin, it would be a double subtraction if the sums the Claimant had expended in the expectation of performance were not awarded to it in damages.[498] In support of its arguments, the Claimant has cited Sudanese and English case law.[499]

[496] Transcript, Day 1, pp. 127-128.
[497] See Claimant's table at Exhibit S110.
[498] Claimant's Post-Hearing Brief, paras. 185-187, 239-245.
[499] Claimant's Post-Hearing Brief, paras. 374-390.

373. The Claimant also bases its claim on Clauses 16.4 and 19.6 of the Technical Contract.[500] Those terms are reproduced below. The Claimant contends that it may recover its out of pocket expenses under Clause 19.6(a) and (c) of the Technical Contract, since each of the itemized expenses correspond to line items in the Bill of Quantities, and because the expenditures were reasonably incurred by the Claimant in the expectation of completing the works.[501]

374. The Respondent argues that the Claimant is not entitled to out of pocket damages because the Claimant has failed to prove its claim; the evidence adduced by Mr. Fagir "did not include details and the particulars of the activities APG undertook in the performance of the contract; for example vouchers and receipts";[502] and the Claimant agreed to carry out the site survey of 8 towns at its own cost at the meeting in Juba on March 18, 2008.[503] In addition, the Respondent sought to argue that the Claimant was not entitled to carry out preparatory works prior to the Notice of Commencement being issued by the Respondent.[504]

375. As to the objections raised by the Respondent, the Tribunal finds that the Claimant has provided extensive evidence in support of its allegations as to the sums expended in the expectation of performance of the Contract and the additional costs incurred by reason of the delay in issuance of the payment guarantee. Further, for the reasons given in relation to its findings on the merits, the Tribunal is not persuaded that the Claimant was not permitted to incur these expenses. Notably, the Claimant's activities were made known to the Respondent at the time. The Tribunal turns therefore to the question whether such losses may be recovered in addition to the Claimant's lost profit.

376. The Tribunal notes at the outset that because the Claimant's case is that its expenses were incurred in the expectation that the Government would eventually provide the guarantee, these are expenses that would have been expended by the Claimant had the contract been performed. In that event, the Claimant would have made a profit at what it says is a margin of 35%. It would not have obtained reimbursement of its expenses in addition to that figure. For these reasons, the Tribunal is not persuaded that the Claimant must in principle recover its reliance damages in order to put it in the position in which it would have been had the Technical Contract and Finance Agreement been performed. The Contract however provides otherwise.

377. Clause 16.4GC of the Technical Contract indeed provides (emphasis added):

> "After termination under Sub-Clause 16.2, the GOSS shall return the performance security and shall pay the Contractor **an amount calculated and certified in accordance with Sub-Clause 19.6 plus the amount of any loss or damage including loss of profit**, which the Contractor may have suffered in consequence of termination."

378. The amount to be calculated and certified in accordance with Sub-Clause 19.6 includes, in relevant part:

> "(a) the amounts payable for any work carried out for which a price is stated in the Contract;

[500] Claimant's Pre-Hearing Brief, paras. 185-187; Claimant's Post-Hearing Brief, paras. 364, 374-375.
[501] Claimant's Pre-Hearing Brief, para. 186.
[502] Respondent's Post-Hearing Brief, p. 5.
[503] Respondent's Post-Hearing Brief, p. 5; Exhibit 16.
[504] Transcript, pp. 29-30, 32, 315-316; Respondent's Post-Hearing Brief, pp. 1-4, 7, 8-9.

> (b) the Cost of Plant and Materials ordered for the Works which have been delivered to the Contractor, or of which the Contractor is liable to accept delivery: such Plant and Materials shall become the property of (and bet [*sic*] at the risk of) the GOSS when paid for by the GOSS, and the Contractor shall place the same at the GOSS's disposal;
>
> (c) any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works."[505]

379. The term "Cost" is defined in Clause 1.1.5.6 GC of the Technical Contract as follows:

> "Cost" means all the expenditure properly incurred (or to be incurred) by the Contractor, whether on or off the Site, including overhead and similar charges, but does not include profit."

