

PCA Case No. 2015-17

**IN THE MATTER OF AN ARBITRATION
UNDER THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW, AS REVISED IN 2010**

-between-

INDIAN POTASH LIMITED (INDIA)

(the "Claimant")

-and-

AGRICULTURE INPUTS COMPANY LIMITED (NEPAL)

(the "Respondent," and together with the Claimant, the "Parties")

AWARD

Arbitral Tribunal

Dr. Kamal Hossain (Presiding Arbitrator)
Honourable Justice (Retired) Mr. Sachchida Nand Jha
Honourable Judge (Retired) Mr. Raghav Lal Vaidya

Registry

Permanent Court of Arbitration

December 2, 2016

PCA 164432

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GLOSSARY OF DEFINED TERMS

2015 Constitution of Nepal	Constitution of Nepal that came into force on September 20, 2015
AICL (or Agriculture Inputs, or Respondent)	Agriculture Inputs Company Limited
Arbitration Act	Arbitration Act 2055 of Nepal of 1999
CIAA	Commission for the Investigation of Abuse of Authority
CIAA Act	CIAA Act 2048 of Nepal of 1991
CIAA Directive	CIAA letter Ref. No. 477 to the Respondent, dated September 18, 2012
CIAA Rules	CIAA Rules 2059 of 2002
CIF	Cost, Insurance and Freight
Claimant's Rejoinder	Claimant's Reply to Respondent's Rejoinder, dated January 29, 2016
Claimant's Reply	Claimant's Statement of Reply to the Statement of Defence of Respondent, dated December 24, 2015
Contract	Contract No. 13/068/69 for Supply and Delivery of 30,000 MT Urea 46% N Chemical Fertilizers under Tender Notice No. KPN/29/067/68, entered into between the Parties on August 8, 2011
Contract Act	Contract Act 2056 of Nepal of 2000
Country Code	Muluki Ain Country Code 2020 of Nepal
DAP	Diammonium Phosphate
Expert Report	Expert Team's Report
Expert Team	Respondent's Expert Team conformed under the co-ordination of the Ministry of Agriculture and Co-operatives who investigated the bags' underweight
IPL (or Indian Potash, or Claimant)	Indian Potash Limited
LC	Letter of Credit
Oath	Arbitrator's Oath in Schedule of the Arbitration Act
PCA	Permanent Court of Arbitration
PGB	Performance Guarantee Bond
PHB	Post-Hearing Brief
Respondent's Rejoinder	Respondent's Rejoinder dated January 15, 2016
SGS	Société Générale de Surveillance
Statement of Claim	Claimant's Memorial and Statement of Claim, dated October 1, 2015
Statement of Defense	Respondent's Statement of Defense and Counter Memorial, dated November 15, 2015

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TCI	Transportation Consultancies International sprl
Tender	Tender Notice No. KPM/29/067/68 for the supply and delivery of 30,000 MT +/- 5% of urea (46% N) fertilizer at the Respondent's facilities in Biratnagar, Birgunj and Bhairahawa, Nepal, issued by the Respondent on July 1, 2011
Tribunal's Oaths	Arbitrators' Oath in the form contained in the Schedule of the Arbitration Act, signed by each Member of the Tribunal, pursuant to Section 9 of the Arbitration Act
UNCITRAL Rules	UNCITRAL Arbitration Rules, as revised in 2010

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I. INTRODUCTION

A. THE PARTIES AND THE TRIBUNAL

1. *The Claimant:* The Claimant in this arbitration is Indian Potash Limited (“**Indian Potash**”, “**IPL**” or the “**Claimant**”), a limited company incorporated under the laws of the Republic of India, and a designated State Trading Enterprise for the Government of India,¹ with its registered office in Chennai, India, and its corporate office in New Delhi, India.
2. *The Claimant's Legal Representatives:* The Claimant is represented in this arbitration by its General Manager (PO), Mr. Sangram Singh Sandhwalia, and Ms. Shiva Lakshmi and Mr. Sri Ram Krishna of SKM Advocates & Solicitors in New Delhi, India.
3. *The Respondent:* The Respondent in this arbitration is Agriculture Inputs Company Limited (“**Agriculture Inputs**”, “**AICL**” or the “**Respondent**”, and together with the Claimant, the “**Parties**”), a public corporation incorporated in accordance with the laws of the Federal Democratic Republic of Nepal, with its registered office in Kathmandu, Nepal.
4. *The Respondent's Legal Representatives:* The Respondent is represented in this arbitration by its Managing Director, Mr. Shri Ammar Raj Khair, and its Chief of Procurement, Mr. Narayan Marasini, as well as Messrs. Purna Man Sakhya, Prakrit Shrestha, Bikalpa Rajbhandari and Nanda Krishna Shrestha of Reliance Law Firm in Kathmandu, Nepal.
5. *The Tribunal:* The Tribunal is composed of Honourable Justice (Retired) Mr. Sachchida Nand Jha, appointed by the Claimant, Honourable Judge (Retired) Mr. Raghav Lal Vaidya, appointed by the Respondent, and Dr. Kamal Hossain, appointed as presiding arbitrator by the Secretary-General of the Permanent Court of Arbitration (the “**PCA**”), in his capacity as Appointing Authority by agreement of the Parties.
6. *The Registry:* The PCA acts as registry in these proceedings by agreement of the Tribunal, the Parties and the PCA (as confirmed in Procedural Order No. 1 dated August 24, 2015).

¹ Statement of Claim, para 2.1; Claimant's letter to the Respondent, dated February 15, 2012 (Exhibit C-35).

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B. THE ARBITRATION AGREEMENT

7. The terms of the arbitration agreement invoked by the Claimant are contained in Clause 15 (Conditions of Contract) of the Contract No. 13/068/69 for Supply and Delivery of 30,000 MT Urea 46% N Chemical Fertilizers under Tender Notice No. KPN/29/067/68, entered into between the Parties on August 8, 2011 (the "Contract"),² which provides as follows:

15. Settlement of Dispute and Contract Arbitration:

If any dispute happens, the two parties agree to try their utmost to solve it by friendly negotiation. If the dispute proves impossible to settle within a period of 30 days from the date of notice by either party, all disputes arising out of or in connection with the present contract shall be finally settled under UNCITRAL Arbitration Rules as at present in force. The venue of arbitration shall be Kathmandu, Nepal. English language shall prevail for arbitration purposes.

The forfeitures of the performance bond as per the conditions of contract shall not be under the jurisdiction of arbitrator and cannot be arbitrated upon.

C. THE DISPUTE

8. In summary, the Parties' dispute arises from the performance of the Contract. The Claimant argues that the Respondent failed to pay part of the sum owed to the Claimant under the Contract. The Respondent, in turn, argues that the Claimant failed to deliver the fertilizer in the amount and on the date specified in the Contract.

² The Contract (Exhibit C-7, RLA-1).

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II. PROCEDURAL HISTORY

9. By **Notice of Arbitration** dated January 31, 2013, and a further **Notice** dated May 2, 2014, received by the Respondent on June 16, 2014, the Claimant commenced arbitration proceedings against the Respondent pursuant to Clause 15 of the Contract, and the UNCITRAL Arbitration Rules, as revised in 2010 (the "**UNCITRAL Rules**").
10. In its Notice of Arbitration, the Claimant appointed the first arbitrator, who subsequently resigned. On December 8, 2014, the Claimant appointed Honourable Justice (Retired) Mr. Sachchida Nand Jha as arbitrator.
11. By letter dated October 12, 2014, the Respondent appointed Honourable Justice (Retired) Mr. Tope Bahadur Singh as the second arbitrator.
12. By letters dated May 30, 2015, and June 1, 2015, the Parties respectively requested the PCA to act as the Appointing Authority and to appoint the presiding arbitrator.
13. By the "Appointment of Presiding Arbitrator", dated July 13, 2015, the Secretary-General of the PCA appointed Dr. Kamal Hossain as Presiding Arbitrator.
14. By letter dated August 12, 2015, the Tribunal convened a first procedural meeting via telephone conference to determine the further conduct of the proceedings, and circulated draft **Procedural Orders Nos. 1 and 2** inviting the Parties' comments thereon.
15. By letter dated August 14, 2015, the Respondent submitted its comments on the draft procedural orders.
16. By letter dated August 17, 2015, the Tribunal circulated to the Parties a proposal of procedural calendar for these proceedings.
17. On August 18, 2015, the Tribunal held a first procedural meeting with the Parties via telephone conference. At the conference, the Claimant approved both draft Procedural Orders Nos. 1 and 2, and confirmed that it would not submit written comments thereon. The Claimant reiterated this position by letter dated August 21, 2015.
18. On August 24, 2015, the Tribunal issued Procedural Orders Nos. 1 and 2, setting out the basic framework for the arbitration. Procedural Order No. 1, *inter alia*, provides that: (i) the arbitration shall be conducted in accordance with the UNCITRAL Rules (para 3.1); (ii) the place of arbitration is Kathmandu, Nepal (para 6.1); (iii) the language of the proceedings shall be English

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(section 7); and (iv) the PCA shall act as registry and administer the arbitral proceedings (section 8). Procedural Order No. 2, *inter alia*, provides the procedural calendar agreed upon by the Parties (para 3.1).

19. By letter dated August 27, 2015, and pursuant to Section 9 of the Arbitration Act 2055 of Nepal of 1999 (the "Arbitration Act"),³ the Tribunal circulated to the Parties copies of the Arbitrators' Oath (the "Tribunal's Oaths")⁴ signed by each Member of the Tribunal, and directed the Parties to file them in accordance with the Arbitration Act.
20. On October 1, 2015, pursuant to the procedural calendar set out in Procedural Order No. 2, the Claimant submitted its Memorial and Statement of Claim (the "Statement of Claim"). Together with its Statement of Claim, the Claimant submitted Exhibits C-1 to C-50.
21. On November 16, 2015, pursuant to the procedural calendar, the Respondent submitted its Statement of Defense and Counter Memorial (the "Statement of Defense"). Together with its Statement of Defense, the Respondent submitted Exhibits R-1 to R-14, Legal Authorities RLA-1 to RLA-4, and Expert Reports RER-1 and RER-2.
22. By letter dated December 17, 2015, the Tribunal granted the Claimant's request for an extension of until December 24, 2015 to submit its reply memorial in light of massive floods in Chennai that disrupted the Claimant's regular operations.

³ Section 9 of the Arbitration Act (in the English version submitted by the Claimant) reads:

"Arbitrators to Take Oath:

(1) Before starting the proceedings of arbitration, the arbitrator must affix his signature on two copies of a written oath as indicated in the schedule regarding impartiality and honesty and send one copy thereof to the Appellate Court and keep the other copy in the case-file.

(2) Before taking oath pursuant to Sub-section (1), the arbitrator must make clear matters, if any, which raise a reasonable doubt about his /her impartiality or independence in respect to the dispute which he/she has to settle."

⁴ The Schedule of the Arbitration Act (in the English version submitted by the Claimant) reads as follows:

"Schedule

(Pertaining to Section 9)

In the dispute referred to me/us for arbitration between and, I/we shall work in an impartial and honest manner without any bias toward any party.

Name Signature Date"

The Oath circulated by the Tribunal to the Parties reads: "In the dispute referred to me for arbitration between Indian Potash Limited (India) and Agriculture Inputs Company Limited (Nepal), PCA Case No. 2015-17, I shall work in an impartial and honest manner without any bias toward any party."

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23. On December 24, 2015, the Claimant submitted its Statement of Reply to the Statement of Defense of the Respondent (the "Claimant's Reply"). Together with its Reply, the Claimant submitted Exhibits C-51 and C-52.
24. On January 15, 2016, pursuant to the procedural calendar, the Respondent submitted its Rejoinder (the "Respondent's Rejoinder").
25. On January 25, 2016, the Tribunal issued **Procedural Order No. 3** concerning the oral hearings in Kathmandu, Nepal, scheduled for February 12-13, 2016 as provided by the procedural calendar of Procedural Order No. 2.
26. By message of the same date, the Claimant drew the Tribunal's attention to the provision of Article 135 of the new Constitution of Nepal,⁵ which came into force on September 20, 2015 (the "2015 Constitution of Nepal"), rendering retired Nepalese Supreme Court Justices ineligible to act as arbitrators.⁶
27. By message of January 26, 2016, the Tribunal invited comments from the Respondent and adjourned the oral hearings, as confirmed by message of January 29, 2016.
28. On January 29, 2016, pursuant to the procedural calendar, the Claimant submitted its Reply to Respondent's Rejoinder (the "Claimant's Rejoinder"). Together with its Rejoinder, the Claimant submitted Exhibits C-53 and C-54.
29. On February 1, 2016, the Honourable Justice (Retired) Mr. Tope Bahadur Singh submitted his resignation as arbitrator in the present arbitration.
30. By letter dated March 2, 2016, the Respondent appointed Mr. Raghav Lal Vaidya, Honourable Judge (Retired) of the Court of Appeal of Nepal, as arbitrator.
31. By letter dated March 7, 2016, the Tribunal circulated to the Parties draft Procedural Order No. 4 concerning the organization of oral hearings, and convened a telephone conference to discuss the draft order, which took place on March 16, 2016.

⁵ Art. 135 of the 2015 Constitution of Nepal (in the English version submitted by the Claimant) reads: "*Not to be part of pleading of court cases: The Chief Justice or Judge of the Supreme Court, following their retirement shall not be allowed to plead any cases in any court, or involve in reconciliation or mediation business.*"

⁶ Referring to the ineligibility of Honourable Justice (Retired) Tope Bahadur Singh to act as co-arbitrator.

