EXCERPTS

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

SUDAPET COMPANY LIMITED

Claimant

and

REPUBLIC OF SOUTH SUDAN

Respondent

ICSID Case No. ARB/12/26

AWARD

Members of the Tribunal
Professor Campbell McLachlan QC, President
Dr. Gavan Griffith QC, Arbitrator
Professor David A. R. Williams QC, Arbitrator

Secretary of the Tribunal
Mr. Paul-Jean Le Cannu

Date of dispatch to the Parties: 30 September 2016

EXCERPTS
Sudapet Company Limited v. Republic of South Sudan (ICSID Case No. ARB/12/26)

REPRESENTATION OF THE PARTIES

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Mr. Bruce Macaulay
Mr. Daniel Gal
Mr. David Herlihy
Ms. Sara Nadeau-Séguin
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TABLE OF CONTENTS*

I. INTRODUCTION AND PARTIES 1
II. SUMMARY OF PROCEDURAL HISTORY 1
III. FACTUAL BACKGROUND 13
A. The broader context: the Comprehensive Peace Agreement ("CPA") 13
B. Oil resources in Sudan and South Sudan 13
C. The contractual structure 14
(1) The Exploration and Production Sharing Agreements ("EPSAs") 14
(2) Joint Operating Agreements ("JOAs") 14
(3) The Shareholders' Agreements ("SHAs") 14
(4) The Pipeline Agreements ("COPAs") 14
(5) The Transportation Agreements ("COTAs") 14
D. The pre-secession inter-State negotiations over oil resources 14
E. The secession of South Sudan 14
F. The post-secession inter-State negotiations over oil resources 14
IV. SUMMARY OF THE PARTIES' CLAIMS AND RELIEFS 15
A. Claimant's request for relief 15
B. Respondent's request for relief 15
V. SUMMARY OF THE PARTIES' ARGUMENTS 16
A. Effect of State succession on property that Sudapet claims was expropriated 16
(1) Respondent's position 16
a. Sudapet can be "equated" to Sudan for purposes of this arbitration 16
b. Sudapet's interests under the EPSAs are State property and part of the "Government take" 16
c. Sudapet's EPSA interests vested in South Sudan upon secession: Respondent's vesting theories 16
(2) Claimant's position 16
a. There is no close connection between Sudapet and Sudan 16
b. Sudapet's EPSA interests are not State property 16
c. Respondent's vesting theory fails 17
B. Jurisdiction 17

* The page numbers in the Table of Contents of these Excerpts do not correspond to the original page numbers of the Award.

(1) Jurisdiction *ratione materiae* 17

a. Respondent's argument that Sudapet made no "foreign" investment in South Sudan, as the ICSID Convention requires 17

b. Respondent's argument that the Sudapet Interests did not involve contribution and risk so as to be an "investment" under the IPA or the ICSID Convention 17

c. Respondent's argument that the IPA is subordinate to the Constitution, which vested the Sudapet Interests in South Sudan on 9 July 2011 17

(2) Jurisdiction *ratione personae* 17

a. Respondent's argument that Sudapet is not a qualifying "investor" under the IPA 17

b. Respondent's argument that Sudapet is not a national of another Contracting State within the meaning of the ICSID Convention 17

C. Liability 17

(1) Applicable Law 18

a. Claimant's position 18

b. Respondent's position 18

(2) Respondent's alleged violation of its obligations under the IPA 18

a. Respondent's alleged unlawful discrimination against Claimant in violation of Section 33(5) of the IPA 18

b. Expropriation 18

(3) Minimum standard of treatment under international law 18

a. Claimant's position 18

b. Respondent's position 18

(4) Unjust enrichment 18

a. Claimant's position 18

b. Respondent's position 18

(5) Acquiescence, waiver and estoppel 19

a. Claimant's position 19

b. Respondent's position 19

(6) Respondent's reservation of a right of counter-claim or set-off 19

a. Respondent's position 19

b. Claimant's position 19

VI. THE TRIBUNAL'S ANALYSIS 19

A. Introduction: the centrality of State succession 19

B. Findings of fact as to the Interim Period and the Secession Negotiations 22
(1) The Interim Period under the Comprehensive Peace Agreement: 2004–2010 22
(2) The Pre-Secession Negotiations: January–8 July 2011 22
a. First round: 1-6 March 2011 (Bishoftu) 22
b. Second round: 9-11 April 2011 (Bishoftu) 22
c. Third round: 8–9 May 2011 (Khartoum) 22
d. Fourth round: 19–21 May 2011 (Bishoftu) 22
e. Fifth round: 22–24 June 2011 (Addis Ababa) 22
C. Rules of law applicable to State succession 22
(1) Applicable choice of law rules 23
a. Article 42(1) ICSID Convention 23
b. The Parties' pleadings 25
(i) Claimant 25
(ii) Respondent 26
c. Tribunal's conclusion on law applicable to State succession 27
(2) Source and content of the relevant rules of international law 28
a. Scope and effect of the Parties' Agreement of 11 April 2011 28
b. Reference to the relevant provisions of the VCSP 31
D. Are the Sudapet Interests "State assets"? 36
(1) The scope of the issue 36
(2) Extent of Government shareholding in Sudapet 41
(3) Treatment of Sudapet Interests in Negotiations 42
(4) Were the Sudapet Interests held on behalf of the State? 43
(5) Even if held by Sudapet, are the Sudapet Interests State property? 45
(6) Implications of the Government shareholding in Sudapet as State property 48
(7) Post-secession conduct 49
E. Application of the connecting factor applicable to succession to the Sudapet Interests 50
F. Outcome 54
G. Costs 54
(1) Power to assess expenses 54
(2) Claimant's statement of costs 55
(3) Respondent's statement of costs 56
(4) Fees and expenses of the Centre and the Tribunal 57

(5) Tribunal's decision on costs 58
VII. DECISION 59

TABLE OF ABBREVIATIONS

[…]	[…]
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
AUHIP	African Union High Level Implementation Panel for Sudan and South Sudan
AUPSC	Peace and Security Council of the African Union
BIT	Bilateral Investment Treaty
[…]	[…]
[…]	[…]
Counter-Memorial	Respondent's Counter-Memorial dated 23 July 2014
[…]	[…]
Companies Act	1925 Sudanese Companies Act
COPA	Crude oil pipeline agreement
COTA	Crude oil transportation agreement
CPA	Comprehensive Peace Agreement between the government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army signed in January 2005
[C-] [R-]	Exhibit [Claimant] [Respondent]
[CLA-] [RLA-]	Legal Authority [Claimant] [Respondent]
[…]	[…]
Decree	Presidential Decree No 27/2011, 8 November 2011
EPSA	Exploration and production sharing agreement
Exploration Operations 1, 2, 3 and 4	Contract areas Blocks A, B, C and E
FOCs	Foreign Oil Companies
[…]	[…]

GoS	Government of Sudan
GoSS	Government of South Sudan
Government Share	The share in the profit oil ascribed to the Government under the EPSAs
[…]	[…]
Guiding Principles	Guiding Principles on post-2011 Referendum Arrangements Negotiations
ICJ	International Court of Justice
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
ICSID or the Centre	International Centre for Settlement of Investment Disputes
IGAD	Intergovernmental Authority on Development
ILC	International Law Commission
Interim Constitution	Interim Constitution of Southern Sudan
IPA	Southern Sudan Investment Promotion Act 2009
[…]	[…]
IPO	Investment Provisional Order 2008
JOA	Joint Operating Agreement
JOCs	Joint operation companies
[…]	[…]
MCP	Mutual Commitments Package
Memorial	Claimant's Memorial dated 13 December 2013
MoEM	Ministry of Energy and Mining of the Government of South Sudan
MoPM	Ministry of Petroleum and Mining of the Government of South Sudan

MoP	Ministry of Petroleum of the government of Sudan
[…]	[…]
OEPA	Oil Exploration and Production Authority
OFAC	Office of Foreign Assets Control (US)
Oil Agreement	Agreement on Oil and Related Economic Matters dated 27 September 2012
[…]	[…]
[…]	[…]
[…]	[…]
PCIJ	Permanent Court of International Justice
[…]	[…]
PHB	Post-Hearing/Closing Brief (Respondent's dated 21 September 2015 and amended on 25 September and 25 October 2015, Claimant's dated 13 October 2015 and amended on 14 and 25 October 2015)
[…]	[…]
Power Sharing Agreement	Power Sharing Chapter of the Comprehensive Peace Agreement agreed on 26 May 2004
Production Operations 1, 2 and 3	Contract areas Blocks 1/2/4, Blocks 3/7 and Block 5A
[…]	[…]
[…]	[…]
Rep.	Claimant's Reply dated 30 December 2014
Rej.	Respondent's Rejoinder dated 27 April 2015
RoS	Republic of Sudan
RoSS	Republic of South Sudan
SHA	Shareholders' Agreement
[…]	[…]

[…]	[…]
SPLM, SPLA, SPLM/A	Sudan People’s Liberation Movement, Sudan People’s Liberation Army, together SPLM/A
SSIA	Southern Sudan Investment Authority
[…]	[…]
Sudapet Interests	The Interests of Sudapet under the EPSAs in the territory of South Sudan
T1/1/1 [Day/page/line]	Transcript of the hearing on jurisdiction and merits held in London, United Kingdom from 29 June 2015 through 10 July 2015 and on 26 and 27 October 2015
Transitional Constitution	Transitional Constitution of the Republic of South Sudan which came into force on 9 July 2011
Transition Agreement	Transition Agreement on Productions Operations 2 entered into on 13 January 2012
VCSP/1983 Vienna Convention	Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, 7 April 1983
Wealth Sharing Agreement/WSA	Chapter III of the Comprehensive Peace Agreement
[…]	[…]

EXCERPTS

Sudapet Company Limited v. Republic of South Sudan (ICSID Case No. ARB/12/26)

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") on the basis of the Southern Sudan Investment Promotion Act 2009 (the "IPA"),[1] which entered into force on 6 April 2009,[2] and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "ICSID Convention"). Claimant raises allegations *inter alia* of Respondent's allegedly unlawful expropriation of Claimant's investment in oil exploration and production operations in South Sudan and Respondent's allegedly discriminatory conduct towards Claimant.

2. Claimant is Sudapet Company Limited and is hereinafter referred to as "Sudapet" or "Claimant." Claimant is a company organised and registered in Khartoum, in the Republic of the Sudan ("Sudan"), under the laws of Sudan.

3. Respondent is the Republic of South Sudan and is hereinafter referred to as "South Sudan" or "Respondent."

4. Claimant and Respondent are hereinafter collectively referred to as the "Parties." The Parties' respective representatives and their addresses are listed above on page (i).

II. SUMMARY OF PROCEDURAL HISTORY

5. On 18 July 2012, Sudapet Company Limited filed with ICSID a request for arbitration dated 16 July 2012 against the Republic of South Sudan (the "Request" or "RFA").

6. On 29 August 2012, the Secretary-General of ICSID registered the Request, as supplemented by letters of 8 and 26 August 2012, in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

[1] C-1.

[2] The Southern Sudan Gazette, Vol.2 - No.001, 15 October 2009, C-107; Memorial, ¶ 128.

7. By letter of 15 September 2012, the Minister of Justice of the Republic of South Sudan informed ICSID that Respondent was represented by the law firm of Skadden, Arps, Slate, Meagher & Flom (UK) LLP in this proceeding.

8. In accordance with Article 37(2)(a) of the ICSID Convention, the Parties agreed that the Tribunal should consist of three arbitrators and that each party should nominate one arbitrator, with the two party-nominated arbitrators to appoint the president of the Tribunal jointly within a period of 60 days after the nomination by Respondent of its party-appointed arbitrator.[3]

9. The Tribunal is composed of Professor David A. R. Williams QC, a national of New Zealand, appointed by Claimant;[4] Dr. Gavan Griffith QC, a national of Australia, appointed by Respondent;[5] and Professor Campbell McLachlan QC, a national of New Zealand, President, appointed by agreement of the co-arbitrators.[6]

10. On 22 January 2013, the Secretary-General, in accordance with Rule 6(1) of the Arbitration Rules, notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed constituted on that date. Mr. Paul-Jean Le Cannu, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

11. By agreement between the Tribunal and the Parties, the first session was scheduled for 22 April 2013 in London.

12. By letter dated 13 March 2013, Respondent indicated that the Governments of Sudan and South Sudan had agreed to an Implementation Matrix signed on 12 March 2013, which provides *inter alia* that: "(i) the current ICSID proceedings will be suspended for 60 days; (ii) the two States will discuss the claims asserted in this arbitration 'with the aim of reaching an agreement'; and (iii) the States will 'establish a joint committee that will be responsible for developing proposals for a resolution of the Sudapet issue.'" A copy of the Implementation Matrix was attached to Respondent's letter. Respondent requested in its letter Claimant's confirmation that these

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[3] Request for Arbitration, ¶ 52; letter from Respondent dated 15 September 2012.

[4] By letter dated 28 September 2012 and received by ICSID on 12 October 2012, Claimant appointed Mr. David A. R. Williams QC who accepted his appointment on 19 October 2012.

[5] By letter dated 27 November 2012, Respondent appointed Dr. Gavan Griffith QC who accepted his appointment on 29 November 2012.

[6] By email of 11 January 2012, Dr. Gavan Griffith QC, the arbitrator appointed by Respondent, informed ICSID that Mr. David A. R. Williams QC, the arbitrator appointed by Claimant, and himself had agreed to appoint Professor Campbell McLachlan QC as President of the Tribunal. Professor McLachlan accepted his appointment on 22 January 2013.

proceedings were to be suspended on that basis, so that the Parties could present this as a joint proposal to the Tribunal.

13. By email dated 14 March 2013, the Tribunal requested Claimant to inform it by close of business in London on 18 March 2013 of Claimant's position as regards any suspension of the proceedings.