380. The Technical Contract thus expressly stipulates that in the event of termination under Clause 16.2, the Claimant would be compensated for any "Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works", in addition to "the amount of any loss or damage including loss of profit". Such costs reasonably incurred were expressly defined so as to include "overhead and similar charges".

381. The Tribunal finds, therefore, that the Claimant is entitled to recover its direct and indirect costs incurred in the expectation of completing the works. In these circumstances, the Tribunal refers to the evidence presented by the Claimant as to the direct and indirect costs. In particular, the Tribunal notes that the Claimant was placed in a particularly difficult position vis-à-vis third party suppliers because of the belief, entertained through the acquiescence or omission of the Respondent, that it could be required to mobilize under the Technical Contract at any time.

382. The Tribunal considers that the Claimant has demonstrated that its direct and indirect out of pocket expenses in the amount of USD 12.4 million were "Costs" within the meaning of Clause 1.1.5.6 GC of the Technical Contract that were "reasonably incurred in the expectation of completing the Works". Clause 16.4 of the Technical Contract stipulates that the Claimant is to be paid such costs in addition to its lost profits.

383. The Claimant submits that in addition to out of pocket expenses, it incurred additional expense in operational overheads. The Claimant explains that it calculated its anticipated overheads as a percentage of the direct costs, "because it is not otherwise possible to specifically price out the part of overall management overhead spent on one specific project in any given office".[506]

384. In accordance with the percentages adopted by the Tribunal in calculating the net profit margin, the Tribunal will therefore calculate the indirect costs to be awarded to the Claimant under Clause 16.4 and 19.6(c) GC of the Technical Contract on the basis of the relevant percentages used in the Claimant's calculation of its profit margin for five towns, namely, at a rate of 1.6% (i.e. 4.6% - 3%,[507] the 3% figure corresponding to financial risks and contingencies not to be taken into account as explained above at paragraph 369), which includes: "HQ offices overheads" at 0.2%, "project offices overheads (Juba)" at 0.2%, "finance office overheads (Dubai)" at 0.1%, "logistical offices overheads (Nairobi)" at 0.1%; and "accommodation, living expenses (Juba)" at 1.0%. The Tribunal therefore assesses the "Costs" of the Claimant recoverable under Clause 16.4 and 19.6 GC of the Technical

[505] Exhibit 31 at p. 43.
[506] Claimant's Post-Hearing Brief, para. 170; Transcript, pp. 76-78; Exhibits S107, S101, S102.
[507] See Claimant's table at Exhibit S110.

Contract by applying the rate of 1.6% to the Claimant's actual direct costs of USD 12,419,505, with the following result:

Direct Costs:	USD 12,419,505
Indirect costs at 1.6%:	USD 198,712.08
Total "Costs" under Clause 19.6:	**USD 12,618,217.08**

C. Liquidated damages

385. The Claimant claims liquidated damages for delay at the rate of 0.1% per delayed day. It relies on the liquidated damages clause at Clause 8.7 of the May Bid Contract to calculate its liquidated damages, in conjunction with Clause 8.6 of the Technical Contract.[508]

386. The Claimant's argument is based on its reading of the Contract and the May Bid Contract, together with FIDIC standard practice and industry practice. The Claimant notes that the Technical Contract is based on the FIDIC Yellow Book 1999, but the GOSS altered this mechanism by deleting a number of key clauses. According to the Claimant, the GOSS consolidated the contractual treatment of delays caused by Contractor and by Employer in one single clause at Clause 8.6 GC of the Technical Contract, which creates a delay mechanism on which either party may rely.[509] Because the GOSS drafted an unclear contract, any ambiguities must be interpreted against the Respondent.[510] According to the Claimant, it is entitled to rely on Clause 8.6 GC to recover damages for delay because this clause necessarily applies to delays caused by either party (even though it does not expressly state so).[511]

387. Clause 8.6 GC of the Technical Contract provides:

> "If suspension under Sub-Clause 8.7 has continued for more than 84 days, and the suspension is not due to a cause attributable to the Contractor, the Contractor may by notice to the GOSS's Representative require permission to proceed within 28 days. If permission is not granted within that time, the Contractor may treat the suspension as an omission under Clause of the affected part of the Works. If such suspension affects the whole of the Works, the Contractor may terminate his employment, under Sub-Clause 16.2."