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32. On March 23, 2016, the Tribunal issued **Procedural Order No. 4** fixing April 22-23, 2016, as the dates of the oral hearings and providing other details concerning their organization.
33. On April 1, 2016, in accordance with Procedural Order No. 4, the Respondent submitted its list of witnesses called for examination at the hearing and their respective witness statements. The Claimant did not submit any such list or witness statements.
34. On April 21, 2016, prior to the commencement of the hearing, each member of the Tribunal executed the Tribunal's Oaths, an original signed set of which was provided to each Party to comply with the filing requirement of Section 9 of the Arbitration Act.⁷
35. During April 22-23, 2016, **Oral Hearings** were held at Hotel Annapurna, in Kathmandu, Nepal.
36. The Claimant was represented by the following persons at the hearing:
- Dr. P.S. Gahlaut, Managing Director, IPL
 - Mr. S.S. Sandhawalía, General Manager (PO), IPL
 - Ms. Shiva Lakshmi Singh, Advocate, SKM Advocates & Solicitors
 - Mr. Sri Ram Krishna, Advocate, SKM Advocates & Solicitors
37. The Respondent was represented by the following persons at the hearing:
- Mr. Ammar Raj Khair, Managing Director, AICL
 - Mr. Naryan Marasini, Chief of Procurement, AICL
 - Mr. Bishnu Prasad Pokhrel, Chief of Planning, AICL
 - Sr. Advocate Purna Man Shakya, Partner, Reliance Law Firm
 - Advocate Prakrit Shrestha, Sr. Associate, Reliance Law Firm
 - Advocate Bikalpa Rajbhandari, Associate, Reliance Law Firm
 - Advocate Nanda Krishna Shrestha, Associate Advocate/Paralegal
38. The following witnesses were examined at the hearing:
- Mr. Ammar Raj Khair, Managing Director, AICL
 - Mr. Ram Babu Adhikari, Senior Agricultural Economist, Ministry of Agriculture Development
 - Mr. Hari Prasad Gajurel, Deputy Manager, AICL
39. On April 22, 2016, at the hearing, at the beginning of its opening statement, the Claimant submitted a **Chronological List of Events**. Additionally, the Claimant submitted copies of the

⁷ See Hearing Transcript, Day 1, 13:1-16:25.

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certificates of weight and the certificates of inspection issued by Transportation Consultancies International sprl (“TCI”) for urea dispatched to the Respondent (Exhibit C-55). The Tribunal, noting paras. 4.4 and 7.3 of Procedural Order No. 2,⁸ requested the Claimant to file a formal written application for leave to introduce Exhibit C-55.

40. During its opening statement, the Respondent submitted an excerpt of the 2015 Constitution of Nepal. Absent opposition by the Claimant, it was duly admitted to the record.⁹
41. The Parties also submitted the English¹⁰ and Nepali¹¹ versions of the Commission for the Investigation of Abuse of Authority Act 2048 of Nepal of 1991 (the “CIAA Act”) during the hearing.
42. On April 23, 2016, the Claimant filed an application seeking leave to add Exhibit C-55 and a new Exhibit C-56 to the record.¹² The Respondent opposed the introduction of Exhibit C-55¹³ but did not oppose the introduction of Exhibit C-56¹⁴. The Tribunal decided to formally admit Exhibit C-55 to the record but noted that the Tribunal will decide what value shall be given to it.¹⁵
43. The Parties agreed to submit post-hearing briefs by May 16, 2016, and the Tribunal requested the Parties to file submissions on costs by May 2, 2016. The foregoing was confirmed by a letter dated April 24, 2016, wherein the Tribunal posed the following two questions to the Parties, to be dealt with in the post-hearing briefs:

1) The Parties are expected to give references to exhibits and oral testimony already in record with respect to the calculations of shortage and late delivery, in particular, with respect to: (a) the facts stated in exhibit R-11, e.g., how the dates and amounts in this table were calculated; also with regard to the re-standardization of bags; and (b) the amount of urea that was provided by the Claimant to the Respondent in the re-standardization/re-bagging process, to make up for the shortage actually detected in the bags delivered by the Claimant.

2) Clause 14 of the Conditions of Contract, on insurance, provides for the goods to be insured up to final destination, i.e., Respondent’s warehouse in Nepal. In this context, concerning the

⁸ Procedural Order No. 2, para. 4.4: “Following submission of the Reply and Rejoinder, the Tribunal shall not consider any evidence that has not been introduced as part of the written submissions of the Parties, unless the Tribunal grants leave on the basis of exceptional circumstances. Should such leave be granted to one side, the other side shall also be granted an opportunity to submit relevant counter-evidence”; and para. 7.3, in relevant part: “No new evidence may be presented at the hearing except with leave of the Tribunal”; see Hearing Transcript, Day 1, 111:14-112:13.

⁹ See Hearing Transcript, Day 1, 171:22-172:8.

¹⁰ Submitted by the Claimant.

¹¹ Submitted by the Respondent.

¹² Hearing Transcript, Day 2, 225:25-227:18.

¹³ Hearing Transcript, Day 2, 229:8-230:23.

¹⁴ Hearing Transcript, Day 2, 231:1-5.

¹⁵ Hearing Transcript, Day 2, 233:20-23.

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Respondent's submission that no claim could be made by the Respondent because of the Claimant's failure to provide necessary documents, could the Respondent clarify what documents were not provided by the Claimant, which precluded the Respondent from filing claims with the insurer?

In the same letter, the Parties were also informed that audio recordings of the hearing would be available on the PCA's secure extranet and provided access details. Finally, the Parties were requested to file the Tribunal's Oaths and provide confirmation thereof.

44. By letter dated April 25, 2016, the Claimant submitted soft copies of its application to add Exhibits C-55 and C-56 to the record.
45. On April 28, 2016, the Respondent wrote to the Tribunal raising objections to the Claimant's application seeking leave to admit fresh evidence at the hearing stating that the Tribunal had already clearly ruled on its inadmissibility.
46. On May 2, 2016, the Parties filed their respective **Costs Submissions**.
47. On May 4, 2016, the Claimant wrote to the Tribunal stating that Exhibits C-55 and C-56 had been added to the record pursuant to instructions from the Registry and that the decision on admissibility remained the prerogative of the Tribunal.
48. On May 5, 2016, the PCA circulated the hearing transcripts. The Parties were requested to submit their agreed revised transcripts to the Tribunal by June 2, 2016.
49. By a letter dated May 6, 2016, the Tribunal recalled that it had decided at the hearing to formally admit Exhibit C-55 to the record, but had retained the discretion to decide on the value that would ultimately be placed on it.
50. On May 16, 2016, the Parties filed their respective **Post-Hearing Briefs**.
51. On May 20, 2016, the Respondent informed the Tribunal that the signed copies of the Tribunal's Oaths had been duly filed at the Appellate Court, Patan, attaching a scan of the filing document as evidence. As the filing document provided was in Nepali, the Parties were requested by the Registry to provide an English translation of the document.
52. By e-mail dated June 9, 2016, the Registry reminded the Parties to submit their agreed revised transcripts, as the deadline set for submission of jointly revised transcripts had lapsed and the Parties had failed to meet the deadline.

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53. On June 10 and 12, 2016, respectively, the Claimant and the Respondent separately notified the Tribunal that they did not propose any changes to the transcripts.
54. On June 17, 2016, the Respondent submitted a translated copy, from Nepali into English, of the evidence of the filing of the Tribunal's Oaths.
55. On June 17, 2016, the Claimant and the Respondent confirmed that no comments or revisions were suggested for the hearing transcripts.
56. Subsequently, the Registry confirmed that the **Hearing Transcripts** circulated to the Parties on May 5, 2016 would be deemed final.
57. On October 3, 2016, the Tribunal, prior to closing the hearings pursuant to Article 31 of the UNCITRAL Rules, requested the Parties to confirm that they do not have any further proof to offer or witnesses to be heard or submissions to make.
58. On October 11, 2016, the Claimant submitted certain documents, which the Tribunal rejected for considering them untimely on the basis of paras. 4.2 and 4.3 of Procedural Order No. 2.
59. On November 7, 2016, the Tribunal issued **Procedural Order No. 5** declaring the hearings closed pursuant to Article 31 of the UNCITRAL Rules.

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III. SUMMARY OF RELEVANT FACTS

60. The Tribunal briefly summarizes below the relevant facts presented by the Parties, based on the written and oral submissions made in this arbitration. This summary, made to facilitate an understanding of this Award, is not intended to be complete or exhaustive.
61. On July 1, 2011, the Respondent issued Tender Notice No. KPN/29/067/68 (the “Tender”) for the supply and delivery of 30,000 MT +/- 5% of urea (46% N) fertilizer to the Respondent’s facilities in Biratnagar, Birgunj and Bhairahawa, Nepal.¹⁶
62. The Claimant entered the Tender and made an offer dated July 21, 2011.¹⁷ By letter dated August 4, 2011, the Respondent accepted the Claimant’s offer for 30,000 MT of urea for USD 18,891,250.00.¹⁸ By letter of the same date, the Claimant acknowledged the award of the Tender, issued a pro forma invoice and informed the Respondent that it was arranging for the issuance of the Performance Guarantee Bond (the “PGB”) as per terms of the Tender.¹⁹ The Claimant then opened a PGB for USD 944,562.50 (5% of the total in the pro forma invoice pursuant to Clause 2 of the Conditions of Contract) in favor of the Respondent, with validity from August 4, 2011 to February 1, 2012.²⁰
63. On August 8, 2011, the Parties entered into the Contract.²¹
64. Paragraph 2 of the Contract reads as follows:

2. ATCL will pay the SUPPLIER as follows.

a.	CIF ATCL warehouse Biratanagar	5,000X633.75	USD 3,168,750.00
b.	CIF ATCL warehouse Birgunj	15,000X626.50	USD 9,397,500.00
c.	CIF ATCL warehouse Bhairahawa	10,000X632.50	USD6,325,000.00
		Total	USD 18,891,250.00
	In words eighteen Million eight hundred ninety one thousand two hundred fifty US dollar only		

¹⁶ Statement of Claim, para.4.1; Claimant’s Chronological List of Events, item 1.

¹⁷ Statement of Claim, para.4.2; Claimant’s Chronological List of Events, item 2.

¹⁸ Statement of Claim, para. 4.3; Letter of Acceptance from the Respondent to the Claimant, dated August 4, 2011 (Exhibit C-4); Claimant’s Chronological List of Events, item 3.

¹⁹ Statement of Claim, para. 4.4; Claimant’s letter dated August 4, 2011, along with pro forma invoice (Exhibit C-5); Claimant’s Chronological List of Events, item 4. *Cfr.* Clause 2 of the Conditions of Contract, which reads, in relevant part: “[t]he supplier shall have to provide 5 (five) percent performance bond of the total CIF value before or at the signing of the contract”.

²⁰ Statement of Claim, para.4.5; copy of the PBG issued on August 4, 2011 (Exhibit C-6); Claimant’s Chronological List of Events, item 5. According to the Claimant, this PBG was later extended until October 28, 2012 (Hearing Transcript, Day 1, 21:14-18).

²¹ Statement of Claim, para.4.6; the Contract (Exhibit C-7, RLA-1); Claimant’s Chronological List of Events, item 6.

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65. Clause 6 of the Conditions of Contract reads: “[t]he latest date of loading and shipment shall be 35 days for the first shipment and 65 days for the second shipment from the date of opening of [Letter of Credit (“LC”) by the Respondent]. The shipment date shall be counted from the seventh day of the establishment of [LC]. Unless otherwise proved, the date of the bill of lading shall be considered as the date of shipment.”
66. On August 9, 2011, the Respondent opened the first LC of USD 6,265,000.00 for the supply of 10,000 MT (+/- 5%) of urea to Birgunj, Nepal, at a rate of USD 626.50 per MT, with September 19, 2011 as the latest date of shipment.²²
67. On September 16, 2011, the Claimant informed the Respondent as follows:
- We are pleased to inform that our urea shipment to Vizag has completed discharge of 31500 MT urea for supply to AICL, Nepal.*
- We have also received Vizag customs clearance for export to Nepal and already indented for the first Rake which we expect to load on 17th September, 2011.*
- We regret the delay in above supply which was mainly due to continuous heavy rains at Vizag and acute congestion at port, which resulted in 15 days delay in berthing and discharge of vessel.*
- We shall now make our best efforts to load urea rakes at every 3-4 days interval.*²³
68. On September 17, 2011, the Respondent requested the Claimant “not to dispatch the fertilizers until [Respondent’s] further request”.²⁴
69. The Claimant replied by consecutive letters dated September 20 and 27, and October 7, 2011, that the cargo was stored in a customs bonded warehouse in Vizag Port, that it should be cleared within an allocated time, and that otherwise, the Claimant would have to pay heavy demurrage and penalty costs to the warehouse. In addition, the Claimant highlighted that holding the cargo any further would delay the delivery of the cargo beyond the contractual delivery date.²⁵
70. On October 14, 2011, the Respondent requested that the Claimant arrange the dispatch of the fertilizers to the three different destinations set forth in the Contract simultaneously.²⁶ On the

²² Statement of Claim, paras. 3.4 & 4.10; Letter of Credit No. EB0100F0S00641, dated August 9, 2011 (Exhibit C-10); Claimant’s Chronological List of Events, item 7.

²³ Statement of Claim, paras. 3.4 & 4.11; Claimant’s letter to the Respondent, dated September 16, 2011 (Exhibit C-11); Claimant’s Chronological List of Events, item 13.