14. By letter dated 18 March 2013, Claimant confirmed its understanding that an agreement had been reached between the Republic of Sudan ("RoS" or "Sudan") and Respondent as set out in the Implementation Matrix, and indicated that it was prepared to consent to the suspension of the arbitration for the periods set forth in Sections 10.11 through 10.13 of the Implementation Matrix, with the proceedings to resume absent any resolution of the dispute. Claimant further proposed that arrangements for the first session be put on hold and that discussions concerning the venue and date for the first session be resumed following the end of the suspension period, if necessary. Claimant stated that its agreement to the suspension period was without prejudice to its claims in the arbitration and all rights were accordingly reserved.

15. In light of the Parties' agreement, the Tribunal decided on 19 March 2013 to suspend the proceedings until 15 May 2013, vacating the date then fixed for the first session. Following further correspondence between the Parties and the Tribunal on 13-14 May 2013, the Tribunal agreed to extend this period until 15 June 2013.

16. The proceedings resumed on 15 June 2013, following which the date for the first session was re-fixed by agreement between the Parties and the Tribunal for 17 July 2013 in London with the President of the Tribunal joining the session by video. Further to the Tribunal's invitation, the Parties submitted on 12 July 2013 their comments on the Tribunal's Draft Procedural Order No. 1 circulated on 2 July 2013.

17. The Tribunal held a first session with the Parties on 17 July 2013 at the International Dispute Resolution Centre, London, United Kingdom. The Parties confirmed that the Tribunal was properly constituted and that no party had any objection to the appointment of any Member of the Tribunal. They agreed *inter alia* that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English and that the place of proceeding would be London. The Parties agreed on a schedule for the jurisdiction and liability phase of the proceedings, including production of documents. The agreement of the Parties and the Tribunal's decisions were embodied in Procedural Order No. 1, which was signed by the President and circulated to the Parties by the Secretary on 30 July 2013.

18. By email of 2 August 2013, Claimant submitted comments on Procedural Order No. 1. Upon the Tribunal's invitation, Respondent submitted its comments on 14 August 2013 in response to Claimant's email of 2 August 2013. Respondent stated that it had no objection to Claimant's proposed amendments to Procedural Order No. 1, with the exception of one issue as to which it proposed a further amendment. On the same date, Claimant confirmed its agreement to Respondent's proposed amendment. A revised Procedural Order No. 1 ("PO1") was issued and circulated on 30 August 2013.

19. In accordance with the schedule set forth in PO1, Claimant filed its Memorial on jurisdiction and the merits on 13 December 2013, along with supporting documentation.

20. On 24 January 2014, Respondent filed its requests for production of documents, along with Claimant's objections to production and Respondent's replies to Claimant's objections.

21. On 13 February 2014, the Tribunal issued Procedural Order No. 2 with a Redfern schedule containing its ruling on Respondent's requests of 24 January 2014. By email of 6 March 2014, Claimant informed the Tribunal that it had agreed with Respondent to extend the date for production of the documents by two weeks (that is, until 20 March 2014). It further informed the Tribunal that where possible it would produce documents on a rolling basis in the interim.

22. By letter dated 5 June 2014, Respondent requested from the Tribunal a six-week extension of time for the filing of its Counter-Memorial due to events in South Sudan that impaired Respondent's ability to prepare its defence and accompanying evidence. By agreement between the Parties and the Tribunal on 6 June 2014, the timetable for written pleadings was amended as follows:

    (a) Respondent's Counter-Memorial: 23 July 2014;

    (b) Claimant's Reply: 15 December 2014;

    (c) Respondent's Rejoinder: 31 March 2015.

23. In accordance with the adjusted timetable, Respondent filed its Counter-Memorial on jurisdiction and the merits on 23 July 2014, with supporting documentation.

24. On 24 September 2014, following an extension of time agreed between the Parties and the Tribunal, Claimant filed its requests for production of documents, along with Respondent's

responses and objections to production and Claimant's replies to Respondent's responses and objections.

25. On 17 October 2014, the Tribunal issued Procedural Order No. 3 ("PO3") with a Redfern schedule containing its ruling on Claimant's requests of 24 September 2014.

26. By email dated 21 December 2014, Claimant notified the Tribunal that the Parties had agreed to an extension of time for the filing of Claimant's Reply (until 30 December 2014) and Respondent's Rejoinder (until 15 April 2015), which extension the Tribunal granted on 24 December 2014.

27. On 30 December 2014, Claimant filed its Reply on jurisdiction and the merits, along with supporting documentation.

28. By letter dated 1 April 2015, Respondent requested from the Tribunal a 15-day extension of time to file its Rejoinder (until 30 April 2015) owing to the security situation in Juba and its impact on Respondent's preparation of its Rejoinder. Upon the Tribunal's invitation on 1 April 2015, Claimant provided its response to Respondent's extension request on 3 April 2015. By letter dated 6 April 2015, the Tribunal decided to allow a ten-day extension for Respondent to file its Rejoinder, i.e. until 27 April 2015 close of business (London time), in accordance with ICSID Administrative and Financial Regulation 29(2).

29. On 27 April 2015, Respondent filed its Rejoinder on jurisdiction and the merits, along with supporting documentation.

30. By letter dated 7 May 2015, Claimant requested that the Tribunal strike from the record of this arbitration the expert report of […] and the expert legal opinion of […], which were filed by Respondent with its Rejoinder, in exercise of its power under ICSID Arbitration Rule 34(1), together with the paragraphs in the Rejoinder that cite or rely on the aforementioned expert report and expert legal opinion.

31. On 13 May 2015, the Tribunal invited Respondent to submit its comments on Claimant's request of 7 May 2015. On the same date, the Tribunal invited the Parties to confer with regard to the organization of the hearing on jurisdiction and liability, in the light of its own indications there set out. Respondent submitted its comments on Claimant's request on 15 May 2015. Claimant provided its response on 20 May 2015.

32. On 21 May 2015, the Tribunal issued Procedural Order No. 4 ("PO4") containing its decision on Claimant's request. […]

33. By letter of 25 May 2015, Claimant submitted comments on the Tribunal's letter of 13 May 2015 and PO4. Following a further exchange of comments between the Parties at the Tribunal's invitation, the Tribunal provided further directions as to the organization of the hearing in light of the Parties' comments on 1 June 2015.

34. By letters of 1 June 2015, each Party notified the other and the Tribunal that they each desired to cross-examine all of the other Party's fact witnesses and legal experts at the hearing. Only Claimant's witness, […], required Arabic translation at the hearing, all other witnesses being content to give their evidence in English.

35. By letter of 10 June 2015, Claimant outlined the Parties' points of agreement and disagreement regarding the organisation of the hearing, and requested that the Tribunal confirm the points of agreement and decide on the points of disagreement during the pre-hearing conference call. By letter of 10 June 2015, Respondent provided its positions on the points of contention.

36. On 11 June 2015, the President of the Tribunal held a pre-hearing organizational meeting by telephone conference with the Parties. By letter of 11 June 2015, ICSID summarised the President's requests and outlined the deadlines for the Parties to submit the following: the order in which fact witnesses would be called, a completed schedule for the hearing based on the draft circulated by the President on 10 June 2015, any joint report of legal experts, consolidated indices of their exhibits and legal authorities, and presentation bundles, if desired.

37. By email of 15 June 2015, in accordance with the President's request of 11 June 2015, both Parties submitted the order of their fact witnesses for the hearing.

38. By letter of 15 June 2015, Claimant requested an extension from 18 June 2015 until 23 June 2015 to file an additional written submission on the expert report of Mr […], as required by PO4. Following an exchange of submissions by the Parties, the President ruled on 17 June 2015 that Claimant's request was granted, on condition that it provide a summary of the submission by 20 June 2015.

39. By email of 17 June 2015, Claimant provided an indicative hearing schedule agreed upon by the Parties. By email of the same date, Respondent confirmed its agreement to the schedule.

40. By letter of 19 June 2015, Respondent requested the Tribunal decide on whether English translations of Arabic documents already on the record could be submitted in advance of the hearing, as provided for in Paragraph 10.1 of PO1.[7] Following both Parties' submissions on this request, the Tribunal decided on 21 June 2015 to allow Respondent to file translations by 24 June 2015, with the provision that Claimant was granted leave to apply at the hearing if it took any issue with Respondent's translations.

41. By email of 20 June 2015, Claimant submitted its Summary of Points in Dispute Regarding Expert Report of […] and Related Written Submissions.

42. On 22 June 2015, […] and […] (as to Sudanese law), and […] and […] (as to South Sudanese law) filed joint expert reports. On 23 June 2015, Claimant submitted the expert report of […] in response to the report of […].

43. On 23 June 2015, Claimant submitted its Additional Written Submission on the report of […]. By letter of 25 June 2015, Respondent objected to Claimant's Additional Written Submission on the grounds that it relied on new documentary evidence, legal authorities, and arguments. Following from this, Respondent applied that it be allotted an additional 40-minute period at the hearing to address the submission, and that its witnesses be allowed to address the issues raised in a rebuttal, to be submitted with additional evidence and legal authorities. By letter of 25 June 2015, Claimant listed its objections to Respondent's application. On 26 June 2015, the Tribunal rejected Respondent's request for additional time in oral argument, but gave leave for Respondent to submit additional evidence, provided it was in direct response to new evidence introduced by Claimant.

44. By letter of 23 June 2015, Respondent informed the Tribunal of its difficulties in obtaining British visas for a number of its witnesses. By letter of 24 June 2015, the President accepted that alternative arrangements would have to be made for witnesses in the event that they were unable to obtain visas for the UK prior to the hearing. At the same time, the President sought the assistance of the United Kingdom Foreign & Commonwealth Office in order to expedite the processing of visas to enable witnesses to attend to give evidence in person in London, which assistance is here gratefully acknowledged. Following a dispute between the Parties and the Tribunal's ruling thereon

[7] PO1, ¶ 10.1: "English is the procedural language of the arbitration. Documents filed in any other language must be accompanied by a translation into English. If the document is lengthy and relevant only in part, it is sufficient if only the relevant parts are translated, provided that the Tribunal may require a fuller or a complete translation at the request of any party or upon its own initiative. Translations need not be certified, unless there is a dispute as to the content of a translation provided and the party disputing the translation specifically requests a certified version."

of 26 June 2015, the Tribunal and the Secretariat put in place alternative arrangements to enable the taking of evidence if necessary by video from the World Bank's Nairobi Office. However, in the event all witnesses obtained the necessary visas and attended in person before the Tribunal in London to give their evidence.

45. By letter of 28 June 2015, Claimant sought to introduce two additional pieces of evidence that it stated it had received on the same date. On 29 June 2015, these documents were added to the record by agreement of Respondent.

46. A hearing on jurisdiction and the merits took place at the International Dispute Resolution Centre, London, United Kingdom, from 29 June through 10 July 2015 (the "Hearing"). In addition to the Members of the Tribunal and the Secretary, present at the Hearing were:

For Claimant:

Counsel:	
Mr Alexander Layton QC	20 Essex Street Chambers
Mr Lucas Bastin	Quadrant Chambers
Ms Michelle Bradfield	Dentons UKMEA LLP
Mr James Langley	
Ms Manal Tabbara	
Ms Catherine Gilfedder	
Parties:	
Mr Adil Elmutasim	Sudapet Company Limited
Mr Abdien Gailani	
Mr Salih Gafar	
Observer:	
Ms Belinda McRae	Pupil barrister, 20 Essex Street Chambers

For Respondent:

Counsel:	
Ms Karyl Nairn QC	Skadden, Arps, Slate, Meagher & Flom (UK) LLP

Mr Bruce Macaulay	
Mr Daniel Gal	
Mr David Herlihy	
Ms Sara Nadeau-Séguin	
Mr Ahmed Abdel-Hakam	
Mr Amarjeet Johal	
Ms Carla Alves	
Ms Kirsty Pappin	
Ms Vanessa Jimenez	Independent Legal & Policy Advisor

Parties:

Minister Stephen Dhieu Dau Ayik Monythiec	Minister of Petroleum and Mining
Mr Gieth Abraham Dauson Thon	Executive Director, Office of Minister of Petroleum and Mining
Mrs Julia Akur Ajuoi Magot	Legal Advisor, Ministry of Petroleum and Mining

47. The following persons were examined:[8]

On behalf of Claimant:

Witnesses:

[…]	[…]
[…]	[…]
[…]	[…]

Experts:

[…]

[…]

[…]

On behalf of Respondent:

Witnesses:

[8] The name of the short form of address for each witness is underlined.

[…]	[…]
[…]	[…]
[…]	[…]
[…]	[…]
[…]	[…]
[…]	[…]
[…]	[…]
[…]	[…]
[…]	[…]

Experts:

[…]

[…]

Observer:

[…]

48. At the conclusion of the Tribunal's morning sitting on 9 July 2015, being Day 9 of the Hearing, both Parties confirmed that they had concluded the evidence to be advanced in these proceedings.[9]

49. The Tribunal had indicated on Day 5 of the Hearing that it intended to make provision for post-hearing briefs on specific questions of law to be posed by the Tribunal.[10] It provided a copy of those questions to the Parties on Day 8 (the "Tribunal's Questions").[11] At the same time, it invited the Parties to consider whether they would wish to have an opportunity to address the Tribunal in writing by way of (page-limited) post-hearing briefs in addition to addressing the specific questions posed by the Tribunal. The Parties agreed the following day, prior to the commencement of oral closings, that post-hearing briefs on legal questions (not limited to the Tribunal's specific questions) would be useful, and the President confirmed that such an opportunity would be provided.[12]

[9] T9/100/12-18.

[10] T5/42/5-8.

[11] T8/270/20 – 271/11.

[12] T9/101/4 – 102/15.