388. Clause 8.6 of the Particular Conditions of the Technical Contract provides:

> "(a) The liquidated damages for the whole of the works is **5% of the contract price per day, in the proportions of currencies in which the Contract price is payable.**
> (b) Amount of the liquidate damages for delay is **3% of the total price of the Contract.**"

389. The May Bid Contract provides at Article 8.7 GC:

> "If the Contractor fails to comply with Sub-Clause 8.2 [Time for Completion], the Contractor shall be subject to notice under Sub-Clause 2.5 [Employer's Claims] pay delay damages to the Employer for this default. These delay damages shall be the sum stated in the Contract Data, which shall be

[508] Claimant's Post-Hearing Brief, para. 289; Exhibit 76 at 364.
[509] Claimant's Post-Hearing Brief, para. 279.
[510] Claimant's Post-Hearing Brief, para. 248.
[511] Claimant's Post-Hearing Brief, paras. 275-281.

> paid for every day which shall elapse between the relevant Time for Completion and the date stated in the Taking-Over Certificate. However, the total amount due under this Sub-Clause shall not exceed the maximum amount of delay damages (if any) stated in the Contract Data.
>
> These delay damages shall be the only damages due from the Contractor for such default, other than in the event of termination under Sub-Clause 15.2 [Termination by Employer] prior to completion of the Works. These damages shall not relieve the Contractor from his obligation to complete the Works, or from any other duties, obligations or responsibilities which he may have under the Contract."

390. The Contract Data of the May Bid Contract provides in relation to Clause 8.7 GC:

Conditions	**Ref. GC**	**Data**
Delay damages for the Works	8.7 and 14.15(b)	0.1% of the final Contract Price per day, in the currencies and proportions in which the Contract Price is payable.
Maximum amount of delay damages	8.7	Ten 10% of the final Contract Price.

391. Clause 14.15(b) GC of the May Bid Contract relates to the currencies in which the Contract Price is to be paid.

392. The Tribunal observes that Clauses 8.6 GC and Clause 8.6 of the Particular Conditions of the Technical Contract, as modified from the May Bid Contract, reproduce only a portion of Clause 8.11 of the May Bid Contract. The figure of 0.1% has no direct connection with Clause 8.6 GC or Clause 8.6 of the Particular Conditions of the Technical Contract. Thus, the reasoning advanced by the Claimant entails creating a hybrid between Clause 8.6 GC of the Technical Contract, Clause 8.6 of the Particular Conditions of the Technical Contract, and Clause 8.7 GC of the May Bid Contract. To this extent, the Claimant's reasoning on this issue is difficult to follow. The Tribunal considers that it does not have a sufficiently clear basis for liquidated damages under the Contract.

393. A further problem with the approach proposed by the Claimant is that there is no contractual basis for "delay damages" as specified under Clause 8.6 of the Particular Conditions of the Contract to be applied against the other party. The origin of the "delay damages" is Clause 8.7 GC of the May Bid Contract, which relates specifically to failure by the Contractor to comply with the contractual "Time for Completion" and provides that in the event of such failure "the Contractor shall … pay delay damages to the Employer for this default". There is no mention in Clause 8.7 GC of the May Bid Contract of delay damages for delay by the Employer. Indeed, the Tribunal finds it difficult to understand where any delay in implementation of the Contract would occur on the part of the Government of South Sudan.

394. The Tribunal is not persuaded that there was understanding between the Parties either as to the rate of 0.1%, or as to the possibility of the Government being the non-complying Party in relation to the provision for delay damages under Clause 8.6 of the Particular Conditions of the Contract. Moreover, the Tribunal is of the view that the present case was not a case of delay in performance, but of complete non-performance by the Respondent.