²⁴ Statement of Claim, paras. 3.4 & 4.12; Respondent’s letter to the Claimant, dated September 17, 2011 (Exhibit C-12); Claimant’s Chronological List of Events, item 14.

²⁵ Statement of Claim, paras. 3.4 & 4.13-4.14; Claimant’s letters dated September 20, 2011, and October 7, 2011 (Exhibits C-13 & C-14); Claimant’s Chronological List of Events, items 16, 17 & 18.

²⁶ Statement of Claim, paras. 3.4 & 4.17; Respondent’s letter to the Claimant, dated October 14, 2011 (Exhibit C-17); Claimant’s Chronological List of Events, item 21.

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same date, the Government of India issued instructions to the Indian Railways to give priority in loading Diammonium Phosphate (“DAP”) and other phosphatic fertilizer over any other fertilizer. According to these instructions, rakes could only be allotted to urea fertilizer in the absence of DAP and other phosphatic fertilizer to be loaded.²⁷

71. The Claimant informed the Respondent of the aforementioned circumstances and requested that the Respondent assist in resolving the issue of the allotment of rakes for the loading of urea fertilizers.²⁸ After exchanges of correspondence and follow up by the Respondent with the Government of India, including through the Nepalese Embassy in India,²⁹ the Claimant was able to load the first rake of urea on November 9, 2011.³⁰ Further correspondence was sent from the Nepalese Embassy in India to the Ministry of Railways, requesting necessary arrangements to be made for allotment of railway rakes for transporting the urea fertilizers.³¹
72. In view of the delay, the Claimant requested the Respondent to amend the LCs and extend the dates of last shipment and expiry thereunder.³² However, the Respondent’s response was limited to extending the LC until December 30, 2011.³³
73. On December 19, 2011, the Claimant requested the Respondent to extend the shipment schedule against the Contract until January 30, 2012, and asked the Respondent for compensation with respect to the inventory cost incurred by the Claimant during the period in which the cargo was on hold at the custom bonded warehouses (“*i.e. 3 months of inventory carrying cost of approx. USD 27.25 pmt by way of interest costs and go down rents*”).³⁴ By letter dated December 22,

²⁷ Statement of Claim, paras. 3.5 & 4.15-4.16; Fax Message from the Government of India, Ministry of Chemicals & Fertilizers, Department of Fertilizers, dated October 14, 2011 (Exhibit C-16); Claimant’s Chronological List of Events, item 20.

²⁸ Statement of Claim, paras. 3.5, 4.19 & 4.21; Claimant’s letters to the Respondent, dated October 24 and 31, 2011 (Exhibits C-19 & C-21); Claimant’s Chronological List of Events, items 24 & 26.

²⁹ Statement of Claim, paras. 4.20 & 4.22; Respondent’s letter to the Government of India, dated October 25, 2011 (Exhibit C-20); Nepalese Embassy’s letter to the Government of India, dated November 2, 2011 (Exhibit C-22); Claimant’s Chronological List of Events, items 25 & 27.

³⁰ Statement of Claim, paras. 3.6 & 4.23; Claimant’s letters to the Respondent, dated November 8 and December 19, 2011 (Exhibits C-23 & C-25); Claimant’s Chronological List of Events, items 28 & 29.

³¹ Nepalese Embassy’s letter to the Government of India, dated November 23, 2011 (Exhibit C-24); Claimant’s Chronological List of Events, item 31.

³² Claimant’s letter to the Respondent, dated October 20, 2011 (Exhibit C-18).

³³ Statement of Claim, paras. 4.25-4.26; Claimant’s letter to the Respondent, dated December 19, 2011 (Exhibit C-25); Claimant’s Chronological List of Events, item 32.

³⁴ Claimant’s letter to the Respondent, dated December 19, 2011 (Exhibit C-25).

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2011, the Respondent rejected the inventory costs sought by the Claimant, stating the lack of a contractual provision for such claim.³⁵

74. On December 21, 2011, the Claimant notified the Respondent that eight (8) rakes, containing 19,468.550 MT, had been dispatched from Vizag to Birgunj/Bhairahawa and that one rake for each location was being loaded. The Claimant also informed the Respondent that confirmation of acceptance of certain documents presenting “minor discrepancies” by the Respondent was required for the release of payments under LCs for urea already delivered.³⁶
75. On December 23, 2011, the Respondent notified the Claimant that payment for the first rake had already been released, and payments for all the remaining rakes would be released the following week. The Respondent further stated that amending LCs is complicated, and requested the Claimant to make the shipment of the additional quantity of urea assuring that discrepancies in the LC documents would be accepted.³⁷
76. On December 29, 2011, the Respondent requested one additional rake for Bhairahawa and one additional rake for Birgunj instead of Biratnagar.³⁸ On the same day, the Claimant indicated that shipment would be modified to comply with this request and invited the Respondent to amend the last date of supply to January 6, 2012,³⁹ and the extension of the LC expiry date to February 5, 2012.⁴⁰
77. Thereafter, the Claimant continued with the supply of urea under the Contract, through a total of 13 railway rakes, the last of which was delivered on December 30, 2011.⁴¹

³⁵ Respondent’s Letter to the Claimant, dated December 22, 2011 (Exhibit R-14); Claimant’s Chronological List of Events, item 34.

³⁶ Claimant’s letter to the Respondent, dated December 21, 2011 (Exhibit C-26); Claimant’s Chronological List of Events, item 33.

³⁷ Respondent’s letter to the Claimant, dated December 23, 2011 (Exhibit C-27); Claimant’s Chronological List of Events, item 35.

³⁸ Respondent’s e-mail to the Claimant, dated December 29, 2011 (Exhibit C-28); Claimant’s Chronological List of Events, item 36.

³⁹ Claimant’s e-mail of December 29, 2011 (Exhibit C-29).

⁴⁰ Claimant’s letter to the Respondent, dated December 29, 2011 (Exhibit C-30).

⁴¹ Statement of Claim, paras. 3.6-3.7 & 4.33; Claimant’s Chronological List of Events, item 40. *Cfr.* Exhibits C-2 & C-3; Claimant’s letter dated January 17, 2012 (Exhibit C-32).

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78. The Claimant presents the following details regarding the 13 rakes of urea delivered to the Respondent:⁴²

	LC No	Commercial Invoice No	RR No.	RR Date	Net Quantity (MT)	Destination	Rate P/BT	100% Value	95% Value	5% value	95% amount received (US\$)	95% receipt date
1st Rake	EB0100F0500441 dated 05-08-2011	IPUDLUUREA/ACLU/2011-12/01 Dated: 08-11-2011	262004249	08-11-2011	2,499.850	Ispuj	626.50	15,66,156.03	14,87,848.32	78,302.80	14,87,738.21	06-01-2012
2nd Rake	EB0100F0500441 dated 10-08-2011	IPUDLUUREA/ACLU/2011-12/02 Dated: 26-11-2011	262004340	26-11-2011	2,550.000	Nautanwa/ Nhotawa	637.50	16,12,875.00	15,32,231.25	80,643.75	15,32,121.24	27-12-2011
3rd Rake	EB0100F0500441 dated 08-08-2011	IPUDLUUREA/ACLU/2011-12/03 Dated: 27-11-2011	262004343	27-11-2011	2,550.000	Ispuj	626.50	15,97,575.00	15,17,696.25	79,878.75	15,17,586.24	29-12-2011
4th Rake	EB0100F0500441 dated 08-06-2011	IPUDLUUREA/ACLU/2011-12/04 Dated: 05-12-2011	262004375	05-12-2011	2,567.700	Ispuj	626.50	16,08,664.05	15,28,230.83	80,433.20	15,28,232.84	31-12-2011
5th Rake	EB0100F0500441 dated 08-08-2011	IPUDLUUREA/ACLU/2011-12/05 Dated: 07-12-2011	262004392	07-12-2011	2,330.000	Ispuj	626.50	14,59,745.00	13,86,757.75	72,987.25	13,86,757.74	10-01-2012
6th Rake	EB0100F0500441 dated 03-09-2011	IPUDLUUREA/ACLU/2011-12/04 Dated: 16-12-2011	262004424	16-12-2011	2,210.500	Ispuj	626.50	13,84,878.25	13,15,634.34	69,243.91	13,15,634.33	10-01-2012
7th Rake	EB0100F0500441 dated 10-08-2011	IPUDLUUREA/ACLU/2011-12/07 Dated: 16-12-2011	262004424	19-12-2011	2,550.000	Nautanwa/ Nhotawa	632.50	16,12,875.00	15,32,231.25	80,643.75	15,32,101.24	12-01-2012
8th Rake	EB0100F0500441 dated 01-09-2011	IPUDLUUREA/ACLU/2011-12/08 Dated: 21 Dec, 2011	262004441	21-Dec-11	2,210.500	Ispuj	626.50	13,84,878.25	13,15,634.34	69,243.91	13,15,634.33	12-01-2012
9th Rake	EB0100F0500441 dated 27-08-2011	IPUDLUUREA/ACLU/2011-12/09 Dated: 27-12-2011	262004452	27-Dec-11	2,490.500	Nautanwa/ Nhotawa	637.50	15,12,875.00	15,32,231.25	80,643.75	5,00,050.66	09-01-2012
10th Rake	EB0100F0500441 dated 27-08-2011	IPUDLUUREA/ACLU/2011-12/10 Dated: 24-12-2011	262004465	24-Dec-11	2,210.500	Ispuj	626.50	13,84,878.25	13,15,634.34	69,243.91	13,15,504.33	17-02-2012
11th Rake	EB0100F0500441 dated 03-09-2011	IPUDLUUREA/ACLU/2011-12/11 Dated: 26-12-2011	262004475	26-12-2011	2,503.200	Nautanwa/ Nhotawa	632.50	15,83,274.00	15,04,110.30	79,163.70	15,04,050.29	19-10-2012
12th Rake	EB0100F0500441 dated 21-08-2011	IPUDLUUREA/ACLU/2011-12/12 Dated: 28-12-2011	262004488	28-Dec-11	2,210.500	Ispuj	626.50	13,84,878.25	13,15,634.34	69,243.91	13,15,504.33	17-02-2012
13th Rake	EB0100F0500441 dated 29-08-2011	IPUDLUUREA/ACLU/2011-12/13 Dated: 30-12-2011	262004498	30-Dec-11	2,557.250	Nautanwa/ Nhotawa	632.50	16,17,460.63	15,36,587.39	80,873.03	15,36,437.58	16-10-2012
				TOTAL =	31,500.000			1,93,11,012.70	1,88,20,462.07	9,90,550.64	1,77,87,981.36	

79. During the supply period, the Respondent requested the delivery of additional urea rakes and a change of destination for part of the shipment.⁴³ According to the Claimant, despite accommodating these requests, it experienced delays in receiving payments from the Respondent for the amounts of fertilizer that were delivered.⁴⁴

80. By a letter dated February 13, 2012, the Claimant complained of the Respondent's delay in validating the LC documents, which prevented the release of cargo at Nautanwa "causing heavy inventory cost, warfage, demurrage penalty, etc.", noted that "due to unexpected rain since past few days, it is very likely that the cargo might get damaged", and requested the Respondent's immediate action to validate the LC.⁴⁵

81. In a letter of the same date, the Respondent claimed that the bags supplied by the Claimant were underweight and not in compliance with the standard weight stipulated in the Contract.⁴⁶ In

⁴² Exhibit C-3.

⁴³ Statement of Claim, paras. 4.29-4.30; Hearing Transcript, Day 1, 46:2-4.

⁴⁴ Statement of Claim, paras. 4.27-4.28; Claimant's letter to the Respondent, dated December 21, 2011 (Exhibit C-26); Respondent's e-mail to the Claimant, dated December 29, 2011 (Exhibit C-28); Claimant's e-mail of December 29, 2011 (Exhibit C-29); Claimant's letter to the Respondent, dated December 29, 2011 (Exhibit C-30); Claimant's e-mail of December 29, 2011 (Exhibit C-31); Claimant's letter to the Respondent, dated January 17, 2012 (Exhibit C-32); Claimant's Chronological List of Events, items 33, 37, 38, 39 & 42; letter from the Claimant's agent to the Respondent, dated February 13, 2011 (Exhibit C-33); Claimant's Chronological List of Events, item 43.

⁴⁵ Letter from the Claimant's agent to the Respondent, dated February 13, 2011 (Exhibit C-33).

⁴⁶ Statement of Claim, para. 4.36; Respondent's letter to the Claimant, dated February 13, 2012 (Exhibit C-34); Claimant's Chronological List of Events, item 44. The Counsel for the Claimant, at the hearing, argued that the first written complaint

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response, the Claimant had deputed its officers to ascertain the variations in the bags' weight. Whereas the standard weight of the bags was 50 kg, the Claimant found that some bags weighed approximately 47 kg and some others were in excess of up to 53 kg. A re-bagging process was undertaken by the Respondent at the cost of the Claimant.⁴⁷

82. Upon the Respondent's request for clarification,⁴⁸ the Claimant explained that there had been a malfunction with the mechanical bagging system at the Vizag warehouse in December 2011, which went undetected due to heavy workload as it was peak fertilizer handling season.⁴⁹ The Claimant further stated that the short weight bags occurred only in the last 2-3 rakes supplied.⁵⁰
83. On February 27, 2012, the Nepalese Government formed a Committee for Investigation, the Chemical Fertilizer Scrutiny Investigation Committee, in order to address matters raised in the media regarding bags of urea fertilizers that were being received with shortfall in weight quantity.⁵¹ The Committee for Investigation submitted its conclusions in a Report dated March 12, 2012.⁵²
84. Throughout 2012, the Claimant requested the Respondent to release the payments due for the fertilizer delivered under the Contract.⁵³ In a letter dated August 9, 2012, the Claimant requested the Respondent to release the pending payments, stating that "*IPL further in good faith, without any evidence being given by AICL agreed to get deducted amount for shortage of 564.45 MT at Birgunj and 308.65 MT at Bhairahawa at reconciliation.*"⁵⁴ In a letter dated September 20, 2012,

pointing out to the Claimant the shortage was of February 13, 2012 (*see* Hearing Transcript, Day 1, 54:24-55:3), but conceded that the Respondent may have informed the Claimant verbally two or three days before (*see* Hearing Transcript, Day 1, 58:18-59:2).