50. During the course of the afternoon sitting on 9 July 2015, both Parties commenced their oral closings. In the course of Respondent's oral closing, counsel for Claimant intimated that he wished to apply to strike out certain parts of Respondent's closing submissions. [13]

51. At that stage, the Tribunal directed that Claimant file a written Application by 9 am the following morning, which would be considered following the conclusion of Respondent's closing submissions. Claimant filed its written Application (the "Application") by 9 am on 10 July 2015. Later that morning, after the completion of Respondent's oral closing (save for any surebuttal), the Tribunal adjourned to determine the procedural course for the disposition of the Application.

52. The Tribunal gave the following directions on the Application:

(a) Claimant to have until 5pm on 10 July 2015 to file a revised Application to constitute a complete statement of the matters on which it makes its Application;

(b) Respondent to have until 5pm on Wednesday 15 July 2015 to file written submissions in response;

(c) Claimant to have until 5pm on Friday 17 July 2015 to reply to those submissions;

(d) Thereafter the Tribunal would rule on the Application;

(e) The Tribunal would then also give further consideration to the directions that should be made consequent upon its ruling on the Application, giving the parties an opportunity to be heard on its proposed directions;

(f) It adjourned the hearing, fixing the dates of 26 and 27 October 2015 as dates for completion of the hearing on jurisdiction and the merits.[14]

53. The Parties filed written submissions in accordance with this timetable.[15]

54. By email of 23 July 2015, Respondent informed the court reporter that the Parties were unable to agree on a statement made by […] on Day 3 of the Hearing. On 1 August 2015, the President ruled on the disputed sentence pursuant to the provisions of paragraph 17.4 of PO1.

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[13] T9/289/11 – 291/8.

[14] T10/27/17 – 34/25.

[15] In addition to the ordered pleadings, Respondent also submitted a further letter dated 17 July 2015, to which, by letter dated 31 July 2015, the Tribunal permitted Claimant to respond by Monday 3 August 2015. The Tribunal based its decision primarily on the submissions that it directed the Parties to submit, but also considered the additional correspondence.

55. On 4 August 2015, the Tribunal issued Procedural Order No. 5 ("PO5") regarding Claimant's strike-out application. […]

56. The Tribunal proposed to the Parties a procedural timetable in order to accommodate this additional pleading prior to the dates fixed for the resumption of the Hearing on 26 and 27 October 2015, and invited the Parties' observations on the timetable. By email of 10 August 2015, Respondent provided its comments on the Tribunal's proposed further directions. By letter of 14 August 2015, Claimant provided its submission on the Tribunal's proposed further directions, including a request that the Tribunal amend a paragraph in PO5 and a request to adjourn the dates for the resumed Hearing.

57. On 26 August 2015, the Tribunal issued Procedural Order No. 6 ("PO6") […].

58. By letter of 2 September 2015, Claimant requested that the procedural timetable established in PO6 be altered, to which request Respondent replied by letter of 7 September 2015. By letter of 9 September 2015, the Tribunal rejected Claimant's proposed changes to the procedural timetable and ruled that the schedule as set out in PO6 was maintained.

59. Claimant did not avail itself of the opportunity provided by the Tribunal in paragraph 1 of PO6 to apply to adduce additional evidence in relation to the admission point. Both Parties filed written closing briefs.

60. The resumed Hearing on jurisdiction and the merits took place at the International Dispute Resolution Centre, London, United Kingdom, on 26 and 27 October 2015 for the purpose of concluding oral closings. In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the Hearing were:

61. For Claimant:

Counsel:

Professor Stefan Talmon	20 Essex Street Chambers
Mr Lucas Bastin	Quadrant Chambers
Ms Michelle Bradfield	Dentons UKMEA LLP
Mr James Langley	
Ms Catherine Gilfedder	
Ms Manal Tabbara	

For Respondent:

Counsel:	
Ms Karyl Nairn QC	Skadden, Arps, Slate, Meagher & Flom (UK) LLP
Mr Bruce Macaulay	
Ms Sara Nadeau-Séguin	
Mr Ahmed Abdel-Hakam	
Ms Paula Henin	
Ms Carla Alves	
Mr Gareth Rund	
Ms Vanessa Jimenez	Independent Legal & Policy Advisor
Parties:	
Mrs Julia Akur Ajuoi Magot	Legal Advisor, Ministry of Petroleum and Mining

62. At the conclusion of the Hearing, both Parties confirmed that they did not maintain any objection to the procedure adopted by the Tribunal in the proceedings to date.[16] The Tribunal then fixed dates for finalising the transcript and for submissions on costs.

63. The Parties filed their submissions on costs on 24 November 2015. By letter of 26 November 2015, ICSID informed the Parties of the Tribunal's request for more detailed breakdowns of their claimed costs, and invited the Parties to provide itemised lists by 10 December 2015. On 10 December 2015, each Party filed a supplemental submission on costs. By letter of 15 March 2016, Respondent submitted a correction to its submission of 10 December 2015.

64. The proceeding was closed on 30 September 2016.

III. FACTUAL BACKGROUND

A. The broader context: the Comprehensive Peace Agreement ("CPA")

65. […]

B. Oil resources in Sudan and South Sudan

[16] T12/140/24–141/5.

69. […]

C. The contractual structure

72. […]

(1) The Exploration and Production Sharing Agreements (“EPSAs”)

77. […]

(2) Joint Operating Agreements (“JOAs”)

83. […]

(3) The Shareholders’ Agreements (“SHAs”)

84. […]

(4) The Pipeline Agreements (“COPAs”)

86. […]

(5) The Transportation Agreements (“COTAs”)

89. […]

D. The pre-secession inter-State negotiations over oil resources

91. […]

E. The secession of South Sudan

94. […]

F. The post-secession inter-State negotiations over oil resources

99. […]

IV. SUMMARY OF THE PARTIES' CLAIMS AND RELIEFS

A. Claimant's request for relief

115. In its Memorial, Claimant requested that the Tribunal render an award:

> (a) declaring that the Respondent has breached the IPA, including Articles 33(4), 33(5) and 34 of the IPA;
>
> (b) further or alternatively, declaring that the Respondent has breached the international law obligations that it owed to the Claimant;
>
> (c) ordering the Respondent to pay the costs of the arbitration, including all the fees and expenses of ICSID and the Tribunal and all the legal costs and expenses incurred by the Claimant at the interest rate of LIBOR + 4 per cent; and
>
> (d) ordering such other and further relief as the Tribunal deems appropriate.[745]

116. Recalling the Parties' agreement to bifurcate the quantum phase of the proceeding from the jurisdictional and liability phases, Claimant also "reserved its rights in full to request relief in the form of damages and/or any other appropriate relief during the quantum phase of this arbitration."[746]

B. Respondent's request for relief

117. In its Counter-Memorial, Respondent requested that the Tribunal render an award:

> (a) declaring that it lacks jurisdiction to determine the claims presented in Sudapet's Request for Arbitration;
>
> (b) in the alternative, declaring that South Sudan did not expropriate the Sudapet Interests; or
>
> (c) in the further alternative, declaring that Sudapet is not entitled to any compensation or damages on any basis pleaded in the Memorial, for the reasons explained in Parts V-XI of this Counter-Memorial; and
>
> (d) directing Sudapet to pay all costs of and associated with this arbitration including South Sudan's attorneys' fees and expenses, experts' fees and expenses (if required

[745] Memorial, ¶ 265; Reply, ¶ 605.[746] Memorial, ¶ 266; Reply, ¶ 606.[747] Counter-Memorial, ¶ 380; Rejoinder, ¶ 429.[748] Rejoinder, ¶ 284.

[746] Memorial, ¶ 266; Reply, ¶ 606.[747] Counter-Memorial, ¶ 380; Rejoinder, ¶ 429.[748] Rejoinder, ¶ 284.

in due course), witnesses' expenses, and the fees and expenses of the Tribunal and the Centre, together with post-award interest on all such costs so awarded until the date of payment.[747]

V. SUMMARY OF THE PARTIES' ARGUMENTS

A. Effect of State succession on property that Sudapet claims was expropriated

(1) Respondent's position

118. […]

a. Sudapet can be "equated" to Sudan for purposes of this arbitration

119. […]

b. Sudapet's interests under the EPSAs are State property and part of the "Government take"

130. […]

c. Sudapet's EPSA interests vested in South Sudan upon secession: Respondent's vesting theories

143. […]

(2) Claimant's position

163. […]

a. There is no close connection between Sudapet and Sudan

165. […]

b. Sudapet's EPSA interests are not State property

175. […]

[747] Counter-Memorial, ¶ 380; Rejoinder, ¶ 429.[748] Rejoinder, ¶ 284.

c. **Respondent's vesting theory fails**

186. […]

B. Jurisdiction

203. […]

(1) Jurisdiction *ratione materiae*

a. **Respondent's argument that Sudapet made no "foreign" investment in South Sudan, as the ICSID Convention requires**

207. […]

b. **Respondent's argument that the Sudapet Interests did not involve contribution and risk so as to be an "investment" under the IPA or the ICSID Convention**

209. […]

c. **Respondent's argument that the IPA is subordinate to the Constitution, which vested the Sudapet Interests in South Sudan on 9 July 2011**

227. […]

(2) Jurisdiction *ratione personae*

a. **Respondent's argument that Sudapet is not a qualifying "investor" under the IPA**

229. […]

b. **Respondent's argument that Sudapet is not a national of another Contracting State within the meaning of the ICSID Convention**

245. […]

C. Liability

251. […]

(1) **Applicable Law**

a. **Claimant's position**

252. […]

b. **Respondent's position**

257. […]

(2) **Respondent's alleged violation of its obligations under the IPA**

a. **Respondent's alleged unlawful discrimination against Claimant in violation of Section 33(5) of the IPA**

261. […]

b. **Expropriation**

269. […]

(3) **Minimum standard of treatment under international law**

a. **Claimant's position**

285. […]

b. **Respondent's position**

293. […]

(4) **Unjust enrichment**

a. **Claimant's position**

303. […]

b. **Respondent's position**

305. […]

(5) Acquiescence, waiver and estoppel

a. Claimant's position

306. […]

b. Respondent's position

310. […]

(6) Respondent's reservation of a right of counter-claim or set-off

a. Respondent's position

314. […]

b. Claimant's position

315. […]

VI. THE TRIBUNAL'S ANALYSIS

A. Introduction: the centrality of State succession

317. The present case raises for decision one central issue: the scope and application of the law of State succession to assets in the context of a claim for expropriation of those assets brought by the national oil company of the predecessor State against the successor State pursuant to domestic investment legislation (the IPA) adopted prior to independence within the territory of the predecessor State.

318. As the preceding summary of the Parties' arguments amply demonstrates, substantially all of the issues of both jurisdiction and merits raised by the Parties stand or fall on this key question. Claimant founds its claim upon a straightforward invocation of the offer to arbitrate extended by Southern Sudan to foreign investors under the IPA. It maintains that it meets all of the jurisdictional requirements of Article 25 of the ICSID Convention and of the IPA. To this, Respondent's primary answer is that Claimant's investment was neither private nor foreign. Prior to independence the investment was domestic. Upon independence, Claimant's interests in South Sudan vested by operation of law in Respondent. Accordingly: Claimant made no investment; was not an investor;

and is not a national of another Contracting State–being rather "an extension of the State of Sudan."[748]

319. On the merits, Claimant's principal claim is one of direct expropriation. It claims that Respondent took the Sudapet Interests in South Sudan without compensation by means of an executive order: Presidential Decree No 27/2011 of 8 November 2011.[749] This, it says, was a violation of the protection from expropriation without compensation enshrined in s 34 IPA. It adds that that this Decree unlawfully discriminated against it vis-à-vis the FOCs, whose assets Respondent did not expropriate, in violation of s 33(5) IPA. It maintains that this taking was also a breach of the minimum standard of treatment under international law, not only because it was expropriatory, but also because it failed to protect its legitimate expectations, failed to provide a stable legal framework, and was carried out in an arbitrary and discriminatory manner that also violated basic tenets of due process. It further claims that Respondent has been unjustly enriched to the extent of its acquisition without compensation of the Sudapet Interests.

320. In each case, Respondent's primary defence to these claims is that the assets of Sudapet vested in it by operation of law upon the independence of South Sudan on 9 July 2011. As a consequence, Respondent maintains there could be no expropriation, since the assets were, from that date, not the property of Claimant and therefore could not be taken. There was no discrimination, because Claimant's assets, being State property, were not in a like situation to the private interests of the FOCs. If (which Respondent denies) the minimum standard of treatment is applicable here at all and has the content for which Claimant contends, it was not breached, since, upon South Sudan's independence Claimant could have no legitimate expectation that it would continue to hold its interests in the South. Rather Respondent submits that the record demonstrates the reverse: that the Sudapet Interests in the South would not be maintained, but would be subject to State succession. It denies that there was any unjust enrichment since the property belonged on secession to it and not to Sudapet. Respondent denies that any of its conduct, before or after secession, gave Claimant any legal ground on which it might properly rely to the contrary.

321. At each point, the principal issue that divides the Parties, which they submit for the Tribunal's decision in the present Award, is therefore the effect of Respondent's secession as an independent State on 9 July 2011 upon its right to succeed to the Sudapet Interests in the territory of the South.

[748] Rejoinder, ¶ 284.

[749] C-26.

322. Although other issues of State succession have arisen previously in other investment arbitrations (in particular questions of State succession to treaties),[750] the Parties did not refer the Tribunal (and nor is the Tribunal otherwise aware) of any directly comparable prior issue that has arisen for decision, nor of any directly comparable State practice on the retention of ownership of property in the successor State by a State-owned company of the predecessor State.[751]

323. This is not to say, however, that the question is one of first impression. Particularly in response to the Tribunal's Questions of 8 July 2015,[752] the Tribunal has had the benefit of a very full citation of authority and helpful submissions from counsel for both Parties in writing in their post-hearing briefs and orally on the applicable general principles of State succession and their application in the present case.