395. For these reasons, the claim for liquidated damages is dismissed.

(a) Consequential damages

396. The Claimant claims damages for loss of a potential contract with Hyundai on which it expected to make a profit of USD 120 million, which it was unable to conclude because the Claimant's financier, Centuria Capital, withdrew from South Sudan as a result of the Respondent's inability to issue the payment guarantee.[512] According to the Claimant, the Respondent was aware of this project and of the impact on the Hyundai project of its delay in issuing the payment guarantee.[513]

397. The Respondent argues that the Claimant has no proof that the loss of the Hyundai contract occurred because of its failure to secure the implementation of the electrification project.[514] Rather, the Respondent submits that the Claimant lost the relevant contracts because the prices it offered were too high.[515]

398. The Tribunal will begin by recalling the evidence presented concerning the cause of the discontinuation of the Hyundai project. At the hearing, Mr. Fagir was asked by a member of the Tribunal, "if Centuria did not want to work with you any more, could you not continue with Hyundai and look for another financier who did want to continue with both of you?"[516] Mr. Fagir responded:

> "At that time finding a financier willing to finance Sudan was very difficult, and any financing institution, especially the ones related to the West – Centuria is actually based in Dubai but they were part of the group financier Centuria who are also part of Dexia, so it is a western institution, and it was very difficult to find any financial institution willing to finance Sudan during that time due to the high political risk. This is a time where no one knew whether Sudan would go into two countries or one; whether we would have war or not."[517]

399. When asked by a member of the Tribunal whether Hyundai ultimately signed the contract with another party. Mr. Fagir responded:

> "As far as I know, no. They pulled – the project was actually not only Hyundai and us. The client themselves, NEC – because NEC were without finance they would not discuss with you. They are not interested in your technical offers, if you cannot prove to them you can provide funds or finance. They say show us you can finance the project and we will discuss with you. That is why they started the technical discussions with us until they approved their technical offer, but then when Centuria informed them they are not willing to continue, even NEC, the client, were not willing to continue any discussions with us. Also Hyundai."[518]

[512] Claimant's Pre-Hearing Brief, paras. 136-142, Transcript, pp. 99-105, 307-308, Claiamnt's Post-Hearing Brief, paras. 402-408.
[513] Claimant's Post-Hearing Brief, para. 404; Exhibit S103.
[514] Respondent's Post-Hearing Brief, p. 9.
[515] Respondent's Post-Hearing Brief, p. 9, citing Exhibit 26.
[516] Transcript, p. 100.
[517] Transcript, p. 100.
[518] Transcript, p. 101.

400. When asked about the impact of the global financial crisis on the problem of finding financing for South Sudan in general, Mr. Fagir testified that the global financial crisis of 2008 "was part of the reason it was difficult to find financing for South Sudan".[519]

401. Mr. Marcus Fuchs testified at the Hearing regarding the Hyundai project for the construction of power plants in Sudan.[520] Mr. Fuchs stated that Centuria Capital were involved in the early stages of the project and met with some of the Hyundai executives in Dubai to discuss the projects on which they were collaborating with the Claimant,[521] but did not end up financing the project.[522] When asked what caused Centuria Capital to pull out from the project, Mr. Fuchs stated:

> "We just didn't see the first project that we were working on with APG going anywhere, and we just lost confidence in Sudan as a market because we put quite a bit of resources in the country and we didn't see it going anywhere."[523] When asked whether, assuming everything had gone according to plan in the electrification project, namely that GoSS had been able to provide the bank guarantee, Centuria would have continued to work with APG on the NEC project, Mr. Fuchs stated that this was a "definite probability."[524]

402. When asked when Centuria decided to stop the NEC project, Mr. Fuchs stated:

> "Typically when we pulled out of Sudan we stopped focusing on any interest in Sudan. It was around sometime in the middle to end of 2009. I can't remember specifically. I just lost interest because the financial crisis came to Dubai in November of 2009, and the focus was to stick on the core businesses in Dubai essentially."[525] Mr. Fuchs added that "the geopolitical events going on in the country complicated things as well".[526]

403. The Tribunal finds that the failure by the Respondent to meet its obligations under the Technical Contract and Financial Agreement in relation to the electrification project was not the sole cause of the loss of the Hyundai project. The Tribunal notes that according to the evidence presented by the Claimant, Sudan in general was an uncertain market with a high level of risk. Moreover, the Hyundai project was not, to the Claimant's knowledge, concluded with any other partner. In the circumstances, the Tribunal is not persuaded that the loss of the Hyundai project was solely attributable, or even attributable at all, to the Respondent's breach of contract. Other factors, notably the global financial crisis which affected Centuria Capital from November 2009 and the geo-political events in Sudan, informed Centuria's decision to pull out of Sudan as a whole.