⁴⁷ Statement of Claim, paras. 3.9-3.10 & 4.37; Claimant's letter to the Respondent, dated February 15, 2012 (Exhibit C-42); Claimant's Chronological List of Events, items 45 & 68.

⁴⁸ Respondent's letter to the Claimant, dated February 13, 2012 (Exhibit C-34); Claimant's Chronological List of Events, item 44.

⁴⁹ Claimant's letter to the Respondent, dated February 15, 2012 (Exhibit C-42); Claimant's Chronological List of Events, item 45.

⁵⁰ Statement of Claim, paras. 3.11, 4.37 & 4.43; Claimant's letter to the Respondent, dated June 4, 2012 (Exhibit C-39), and February 15, 2012 (Exhibit C-35); Claimant's Chronological List of Events, item 56.

⁵¹ Report of the Chemical Fertilizer Scrutiny Investigation Committee (RER-I); Claimant's Chronological List of Events, item 47.

⁵² Report of the Chemical Fertilizer Scrutiny Investigation Committee (RER-I); Claimant's Chronological List of Events, item 47.

⁵³ Statement of Claim, paras. 3.12, 4.43-4.50; Claimant's letters to the Respondent, dated June 27, 2012 (Exhibit C-40), July 31, 2012 (Exhibit C-41), August 9, 2012 (Exhibit C-42), September 18, 2012 (Exhibit C-43), September 20, 2012 (Exhibit C-44), October 19, 2012 (Exhibit C-45), and November 2, 2012 (Exhibit C-46); Claimant's Chronological List of Events, items 59, 60, 62, 63, 65, 67 & 68.

⁵⁴ Claimant's letter to the Respondent, dated August 9, 2012 (Exhibit C-42); Claimant's Chronological List of Events, item 62.

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in addition to the release of the payments, the Claimant also requested the payment of USD 252,000.00 for inventory carrying cost and USD 150,110.00 as interest.⁵⁵

85. In response, by letter dated September 27, 2012, the Respondent informed the Claimant that *"the CIAA also decided on this issue and it directed [the Respondent] to make payment after deducting loss of underweight bags [...] which shows the total loss 1524.6 MT"* and asserted that the Claimant's claim for inventory costs and interest was unreasonable and an improper claim outside the scope of the Contract.⁵⁶
86. By letter dated December 17, 2012, the last sent by the Claimant to the Respondent on this issue, the Claimant requested that the Respondent pay a total pending amount of USD 2,522,782.00, with interest.⁵⁷
87. On December 18, 2012, the Respondent informed the Claimant of the final settlement of the account under the Contract concluding that after making certain deductions, the remaining amount to be paid was USD 844,322.39, in accordance with the following.⁵⁸

Details of amount to be paid

S.No.	Details of payment	Amount in USD
1.	According to Invoice/RR for 31,500 MT	1,98,11,012.71
2.	Release of documents of 28,950 MT (95% payment)	1,72,88,230.81
3.	Balance of 5% payment	9,09,906.88
4.	Payment to be made under L/C No.CIBILFX011002197 100 % value of 2,550 MT (@ 632.50) and 5% value of 28,950 MT	16,12,875.00
	Total amount to be paid(a)	25,22,781.88

⁵⁵ Statement of Claim, para. 4.51; Claimant's letter to the Respondent, dated September 20, 2012 (Exhibit C-44); Claimant's Chronological List of Events, item 65.

⁵⁶ Respondent's letter to the Claimant, dated September 27, 2012 (Exhibit R-5); Claimant's Chronological List of Events, item 66.

⁵⁷ Claimant's letter to the Respondent, dated December 17, 2012 (Exhibit C-47); Claimant's Chronological List of Events, item 69.

⁵⁸ Statement of Claim, para. 4.52; Respondent's letter to the Claimant, dated December 18, 2012 (Exhibit C-48); Claimant's Chronological List of Events, item 70.

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Details of deduction

S.No.	Details of deduction	Amount in USD
1.	For Shortage, Sweeping and Short Delivery in Bhairahawa and Birgunj Total 1633.25 MT	10,27,364.17
2.	Added 15% according to contract	1,54,104.63
3.	Late delivery of 14,760.10 MT	3,61,597.99
4.	Empty bags 3,841 MT	3,841.00
5.	L.C amendment & Extension Charge	3,522.30
6.	Weighing charges in different districts	2557.00
7.	Labour charges to be paid in Bhairahawa	2,299.28
8.	Railway, Truck detention and Short Delivery	1,23,173.12
	Total Deduction to be made(b)	16,78,459.49
	Total payment to be made (a) – (b)	8,44,322.39

88. By letter dated January 12, 2013, the Claimant confirmed receipt of the payment of USD 844,322.39 from the Respondent, which it accepted under protest stating that “*arbitrary recoveries have been made from the amount due to*” the Claimant, and that the deductions made by the Respondent were “*unjust unreasonable and unwarranted and therefore, unacceptable to*” the Claimant.⁵⁹ The Claimant alleged that “*against the actual standardisation shortage of 764.450 MTs arbitrary recovery of 1,633.25 MTs have been made*” by the Respondent.⁶⁰
89. According to the Claimant, following further attempts to recover the amounts deducted by the Respondent, the Claimant initiated these proceedings.

⁵⁹ Statement of Claim, para. 4.53; Claimant’s letter to the Respondent, dated January 12, 2013 (Exhibit C-49); Claimant’s Chronological List of Events, item 71.

⁶⁰ Claimant’s letter to the Respondent, dated January 12, 2013 (Exhibit C-49).

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IV. SUMMARY OF THE PARTIES' SUBMISSIONS

90. It is necessary to briefly summarize the Parties' respective submissions before setting out the Tribunal's analyses. This summary, made to facilitate an understanding of this Award, is not intended to be complete or exhaustive, and the fact that any submission has been omitted or truncated below should not be taken as an indication that such submission has not been considered by the Tribunal.

A. PERFORMANCE OF THE CONTRACT

(a) *The Claimant's Position*

91. The Claimant argues that the Respondent breached the Contract by "fail[ing] to make full payments and in time for the total supplied and delivered quantity of urea" under the Contract, while the Claimant "adhered to all the terms and conditions of the Contract".⁶¹

92. The Claimant invokes the Contract Act 2056 of Nepal of 2000 (the "Contract Act"). In particular, the Claimant relies on Articles 83, 84 and 85, which it argues provide that the supplier has the right to receive payment for the full quantity of the goods supplied and accepted by the buyer.⁶²

93. Article 83 provides:

Compensation on breach of contract:

(1) In case a contract has been breached under Section 82, the aggrieved party may realize from the party who has broken the contract, the actual loss or damage suffered by him/her a result of such breach of contract of the loss or damage, which the contracting parties had anticipated at the time of signing the contract.

(2) In case the contract provides that any specific amount or compensation shall be paid in the event of breach of contract, the aggrieved party may recover from the other party a reasonable amount not exceeding that amount.

(3) In case the amount of compensation under Sub-section (2) is not mentioned, the party making a claim for such compensation may realize a reasonable amount in consideration of the direct and actual loss or damage that has resulted from the breach of contract, or in consideration of the breach of contract, or in consideration of the breach of contract, or in consideration of compensation. No compensation may be recovered for any indirect or imaginary loss or damage.

(4) In case a contract has been signed for completing any work within a specific period, and in case provision has been made for payment of compensation under Sub-section (1) for failure to complete that work within the specific period, the party paying compensation may

⁶¹ Statement of Claim, para. 5.1(a).

⁶² Statement of Claim, para. 5.1(c) & (d).

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request for extension of the period for completing the contract in proportion to the amount paid by him/her as compensation.

94. Article 84 provides:

Compensation in the event of cancellation or termination of contract:

(1) In case a contract is terminated with the mutual consent of both parties or it is no longer necessary to perform the contract under this Act or other prevailing laws, or in case the contract is made void under the law or becomes void or cancelled under this Act, after one party has already received some amount in cash or in kind or any other benefit from the other party as per the contract, the cash or goods which have to be refunded after adjusting the accounts until the term of the contract expires from the amount paid in cash or in kind shall be refunded. In case any service or benefit other than cash or goods has been provided, the beneficiary must pay a reasonable amount to the other party in consideration thereof.

(2) In case it becomes necessary to initiate legal action owing to the non-refundment of the amount paid in cash or kind or the non-payment of amount under Sub-section (1), the concerned party may also realize reasonable expenses incurred for the purpose.

95. Article 85 provides:

Right to recover a reasonable amount: The aggrieved party may claim payment in proportion to the work performed or the amount paid by him/her in cash or in kind in any of the following circumstances;

(a) In case the contract is terminated due to the mistake of the other party at a time when he/she has already completed the work to be performed under the contract or was performing it;

(b) In case the other party utilizes any service or commodity that has been given to him/her without the clear intention of giving it free of cost.

96. According to the Claimant, the Respondent was obliged to make the full payment for the quantity of fertilizer received once it was delivered. For support, the Claimant refers to Articles 51, 52 and 55 of the Contract Act, which it argues provide that goods are deemed to be delivered once the buyer receives them, and if the buyer refuses to pay for the goods, the seller may claim for compensation.⁶³

97. Article 51 provides:

Goods to be deemed delivered: The buyer shall be deemed to have received the goods in any of the following' circumstances:

(a) In case the buyer or his/her representative receives the goods;

(b) In case a receipt or letter acknowledging the delivery of the goods is issued;

(c) In case the buyer inspects the goods and ascertains that they conform to the contract under Section 50, and accordingly keeps them in his/her stock;

(d) In case the goods reach the buyer and are retained by him/her, even if he does not send information about his/her refusal to accept them within a reasonable time limit,

(e) In case he/she does anything to prove his/her ownership of such goods.

⁶³ Statement of Claim, para. 5.1(e).

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98. Article 52 provides:

Time-limit for delivering goods:

(1) *In case the contract provides that goods to be delivered at any specified time or within any specified period, the seller must deliver the same to buyer at that very time or within that very period.*

(2) *Notwithstanding anything contained in Sub-section (1), in case the buyer accepts goods delivered by the seller before the time or period prescribed in the contract, or after the time of period prescribed in the contract, the seller shall be deemed to have delivered the goods.*

99. Article 55 provides:

Special provisions concerning compensation:

Notwithstanding anything contained elsewhere in this Act, action in respect to compensation for contract under this chapter shall be taken as follows:

(1) *In case a buyer does not accept or refuses to accept or refuses to pay the price of goods after once signing a contract relating to sale of goods, the seller may, subject to the contract, claim compensation from the buyer in consideration of the buyer's failure to accept or refusal to accept the goods.*

(2) *While determining compensation under Clause (a), in case goods not accepted or rejected by the buyer are available in the market, compensation shall be determined on the basis of the difference between the price of goods mentioned in the contract and the market or current price.*

(3) *In case the seller does not deliver or refuses to deliver goods according to the contract after signing a contract relating to sale of goods, the buyer may claim compensation from the seller in consideration of his/her failure to deliver the goods. While determining Compensation under Clause (c), in case the goods which the seller has refused or failed to deliver to the buyer are available in the market, compensation shall be determined on the basis of difference between the price of the goods mentioned in the contract and the market or current price.*

100. With regard to the variation in the bags' weight, the Claimant relies on Article 54(1) of the Contract Act, which provides:

In case seller delivers goods to the buyer in a quantity less than the quantity mentioned in the contract, the buyer may refuse to accept them. Provided that, in case the buyer accepts the goods even in the quantity, he/she shall be required to pay the price of the quantity at the rate mentioned in the contract.

101. The Claimant states that it supplied and delivered 31,500 MT of urea under the Contract to the Respondent,⁶⁴ and that the latter accepted this quantity. The Claimant adds that the figure of 31,500 MT was within the '(+/- 5%)' range provided for in Clause 6 of the Contract.⁶⁵ Hence, it argues, the Respondent must pay the Claimant in full for the quantity of urea it accepted.⁶⁶

⁶⁴ Statement of Claim, para. 3.1; Claimant's Post-Hearing Brief, paras. 2.2, 2.3 & 3.3.

⁶⁵ Claimant's Post-Hearing Brief, para. 3.3.

⁶⁶ Statement of Claim, para. 5.1(f).