324. In considering this issue it is important to view it in its full factual as well as legal context. Such a contextual enquiry is particularly important in the field of State succession, since "no general rule can be laid down concerning all the cases in which a succession occurs, and each needs to be examined separately […]. Furthermore, state practice in much of this area has been variable, often dependent upon the very special circumstances of particular cases, and based on *ad hoc* agreements [...]."[753]

325. In order to analyse the issue, the Tribunal proceeds first to make findings, in section B, on the evidence of fact concerning the negotiations for secession. It will then be possible to decide a series of questions of law that necessarily arise on those facts for decision: in section C, the legal rules applicable to issues of State succession; in section D, the application of those rules to the Sudapet Interests; and, in section E, the consequences of these findings for the questions of jurisdiction and liability.

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[750] *Sanum Investments Limited v Laos* (Award on Jurisdiction) UNCITRAL, PCA Case No 2013-13 (13 December 2013); P. Dumberry, "An uncharted question of state succession: are new states automatically bound by the bits concluded by predecessor states before independence?" (2015) 6 JIDS 74; C. Tams, "State succession to investment treaties: mapping the issues" (2016) 31 ICSID Review–FILJ.

[751] T11/34/24–35/18: THE PRESIDENT: In your review of the state practice, have you found, and I pose this question to both parties, any example of state practice on state succession in which a state-owned company of the predecessor state has retained ownership of property in the successor state? […]

PROFESSOR TALMON: I have tried very hard to find such an example myself, I haven't come across any […]."

[752] T8/270/20–271/11, corrected on 3 August 2015 ("Tribunal's List of Issues").

[753] R. Jennings and A. Watts (eds), *Oppenheim's International Law* vol 1 "Peace" (9th edn, 1992), 210, CLA-31.

B. Findings of fact as to the Interim Period and the Secession Negotiations

(1) The Interim Period under the Comprehensive Peace Agreement: 2004–2010

326. […]

(2) The Pre-Secession Negotiations: January–8 July 2011

335. […]

a. First round: 1-6 March 2011 (Bishoftu)

348. […]

b. Second round: 9-11 April 2011 (Bishoftu)

358. […]

c. Third round: 8–9 May 2011 (Khartoum)

369. […]

d. Fourth round: 19–21 May 2011 (Bishoftu)

372. […]

e. Fifth round: 22–24 June 2011 (Addis Ababa)

380. […]

C. Rules of law applicable to State succession

389. In order to determine the rules of law applicable to the issue of State succession before it, the Tribunal proceeds first in section (1) to determine the applicable choice of law rules and then in section (2) to identify the source and content of the relevant rules of international law.

(1) **Applicable choice of law rules**

390. The first matter that the Tribunal must determine is: which rules of law are applicable to the issue presently before it, namely the question whether the Respondent succeeded to the Sudapet Interests in the South upon independence? The preliminary step in answering that question is to determine the relevant choice of law rules that the Tribunal is to apply. This requires reference first to Article 42(1) of the ICSID Convention, which sets the parameters for the Tribunal's choice of law exercise. Then the Tribunal will consider the positions taken on this question in the Parties' pleadings, including notably their post-hearing briefs in response to the Tribunal's Questions. The Tribunal then presents its conclusions in the light of these considerations and the material facts decided above.

a. **Article 42(1) ICSID Convention**

391. Article 42(1) of the ICSID Convention provides:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

392. This provision sets the parameters within which the choice of law process applicable by an arbitral tribunal in ICSID proceedings must operate. It is not in itself sufficient to operate as a choice of law rule. It serves to confirm that the tribunal is competent to apply the stipulated sources of law, rather than prescribe the connecting factors necessary to determine the law applicable to any given issue in a case before an ICSID tribunal.

393. The structure and content of Article 42(1) nevertheless clarify a number of points of relevance to the present enquiry.

394. The first sentence of Article 42(1) importantly clarifies that the Tribunal is empowered to "decide a dispute in accordance with such *rules of law* as may be agreed by the parties." The use of this phrase confirms that the framers of the ICSID Convention embraced the principle of party autonomy, empowering the parties to choose the rules of law applicable to their dispute. Where the parties have made such a choice, the tribunal is bound to give effect to it.

395. Such a choice need not be made by contract. It may be based upon a provision in a treaty or legislation. It may also be implicit: inferred from the facts and circumstances of the relationship between the Parties.[815]

396. The references to "rules of law" imports a wider range of choice for the parties than would have been the case were the framers of the Convention to have limited the available range of choice to the choice of a *legal system*. This wording allows the parties to agree on a partial choice of law, and in particular to select specific rules from a system of law.

397. Whether under the first or the second sentence, the choice of law process envisaged by Article 42(1) requires the Tribunal to determine the law applicable to the particular *issue* that arises for decision. It is not limited to selecting a legal system applicable to the whole of the dispute. The language of Article 42(1) necessarily so requires: in the reference to the plural "*rules* of law" in the first sentence and in the requirement in the second sentence to apply both the law of the Respondent State (including its conflicts rules) and "such *rules* of international law as may be applicable."

398. The Tribunal must therefore proceed by characterising the issue or issues before it and then determining the choice of law rules applicable to the particular issue. The *ad hoc* Committee in *MTD v. Chile* confirmed that such an approach is required, stating (in the context of a BIT claim):

> Whether the applicable law here derived from the first or second sentence of Article 42(1) does not matter: the Tribunal should have applied Chilean law to those questions which were necessary for its determination and of which Chilean law was the governing law. At the same time, the *implications* of some issue of Chilean law for a claim under the BIT were for international law to determine. In short, both laws were relevant.[816]

399. Aron Broches, who was Legal Counsel to the World Bank and a principal architect of the ICSID Convention, commented, when considering the circumstances in which international law might have to be applied by a tribunal, that one such case would be "[...] where the subject-matter *or issue* is directly regulated by international law."[817]

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[815] C. Schreuer et al., *The ICSID Convention: A Commentary,* (2nd edn, Cambridge UP, 2009), ¶¶ 42.23, 42.62, CLA-130.

[816] *MTD Equity Sdn Bhd and MTD Chile S.A. v. Republic of Chile* (Decision on Annulment) ICSID Case No ARB/01/7 (21 March 2007) 13 ICSID Rep 500, ¶ 72, emphasis in original.

[817] A. Broches (1972) 136 *Recueil des Cours* 392, CLA-87, emphasis added.

b. **The Parties' pleadings**

400. The Parties devote considerable attention to issues of applicable law in their written pleadings.[818] Claimant argues generally that, by virtue of Article 42(1), "public international law applies as an autonomous body of rules on which the Tribunal is entitled to decide this dispute, alongside South Sudanese law."[819] Respondent argues in its written pleadings on liability that the IPA, as a domestic statute of South Sudan, represents a choice of the law of that State for purposes of the first sentence of Article 42(1).[820]

401. Both Parties nevertheless accept, in response to the Tribunal's Questions, that the law applicable to the issue of State succession could be addressed as a question distinct from the law applicable to other issues in the arbitration. In so doing, they both accept a significant role for international law, whilst also emphasising the role of their preferred system of national law.

402. The Tribunal asked the Parties, in their post-hearing briefs, to consider specifically *inter alia* what law governed (a) the division of the Government share between the RoS and the RoSS on 9 July 2011 (the date of the independence of the RoSS); and (b) the determination of Sudapet's rights to a share of the profit oil.

(i) <u>*Claimant*</u>

403. Claimant submits that the international law of succession applies to the division of the Government share, in particular the general rule of customary international law that the predecessor and successor States must settle the division of State property by agreement.[821] In this case, evidence shows that there was an agreement between Sudan and South Sudan for the GoS's EPSA interest in profit oil to pass to the GoSS upon secession.[822] The division took effect upon secession "as a result of, and in accordance with the agreement between, the RoS and the Respondent."[823] This was

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[818] Part V.C(1) above.

[819] Reply, ¶ 443.

[820] Counter-Memorial, ¶ 240.

[821] CPHB, ¶¶ 107, 108.

[822] CPHB, ¶ 109 citing Position Paper titled NORTH POSITIONS from Round Two Debre Zeit, R-142; AUHIP Oil Sub-group, Summary of discussions, 2–5 March 2011, R-56; Government of Southern Sudan Presentation for Foreign Oil Companies Operating in Southern Sudan, Working Together for the Benefit of the People of Southern Sudan, 13 May 2011, 3, R-190; Presentation titled Petroleum Production and Lifting Program July 2011, SPLM/GOSS oil sub-group, 20 June 2011, C-171; Letter from the GoS to […], 25 May 2011, C-70; Letter from […], […], […] and […] to the MoEM, 6 July 2011, C-67.

[823] CPHB, ¶ 114.

confirmed by the States' conduct after secession[824] and their Agreement on Certain Economic Matters of 27 January 2012.[825]

404. Claimant argues that both Sudanese law and international law govern Sudapet's right to a share of the profit oil under the EPSAs. First, it must be regarded as a contractual right resulting from the EPSAs and their continuation.[826] In addition, by operation of international law, Sudapet's rights to a share of the profit oil were unaffected by South Sudan's secession, as confirmed by State practice and Article 6 of the VCSP.[827] It must be regarded as an acquired right protected under international law, which the successor State can only terminate if compensation is paid.[828]

(ii) <u>Respondent</u>

405. Respondent submits that both international law and South Sudanese law provide for the division of State property on a territorial basis.[829] The source and content of the territorial principle are found (i) in the parties' agreement as recorded in the document authored by the AUHIP on 11 April 2011;[830] (ii) in the Transitional Constitution and specifically Articles 171(4) and 173(1), which recognise that "upon secession, Sudan's ownership of petroleum located in what used to be Southern Sudan vested in South Sudan;"[831] and (iii) international law, which "favours the division of State assets on a territorial basis."[832]

406. If the Tribunal applies Articles 8, 9, 10, and 17(1) of the VCSP, it will reach the same result as under South Sudanese law.[833] As contemplated by Article 17(1), Sudan and South Sudan have agreed on a territorial division of assets.[834] If they were held not to have done so, the default principles of Article 17(1)(a) and (b) would apply.[835] The Government's allocation of oil amounts to immovable property since oil located in the ground constitutes immovable property under

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[824] CPHB, ¶ 109.
[825] CPHB, ¶ 110 citing Agreement on Certain Economic Matters, R-119.
[826] CPHB, ¶¶ 115-117.
[827] CPHB, ¶ 118.
[828] CPHB, ¶ 119.
[829] RPHB, ¶ 128.
[830] RPHB, ¶ 131.
[831] RPHB, ¶ 136.
[832] RPHB, ¶ 138 citing Shaw *International Law* (6th edn, Cambridge UP 2008), 990, RLA-53; J. Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford UP 2012), 430 RLA-73.
[833] RPHB, ¶ 140.
[834] RPHB, ¶ 141.
[835] RPHB, ¶ 142.

international law.[836] Alternatively, it would constitute movable property because the Government interest is "connected with the activity of the sovereign in the territory, namely its agreement to develop and exploit the Oil Blocks."[837] The division of property took effect automatically upon secession as a result of the application of the territorial principle, either by agreement in accordance with international, or under South Sudanese law, or under customary international law as reflected in the VCSP.[838]

407. Respondent submits that the reasoning applied to the Government interest under the EPSAs applies *mutatis mutandis* to Sudapet's interest because "Sudapet's entitlement to receive a share of Profit Oil constituted property of the Government of Sudan."[839] Alternatively, Sudapet's EPSA interests ought to be regarded as "contractual rights which derive from a sovereign's exercise of its rights."[840] In both cases, Sudapet's EPSA interests constitute property.[841] The same legal rules as are applicable to the Government share are also applicable to the Sudapet Interests.[842]

c. **Tribunal's conclusion on law applicable to State succession**

408. The Tribunal finds that rules of international law are applicable to the issue of State succession, both on the basis of the Parties' agreement under the first sentence of Article 42(1) and in any event as a matter of its own application of the second sentence.

409. […]

410. […]

411. […]

412. […]

413. In any event, the Tribunal concludes that the law applicable to the issues of State succession that arise in this case is international law and not the national law of either the RoS or the RoSS. Indeed, this must be so. The problems addressed by the rules of State succession relate to a situation that

[836] RPHB, ¶¶ 142-143.
[837] RPHB, ¶ 144.
[838] RPHB, ¶ 146.
[839] RPHB, ¶ 147.
[840] RPHB, ¶ 148.
[841] RPHB, ¶ 149.
[842] RPHB, ¶ 150.

cannot be the province of any national legal system. The creation of a new State arises on the plane of international law. Legal problems that are necessary incidents of the emergence of a new State must also be addressed on the plane of international law. One such problem is succession, since "State succession depends upon the conclusion reached as to State personality."[843] The legal issues arising on the creation of a new State are not–save to the extent that international law itself permits or refers–susceptible to being governed by any national legal system.

414. This conclusion does not mean that international law is necessarily the law applicable to any other issue that arises in the arbitration, since, as explained above, Article 42(1) empowers the Tribunal to determine the law, or rules of law, applicable to a particular issue.

(2) **Source and content of the relevant rules of international law**

a. **Scope and effect of the Parties' Agreement of 11 April 2011**

415. The Parties' Agreement of 11 April 2011 went further than an agreement that international law in general is applicable to issues of succession to assets. In the first place, the Parties did not decide to apply international law *in abstracto.* Rather they agreed that they were "drawing on international law and practice" and that this was "including where relevant the [VCSP]."[844]

416. The Parties then set forth four basic principles on which they agreed:

(1) That the RoS as the continuing State "retains state assets and liabilities (other than external debt)" subject to two qualifications:

(2) The territorial principle, which would apply to "domestic assets (including movables and immovables) […] in or associated with the territory of the South" and

(3) The option for the Parties to agree to a distribution of identified assets on an equitable proportion basis; and

(4) That the principles "do not prejudice the property rights of private parties."

417. In the Tribunal's view, these principles provide a set of rules of law that the Parties have agreed is to be applied. Their agreement applies to issues of state succession generally.

[844] Parties' Agreement of 11 April 2011, ¶ 7, R-60.
[844] Parties' Agreement of 11 April 2011, ¶ 7, R-60.