404. Moreover, the Claimant has not shown that it could expect with any degree of certainty to recover a profit margin of 15% on the Hyundai project. On the contrary, Mr. Fuchs's testimony was that Centuria Capital was concerned by the credit rating and geopolitical risk in South Sudan;[527] it subsequently lost confidence in the whole of Sudan as a market.[528]

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[519] Transcript, pp. 101-102.
[520] Transcript, pp. 260-262.
[521] Transcript, p. 260.
[522] Transcript, p. 261.
[523] Transcript, p. 261.
[524] Transcript, p. 262.
[525] Transcript, p. 269.
[526] Transcript, p. 269.
[527] Transcript, p. 257.
[528] Transcript, p. 265.

405. The Tribunal considers that the claim for USD 120 million in consequential damages is too remote. Consequently, the claim for consequential damages is dismissed.

(b) Interest

406. The Claimant claims interest at the rate of 3.75% to be applied on its loss of profit, out of pocket expenses, liquidated damages, consequential damages, attorney's fees, and costs of the arbitration.[529] The Claimant relies on Clause 13.8 GC of the Technical Contract, which provides for the Contractor's right to receive financing charges on any unpaid amount payable under Clause 13.7. Clause 13.8 refers to "the annual rate three percentage points above the discount rate of the central bank in the country of the currency of payment". The discount rate of the Reserve Bank of the United States of America is currently set at 0.75%.[530] Clause 13.7 provides for such financing charges to be "compounded monthly on the amount unpaid during the period of delay".

407. The Claimant acknowledges that Clauses 13.7 and 13.8 contemplate delay in payment of the amount certified in the Final Payment Certificate, which in turn presupposes a normal course of execution of the Contract, but in fact the Project never properly commenced.[531] The Claimant submits that had the Respondent met its obligations, the Claimant would have recovered its gross profits, and any late installments would have been subject to the financing charge under Clause 13.8.[532] Further, the Claimant submits that its USD 12.4 million in preparations, which would have been recovered had the Project proceeded as planned, "can also be conceptualized as late payments under the Contract. As a result, APG may reasonably apply the contractual (compounded) interest rate of 3.75%."[533]

408. The Respondent has not stated its position with respect to interest.

409. In the circumstances, the Tribunal finds that in order to restore the Claimant to the position in which it would have been if the Contract had been performed, the Claimant should be awarded the cost of financing. Given that the Parties specifically agreed on a rate of financing charges that would be applied to delays in payment, the Tribunal finds it reasonable to adopt this figure. The Tribunal therefore awards interest at 3.75%, compounded monthly, on the Claimant's lost profits and costs from the date of the Notice of Arbitration, namely, 20 February 2012, until the date of payment in full.

(c) Costs

410. Article 38 of the UNCITRAL Arbitration Rules provides that the Tribunal shall fix the costs of the arbitration in its award. The exhaustive list of items included under the term "costs" includes at Article 38(e) "The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable."

[529] Claimant's Post-Hearing Brief, paras. 419-447.
[530] Claimant's Post-Hearing Brief, para. 421, fn. 58.
[531] Claimant's Post-Hearing Brief, para. 422.
[532] Claimant's Post-Hearing Brief, para. 423.
[533] Claimant's Post-Hearing Brief, para. 423.

411. At the close of the hearing, the Tribunal invited the Parties to provide their submissions on costs by June 6, 2014.[534]

412. The Claimant provided a Submission on Costs dated June 6, 2014, in which the Claimant requests that the Tribunal order the Respondent to pay Claimants the following:

412.1. $197,757 for APG's arbitration costs (exclusive of interest), namely:

412.1.1. $170,534 (€125,000) corresponding to the Claimant's share of the deposit paid to the PCA (exclusive of interest);

412.1.2. $27,223 in arbitration costs corresponding to the travel, accommodation and office expenses that APG has incurred for this arbitration;

412.2. All of the Claimant's legal fees, namely:

412.2.1.$1,740,000 of legal fees that APG has agreed to pay to Mungu & Company Advocates;