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102. The Claimant asserts that the Respondent at no point refused to receive the cargo delivered to it at the warehouse in Nepal.⁶⁷ In addition, according to the Claimant, the release of the PGB is proof that the Contract was performed satisfactorily by the Claimant.⁶⁸ It is the Claimant's view that the Respondent's refusal to make payment—absent any loss—is akin to an illegal penalty.⁶⁹
103. According to the Claimant, the delay in delivery, if any, occurred due to the emergency order issued by the Government of India—resulting in the restriction of urea fertilizer while DAP and other phosphatic fertilizer were granted priority in loading—which was beyond the reasonable control of the Claimant thereby constituting *force majeure*.⁷⁰ Moreover, the Claimant contends that this delay would not have occurred if the Respondent had not changed the date of dispatch from September 16 to October 14 of 2011.⁷¹ Thus, the delay, if any, is excused under the terms of the Contract.⁷²

(b) *The Respondent's Position*

104. The Respondent asserts that the Claimant's contention regarding the illegality of deductions is unfounded. According to the Respondent, the established principles of contractual relationship require the buyer to make payment only when the supplier completes the delivery of the quantity of goods that it promised to deliver.⁷³
105. The Respondent submits that the Claimant failed to comply with the delivery terms of the Contract by supplying underweight bags,⁷⁴ and notes that the Claimant acknowledged the short delivery by, *inter alia*, accepting the deductions made from the total payment for the shortage of 873 MT of fertilizers.⁷⁵
106. The Respondent rejects the Claimant's reliance on the doctrine of *force majeure* as a justification for its delay. The Respondent argues that Clause 11 of the Contract unambiguously provides that

⁶⁷ Statement of Claim, para. 5.1(f).

⁶⁸ Statement of Claim, para. 5.1(g).

⁶⁹ Statement of Claim, para. 5.1(h).

⁷⁰ Statement of Claim, para. 5.3(a).

⁷¹ Statement of Claim, para. 5.3(b).

⁷² Statement of Claim, para. 5.3(b).

⁷³ Statement of Defense, para. 1.3.1.1.1.

⁷⁴ Statement of Defense, para. 1.3.1.1.1.

⁷⁵ Statement of Defense, para. 1.3.1; Respondent's Rejoinder, p. 5. *Cfr.* Statement of Claim, para. 5.2(6); Hearing Transcript, Day 1, 125:13-20.

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a *force majeure* condition does not include situations outside Nepal, and that the supplier shall be responsible for the delayed delivery of goods due to any governmental procedures outside Nepal.⁷⁶ The Respondent adds that the non-performance of Claimant's obligations, *vis-à-vis* the admitted shortage of 873 MT of urea, is clearly a breach of the Contract.⁷⁷

B. DEDUCTIONS ON THE BALANCE OF 5% PAYMENT

(a) The Claimant's Position

107. The Claimant submits that the deductions made on the remaining balance of the 5% payment contravene the terms of the Contract. According to the Claimant, the Respondent is contractually bound to make 95% payment against LC on submission of documents of dispatch of urea, and 5% payment after the completion of delivery to Respondent's warehouses in Nepal.
108. The Claimant asserts that it supplied and made timely delivery of the first 10 rakes, which were then sold by the Respondent.⁷⁸ The Claimant adds that after the re-standardization of the bags, any previous deficiency in the bags delivered was cured.⁷⁹
109. Therefore, the Claimant argues, there was no justification for withholding the remaining balance of 5% payment. Furthermore, the Claimant notes that the Respondent "*at no point gave evidence of the weight variation/ how was it done/ calculated/ occurrence of the same.*"⁸⁰

(b) The Respondent's Position

110. The Respondent submits that it legitimately deducted the balance of 5% payment as authorized by Clause 4 of the Conditions of Contract, which provides in relevant part that: "[b]alance 5% payment (after necessary deduction, if any) will be made after all the fertilizers are successfully delivered at designated AICL warehouses in Nepal".⁸¹

⁷⁶ Statement of Defense, para. 1.3.4.3.

⁷⁷ Respondent's Rejoinder, p. 6.

⁷⁸ Claimant's Reply, p. 28.

⁷⁹ Claimant's Reply, p. 29.

⁸⁰ Statement of Claim, para. 5.2(6).

⁸¹ Statement of Defense, para. 1.3.1.3.4; Respondent's Post-Hearing Brief, p. 9.

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111. The Respondent contends that the Claimant evidently failed to deliver the quantity of fertilizer as per its commitment under the Contract, and, therefore, the deduction of the 5% payment was made in accordance with the terms of the Contract.⁸² The Respondent adds that the release of the PGB was made in good faith bearing in mind the past and future relationship between the Parties.⁸³

C. CIAA DIRECTIVE

(a) The Claimant's Position

112. The Claimant objects to the Respondent's argument that it was under an obligation to make the deductions because of the directives of the Commission for the Investigation of Abuse of Authority (the "CIAA").

113. The Claimant submits that the CIAA's authority is limited to investigations of "abuse of authority, improper action or corruption" against "persons holding a public post or any [public] institution [of Nepal] as defined under the CIAA Act 1991".⁸⁴ The Claimant further submits that the CIAA investigation was with regard to 'AICL's distribution of fertilizer', and the report is directed against the officials and employees of AICL, and not that of IPL.⁸⁵

114. Furthermore, the Claimant notes that it is a foreign entity, and neither a public institution under the laws of Nepal, nor an institution employing Nepalese public servants. Therefore, the Claimant argues that the CIAA Directive cannot be imposed upon it. In the Claimant's view, if these directives are to be legally binding on the Claimant, the purpose of the present arbitration would become infructuous.⁸⁶

115. Moreover, according to the Claimant, the so-called CIAA Directive is not a binding decision but only a recommendation to AICL, and they are not equivalent to laws of Nepal and, therefore, not binding. The Claimant submits that the CIAA is only a fact finding/investigative body pursuant

⁸² Statement of Defense, para. 1.3.1.3.4.2.

⁸³ Statement of Defense, para. 1.3.1.3.4.2; Respondent's Post-Hearing Brief, p. 9.

⁸⁴ Claimant's Reply, pp. 3-4; Claimant's Post-Hearing Brief, para. 4.4.

⁸⁵ Claimant's Post-Hearing Brief, paras. 4.5-4.6.

⁸⁶ Claimant's Reply, p. 23.

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to Art. 239 of the 2012 Constitution of Nepal. The Claimant thus argues that the decision of the balance payment was left in the hands of the AICL.⁸⁷

116. The Claimant further contends that the CIAA's investigation and directives are legally flawed because they did not follow the procedures laid down in Sections 19(1)(b) and 20(1) of the CIAA Act. According to the Claimant, by virtue of Section 19(1)(b), the CIAA may interrogate persons against whom charges of abuse of authority have been made or persons who possess knowledge of the relevant facts. Furthermore, by virtue of Section 20(1), the CIAA may resort to an expert or specialized agency. The Claimant submits that the CIAA failed to question or request the Claimant's statement against the Respondent's allegations; furthermore, the CIAA did not consult any independent expert in respect of the disputed facts even though, by its own admission, it was required to do so.⁸⁸

117. With respect to the Respondent's *force majeure* argument, the Claimant contends that the Respondent had neither raised this condition previously⁸⁹ nor had it informed the Claimant of the CIAA Directive.⁹⁰ The Claimant rejects the Respondent's assertion that such *force majeure* situation was unforeseeable and beyond the Respondent's reasonable control. The Claimant argues that the fact that the Respondent tried to persuade the CIAA to reassess its directives is evidence that the Respondent was aware that the CIAA Directive was incorrect. The Claimant points out that the Respondent failed to take any steps to appeal the CIAA Directive under Rule 29 of the CIAA Rules 2059 of 2002 (the "CIAA Rules"),⁹¹ which, in the Claimant's view, clearly shows that the Respondent never had the intention to comply with its obligations under the Contract.⁹² Finally, the Claimant argues that the Respondent is "*misinterpreting the laws of their own nation, Nepal in their own favor*".⁹³

(b) *The Respondent's Position*

118. The Respondent notes that once the 'short weight' of the bags was discovered, an independent expert team (the "Expert Team") was formed, which carried out an investigation and produced

⁸⁷ Claimant's Post-Hearing Brief, para. 4.7.

⁸⁸ Claimant's Reply, p. 24.

⁸⁹ Claimant's Reply, p. 26.

⁹⁰ Claimant's Reply, p. 12.

⁹¹ CIAA Rules 2059 of 2002 (RLA-2).

⁹² Claimant's Reply, p. 25.

⁹³ Claimant's Reply, p. 2.

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a detailed report of 104 pages (the “Expert Report”) finding an average shortage of 2.42 kg per bag.⁹⁴ Thereafter, according to the Respondent, on September 18, 2012, the CIAA issued directives (referred to for purposes of this Award as the “CIAA Directive”)⁹⁵ ordering the Respondent to release the remaining amount to be paid under the Contract only after deducting the value of the average shortage as determined in the Expert Report as well as damages incurred due to the sweeping and non-delivery.⁹⁶

119. According to the Respondent, the CIAA is a constitutional body in Nepal that has the power to exercise quasi-judicial authority by issuing directives binding upon public institutions. As a government-owned company, the Respondent is obliged to follow the CIAA Directive.⁹⁷ Therefore, the circumstances created by the CIAA Directive fall within the purview of *force majeure* as stipulated in Clause 10 of the Contract, which provides that: “[t]he valid force majeure clause of the ICC is applied to this contract (international provision of force majeure publication by ICC)”.
120. The Respondent then invokes the relevant provisions of the ICC Force Majeure Clause 2003,⁹⁸ which read as follows:

- [1] *Unless otherwise agreed in the contract between the parties expressly or impliedly, where a party to a contract fails to perform one or more of its contractual duties, the consequences set out in paragraphs 4 to 9 of this Clause will follow if and to the extent that that party proves:*
- a) *that its failure to perform was caused by an impediment beyond its reasonable control; and*
 - b) *that it could not reasonably have been expected to have taken the occurrence of the impediment into account at the time of the conclusion of the contract; and*
 - c) *that it could not reasonably have avoided or overcome the effects of the impediment.*
- [2] [...]
- [3] *In the absence of proof to the contrary and unless otherwise agreed in the contract between the parties expressly or impliedly, a party invoking this Clause shall be presumed to have established the conditions described in paragraph 1(a) and (b) of this Clause in case of the occurrence of one or more of the following impediments: [...]*
- c) *act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalization; [...]*

⁹⁴ Statement of Defense, paras. 1.3.1.2.2. to 1.3.1.2.5; RER-1 (Nepali) and RER-2 (English).

⁹⁵ Exhibit R-4.

⁹⁶ Statement of Defense, para. 1.3.1.3.1.1; Respondent’s Post-Hearing Brief, p. 6.

⁹⁷ Statement of Defense, para. 1.3.1.3.2.1.

⁹⁸ ICC Force Majeure Clause, 2003 (RLA-3).

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121. The Respondent submits that the CIAA Directive was not reasonably foreseeable at the conclusion of the Contract and beyond its reasonable control. The Respondent adds that it tried to persuade the CIAA to reassess its directives, to no avail.⁹⁹ Rejecting the Claimant's contention that the directives are legally flawed because the CIAA did not follow the procedures as laid down in the CIAA Rules and the CIAA Act, the Respondent asserts that the "*provision of law in the mentioned section is not mandatory in nature but simply outlines the discretionary powers of CIAA to the extent that it can go while conducting an investigation as required*", that "[n]one of the provisions cited by the CLAIMANT obligated CIAA or any other concerned agency to mandatorily follow any of the prescribed procedure as depicted by CLAIMANT", and "[t]herefore, such contentions of CLAIMANT are baseless and legally unfounded."¹⁰⁰
122. The Respondent acknowledges that the Claimant is not subject to the CIAA, and is not bound by the CIAA Directive. However, the Respondent submits that the Claimant was duly informed about the CIAA Directive and aware of the Respondent's inability to release the entire payment without deducting the amount prescribed in the CIAA Directive.¹⁰¹ The Respondent submits that the *force majeure* condition came into operation as a direct result of the Claimant's negligent acts,¹⁰² and that the Respondent cannot be expected to act illegally by contravening the CIAA Directive.¹⁰³ Furthermore, it argues that the Contract is governed by the laws of Nepal,¹⁰⁴ pursuant to which the CIAA directed the Respondent to release the payment to the Claimant only after making the deductions at issue.¹⁰⁵ The Respondent adds that as "*the direction from the CIAA is binding and the RESPONDENT must follow and ipso facto operates as binding law*". Therefore, the Claimant is "*contractually bound by the same and the RESPONDENT cannot be forced to perform contradicting to the instructions.*"¹⁰⁶

⁹⁹ Statement of Defense, para. 1.3.1.3.2.6; Respondent's Post-Hearing Brief, p. 7.

¹⁰⁰ Respondent's Rejoinder, p. 12.

¹⁰¹ Statement of Defense, para. 1.3.1.3.1.2.

¹⁰² Statement of Defense, para. 1.3.1.3.2.6.

¹⁰³ Statement of Defense, para. 1.3.1.3.2.8.

¹⁰⁴ Clause 16 of the Conditions of Contract (Exhibit C-7, RLA-J).

¹⁰⁵ Statement of Defense, para. 1.3.1.3.3.2.

¹⁰⁶ Respondent's Post-Hearing Brief, p. 8.

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D. PROMISSORY ESTOPPEL AND UNJUST ENRICHMENT

(a) The Claimant's Position

123. The Claimant invokes the principle of promissory estoppel against the Respondent's conduct. According to the Claimant, after the delivery of the first eight (8) rakes, the Respondent sold the urea it had received, to Nepalese farmers.¹⁰⁷ Therefore, the Respondent suffered no loss. Furthermore, the Respondent did not raise any complaint. The Claimant argues that Article 83(3) of the Contract Act makes it illegal to recover compensation for any indirect or imaginary loss.¹⁰⁸
124. The Claimant refers to Clause 13 of the Conditions of Contract, which provides that: "[h]owever, on arrival of fertilizer at unloading point i.e.: AICL warehouses in Nepal, AICL shall inspect the fertilizer by SGS or third party independent surveyor." The Claimant submits that the Respondent did not comply with this clause. The Claimant asserts that the Respondent had a duty to inspect the cargo through Société Générale de Surveillance ("SGS") or a recognized independent surveyor at the time of unloading. Instead, the Respondent resorted to the CIAA, which is not the competent body to carry out inspections under the Contract.¹⁰⁹ The Claimant considers the absence of complaints or objections as evidence that the Respondent accepted the cargo as delivered and is now estopped from arguing otherwise.¹¹⁰
125. The Claimant alleges that the Respondent unjustifiably enriched itself through the deductions it made.¹¹¹ The Claimant argues that the conclusions found in the Expert Report reflect the farmers' view that they were overcharged for the fertilizers. Thus, while the Respondent benefited from the deductions, these monetary benefits did not pass on to the farmers.
126. The Claimant argues that this conduct constitutes unjust enrichment, and alleges that the Respondent is attempting to shift the resulting liability to the Claimant.¹¹²

¹⁰⁷ Statement of Claim, paras. 5.2(1)(a) & 5.4(b) & (c).