418. […] was shown the "Summary of Decisions" document.[845] He confirmed the nature and scope of this Agreement in evidence in the following terms:[846]

> THE PRESIDENT: Was there, in your view general agreement between the parties in the negotiations that led up to independence about that–the principles upon which, if an asset were a state asset, it was to be divided?
>
> A. Well, there was general agreement by the parties on the general principles, that is we agreed that yes. Sudan is a continuing state and South Sudan is a successor state. We also agreed on the principles of–on the principle that a successor state goes out with with–applies the principle of a clean slate, and for the seceding state we apply the principle of–the territorial principle. So we agreed that whatever is external goes to the National Government, goes to the Government of Sudan, and whatever is internal should be divided in accordance with the territorial principle.
>
> THE PRESIDENT: If you could just turn in the same document [R-60] to paragraph 7, take a moment just to read this to yourself again. (Pause). In your understanding, Minister, does paragraph 7 accurately summarise the agreement between the parties as to the way in which state assets were to be divided upon secession?
>
> A. Yes, it exactly summarises what I stated earlier.
>
> THE PRESIDENT: In your understanding, was that a matter also therefore agreed by the Government of Sudan?
>
> A. Well, this was in principle, we had agreed so, and this is–based on this, this is where we proceeded to agree on other issues, and operationalise the agreement.

419. […] confirmed, in answer to further questions, that the particular principles set forth in paragraph 7 (a) and (b) of the Parties' Agreement of 11 April 2011 were very clear and that they were drawn from the VCSP.[847]

420. The Tribunal has no contrary evidence before it–whether written or oral–that casts any doubt upon the fact of this Agreement between the Parties.

421. The fact that the Parties had reached an agreement in the above terms, and in particular on the application of the territorial principle to domestic assets, is confirmed by their subsequent actions in relation to the Government share in profit oil under the EPSAs in the South. Claimant submits that the transfer of this share from the GoS to the GoSS as at the date of secession is governed by

[845] T4/233/22–25.

[846] T4/235/6–236/9.

[847] T4/237/2–238/17.

international law.[848] It argues that the applicable principle is simply that the parties must settled the division of state property by agreement and that the parties did reach such an agreement in relation to the Government share prior to secession, which was subsequently confirmed thereafter.

422. In the Tribunal's view, when seen in the context of the course of the inter-State negotiations, the parties' agreement on the Government share was a specific application of their more general Agreement recorded on 11 April 2011 on the principle that domestic assets in or associated with the territory of the South would be transferred to the South upon its independence. The Parties stated that this principle, which the Parties expressly adopted and declared applicable, was itself derived from international law and practice, which included in this case the VCSP.

423. Further, the Parties' practice up to and immediately following the date of secession confirms that they intended this transfer of the Government share to take effect by operation of law. The contemporaneous correspondence of both the GoSS and the GoS with the JOCs proceeds on the basis that "[f]rom 9th July 2011 […] Government forecast entitlement from the current producing fields to be allocated to South Sudan."[849] Although the GoSS recognised that this would have to be reflected in the contractual provisions of the EPSAs,[850] those amendments at the contractual level, which were not finally concluded until 2012, did not affect the transfer of the Government share by operation of international law.

424. The State parties reconfirmed their agreement to the territorial principle in their Agreement on Certain Economic Matters of 27 September 2012, in which they provided:

> Unless otherwise agreed, the two States shall treat domestic assets and liabilities in accordance with the territorial principle, by which assets and liabilities that have a domestic connection to the territory of Sudan shall be allocated along territorial lines and attributed to the respective State.[851]

425. It is therefore necessary for the Tribunal to determine the scope and content of the rules of international law that the parties agreed are applicable to the issues of State succession to State property.

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[848] Above, ¶ 403.
[849] Letter from the GoS to […], 25 May 2011, C-70.
[850] Draft Transition Agreement for Blocks 1/2/4, 30 June 2011, R-159.
[851] Art 4.1.1, R-119.

426. In determining the content of their agreement, the Parties referred to international law and practice, and, "where relevant," the VCSP. These references entitle the Tribunal to refer to these sources in interpreting the meaning and scope of the rules of law that the Parties have agreed to apply. At the same time, the Tribunal must give precedence to the specific terms of the principles agreed. It may for that purpose determine whether, and if so to what extent, the rules of the VCSP or other evidence of international law and practice are relevant.

b. **Reference to the relevant provisions of the VCSP**

427. The reference to the VCSP in the Parties' Agreement of 11 April 2011 has the following consequences for the legal status of the VCSP in the present dispute.

428. The Tribunal is not applying the VCSP as a treaty obligation binding upon the relevant States. The VCSP is not in force[852] and has not been signed by either the RoS or the RoSS. That does not end the enquiry. A provision in a treaty may also state a rule of customary international law, recognised and binding on third States as such.[853]

429. The Tribunal need not determine for the purpose of this proceeding precisely how much of the Convention's rules beyond the matters relevant to the present dispute have passed into customary international law. Both Parties agree that some of its rules do set forth rules of customary international law, but they differ as to which rules meet such a criterion.[854] Both Parties agree that this is not the case for the whole of the Convention. In particular, the provisions on "newly independent states" (former dependent territories or colonies) are not regarded as stating customary rules and have hindered the adoption of the Convention by developed states.[855] By contrast, both Parties in the present case both agree that Article 8 (on the definition of State property)[856] and the provisions on the settlement of succession by agreement[857] are rules of custom. They also accept that Article 17(1)(a) embodying the territorial principle in relation to immovables reflects

[852] Counter-Memorial, ¶ 248; Reply, ¶ 10.

[853] Art 38, Vienna Convention on the Law of Treaties 1969 1155 UNTS 331, CLA-84 ("VCLT"); *North Sea Continental Shelf (Germany v Denmark, Germany v The Netherlands)* [1969] ICJ Rep 3, RLA-13.

[854] CPHB, ¶¶ 82, 84; RPHB, ¶ 92.

[855] See, eg, ILA *Resolution No 3/2008: Aspects of the Law on State Succession*, Annex (Conclusion of the ILA Committee on Aspects of the Law of State Succession) (2008) 73 ILA Conf Rep 250, 362, ¶ 14, CLA-174; Institut (2000-1) 69 *Annuaire* 148, CLA-160.

[856] CPHB, ¶ 84, citing Shaw *International Law* (7th edn, Cambridge UP 2014) at 715, CLA-181; Institut (2000-1) 69 *Annuaire* 140, CLA-160; RPHB, ¶ 92.

[857] CPHB, ¶ 82, citing the Badinter Commission Opinion No 9 (4 July 1992) 92 ILR 205, ¶ 4, CLA-164; Opinion No 11 (16 July 1993) 96 ILR 718, 722, ¶ 9, CLA-165; Opinion No 12 (16 July 1993) 96 ILR 723, 725, ¶ 1, CLA-166; and Opinion No 14 (13 August 1993) 92 ILR 729, 731, ¶ 1, CLA-168; RPHB, ¶ 92.

custom.[858] The Parties do not agree on the customary status of Article 17(1)(b) (the territorial principle in relation to movables).[859]

430. It is widely accepted that certain of the Convention's provisions do reflect customary international law.[860] Ress, who served as Rapporteur for the Commission of the *Institut de Droit International* on the subject in 2001 observed in the preamble to its preparatory project that excluding the rules applicable to newly independent States, the provisions of the Vienna Convention "*représentent des solutions adoptées aux fins de codifier le droit coutumier hérité du passé et de l'*opinio iuris *du moment de leur rédaction.*" He noted "*l'utilité de retenir les règles et principes existant relatifs à la succession d'Etats en matière de biens et de dettes qui ont été confirmés par la pratique récente des Etats.*"[861]

431. The principle that immovable property located on the territory of a successor State passes without compensation to that State is accepted to be a rule of customary international law. The Badinter Arbitration Commission on the Former Yugoslavia drew attention to "the well-established rule of State succession law that immovable property situated on the territory of a successor State passes exclusively to that State. […] [T]he principle of *locus in quo* implies that there is no need to determine the previous owner of the property: public property passes to the successor State on whose territory it is situated."[862] The *Institut* confirmed in 2001, following its research into State practice, that "[i]mmovable property of the predecessor State situated on the territory to which the succession relates passes to the successor State on whose territory the property is located."[863] The 2008 Report of the International Law Association Committee on "Aspects of the Law of State Succession" also concludes that:

> […] the transfer of immovable property to the successor State located in its territory is applicable in all types of State succession. If the predecessor State continues to

[858] CPHB, ¶ 92(a); RPHB, ¶ 92.

[859] CPHB, ¶ 92(b); RPHB, ¶ 92.

[860] Shaw *International Law* (7th edn, Cambridge UP 2014) at 714 states that "most of its provisions (apart from those concerning 'newly independent states') are reflective of custom," CLA-181.

[861] Institut (2000-1) 69 *Annuaire* 205, CLA-170.

[862] Badinter Commission Opinion No 14 (13 August 1993) 96 ILR 729, ¶ 3, CLA-168; CPHB, note 165 citing to CLA-168; RPHB, ¶ 117 also referring to this Opinion, RLA-127.

[863] Art 19(1) *Institut* Resolution "State Succession in Matters of Property and Debts," 2001, CLA-172.

> exist, unless otherwise decided based on equitable considerations, there is no compensation. *International practice follows these criteria.*[864]

432. In the present case, the Tribunal is empowered and obliged to refer to the relevant rules of the VCSP and to international law and practice, because the Parties expressly stated that this was the basis for their Agreement. Thus is it the terms of that Agreement itself that determine the ambit of the provisions of the VCSP so incorporated. In referring to the VCSP or to international law and practice, the present Tribunal does so in order to work out the consequences of the Parties' Agreement for the purpose of the present dispute.

433. The following provisions of the VCSP are particularly pertinent to the present proceedings: (a) the core provisions in Part II Section 1 on State property (in particular Articles 8–11); and (b) the specific rules in Articles 17(1)(a) and (b), which contain specific provisions on succession to property in the case of the separation of a part of the territory of a State to form a successor State.

434. *State property.* The general definition of State property in the Convention is that set forth in Article 8, which provides:

> *Article 8*
> *State property*
>
> For the purposes of the articles in the present Part, "State property of the predecessor State" means property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

435. The ensuing sections of Part II Section 1 make provision for the consequences of the passing of State property as follows:

> *Article 9*
> *Effects of the passing of State property*
>
> The passing of State property of the predecessor State entails the extinction of the rights of that State and the arising of the rights of the successor State to the State property which passes to the successor State, subject to the provisions of the articles in the present Part.
>
> *Article 10*
> *Date of the passing of State property*

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[864] ILA *Resolution No 3/2008: Aspects of the Law on State Succession*, Annex (Conclusion of the ILA Committee on Aspects of the Law of State Succession) (2008) 73 ILA Conf Rep 250, 362, ¶ 15, CLA-174, emphasis added.

> Unless otherwise agreed by the States concerned or decided by an appropriate international body, the date of the passing of State property of the predecessor State is that of the succession of States.
>
> *Article 11*
> *Passing of State property without compensation*
>
> Subject to the provisions of the articles in the present Part and unless otherwise agreed by the States concerned or decided by an appropriate international body, the passing of State property of the predecessor State to the successor State shall take place without compensation.

436. Emphasising that the scope of the Convention is limited to State property, Article 6 confirms that "[n]othing in the present Convention shall be considered as prejudging in any respect any question relating to the rights and obligations of natural or juridical persons."

437. *Consequences of secession.* Article 17(1) sets forth general rules applicable to the division of State property upon secession:

> *Article 17*
> *Separation of part or parts of the territory of a State*
>
> 1. When part or parts of the territory of a State separate from that State and form a successor State, and unless the predecessor State and the successor State otherwise agree:
>
> (a) immovable State property of the predecessor State situated in the territory to which the succession of States relates shall pass to the successor State;
>
> (b) movable State property of the predecessor State connected with the activity of the predecessor State in respect of the territory to which the succession of States relates shall pass to the successor State.
>
> (c) movable State property of the predecessor State, other than that mentioned in paragraph (b), shall pass to the successor State in an equitable proportion.

438. A close comparison of the language of Article 17(1) with the Parties' Agreement of 11 April 2011 shows that the Parties adopted the underlying principles of the VCSP, but that they also agreed to adapt them to their particular circumstances in material ways.

439. *Agreement principle.* The Parties confirm, as the *chapeau* of Article 17 provides, that the general basis of distribution is subject to a qualification that they "may agree to a distribution of identified assets or liabilities." Any such agreement is to be "based on 'equitable proportion.'" In contrast to Article 17(1)(c), the Parties retained the liberty to reach such an agreement in respect of any assets or liabilities that they might specifically identify.

440. *Territorial principle.* In the absence of such specific contrary provision, the Parties adopted the principle specified in Articles 17(1)(a) and (b), which they encapsulated in a single rule as "Territorial principle–domestic assets (including movables and immovables) and domestic liabilities in or associated with the territory of the South." This provision combines the two categories of property utilised in the VCSP–movables and immovables–into a composite category of "domestic assets (including movables and immovables)." These terms indicate that the Parties chose to describe the scope of the object of their agreement in more general terms than the VCSP: (a) by use of the expression "assets" rather than "property"; and (b) by the use of an inclusive rather than an exhaustive reference to both "movables and immovables." They also adopted a different connecting factor, utilising "in or associated with the territory of the South" rather than the test in the VCSP, which refers to "connected with the activity of the predecessor State in respect of the territory."

441. The Parties' express inclusion of the reference to movables along with immovables in their definition of the relevant State assets renders academic for the purpose of the present Award the question whether or not the rule in Article 17(1)(b) of the VCSP, providing for a territorial division of movable assets "connected with the activity of the predecessor State in respect of the territory to which the succession of States relates," states a rule of customary international law. The Parties differ in their pleadings on this issue. Respondent submits that Article 17(1)(b) is a customary rule; Claimant argues that it has not achieved this character.[865] There are undoubtedly differences of opinion–or at least of emphasis–in the doctrine on this point. There are also examples of practice in which the parties have resolved issues relating to property other than immovable property differently by agreement.[866] In the context of the present Award, this Tribunal does not need to resolve the question of the customary status of Article 17(1)(b) *vel non.* That is because the Parties have decided that issue for themselves by explicitly including such property within the category of domestic assets to be subject to division according to the territorial principle.