412.2.2.$750,000 of legal fees that APG has agreed to pay to Aztan Law Firm (Khartoum and Juba offices) for the services rendered in this Arbitration;

412.2.3.$3,878,104 of legal fees that APG has agreed to pay EZC Law in case of successful recovery (assuming full recovery on the eight Town scenario); or, in the alternative, $3,428,678 (assuming full recovery on the five Town scenario); or, in the further alternative, $603,500 as an estimate of EZC Law's fees expressed as an hourly fee structure; and

412.3. Interest on the Claimant's arbitration costs and legal fees.

413. The Respondent submits that the Claimant's claim should be dismissed "with costs" for lack of cause of action and failure to prove its case.[535] The Respondent did not provide a breakdown of its own costs when invited to do so by the Tribunal.

414. The Tribunal finds the Claimant's costs of legal representation and assistance reasonable in respect of the expenses of its attendance and representation at the hearing as stated at USD 27,223. In respect of legal fees, the Tribunal finds the Claimant's costs reasonable up to the amount of USD 750,000.

415. The Tribunal fixes the costs of the arbitration as follows, noting that the travel and other expenses of the witnesses presented by the Claimant are included under item (e), with the exception of the costs of the video link by which Mr. Marcus Fuchs testified at the hearing on May 7, 2014, which is the cost fixed under item (d):

[534] Transcript, pp. 324-326.
[535] Respondent's Post-Hearing Brief, p. 10.

(a) Fees of the Tribunal	
Mr. Philippe Pinsolle	**EUR 59,311.48**
Mr. Richard Omwela	**EUR 40,480.00**
Mr. Karel Daele	**EUR 62,048.40**
(b) Travel and other expenses of the Tribunal	**EUR 21,514.37**
(c) The costs of expert or other assistance required by the Tribunal	**EUR 37,713.33**
(d) Travel and other expenses of witnesses	**EUR 3,860.87**
(e) The costs for legal representation and assistance of the successful Party	**USD 777,223.00**
(f) Fees and expenses of the appointing authority and expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague[536]	**EUR 750.00**

416. Article 40(1) of the UNCITRAL Arbitration Rules provides that "except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case."

417. In the present case, the Tribunal notes that the Claimant was required to instigate the present proceedings in order to recover damages for its claim for breach of contract. The Tribunal therefore rules that the costs of the arbitration shall be borne by the Respondent.

[536] The fee of the Permanent Court of Arbitration for the designation of an appointing authority by the Secretary-General is EUR 750. The appointing authority designated by the Secretary-General in this matter, Prof. Hans van Houtte, agreed to carry out this role free of charge *pro bono publico*.

XIII. AWARD

418. For the foregoing reasons, the Tribunal makes the following award:

418.1. South Sudan breached its obligations to the Claimant under Clause 4.2 of the Technical Contract and Clause 5.9(2) of the Financial Agreement.

418.2. The Claimant was entitled to terminate the Contract under Clause 16.2 of the Technical Contract.

418.3. The Claimant is entitled to damages under Clause 16.2 GC and Clause 19.6 GC of the Technical Contract in the amount of **USD 35,770,243.33**.

418.4. The Claimant is entitled to interest at 3.75% compounded monthly, on the sum of USD 35,770,243.33, from the date of the Notice of Arbitration, namely, from February 20, 2012, until the date of payment in full, such interest amounting to **USD 4,127,541.83** as of January 20, 2015.

418.5. The costs of the arbitration are fixed at **EUR 225,678.45**
+ **USD 777,223.00**

418.6. The PCA shall return the unexpended balance of the deposit to the Claimant. The Respondent is ordered to pay to the Claimant the sums of **EUR 75,821.55** as compensation for the Claimant's advance of the costs of the arbitration and **USD 777,223.00** as compensation for the Claimant's reasonable costs.

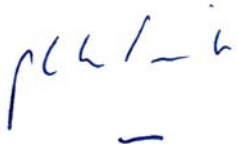
418.7. The Respondent shall bear its own costs in these proceedings.

419. All other claims are dismissed.

Seat of Arbitration: Nairobi, Kenya
Date: January 27, 2015

Richard Omwela

Karel Daele



Philippe Pinsolle
(Presiding Arbitrator)