¹⁰⁸ Claimant's Reply, p. 21.

¹⁰⁹ Claimant's Reply, p. 40; Claimant's Post-Hearing Brief, para. 3.6, noting that this incidentally is also a violation of their own Government order, i.e., Chemical Fertilizer Control Order 2055.

¹¹⁰ Statement of Claim, para. 5.4(d).

¹¹¹ Statement of Claim, para. 5.4(e).

¹¹² Claimant's Reply, p. 40.

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(b) *The Respondent's Position*

127. The Respondent submits that the principle of promissory estoppel is irrelevant to the present dispute. The Respondent asserts that it raised the issue of short delivery before the conclusion of the performance of the Contract, and that the Claimant itself admitted that there was a shortage in the amount of urea delivered and acted with the purpose of rectifying such defects.¹¹³
128. The Respondent rejects the Claimant's argument concerning Clause 13 of the Contract that the Respondent was under an obligation to ascertain the delivered quantity of fertilizers at the unloading point. According to the Respondent, the correct interpretation of Clause 13 would be that the Claimant had the burden of inspecting the commodity by an independent surveyor at the place of loading.¹¹⁴ In the Respondent's view, the present dispute would not have arisen if the Claimant had complied with the requirements of Clause 13. The Respondent argues that under "principles of contract and the law", a defaulting party cannot claim the non-compliance of another party until the former fulfils its obligations.¹¹⁵
129. Clause 13 of the Conditions of Contract reads:

Societe Generale De Surveillance (SGS) [sic] or recognized independent reputed surveyor at sellers cost shall inspect the commodity at the place of loading. SGS or recognized independent reputed surveyor shall issue an inspection certificate of quality and quantity of the fertilizer to certify that the goods are in good order and condition and confirms to the specifications herein stated. The certificate of non contamination should also be issued by SGS or recognized independent reputed surveyor based on appropriate test of actual goods. Expenses incurred for such inspection shall be on the Supplier account.

However, on arrival of fertilizer at unloading point, i.e: AICL warehouses in Nepal, AICL shall inspect the fertilizer by SGS or other third party independent authorized surveyor.

In case if the goods are claimed to be not in conformity with required specification, AICL will evidence with reference thereto. In case it is proved, supplied will be responsible to substitute the said fertilizers by required quality free of cost otherwise payment will be withheld.¹¹⁶

The Respondent recalls that, as per the Claimant's admission, the weight variations of the bags were due to the malfunctioning of the weight machine at the Claimant's plant.¹¹⁷

130. Lastly, the Respondent submits that the Claimant's unjust enrichment argument is based on erroneous facts and the Claimant has provided no evidence to prove its assertions. The

¹¹³ Statement of Defense, para. 3.2.1; Respondent's Post-Hearing Brief, p. 16.

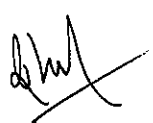
¹¹⁴ Respondent's Rejoinder, p. 7.

¹¹⁵ Statement of Defense, para. 3.2.2.

¹¹⁶ Clause 13. Certification of Inspection, the Contract (Exhibit C-7, RLA-1).

¹¹⁷ Respondent's Rejoinder, p. 10.

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Respondent affirms that it is a State-owned entity committed to supplying Nepalese farmers fertilizers at a subsidized rate and every year the Government of Nepal allocates a substantial amount of the national budget to subsidize the procurement of the fertilizers. Therefore, the Respondent asserts, it has a national duty towards the Nepalese taxpayers to recover the full monetary value of the fertilizers from the supplier.¹¹⁸

E. AMOUNTS RETAINED/DEDUCTED BY THE RESPONDENT

131. While the Claimant argues that the deductions made by the Respondent are unjustifiable, unlawful and inconsistent with the terms of the Contract,¹¹⁹ the Respondent submits that all the amounts were deducted as per the Contract's provisions and as a consequence of the non-performance of the Claimant's obligations. Both Parties raise arguments relating to the overall legal basis for the deductions and the legality of each of the amounts deducted by the Respondent, which are summarized below.

1. Deductions for Shortage, Sweeping and Short Delivery

132. The Respondent deducted from the final payment an amount of USD 1,027,364.17 for shortage, sweeping and short delivery of 1,633.25 MT in Bhairahawa and Birgunj.¹²⁰

(a) The Claimant's Position

133. The Claimant contends that the Respondent has not substantiated this deduction with any evidence.¹²¹ The Claimant submits that the Respondent accepted the 23,889.55 MT of urea supplied through the first 10 rakes without once raising any complaints about the bags' weight.¹²² The short-weight complaint from the Respondent concerned only the last three rakes, for 7,610.45 MT,¹²³ and the bags found deficient were ultimately re-standardized, while the bags found in excess of 50 kg were left untouched, thus, benefitting the Respondent.¹²⁴ In addition, as

¹¹⁸ Statement of Defense, para. 3.3.1; Respondent's Post-Hearing Brief, p. 16.

¹¹⁹ Statement of Claim, para. 5.2.

¹²⁰ Statement of Defense, para. 1.2. *Cfr.* Exhibit C-48.

¹²¹ Statement of Claim, para. 5.2(1); Claimant's Reply, p. 6.

¹²² Statement of Claim, para. 3.8; Claimant's Reply, p. 6.

¹²³ Statement of Claim, para. 4.45.

¹²⁴ Claimant's Reply, p. 7.

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the Respondent had sold or utilized the entire urea supplied and delivered, the Respondent suffered no loss as a result of the alleged shortage of weight in the bags, which was in any case rectified at the Claimant's cost.¹²⁵

134. According to the Claimant, the Respondent's penalty was arbitrary, wrong and illegal.¹²⁶ The Claimant submits that although it agreed to the deduction of USD 548,849.05 for the shortage of 873.10 MT, the Respondent wrongfully extrapolated the shortage of 2.4 kg per bag to the entire contracted quantity.¹²⁷ Moreover, the Claimant notes that the 1,633.25 MT imposed on the Claimant as total shortage is inconsistent with the 1,524.6 MT the Respondent indicated to be the total loss in its letter dated September 27, 2012.¹²⁸
135. Furthermore, the Claimant alleges that the Respondent's claims for deductions are not genuine because the Respondent was under financial constraints, which caused it to delay the release of the final settlement even after the CIAA gave its clearance for payment.¹²⁹ The Claimant asserts that the reason for the weight variation of the bags is that the Respondent compressed the dispatch deadline by preventing the Claimant from dispatching the rakes for almost 30 days, which significantly shortened the supply period.¹³⁰
136. The Claimant additionally points out that after the delivery was effected, the bags were lying in the Respondent's warehouses for a long period, vulnerable to theft and pilferage, which could have also led to variation in the net weight of the bags.¹³¹
137. Turning to the Expert Report, the Claimant contends that the Respondent failed to explicate the so-called lawful and widely accepted methodology applied by the Expert Team.¹³² The Claimant argues that the Expert Report shows that the Expert Team was not satisfied by the time allotted for the investigation and the site visits.¹³³

¹²⁵ Claimant's Reply, p. 7.

¹²⁶ Claimant's Reply, p. 10.

¹²⁷ Statement of Claim, para. 5.2.(6); Claimant's Reply, p. 18.

¹²⁸ Statement of Claim, para. 5.2(1)(a).

¹²⁹ Claimant's Reply, p. 6, referring to Exhibit C-45.

¹³⁰ Claimant's Reply, p. 8.

¹³¹ Claimant's Reply, p. 17.

¹³² Claimant's Reply, p. 12.

¹³³ Claimant's Reply, p. 13.

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138. The Claimant refers to the testimony of Mr. Ram Babu Adhikari, witness for the Respondent, who the Claimant states “*confirmed that ‘no independent surveyor’ was appointed either as per the contract or as per the Chemical Fertilizer Control Order 2055*”.¹³⁴ The Claimant submits that “*having failed to get the inspection of the consignment done at the relevant material time, AICL cannot claim that goods were short*”.¹³⁵ The Claimant adds that due to the surveyors’ failure to carry out an inspection, the Respondent was unable to claim insurance under the applicable insurance policy provided for under Clause 14 of the Contract.¹³⁶ On the matter of insurance, the Claimant adds that even assuming that the Respondent had incurred losses, it had failed to take steps to mitigate such losses by failing to make use of the insurance policy coverage.¹³⁷
139. The Claimant further questions the authenticity and accuracy of the Expert Report. The Claimant argues that the Expert Team failed to specify in its Report which samples were used to come to its final calculation. According to the Claimant, the investigation was a joint inquiry into the supplies made by the Claimant and other suppliers, and, therefore, it is possible that the shortage was found on samples of bags not provided by the Claimant.¹³⁸
140. The Claimant contends that the Expert Team’s conclusion is inaccurate and argues that the Report shows that the Team did not rely on an accounting expert.¹³⁹
141. The Claimant further alleges that the Expert Team was biased and partial. According to the Claimant, the Team comprised public servants who work at the Department of Agriculture and Co-operatives, under which the Respondent also functions. Furthermore, the Team was unilaterally appointed by the Respondent, without any representation from or consultation with the Claimant.¹⁴⁰

(b) *The Respondent’s Position*

142. The Respondent submits that the deductions it carried out to account for shortage, sweeping and non-delivery were lawful and calculated in an equitable manner.¹⁴¹ The Respondent asserts that

¹³⁴ Claimant’s Post-Hearing Brief, para. 3.5(ii).

¹³⁵ Claimant’s Post-Hearing Brief, para. 3.10.

¹³⁶ Claimant’s Post-Hearing Brief, para. 3.12 (v).

¹³⁷ Claimant’s Post-Hearing Brief, paras. 3.12 & 3.15.

¹³⁸ Claimant’s Reply, p. 13.

¹³⁹ Claimant’s Reply, p. 14.

¹⁴⁰ Claimant’s Reply, pp. 10-11.

¹⁴¹ Statement of Defense, para. 1.3.1.3.1.2.

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the Claimant breached its contractual obligation by delivering underweight bags. Therefore, the established principles of contractual relationship render the Respondent, as a buyer, under no obligation to discharge its obligation of payment.¹⁴²

143. The Respondent submits that it has suffered irreparable losses in its reputation and good standing, and that its monopoly in the trade of agricultural inputs and fertilizers was affected due to the Claimant's failure to perform its contractual obligation. The Respondent adds that it was subjected to an intensive and stressful investigation by the CIAA.¹⁴³
144. With regard to the calculation of the deducted amount, the Respondent submits that it was based on an investigation conducted by its Expert Team. According to the Respondent, the Team thoroughly investigated the matter by visiting the observation sites located in Birgunj and Bhairahawa, consulting the relevant agencies, and summoning and analyzing the applicable details and documents, all of which is documented in the 104-page Expert Report.
145. The Respondent affirms that it did not interfere with the process of the investigation, and that the Expert Team was designated by the Government in accordance with the applicable laws.¹⁴⁴ The Respondent adds that since the investigation was of a governmental nature, there was no legal basis requiring the Claimant's participation in the process.¹⁴⁵
146. According to the Respondent, the Expert Team relied on a comprehensively accepted methodology of purposeful and justifiable sampling, which it argues is a globally recognized method to establish discrepancies in these types of cases. The Respondent asserts that the Expert Team found an average of 2.42 kg shortage per bag and the calculation of the amount deducted was based on this finding.

2. Deductions for Additional 15%

147. The Respondent deducted USD 154,104.63 from the final payment, as additional 15% deduction of the amount deducted for shortage, sweeping and short delivery (*i.e.*, USD 1,027,364.17) under the Contract.¹⁴⁶

¹⁴² Statement of Defense, para. 1.3.1.1.1.

¹⁴³ Respondent's Rejoinder, p. 5.

¹⁴⁴ Respondent's Rejoinder, p. 10, referring to Section 6(c) & (e) of the Nepalese Evidence Act, 2031 B.S.

¹⁴⁵ Respondent's Rejoinder, pp. 10-11.

¹⁴⁶ Statement of Defense, para. 1.2. *Cfr.* Exhibit C-48.

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(a) *The Claimant's Position*

148. The Claimant opposes this deduction and submits that there is no provision in the Contract supporting it.¹⁴⁷ While Clause 14 of the Conditions of Contract invoked by the Respondent bestows upon the Respondent the right to deduct the insured value from the balance payment (*i.e.*, 5%) or from the PGB, the Respondent is contractually bound to pay back the deducted amount upon realization of the claim from the insurance company.¹⁴⁸
149. The Claimant alleges that the Respondent also failed to fulfil its contractual obligation under Clause 14 by failing to lodge an insurance claim for shortage or non-delivery.¹⁴⁹ The Claimant notes that it got insurance for the entire quantity of 31,500 MT for total value CIF (Cost, Insurance and Freight, "CIF") price plus 15% against "all risks", valid from September 14, 2011 to September 13, 2012.¹⁵⁰ According to the Claimant, the insurance covered "shortage". The Claimant adds that the Respondent never informed the Claimant of its intention to lodge an insurance claim or any difficulties with so doing, nor did it seek any assistance from the Claimant in this regard.¹⁵¹ The Claimant considers the Respondent's behavior in this respect as arbitrary and unjustified.