442. In view of the express reference that the Parties made to their intent to "draw[ ] upon international law and practice, including where relevant the [VCSP]," the Tribunal is bound to conclude that these differences in language in the Parties' desired implementation of the VCSP to their situation

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[865] RPHB, ¶¶ 92–93 citing *inter alia* Crawford *Brownlie's Principles of Public International Law* (8th edn, 2012), 430, RLA-73; CPHB, ¶ 92(b), citing Degan (1993) 4 Finnish Ybk IL 130, 166, CLA-173.

[866] ILA *Resolution No 3/2008: Aspects of the Law on State Succession*, Annex (Conclusion of the ILA Committee on Aspects of the Law of State Succession) (2008) 73 ILA Conf Rep 250, 362, ¶ 16, CLA-174, which comments: "Recent practice provides examples of different kind of agreements adopting particular solutions, not always going in the direction dictated by the [VCSP]."

were deliberate. The principle of territoriality found in the Agreement constitutes the Parties' express adoption of the principle enshrined in Articles 17(1)(a) and (b) of the VCSP. Both the scope of assets covered by the Agreement and the connecting factor were drawn from the VCSP, but may, given the differences in language, be subject to a different, potentially broader construction than the comparable test under the VCSP. The Tribunal will have to consider this question when it moves to analyse each of the elements of the test, as it must now do.

443. These deliberate differences were recognised at the time. The AUHIP mediators stated in their Note following the Parties' Agreement of 11 April 2011, written in preparation for the third round of negotiations that the categories of interests covered by the Parties' Agreement were not designed to coincide completely with the VCSP:

> [P]ragmatism informed the approach of categorizing assets and liabilities. […] Building from there, other categories of external assets and domestic assets and liabilities were defined. This approach does not produce exact mapping with other categories, such as "national", "localized" and "local debts" as used in the Vienna Convention.[867]

444. As a result of the foregoing analysis, the Tribunal must now consider within the specific context of the Parties' Agreement of 11 April 2011 and drawing upon international law and practice, including where relevant the pertinent provisions of the VCSP two sub-issues:

(a) Are the Sudapet Interests to be treated as State assets for succession purposes; and, if so,

(b) What principle of division applies to them?

D. Are the Sudapet Interests "State assets"?

(1) The scope of the issue

445. The sole issue that the Tribunal is called upon to resolve under this head is whether the Sudapet Interests–that is to say its interest in a portion of the profit oil under EPSAs covering oil fields located in the territory of South Sudan–are to be treated as "State assets" for the purpose of state succession under the rules of international law agreed between the Parties.

[867] AUHIP, "Note on Assets and Liabilities for Sub-Cluster Meeting in Khartoum on 8-9 May 2011," 4 May 2011, n 4, R-61.

446. The specific scope of the Tribunal's enquiry in this regard bears special emphasis. The Parties' arguments, and the evidence adduced in support of those arguments, have ranged very widely.

447. As summarised in Part V.A. above, Respondent advances three main sets of submissions:

(a) That Sudapet as a company is to be equated with the State in view of its ownership; governmental function; intertwined finances and staff; and the degree of control exercised by the State over it.

(b) That the Sudapet Interests in the EPSAs are State property–constituting a carried interest held on behalf of the State and imposed on the consortium of Contractors as part of the Government take, a fact that Respondent claims was accepted in the Pre-Secession Negotiations.

(c) That these Interests vested in the RoSS upon secession: as an incident of the new State's sovereignty over natural resources; by way of reversion to the new State upon independence; under the specific provisions of the Transition Constitution and in application of the customary international law rules of State succession. As a result, Claimant cannot claim to retain acquired rights.

448. Claimant replies in outline:

(a) That Sudapet is a commercial company, which is not wholly government-owned; exercises no governmental function; and operates independently from Government. As a result, it is not to be equated with the State.

(b) That the Sudapet Interests in the EPSAs are not State property: Sudapet is part of the Contractor under the EPSAs and therefore has separate commercial rights and duties to that of the State; it made its own financial contributions and bore risks as a commercial operator. This position was not qualified in the Pre-Secession Negotiations. On the contrary, Sudapet made its position as a private company clear both before and after independence.

(c) That the Sudapet Interests did not vest upon independence, either under the Transitional Constitution or under the VCSP. On the contrary, as a private company, Sudapet is entitled to the maintenance under international law of its acquired rights. In any event, Claimant alleges that Respondent adopted Sudapet's interests post-secession.

449. It will be immediately apparent that these submissions present diametrically opposing images of the functions and capacities of Sudapet and the character of the Sudapet Interests. For Claimant, Sudapet is a private commercial company, which, though admittedly majority Government-owned, is entitled to the maintenance and enjoyment of its private property on the territory of the RoSS following independence. For Respondent, Sudapet is an alter ego of the State, whose assets must vest in the RoSS as a necessary consequence of its independence as a State, whether seen under constitutional or international law.

450. In the assessment of these competing theories, the Parties assembled before the Tribunal a wealth of factual and expert evidence.

451. The Tribunal received evidence on the operations of Sudapet from the following witnesses of fact: Claimant called […], […], together with […] and […] from […]. Respondent called[868] […] (who had served relevantly as […]from June 2010 until secession); […] ([…]from December 2010 to January 2012); […] ([…]1999–2011); and […] ([…]from January 2010 to July 2011).[869]

452. The Tribunal received the assistance of expert evidence on the law of Sudan as to the establishment and legal character of Sudapet from […] for Claimant and […] for Respondent (as well as on the law of South Sudan from […] for Claimant and […] for Respondent). Finally, the Parties adduced expert evidence on the operation of carried interests in the oil industry from […] for Claimant and […] for Respondent.

453. The Tribunal has carefully considered all of this evidence. In light of the view that the Tribunal takes of the matter, it is not necessary for it to take a view on all of the arguments and evidence ranged before it in order to decide whether the Sudapet Interests at issue in this case are to be treated for the purposes of State succession as State assets. This point applies in particular to (a) Respondent's allegations that Sudapet must be equated for all purposes with the State; and (b) Respondent's arguments as to vesting based upon its independence and the terms of its Transitional Constitution or Claimant's submissions based upon the doctrine of acquired rights.

454. As to point (a), for reasons that will be developed below, the Tribunal does not regard the legal character of the Sudapet Interests for succession purposes to stand or fall on whether Sudapet can

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[868] In addition to the witnesses already referenced above in the context of the pre-secession negotiations: […], […] and […].

[869] For convenience, the Tribunal refers here to the short form of address given at the hearing by each witness, whose full names and current titles are set out above at paragraph 47.

be treated as having separate legal personality from the State.[870] Although it will be necessary to determine the ownership of Sudapet, the manner in which it has carried on business since its establishment otherwise than in relation to the Sudapet Interests in the South is not, in the Tribunal's view, issue dispositive.

455. As to point (b), the Tribunal has decided for the reasons given in Part VI.C above that the law applicable to the present issue is the international law of State succession, and specifically the particular rules of international law chosen by the parties in their Agreement of 11 April 2011. The answer is not to be found in South Sudan's acquisition of permanent sovereignty over natural resources upon independence. Nor, for that matter, is it to be found in the doctrine of acquired rights, invoked by Claimant.

456. The doctrines of international law invoked by Respondent and Claimant respectively as alleged to arise from South Sudan's independence simply do not address the central issue in the case. The fact that South Sudan, as a sovereign State, exercises permanent sovereignty over its natural resources from the date of independence, does not address the question whether the Sudapet Interests are, or are not, State assets that passed to it upon secession.

457. As from the date of its independence as a sovereign State, South Sudan undoubtedly exercised the rights of a sovereign over its oil resources in the sub-soil, as it asserted in Articles 171(4) and 173(1) of its Transitional Constitution. This is not in doubt or in issue here. At the same time, South Sudan committed itself in its Transitional Constitution as from the date of its independence and in the exercise of its sovereign prerogatives, to recognition of "the right to acquire or own property as regulated by law" and provided that "[n]o private property may be expropriated save by law in the public interest and in consideration for prompt and fair compensation. No private property shall be confiscated save by an order of a court of law."[871] The question for this Tribunal is whether the Sudapet Interests are State property or private property. This question is not answered by invocation of either permanent sovereignty or the protection of private property rights. It requires prior determination by reference to the international law rules of State succession.

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[870] The present case raises different issues to those that arose in *Niko Resources (Bangladesh) Ltd. v Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")* (Decision on Jurisdiction) ICSID Case No. ARB/10/11 and ARB/10/18 (19 August 2013), CLA-147, in which the Tribunal found (i) that para-statal oil and gas companies were agencies or instrumentalities of the State for purposes of the law of State responsibility, but (ii) maintained separate corporate personality for contractual purposes such that the State was not bound by a contractual arbitration clause entered into by the companies.

[871] Art 28 Transitional Constitution of RoSS 2011, RLA-71.

458. By the same token, Claimant's invocation of the doctrine of acquired rights and Respondent's reliance in response on the "clean-slate" or "Nyerere doctrine" are not to the point. The Tribunal need not necessarily resolve the controversial question whether, and if so to what extent, the doctrine of acquired rights remains an accepted doctrine of customary international law.[872] If the Sudapet Interests are properly to be characterised as State assets, their disposition as between the predecessor and successor States is to be determined by the international law of State succession. It would only be if those Interests were properly characterised as a private concession that their character as acquired rights might fall for consideration.

459. In the Tribunal's view, the critical elements that it must evaluate for the purpose of deciding whether the Sudapet Interests are to be treated as State assets for the purpose of the applicable international law rules of State succession are:

- The scope of the Parties' Agreement of 11 April 2011 in the Pre-Secession Negotiations;
- Whether Claimant held the Sudapet Interests on its own behalf or on behalf of the State;
- Whether, even if the Sudapet Interests were held by Sudapet, they were to be treated as State property;
- Whether the Government shareholding in Sudapet was itself subject to the rules of State succession, and, if so, the consequences of any disposition of that shareholding for the Sudapet Interests; and,
- Whether the position as at the date of independence is affected by the Parties' subsequent conduct.

460. The Tribunal will consider each of those issues in turn. Before it does so, it must decide a preliminary question raised on the evidence, which is the extent of the Government shareholding in Sudapet.

[872] Cf. e.g. D P O'Connell, *The Law of State Succession* (1956), 129, CLA-184; and ILC Report 1969, A/CN.4/220, 227-8 (excluding the doctrine from the draft VCSP on grounds that it was "extremely controversial"), RLA-14; *Republic of Serbia v ImageSat Int'l NV* [2009] EWHC 2853, ¶ 139, RLA-59; Y. Makonnon, *State Succession in Africa: Selected Problems* (1986) 200 *Recueil des Cours* 93, RLA-22.

(2) **Extent of Government shareholding in Sudapet**

461. Sudapet was incorporated as a company under the Companies Act 1925 (Sudan) on 16 February 1997, with its seat in Khartoum.[873] Under its Memorandum and Articles of Association, 99% of its shares were subscribed by the Government of the Republic of Sudan (Ministry of Energy & Mining) and 1% by […].[874]

462. Pursuant to Section 4 of the Companies Act 1925, a private company within the meaning of the Act was required to have at least two subscribers. Claimant rightly accepted in argument that this requirement was the reason for the addition of […] as a subscriber.[875] As at the date of incorporation, […] was itself wholly owned by the Ministry of Mining of the Government of Sudan.

463. At its date of incorporation in 1997, Sudapet was a "public sector company" for the purpose of Part IX of the Act, as it was owned 100% by State federal bodies.[876] As such it was "held liable to the Competent Minister who may in addition to the other powers provided for in this Act, give such general or specific directions to the Board of Directors in any matter relating to the Company, as he may deem to involve the public interest and the Board shall act according to such directions."[877]

464. On 28 December 2009, the Ministry of Mining sold a minority of its shares in […] to […] and […].[878] Claimant had at the document production stage refused a request from Respondent to produce documents on the ownership of […] and […] on grounds of insufficient relevance.[879] On 23 June 2015, the week before the hearing, Claimant introduced, by way of exhibits to […]'[s] industry expert report, two further documents that were stated to be from the Sudanese Companies Register identifying the shareholders of these two entities as three further Sudanese companies and

[873] Certificate of Incorporation of the Claimant, 16 February 1997, C-29.

[874] C-30.

[875] T4/171/21–172/6.

[876] s 257 Companies Act 1925 (as amended), RLA-114. This point was confirmed by […] in evidence T7/41/2–42/16.

[877] *Ibid*, s 259.

[878] Share Transfer Agreement between the Ministry of Energy and Mining, the Ministry of Finance of the GoS and […] (with unofficial translation), 28 December 2009, C-154; and Share Transfer Agreement between the Ministry of Energy and Mining, the Ministry of Finance of the GoS and […] (with unofficial translation), 28 December 2009, C-155.

[879] Claimant's Response to Respondent's Requests 1 & 2 in Redfern Schedule to PO No 2, 13 February 2014.

one Sudanese individual.[880] The late and irregular manner in which these documents were introduced into the record precluded a proper investigation into the information contained in them.

465. Respondent maintains, relying on evidence from the US Office of Foreign Assets Control ("OFAC"), that […] is a Sudanese government-controlled entity.[881] It alleges that the assignment of these shares into the hands of […] and […] is a sham. […], on the other hand, deposed for the first time in oral evidence at the hearing that this had been a commercial transaction for the benefit of the participation of private investors in […]'s downstream operations.[882]

466. […]

467. This conclusion as to the ownership of Sudapet does not of course in and of itself resolve the question of the Sudapet Interests. It nevertheless has implications, as will be seen, for the ability of the GoS as owner to deal with the company that it owns.