(b) *The Respondent's Position*

150. The Respondent contends that it had the right to deduct an additional 15% of the Contract price as insurance for any risks, including non-delivery of goods, and that the Contract (Clause 14 of the Conditions of Contract) allows the deduction of loss from the remaining balance of 5% while settling the final account.¹⁵²
151. In the Respondent's view, the deduction of the additional 15% is justified because of the Claimant's failure to deliver the amount of goods specified in the Contract. Due to this failure, the Respondent suffered damages, which it had to recover through claiming the additional 15% as compensation.¹⁵³

¹⁴⁷ Statement of Claim, para. 5.2(2).

¹⁴⁸ Claimant's Reply, p. 31.

¹⁴⁹ Claimant's Reply, p. 31.

¹⁵⁰ Claimant's Post-Hearing Brief, para. 3.12.

¹⁵¹ Claimant's Reply, p. 33.

¹⁵² Statement of Defense, paras. 1.3.3.1-1.3.3.3; Respondent's Post-Hearing Brief, p. 9.

¹⁵³ Statement of Defense, para. 1.3.3.3.

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152. The Respondent adds that the Claimant “*had the sole responsibility as per the Contract to fulfill all required procedures for the insurance to which the Respondent. The Claimant did not fulfill its obligations and required procedures to insure the goods as per the Contract as admitted by them in the series of correspondence*”.¹⁵⁴ Furthermore, the Respondent adds that “*the insurance under no circumstances covers cost for shortage delivery because of the default of the CLAIMANT.*”¹⁵⁵ Moreover, the Respondent submits: “*to file a claim in insurance [...] would have been a fraudulent claim, and [the Respondent] cannot take such fraudulent claims to the insurance company, because [Claimant has] admitted that the short supply was because of the failure of [Claimant’s] machine.*”¹⁵⁶

3. Deductions for Late Delivery (Liquidated Damages)

153. The Respondent deducted USD 361,597.99 from the final payment for late delivery of 14,760.10 MT of urea.¹⁵⁷

(a) The Claimant’s Position

154. The Claimant submits that the Respondent has neither substantiated nor given any evidence supporting this deduction. The Claimant contends that the calculations in Exhibit R-5 are correct and founded.¹⁵⁸ Moreover, it argues that the delay in delivery was due to *force majeure*, which occurred as a result of the Respondent preventing the Claimant from dispatching the first rakes for almost 30 days, significantly shortening the supply period.¹⁵⁹

155. In addition, the last quantity was stuck at customs clearance at Nautanwa, resulting in delay, due to the Respondent’s failure to amend the LC.¹⁶⁰ Therefore, the Claimant submits that this deduction is illegal, arbitrary and unlawful, and should not stand.

¹⁵⁴ Respondent’s Post-Hearing Brief, p. 9.

¹⁵⁵ Respondent’s Post-Hearing Brief, p. 10.

¹⁵⁶ Hearing Transcript, Day 2, 395:9-15.

¹⁵⁷ Statement of Defense, para. 1.2. *Cfr.* Exhibit C-48.

¹⁵⁸ Claimant’s Post-Hearing Brief, paras. 6.1-6.5.

¹⁵⁹ Statement of Claim, para. 5(3); Claimant’s Reply, pp. 8 & 34.

¹⁶⁰ Statement of Claim, para. 5(3); Claimant’s Reply, p. 34.

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(b) *The Respondent's Position*

156. According to the Respondent, Clause 12 of the Conditions of Contract provides for liquidated damages to cover any damages that the Respondent might face due to delay in supply of the fertilizer and based on total CIF value. The Respondent contends that the Claimant caused the delay in delivering the quantity of urea provided in the Contract, and as a result, the Respondent was unable to meet the demands for fertilizer in the market, which, consequently, caused loss of profit and reputation. Therefore, the Respondent submits that it had a right to deduct the cost as liquidated damages under the Contract.¹⁶¹ The Respondent adds that the *force majeure* condition invoked by the Claimant does not apply to situations caused by government processes outside Nepal, and this is "unambiguously" set out in Clause 10 of the Conditions of Contract. Therefore, the Claimant cannot invoke *force majeure* to avoid liability for late delivery.¹⁶²

4. **Deductions for Shortage of Spare Empty Bags**

157. The Respondent deducted USD 3,841.00 from the final payment for under-delivery of 3,841 empty spare bags under the Contract.¹⁶³

(a) *The Claimant's Position*

158. The Claimant submits that the spare bags agreed to in the Contract were duly delivered. According to the Claimant, the spare bags were used in the re-packing and re-standardization process. The Claimant asserts that during the re-packing process, it supplied more spare bags than the amount provided for in the Contract.¹⁶⁴

(b) *The Respondent's Position*

159. According to the Respondent, the Contract provides that the Claimant had to deliver 1% of the bags as spare to accommodate any contingencies relating to sweeping and repacking. The Claimant, therefore, was supposed to deliver a total of 6,300 empty bags. The Respondent alleges that the Claimant failed to comply with said provisions and delivered only 2,459 spare bags. Thus, the cost of the spare bags that were not duly delivered amounted to USD 3,841.00, at a rate of

¹⁶¹ Statement of Defense, para. 1.3.4.1; Respondent's Post-Hearing Brief, pp. 10-11.

¹⁶² Respondent's Post-Hearing Brief, pp. 10-11.

¹⁶³ Statement of Defense, para. 1.2. *Cfr.* Exhibit C-48.

¹⁶⁴ Claimant's Reply, p. 35.

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USD 1.00 per bag, which is the amount that was deducted from the total payment. The Respondent further notes that the Claimant failed to justify or assign any valid reasons for short delivery of spare bags.¹⁶⁵

160. The Respondent notes that the Claimant, during the hearing, accepted that the Claimant “could have missed out supplying the exact quantity”.¹⁶⁶

5. Deductions for LC Amendments and Extension Charges

161. The Respondent deducted from the final payment an amount of USD 3,522.30 as charges for LC amendments and extensions.¹⁶⁷

(a) The Claimant's Position

162. The Claimant reiterates its position that it was the Respondent that caused the delay, which consequently led to the amendments of the LCs. Hence, the deductions made with respect to LC amendments are unlawful and unjustifiable.¹⁶⁸

(b) The Respondent's Position

163. The Respondent relies on Clauses 4 and 5 of the Conditions of Contract as basis for deducting the charges of LC amendments. According to Clause 5(vi) of the Conditions of Contract, any charges for LC amendment would be at the defaulting party's account. The Respondent asserts that it incurred monetary loss because of the LC amendments that were made due to the Claimant's delay.¹⁶⁹ According to the Respondent, Clause 4 gives it the right to deduct any amount incurred because of the Claimant's negligence.¹⁷⁰

¹⁶⁵ Statement of Defense, para. 1.3.6.1.

¹⁶⁶ Respondent's Post-Hearing Brief, p. 11. *Cfr.* Counsel for Claimant, Hearing Transcript, Day 2, 365:16-17.

¹⁶⁷ Statement of Defense, para. 1.2. *Cfr.* Exhibit C-48.

¹⁶⁸ Statement of Claim, para. 5.2(4); Claimant's Reply, p. 35.

¹⁶⁹ Respondent's Post-Hearing Brief, p. 11.

¹⁷⁰ Statement of Defense, para. 1.3.5.1.

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6. Deductions for Weighing Charges

164. According to the final accounts of the Respondent (*see* table in para. 87 *supra*),¹⁷¹ the Respondent deducted USD 2,557.00 from the final payment for this reason.¹⁷²

(a) The Claimant's Position

165. The Claimant submits that the Respondent has not substantiated this deduction.¹⁷³

(b) The Respondent's Position

166. The Respondent argues that this “*was the cost incurred by the RESPONDENT during the process of re-weighing the bags on various districts*” and that the Claimant was notified in its final account letter of December 18, 2011 (Exhibit C-42), which itself is self-explanatory.¹⁷⁴

7. Deductions for Labour Charges

167. The Respondent deducted USD 2,299.28 from the final payment as labour charges in connection with the re-standardization and re-packing process.¹⁷⁵

(a) The Claimant's Position

168. The Claimant reiterates its position that the re-standardization process was implemented by the Respondent at a cost to the Claimant. The Claimant points out that it co-operated with the Respondent when the issue was raised and incurred all necessary cost to rectify any error on its part.¹⁷⁶ The Claimant, thus, affirms that these deductions were made in contravention with the terms of the Contract.

¹⁷¹ *Cfr.* Exhibit C-48.

¹⁷² This amount is not shown in the overview of deductions made in para. 1.2 of the Statement of Defense, or para. 1.2 of the Respondent's Post-Hearing Brief, but is addressed in the Respondent's Rejoinder and the Claimant's Rejoinder.

¹⁷³ Claimant's Reply, p. 35; Claimant's Rejoinder, p. 2.

¹⁷⁴ Respondent's Rejoinder, p. 8.

¹⁷⁵ Statement of Defense, para. 1.2. *Cfr.* Exhibit C-48.

¹⁷⁶ Claimant's Reply, p. 36.

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(b) *The Respondent's Position*

169. The Respondent alleges that it incurred substantial labour costs during the re-standardization process. While the Respondent acknowledges that the re-standardization process was initiated by the Claimant, it asserts that the process was implemented and completed by the Respondent in coordination with the transporter. Therefore, the Respondent argues, the deductions made with respect to labour charges are justifiable.¹⁷⁷ The Respondent adds that the Claimant "*committed to bear all the costs that would be incurred during the process of re-standardization*".¹⁷⁸

8. Deductions for Railway, Truck Detention and Short Delivery

170. The Respondent deducted USD 123,173.12 from the final payment for railway, truck detention and short delivery charges under Contract No. IPL/FERT/NEPAL/2011/02/DAP, dated June 29, 2012, between the Parties.¹⁷⁹

(a) *The Claimant's Position*

171. The Claimant submits that these deductions have no relation to the present dispute or the Contract. According to the Claimant, the Respondent made these deductions without informing the Claimant or providing any reason. The Claimant points to these deductions to highlight what it deems the Respondent's general approach towards the disputed contractual relationship.¹⁸⁰ The Claimant objects to this deduction and submits that it did not give express approval for it.¹⁸¹

(b) *The Respondent's Position*

172. The Respondent submits that these deductions were made in accordance with a previous contractual relationship between the Parties, whereby the Claimant had pending reimbursements relating to truck and railway detention. The Respondent affirms that the amount in question was deducted only after obtaining express approval from the Claimant.¹⁸²

173. During the course of the hearing, Counsel for the Respondent stated:

¹⁷⁷ Statement of Defense, para. 1.3.8; Respondent's Post-Hearing Brief, p. 12.

¹⁷⁸ Referring to correspondence between the Parties as recorded at Exhibit R-13; Respondent's Post-Hearing Brief, p. 12.

¹⁷⁹ Statement of Defense, para. 1.2. *Cfr.* Exhibit C-48.

¹⁸⁰ Statement of Claim, para. 5.2(5); Claimant's Reply, p. 36.

¹⁸¹ Claimant's Post-Hearing Brief, p. 16.

¹⁸² Statement of Defense, para.1.3.7.1; Respondent's Post-Hearing Brief, pp. 11-12.

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*...unfortunately there is nothing that we have substantial to put it on record to prove that this was authorised but it was a verbal instruction that we got from the Claimants to deduct this amount, and according to their verbal instruction we have deducted accordingly, honourable Tribunal, and for which they are making a claim in the issue during the course of arbitration. It was a verbal instruction, honourable Tribunal, and that is our justification for the deduction.*¹⁸³

F. DAMAGES

174. The Claimant asserts that the Respondent is liable for the inventory carrying cost borne by the Claimant and the interest for the delay in payment, which the Respondent objects to.

1. Inventory Carrying Cost

(a) Claimant's Position

175. The Claimant asserts that the Respondent is liable for the inventory carrying cost for the period between September 17 to October 15, 2011.¹⁸⁴ The Claimant stresses that it had to withhold the dispatch based on the Respondent's instructions, despite the fact that the cargo had been ready to be shipped. The Respondent was informed by the Claimant that the latter was bearing heavy inventory cost, especially in light of the fact that it did not receive any advance payments from the Respondent.¹⁸⁵

176. While acknowledging that there is no specific provision in the Contract dealing with inventory carrying costs, the Claimant argues that this should not be interpreted in favor of the Respondent. The Claimant argues that the absence of such provision does not prohibit the Claimant from asserting the Respondent's liability in respect to the inventory cost, especially given that this cost was incurred due to the Respondent's conduct.¹⁸⁶

¹⁸³ Hearing Transcript, Day 2, 415:5-14.

¹⁸⁴ Statement of Claim, para. 3.13.

¹⁸⁵ Statement of Claim, para. 4.13, referring to the Claimant's letter to the Respondent, dated September 20, 2011 (Exhibit C-13); Statement of Claim, para. 4.26, referring to the Claimant's letter to the Respondent, dated December 19, 2011 (Exhibit C-25).

¹⁸⁶ Claimant's Reply, p. 37.