468. The Tribunal's conclusion on the question of ownership is reinforced by the manner in which the Government of Sudan dealt with Sudapet and its interests in the Pre-Secession Negotiations, to the implications of which it is now necessary to turn.

(3) **Treatment of Sudapet Interests in Negotiations**

469. As has been seen, the first principle on all aspects of state succession is that it is for the parties to reach agreement. Both Parties in the present arbitration accept that one of the matters on which the parties may agree is as to what property falls within the basket for distribution according to the rules of State succession.[883]

470. […]

471. […]

472. […]

473. […]

[880] […] Form Sh/28 Annual Report (with unofficial translation), 17 January 2001, C-235; and […] Form Sh/28 Annual Report (with unofficial translation), 30 January 2001, C-236.

[881] OFAC, "Sanctions List Search," (http://sdnsearch.ofac.treas.gov/ – accessed 18 Jul 2014) […]), R-139.

[882] T2/115/25–117/9.

[883] Claimant: T12/56/9-60/7; Rejoinder ¶ 108-121.

474. […]

475. […]

476. […]

477. […]

478. […]

479. […]

480. […]

481. […]

482. […]

483. […]

484. […]

485. The critical date for determining State succession to State assets is the date of secession–here 9 July 2011. Positions taken by the Parties subsequent to this date are therefore not relevant to the present enquiry, unless they could constitute an estoppel or acquiescence by conduct, an issue to which the Tribunal will return later in its reasons.

486. The Tribunal now turns to consider the basis upon which the Sudapet Interests and the Government shareholding in Sudapet were treated as State assets for purposes of State succession. These are questions of mixed fact and law.

(4) **Were the Sudapet Interests held on behalf of the State?**

487. In this section, the Tribunal considers the basis on which Sudapet held its share in the profit oil under the EPSAs.

488. The Parties presented sharply different analyses on this question. Claimant submits that under the EPSAs, Sudapet was consistently named together with the FOCs as part of the "Contractor" in

contradistinction to the Government.[884] It points out that the Contractor enjoys both rights and duties under the EPSAs that are separate and distinct from the rights and duties of the Government. Indeed, a key purpose of the EPSAs is to delineate the legal position of the Contractor vis-à-vis the Government. Respondent on the other hand maintains that the Sudapet Interests are "carried interests," the contractual character and attributes of which demonstrate that such Interests are not the same as those of the other FOCs within the Contractor group. On the contrary such Interests are only explicable on the basis that they are held on behalf of the State.

489. […]

490. The final EPSA for Blocks 1/2/4, which was concluded on 1 March 1997, describes Sudapet as "a wholly owned company of the Government." Sudapet is part of the Contractor. Nevertheless, clause 1.73 defines the "Government" compendiously to mean "the Government of the Republic of Sudan or any agency or State owned corporation or a company over which the Government has control, authorized by the Government to undertake any duties of obligations or to exercise any rights under the Agreement."

491. The Block 5A EPSA concluded on 8 February 1997 provided in Article XXXV as follows:

> GOVERNMENT PARTICIPATION
>
> 1. Contractor shall assign to a Government owned entity (the "Entity") a five percent 5% interest in all rights, privileges, duties and obligations granted to Contractor under this Agreement (the "Interest").
>
> 2. Within ninety (90) days of the Effective Date, the Government shall notify Contractor of the name of the Entity. Upon receipt of such notice, the Contractor shall promptly execute an instrument of assignment giving effect to the assignment of the Interest in accordance with the provisions of Article XXIII of this Agreement.
>
> 3. All Petroleum Operations costs and payments under this Agreement incurred by Contractor and attributable to the Interest prior to Commercial Production (the "Carried Costs") shall be paid on behalf of the Entity by the other parties constituting Contractor.
>
> 4. The Government agrees that the Entity will reimburse to the other parties constituting the Contractor all Carried Costs attributable to the Interest. Such reimbursement by the Entity to the other parties constituting Contractor shall be made out of seventy five percent (75%) of any excess oil and/or gas attributable to the Interest and available under Article VII Clause 1(v) and shared between the

[884] Blocks 1/2/4 EPSA, Arts 1.15 and 3.2.1, C-4; Block 5A EPSA Assignment, Recital (E), C-16; Blocks 3/7 EPSA Amendment, Arts (3) and (4), C-8.

> Government and Contractor in accordance with Article VII Clause 2 of this Agreement until such time as the Carried Costs have been fully recovered by the other parties constituting the Contractor.
>
> 5. The Government shall cause the Entity to execute any document required to give effect to the foregoing.[885]

492. The Deed of Assignment was duly entered into on 10 June 1997, with […], […] Ministry of Mining, signing on behalf of Sudapet.[886]

493. […]

494. This point is reinforced by the nature of the Sudapet Interests as carried by the other contracting parties. The Tribunal heard a considerable amount of expert evidence from two very experienced experts in the oil industry, […] and […], on the nature of carried interests. It is not necessary for it to reach a view on many of the propositions advanced and debated by these experts in their reports and at the Hearing. In particular, the Tribunal does not need to conclude that the arrangements entered into under the Sudanese EPSAs are unique or even unusual in the terms under which the carry was to be exercised. Plainly the institution of the carried interest in general is not unusual. Private companies may frequently hold such a carried interest, where, for example, they have acquired a licence from the State, the holding of which is a pre-condition to subsequent exploitation by other oil companies.[887]

495. […]

496. […]

(5) **Even if held by Sudapet, are the Sudapet Interests State property?**

497. The two preceding sections each explain the Sudapet Interests as State assets on the basis of agreement, derived from the Parties' Pre-Secession Negotiations and from the structure of the EPSAs themselves. The Sudapet Interests may also be treated as State property even in the absence of specific agreement.

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[885] Block 5A EPSA, Art XXXV, C-13.
[886] R-3.
[887] […] : T8/201-5.

498. The starting point for this analysis is Article 8 of the VCSP itself, which defines "State property" as "property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State."

499. There are two salient elements of this definition for present purposes:

(a) It contains a *renvoi* to the internal law of the predecessor State, here the law of the RoS as at the date of succession; and,

(b) It refers generally to "property, rights and interests […] owned by that State," eschewing earlier distinctions in customary international law between the public and private property of the State. This approach is also in conformity with more recent State practice.[888]

500. The Tribunal is well aware that, absent contrary agreement (such as the Tribunal has found here), customary international law generally may exclude from the scope of State property the "property of private legal persons, even if they have been created with public funds,"[889] though in some cases the concept has been "interpreted widely to cover so-called para-statal property if such a solution was found justified and there was no possibility to draw a distinction between the property of the State and that of specific organizations."[890]

501. These general considerations are always subject to consideration of the specific provisions of the internal law of the predecessor State. For this reason, for example, the Badinter Commission considered enterprises exercising "social ownership" in the former Yugoslavia as coming within the concept of State property for succession purposes where they exercised public prerogatives.[891]

502. The Tribunal has therefore carefully considered the relevant provisions of the law of Sudan. It has considered in this context the views of the experts, […] and […]. It also afforded the Parties an additional opportunity to plead to particular issues of Sudanese law that emerged at the Hearing in their post-hearing briefs.

503. Claimant pleads that Sudapet was incorporated as a private limited company under the Companies Act 1925. This Act is generally applicable to all manner of private companies. As such its character

[888] *Institut* (Ress, Rapporteur) (2000-1) 69 *Annuaire* 149, CLA-160.
[889] Art 12(2) *Institut* Resolution 2001, CLA-172.
[890] ILA Report (2008) 73 ILA Conf Rep 250, 329, CLA-174.
[891] Opinion No 14 (13 August 1993) 96 ILR 729, 731-732, ¶ 7, CLA-168.

is to be distinguished from that of a public institution under the Public Institutions Act 2003.[892] Respondent on the other hand points to the extent to which Sudapet fits within a structure put in place by the Republic of Sudan for the exploitation of its oil wealth under the Petroleum Wealth Act 1998.[893]

504. […]

505. The Tribunal has given close attention to Part 1 of the Civil Transactions Act 1984, an agreed English translation of which was admitted at the Hearing.[894] The Act is in the nature of a code of legal rules governing obligations and property. Chapter 5 governs "Things and Property." Section 27(1) is headed "Public Property" and provides:

> All immovable and movable property owned by the State or other public corporate persons and allocated either in fact of by virtue of a law or public order for public use shall be considered public property.

506. Both Parties agree that an indication as to the meaning of "public corporate persons" is given by Section 23(a), which identifies one category of "[c]orporate persons" as "[t]he State, Public Corporations and other bodies to which corporate personality is granted by law."[895] "Commercial corporations" are identified separately in Section 23(e).

507. Neither Party was able to cite Sudanese judicial decisions that might have assisted the Tribunal in its construction of these provisions. As a result, the Tribunal must approach the matter as one of statutory construction, in the light of the Parties' submissions and such expert evidence as is available to it.

508. Claimant submits that this definition is to be construed narrowly as limited to public institutions and to property designated for public use, such as a hospital or public road. It points out that the purpose of Section 27 is, as Sub-section (2) goes on to declare, to prevent its alienation save in accordance with law, seizure and acquisition by prescription.[896] As such it must be construed as excluding a public sector company.

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[892] CLA-115.

[893] CLA-3.

[894] T7/2/12-15.

[895] RPHB, ¶ 71; CPHB, ¶ 127.

[896] CPHB, ¶¶ 126-146.

509. Respondent submits that a combined reading of Sections 23 and 27 yields the result that property used for public, as distinct from commercial, purposes is public property and that this can include the property of a public sector company engaged in the extraction of the State's oil reserves for the benefit of the State.[897]

510. The Tribunal observes that the question of whether the assets of a State-owned corporation can be treated as the assets of the State can arise in a number of different contexts and often give rise to difficult questions of fact and law.[898] In the present case, a plain reading of Sections 23 and 27 of the Sudanese Civil Transactions Act indicates that Sudan has adopted a wide non-technical concept of public property. The Tribunal does not consider that Section 23 can be confined to Public Corporations or Public Institutions *stricto sensu*. That would be not to give meaning to the concluding phrase "other public corporate persons." Further, the definition of "public property" mandates a consideration of allocation in fact or law. The Tribunal cannot ignore the fact that, whilst incorporated under the Companies Act 1925, Sudapet is subject to Ministerial control under Part IX in the public interest. It therefore concludes that, for this reason as well, the Sudapet Interests are to be treated as property of the State. This conclusion further supports the analysis arrived at in the preceding section as to the basis on which the Sudapet Interests were held for the Government.

(6) Implications of the Government shareholding in Sudapet as State property

511. […]

512. Both Parties agree that the Government's shares in Sudapet are State property that is covered by Article 8 of the VCSP.[899] The Government shares in Sudapet must therefore be treated as amenable to the rules of State succession.

513. […]

514. This point is of some significance. It was perceptively pointed out in the *travaux préparatoires* to the VCSP that, even if the property of a State-owned corporation were otherwise excluded from the

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[897] RPHB, ¶¶ 69-87.
[899] CPHB, ¶¶ 148–149; RPHB, ¶ 153.
[899] CPHB, ¶¶ 148–149; RPHB, ¶ 153.

definition of State property for succession purposes "the shareholding of the predecessor State in [such corporation] would"[900] be so included.

515. If the shares in Sudapet are, by virtue of the applicable rules of international law, to be treated as State assets to which the relevant principles of State succession apply, then such assets fall for division by operation of law, and it will be necessary for the Tribunal to consider the consequences of that for the Sudapet Interests. This it will do in the next Part of its reasons, dealing with the applicable connecting factor.

(7) **Post-secession conduct**

516. Before reaching the basis for distribution of State assets, the Tribunal must deal shortly with arguments advanced on both sides as to the effect of the positions taken by both sides after secession on 9 July 2011: until the Presidential Decree of 8 November 2011, and between then and the conclusion of the inter-State Agreements of 27 September 2012 that settled the matters in dispute between them (save for the reservation of the present claim).

517. Claimant submits that it continued to exercise its rights under the EPSAs and to pay its cash calls for four months after independence, until its Interests were summarily curtailed by the Decree. As a result, Respondent adopted the EPSAs, confirming the validity and continuity of Sudapet's Interests. Respondent is estopped by this conduct from now asserting that these Interests vested in it as a matter of State succession.[901]

518. Respondent replies that, after independence, it consistently maintained that Claimant was no longer entitled to the Sudapet Interests. It made its position plain with the RoS, the FOCs and the Operating Companies, through correspondence and draft Transition Agreements. In its view, Sudapet's continued lifting of oil in the four months after independence was a deliberate ploy in light of Respondent's known position. In contrast to Sudapet, the position that the RoS took in the continuing inter-State settlement negotiations–of maintaining that Sudapet (including the Sudapet

[900] United Nations Conference on Succession of States in respect of State Property, Archives and Debts (1 March–8 April 1983) 1st Meeting of the Committee of the Whole (A/CONF.117/C.1/SR.1), 44 [26], Comments of Mr Nathan (Israel), CLA-91.

[901] Above [Part V.A(2)c].

Interests) is a financial asset of the RoS, subject to the agreed zero-option principle–is consistent with the RoS continuing to treat the Sudapet Interests as a State asset.[902]

519. The Tribunal does not regard the post-secession positions taken by the Parties as qualifying the conclusions that it has already reached as to the position upon secession, that being the relevant date on which to determine State succession to State property.[903]

520. Moreover, it does not consider that Respondent, in adopting the EPSAs vis-à-vis the FOCs had affirmed Claimant's continued ownership of the Sudapet Interests or that it waived its right to assert otherwise. Respondent had stated its position in its letter of 20 May 2011 in terms that made clear that the preservation of the contractual rights of the Contractor did not include Sudapet after 9 July 2011.[904] […] knew that this was Respondent's position at the time.[905] The JOCs also knew. […], […], gave evidence to the Tribunal that the lifting of oil (and the issuing of cash calls) had to continue because it was a continuous operation, but that he knew at the time that "Sudapet would disappear as soon as the independence, because it was a new reality."[906]

521. The Tribunal does not consider that there is any basis on which it might be said that Respondent had made a representation or conducted itself in such a way that Claimant might have justifiably relied to its detriment. So it does not consider that the post-secession developments affect its analysis.

E. Application of the connecting factor applicable to succession to the Sudapet Interests

522. This final Part of the analysis relating to the effect of State succession on the Sudapet Interests considers the connecting factor applicable to succession to the Sudapet Interests. The Tribunal's treatment of this issue is already assisted by the conclusions that it has come to earlier in its Award as to the rules of law agreed between the Parties in their Agreement of 11 April 2011.

523. It will be recalled that the Parties agreed that the territorial principle would apply to "domestic assets (including movables and immovables) […] in or associated with the territory of the

902 Above, [Part V.A(1)b].
903 Art 10 VCSP.
904 Letter from the SPLM to the Chairman of the GoS/NCP Negotiating Team, 20 May 2011, R-63/C-24.
905 […] 1, ¶ 48.
906 […], T4/47-8.

South."[907] The Tribunal has earlier found that this rule, while informed by Article 17 of the VCSP, adopts wider language, referring to "domestic *assets (including* movables and immovables)" and using a connecting factor of "in *or associated with* the territory of the South."[908]

524. The scope of this Agreement ought to render academic the question whether the Sudapet Interests (or the Government shareholding in Sudapet) are properly to be characterised as movable or immovable property. On any view, both are assets and the Parties' Agreement does not confine itself to movable or immovable assets. Both Parties accept that within the framework of the VCSP, the concepts of immovable and movable property must be interpreted according to international law.[909]

525. Claimant submits however that the Convention's concept of movable property does not include intangible property. It argues that the Sudapet Interests, being merely contractual rights, fall into this category and are thus not amenable to division under Article 17 at all, even if it were (contrary to its view) applicable.[910] Respondent argues that all property falls into one or the other category for succession purposes and there is no basis to carve out and exclude from the rules a separate category of intangible property.[911]

526. The Tribunal finds the suggested distinction unconvincing. Article 8 of the VCSP provides a definition of State property that is applicable "[f]or the purposes of the articles in the present Part," namely Part II "State Property." Article 8 includes in its definition of such property: "property, rights and interests." This compendious definition is not by its terms limited to tangible property, since the reference to "rights and interests" denotes intangible property. Article 17 is one of the provisions in Part II. It provides general rules for the passing of State property of the predecessor State to the successor State. Article 17 separates two categories of property, immovable and movable, in order to prescribe differently framed connecting factors for each of them. Giving this provision an *effet utile,* the Tribunal does not draw an implication from this that this Article excludes altogether from its provisions a further category of property. To do so would be to fail to give proper effect to the general definition of State property in Article 8. It would also have seriously impractical consequences for intangible property, since it would mean that the

[907] Parties' Agreement of 11 April 2011, ¶ 7, R-60.
[908] Above, ¶ 440, emphasis added.
[909] CPHB ¶ 94; RPHB ¶ 110.
[910] CPHB, ¶¶ 95-99.
[911] RPHB, ¶¶ 111-3.

Convention, otherwise intended to codify rules for State succession, would have left a potentially very important category of property outside the scheme, with the consequent problem of determining precisely what rule would apply to such property.

527. Fortunately, the Tribunal does not consider that there is any such lacuna. The framers of the Convention intended to adopt a categorisation of property into immovable and movable property "known to the main legal systems of the world."[912] Such a distinction is widely used as a general principle in Private International Law, where it has also been adopted in order to classify property into two categories in order to apply different connecting factors on the basis of common principles that are not limited by the particular distinctions of any one national legal system. In this context, though it can be accepted that there is a degree of artificiality in referring to an intangible thing as movable, since a thing that cannot be touched cannot be moved, the law takes the approach of allocating intangible property according to the binary division, precisely because it is necessary to connect such property with a legal system.[913] For this reason, intangible property is generally classified as movable.[914] On the other hand, a right or interest connected with immovable property is considered as immovable, a classification that (as set out below) the ROS has specifically adopted in its own treaty practice.

528. […]

529. […]

530. As a contractual matter, title to the oil does not pass to the Contractors until its transmission through the pipeline network.[915] This does not change the classification of the right or interest for property purposes, which is defined by reference to its connection with the immovable property, namely the Contract Area.

531. The principle that is applicable to such an interest is the territorial principle agreed between the Parties in their Agreement of 11 April 2011, namely that "domestic assets (including movables and

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[912] United Nations Conference on Succession of States in Respect of State Property, Archives and Debts, Official Records, Vol. II, 13, ¶ 4, CLA-176.

[913] T11/49/9-53/4, where President put the point to Claimant's counsel in argument.

[914] The Tribunal notes that, while the States Parties to the Agreement on Succession Issues in the former Yugoslavia did make separate provision for property and financial and other rights and interests, they specifically used the expression "*tangible* movable property" in the former case: Annex A, Art 3, Agreement on Succession Issues (with annexes), Vienna, 29 June 2001, CLA-177.

[915] Blocks 1/2/4 EPSA, Arts 36.1(h) & 1.51, C-4.

immovables) and domestic liabilities in or associated with the territory of the South"[916] are attributed to the RoSS.

532. […]

533. […]

534. Claimant argues that the applicable principle of public international law is the general rule that the predecessor and successor States must settle the division of State property by agreement. It submits that this is what Sudan and South Sudan did in the course of the negotiations, agreeing that the ownership of Sudapet and […] was to be kept separately in the hands of the GoS and the GoSS respectively.[917] It says that, in any event, the shares in Sudapet were situate in Khartoum, where the register is kept, and are therefore in or associated with the RoS.

535. Respondent argues that, because the State's equity is connected to the territory in which its assets are located, it would also qualify as movable property connected with the territory of Respondent.[918] The effect is that "the Government's shares in Sudapet (or at least an equitable proportion of them referable to the level of activity and value in the territory of South Sudan) vested in South Sudan upon independence."[919] It would also follow that South Sudan "became entitled to the benefits accruing to the holder of those shares, including Sudapet's share of the Profit Oil under the EPSA concerning oil fields in South Sudan."[920]

536. […]

537. The Agreement does not otherwise distinguish between financial and other domestic assets of the State. All state assets are subject to the general agreement set forth in paragraph 7, which provides for retention by the RoS of State assets and liabilities, subject to the two qualifications of territoriality and agreement. The territorial principle applies to domestic assets of the State generally. It adopts a connecting factor that the asset be either (a) "in" or (b) "associated with" the territory of the South.

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[916] Parties' Agreement of 11 April 2011, ¶ 7, R-60.

[917] CPHB, ¶ 149 citing the Memorandum from the AUHIP Finance, Economic and Natural Resource Cluster Oil Sub-Group to the AUHIP, 11 May 2011, R-62.

[918] RPHB, ¶ 155.

[919] RPHB, ¶ 157.

[920] RPHB, ¶ 158.

538. […]

539. The Tribunal agrees that the *situs* of the Government's shares in Sudapet is Khartoum, Sudan, where the share register is kept.[921] Yet, as Professor Ress, *Rapporteur* for the *Institut* on State succession observed: "For companies whose shares/parts are owned by the State, the registered office (with a probable concentration in the capital) if it is maintained as territorial link, can lead to very imbalanced and unfair results."[922]

540. In their Agreement, the Parties defined the connection between the relevant property and the territory as either *situs* ("in") or alternatively "*associated with*" the territory of the South. The concept of association does not limit the enquiry to a formal test of the *situs* of the shares. The function of the law of State succession in a situation in which part of the territory of a predecessor State separates from that State to form a successor State is to determine the extent to which property that was undoubtedly property of the predecessor State as at the date of secession is "connected with the activity of the predecessor State in respect of the territory to which the succession of States relates."[923] This requires an examination of the activity undertaken and the connection of the property to that activity.

541. […]

F. **Outcome**

542. […]

543. […]

544. […]

G. **Costs**

(1) **Power to assess expenses**

545. Article 61(2) of the ICSID Convention provides that:

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[921] CPHB, ¶ 155 and note 283 referring to *Institut* (Ress, Rapporteur) (2000-1) 69 *Annuaire* 221 n 50 (English translation supplied by parties), CLA-170.

[922] CLA-170.

[923] Art 17(1)(b) VCSP.

> [...] the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of facilities of the Centre shall be paid. Such decision shall form part of the award.

546. In accordance with directions issued by the Tribunal at the conclusion of the Hearing,[924] both Parties were invited to submit statements of costs incurred to date on 23 November 2015. Upon receipt of the initial Statements, the Tribunal requested an additional, more detailed breakdown, which the Parties provided on 10 December 2015.

(2) **Claimant's statement of costs**

547. By letter of 24 November 2015, Claimant provided the following overview of its costs, which it updated upon the Tribunal's request for further detail on 10 December 2015:

		Updated Total in Omani Reals
Dentons	Fees	2,310,010.57
	Disbursements	124,795.53
	Sub-total	2,434,806.10
Barristers	Fees	299,660.37
	Expenses	929.65
	Sub-total	300,590.02
Experts *	Fees	73,499.37
	Expenses	8,394.40
	Sub-total	81,893.77
	ICSID Costs	173,273.25

[924] T12/141/23-142/10.

	TOTAL COSTS	2,990,563.14
	+ Client's costs ** in USD	256,498.00

*Expert fees and expenses do not include Dr Idris' fees and expenses because these were paid directly by the client in USD. These amounts are included in client's costs.

**Client's costs are: the costs incurred on visas and hotels when Dentons' lawyers were in Sudan; the client's direct expenses when attending meetings in London, Abu Dhabi and Muscat, and London for the hearing; the fees paid to Dr Idris and his expenses; and the costs of other Sudanese experts they instructed.

548. Claimant confirmed that it had paid OMR 2,549,504.72 of the total costs by that date and that OMR 441,058.80 had not been paid yet. According to Claimant, these outstanding costs corresponded in large part (OMR 421,746.82) to Counsel's last invoice of 5 December 2015, which was to be paid shortly.

549. At the exchange rate prevailing on 10 December 2015 between Omani Reals and the US dollar, the ICSID Secretariat calculates that the US dollar equivalent of Claimant's costs is: USD 7,769,715.12[925]

(3) **Respondent's statement of costs**

550. By letter of 24 November 2015, Respondent provided the following overview of its costs:

	Total
Skadden Fees	9,967,478.00
Disbursements	963,089.84
Experts	527,556.00

[925] Applying an OMR currency rate per USD of 0.3848999728 as at 10 December 2015, available at http://www.xe.com/currencytables/?from=OMR&date=2015-12-10.

ICSID Costs	425,000.00
Client's Costs	509,849.00
TOTAL COSTS	USD 12,392,972.84

551. By letter of 10 December 2015, further to the Tribunal's request, Respondent submitted an Excel spread-sheet which set out the following information for each invoice issued by Counsel for Respondent:

(a) The fees claimed by fee earner, rate and number of hours claimed; and

(b) The expenses claimed by category and amount.

552. In paragraph 4 of Respondent's letter of 10 December 2015, Respondent confirmed it had paid for all fees and expenses "save for (a) the last Skadden invoice listed in the excel spread-sheet dated 17 November 2015 (USD $1,486,406.41); and (b) USD $30,400 (for work carried out by a Skadden contract attorney, Mrs Vanessa Jimenez) which, as of the date of this letter, has not yet been billed to the client, but will be included on our next invoice." On 15 March 2016, Respondent submitted a correction to its submission of 10 December 2015, indicating that it had previously omitted from its calculations an amount of USD 325,831 for work carried out by experts in this arbitration. Respondent further explained that "[t]he amount claimed for the work undertaken by the Respondent's experts is now 853,387 USD (instead of 527,556 USD), and the total amount claimed by the Respondent is now 12,718,803.84 USD (instead of 12,392,972.84 USD)."

(4) Fees and expenses of the Centre and the Tribunal

553. The Secretariat advises that the fees and expenses incurred in these proceedings by the Centre and the Tribunal, determined in accordance with its Administrative and Financial Regulations and the provisions of PO No 1 are as follows:

Arbitrators' fees and expenses	
Prof McLachlan QC, President	248,898.04
Dr Griffith QC, Co-arbitrator	155,680.92
Prof Williams QC, Co-arbitrator	113,284.69

Other direct expenses (estimated)[926]	176,783.15
ICSID's administrative fees	128,000.00
Total	**USD 822,646.80**

554. The above costs have been paid out of the advances made to ICSID by the Parties as indicated in the paragraph below. Once the case account balance is final, the ICSID Secretariat will provide the Parties with a detailed financial statement, and the remaining balance will be reimbursed to the Parties in proportion to the advances they made.

555. Each Party has contributed to date in equal shares to the Secretariat's requests for advances on costs in accordance with paragraph 8 of PO No 1. These contributions amount to:

Sudapet Company Limited	USD 424,975.00
Republic of South Sudan	USD 420,365.80

(5) **Tribunal's decision on costs**

556. Article 61(2) of the ICSID Convention leaves the Tribunal with broad discretion as to how to apportion costs.

557. In the present case, the Tribunal considers that the proper order is that the Parties should bear in equal shares the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre and that each Party should bear its own expenses.

558. […]

[926] Payments made by ICSID for other direct expenses include those related to the conduct of hearings (e.g., court reporting, audio visual, interpretation, the charges of the IDRC for hosting the hearings), and courier services, as well as estimated charges related to the dispatch of this Award.

VII. DECISION

559. […]

[signed]	[signed]
Dr. Gavan Griffith QC Arbitrator Date: 12 September 2016	Mr. David A. R. Williams QC Arbitrator Date: 12 September 2016

[signed]

Professor Campbell McLachlan QC
President
Date: 12 September 2016