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177. The Claimant submits that the estimated inventory cost should be calculated at a rate of USD 8.00 PMT per month on 31,500 MT of urea, for the period between September 14 to October 15, 2011, resulting in a total amount of USD 252,000.00.¹⁸⁷

(b) Respondent's Position

178. The Respondent argues that the inventory carrying cost is unsubstantiated.¹⁸⁸ According to the Respondent, the Contract is considered to be a CIF contract, which means that the buyer agrees to pay in a lump sum the cost of the goods, insurance costs and freight charges. The Respondent asserts that the Contract price was determined between the Parties taking into consideration a lump sum that includes all of these costs.¹⁸⁹

179. The Respondent submits that the Claimant is responsible for delivering the agreed goods to the Respondent's warehouses without charging any additional cost. The Respondent asserts that the Contract's provisions provide that all the cost of freight would be borne by the Claimant, including the cost for demurrage and inventory carrying cost, until the goods reach the Respondent's warehouses. The Respondent points out that the Claimant was informed that the Respondent would not be in a position to reimburse the cost of inventory carrying, as per the terms of the Contract.¹⁹⁰

2. Interest

(a) Claimant's Position

180. The Claimant claims that the Respondent is liable for paying interest on (1) the delayed payment, (2) the outstanding USD 1,381,610.44 wrongfully deducted by the Respondent, and (3) *pendente lite* interest at a rate of 14% p.a.¹⁹¹ The Claimant submits that it has substantially established its side of the case, and that the Respondent failed to substantiate or provide any evidence to support its arbitrary deductions.¹⁹²

¹⁸⁷ Statement of Claim, para. 6.1; Exhibit C-44.

¹⁸⁸ Statement of Defense, para. 2.1.2.

¹⁸⁹ Statement of Defense, para. 2.1.1; Respondent's Post-Hearing Brief, p. 12.

¹⁹⁰ Statement of Defense, para. 2.1.1; Respondent's Post-Hearing Brief, p. 13.

¹⁹¹ Statement of Claim, para. 6.1.

¹⁹² Claimant's Reply, p. 38.

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181. According to the Claimant, Articles 83 and 84 of the Contract Act grant the Claimant the right to seek compensation from the Respondent on grounds of non-fulfilment of the conditions of the Contract.¹⁹³ The Claimant further submits that Article 85 of the Contract Act provides that the supplier has the right to receive payment for the full quantity of goods already accepted by the Respondent.¹⁹⁴ The Claimant asserts that the full quantity of the urea fertilizer under the Contract was supplied and accepted by the Respondent. The Claimant alleges that the Respondent did not, at any point, refuse the cargo delivered to its warehouses in Nepal.¹⁹⁵
182. The Claimant invokes Article 33 of the Arbitration Act to argue that the Tribunal is empowered to order the payment of interest at a rate that is not exceeding the interest rate charged by commercial banks.¹⁹⁶

(b) Respondent's Position

183. The Respondent submits that the interest claimed by the Claimant is unlawful and unfounded. According to the Respondent, the Claimant failed to establish that the Respondent is liable for any payment because all the deductions made were lawful. The Respondent reiterates that the delay in payment was due to the Claimant's negligent late delivery of the fertilizer.¹⁹⁷ The Respondent further alleges that it was unable to proceed with the payment because the matter was under review by various quasi-judicial authorities in accordance with the laws of Nepal.¹⁹⁸ The Respondent argues, therefore, that absent any finding that the deductions were unlawful, the question of interest does not arise.¹⁹⁹
184. Furthermore, the Respondent submits that, even if the Claimant succeeded in its claim regarding the illegality of the deductions, there is no provision in the Contract that supports the Claimant's request for interest.²⁰⁰ The Respondent invokes Chapter 17 of Muluki Ain Code 2020 of Nepal (the "Country Code"), which sets forth the conditions for charging interest.²⁰¹ According to the Respondent, Chapter 17 provides that (1) compounded interest shall not be charged, (2) any

¹⁹³ Claimant's Reply, p. 39.

¹⁹⁴ Claimant's Reply, p. 39.

¹⁹⁵ Claimant's Reply, p. 38.

¹⁹⁶ Claimant's Reply, p. 39.

¹⁹⁷ Respondent's Post-Hearing Brief, pp. 13-14.

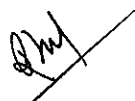
¹⁹⁸ Statement of Defense, para. 2.2.3.1.

¹⁹⁹ Statement of Defense, para. 2.2.3.1.

²⁰⁰ Respondent's Post-Hearing Brief, p. 13.

²⁰¹ Muluki Ain Code 2020 of Nepal (RLA-4); Respondent's Post-Hearing Brief, p. 14.

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interest must be provided in a contract, (3) under no circumstances can the interest rate can exceed more than 10% of the principal payment, and (4) in any case, total claim of interest shall not exceed the principal amount of payment.²⁰²

185. The Respondent submits that the Claimant requests interest of more than 10% of the principal payment of the Contract, which is calculated on a compounded basis.²⁰³ The Respondent contends that the interest claimed is contrary to Chapter 17 of the Country Code, and furthermore, there is no provision in the Contract that substantiate the Claimant's request for interest. In the Respondent's view, the Claimant has evidently failed to rely on any provision in the Contract that stipulates that the delayed payment would attract interest.²⁰⁴

G. RESPONDENT'S COUNTER-CLAIMS

(a) Respondent's Position

186. The Respondent claims that the Claimant's failure to fulfil its contractual obligations damaged the Respondent's reputation and good standing, and resulted in loss of revenue. According to the Respondent, AICL, since its establishment in 1965, had enjoyed a good reputation and a monopoly in the fertilizer industry. The Respondent alleges that due to the Claimant's negligence, the Respondent came under the scrutiny of various investigative authorities and was subjected to various departmental actions, which damaged AICL's credibility.²⁰⁵

187. As a result of these investigations, the Respondent alleges, its monopoly was diluted, causing heavy revenue.²⁰⁶ Therefore, the Respondent claims USD 3,000,000.00 as compensation for this loss, which it claims is a direct result of the Claimant's negligent conduct.²⁰⁷

²⁰² Statement of Defense, paras. 2.2.5.1 & 2.2.5.2.

²⁰³ Statement of Defense, para. 2.2.5.3.

²⁰⁴ Statement of Defense, para.2.2.2.1; Respondent's Post-Hearing Brief, p. 15.

²⁰⁵ Statement of Defense, para.1.1.1; Respondent's Rejoinder, p. 6; Respondent's Post-Hearing Brief, p. 17.

²⁰⁶ Respondent's Post-Hearing Brief, p. 17.

²⁰⁷ Statement of Defense, para. 1.1.1, referring to Salt Trading Corporation of Nepal, which was awarded the right to import and supply fertilizer in Nepal; Respondent's Post-Hearing Brief, p. 17.

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(b) *Claimant's Position*

188. The Claimant submits that the Respondent's counter-claims are frivolous and unsubstantiated.²⁰⁸ With regard to the alleged loss of reputation, the Claimant asserts that the investigations conducted in relation to the Respondent's deficiencies and corruption are unrelated to the Claimant. The Claimant contends that the Respondent tries to push over their liability upon the other Party, because it could not face the media that uncovered its deficiency and corruption. In support of its argument, the Claimant cites that the Expert Report investigated the following complaint:

*Fertilizer not sold or distributed to actual farmers/misappropriation and farmers forced to pay higher price than the fixed price and on the work proficiency of the Respondent Company.*²⁰⁹

²⁰⁸ Claimant's Reply, p. 42.

²⁰⁹ Claimant's Reply, p. 41.

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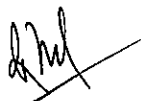
V. COSTS

189. As regards the arbitration costs, the Claimant submits that the Contract provides for arbitration to settle disputes between the Parties. The Claimant points out that the Respondent agreed to submit itself to these arbitration proceedings. According to the Claimant, after the Respondent made its unlawful deductions, there was no other efficacious remedy for the Claimant to invoke but the arbitration clause of the Contract. The Claimant, therefore, argues that the Respondent should be liable to pay the cost of this arbitration.²¹⁰ In its costs submission, the Claimant shows a breakdown of its costs and expenses amounting to USD 35,770.34, up to April 30, 2016, including the payments made to the Appointing Authority including case deposit, costs of the legal representation and expenses to attend the hearing.
190. The Respondent claims that the legal cost of the present arbitration proceedings should be borne by the Claimant. The Respondent alleges that it had to bear as costs USD 60,000 due to the Claimant's unlawful and unsubstantiated claim.²¹¹ In its Costs Submission, the Respondent provided a breakdown of the total amount of USD 60,000, which represents the cost of the arbitration, Tribunal's fees, attorneys' fees and other miscellaneous expenses.

²¹⁰ Claimant's Reply, p. 42.

²¹¹ Statement of Defense, para.1.1.2; Respondent's Post-Hearing Brief, p. 17.

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VI. PARTIES' PRAYER FOR RELIEF

A. THE CLAIMANT'S CLAIMS

191. The Claimant requests the Tribunal to order the following reliefs:²¹²

a) Award;

b) Direct the Respondent to pay to the Claimant the following amounts, and/or interest for:

Outstanding amount of the Claimant - USD 1,381,610.44213

Total Claim towards Interest - USD 1,408,392.81

Total Claim Amount of the Claimant - USD 2,790,003.24

AND FURTHER PENDENTE LITE INTEREST @ 14 % p.a.

c) costs; and

d) such other or further relief, including interest on any amount awarded, as may be deemed appropriate in the circumstances.

192. The Claimant further seeks the dismissal of the Respondent's prayer for its counter-claims with costs.²¹⁴

B. THE RESPONDENT'S COUNTER-CLAIMS

193. The Respondent requests the Tribunal to order the following relief:²¹⁵

a) Dispose all the Contentions of the CLAIMANT terming it as baseless and legally unfounded.

b) Award total amount claimed by the RESPONDENT [i.e., USD 3,060,000.00] as counter claim in RESPONDENT's favor and direct the CLAIMANT to pay such amount along with interest accrued till the realization of such payment within 45 days of [Tribunal's] award.

²¹² Statement of Claim, para. 9.1.

²¹³ This amount represents USD 1,129,610.44, that the Claimant argues the Respondent wrongfully deducted (excluding the amount of USD 548,849.05 that the Claimant agrees that the Respondent deducts for shortage of 873.1 MT), and the inventory carrying cost of USD 252,000.00. *Cfr.* Exhibit C-50.

²¹⁴ Claimant's Reply, p. 43, Section V.

²¹⁵ Statement of Defense, section E, p. 30.

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VII. TRIBUNAL'S ANALYSIS

A. JURISDICTION

194. First of all, the Tribunal notes that none of the Parties challenge the Tribunal's jurisdiction to hear and adjudicate this case.

195. The Tribunal, based on Clause 15 of the Conditions of Contract containing the agreement of the Parties to arbitrate, finds that it has jurisdiction.

B. APPLICABLE LAW

196. The Tribunal recalls that Clause 16 of the Conditions of Contract provides that the Contract "*shall be governed and interpreted in accordance with the Laws of Nepal.*"

197. The Tribunal notes that the Parties do not dispute that the Contract is governed by the Laws of Nepal.

198. The Tribunal further notes that in case of breach of contract, Article 83 of the Contract Act provides that the aggrieved party may realize the actual loss or damage suffered as a result, which the parties anticipated at the time the Contract was signed, and that no compensation may be recovered for any indirect or imaginary loss or damage.

C. CLAIMANT'S CLAIMS

199. The Tribunal starts its analysis of the Parties' claims by noting that the Parties do not dispute that the Respondent requested the delivery of 31,500 MT of urea under the Contract from the Claimant, for USD 19,811,012.70, from which amount the Respondent paid USD 18,132,553.22 to the Claimant, after deducting USD 1,678,459.49 under eight (8) grounds (*see* table in para. 87 *supra*).²¹⁶

²¹⁶ Claimant's Post-Hearing Brief, para. 2.2.

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200. First of all, the Claimant's contention that it had supplied 31,500 MT urea, that is, the full contracted quantity, is not borne out by its own statements, among others, in paragraphs 5.4 and 5.5 of its Post-Hearing Brief ("PHB"), which expressly states as follows:

5.4 During the re-standardization process, only bags with short weights from the last 3 rakes (Bags supplied by previous rakes were not in stock of AICL) were taken to be made 50 Kgs; other bags with 52-53 Kgs were taken as 50 Kgs by AICL. After re-standardization was complete, a total shortage (including sweeping) of 873 MT was intimated by the Respondent. Again as a gesture of goodwill and in good faith, the Claimant accepted the same and agreed that payment may be deducted for 873 MT, subject to their providing normal commercial evidence.

5.5 Assuming without admitting, that the facts and figures provided by the Respondent in Exhibit R11 as correct i.e. Respondent's best case, the shortage in weight comes to only 714.36 MT while the Claimant agreed for having deduced 873 MT, which was 160 MT (approx.) more than the shortage as per Respondent's own exhibit. In column 6 "weight" refers to the amount of Urea re-standardized i.e. 14,759.60 MT. This is equivalent to 2,95,192 bags of 50 Kg each. Even assuming, though unlikely there was a shortage (as assumed by the Respondent) of 2.42 kg per Bag, there is a total shortage of $2,95,192 \times 2.42 = 7,14,364 \text{ Kg} = 714.36 \text{ MT}$ only. It has been admitted during cross-examination that there were bags which were sound and bags which were above 50 Kgs. [Transcript - Day 2, 270: 10 to14].

201. As stated in its written submissions, including in its PHB, and also at the hearing, the Claimant accepted the shortage of 873 MT and "agreed for having deduc[t]ed 873 MT".

202. Therefore, the Tribunal finds that the Claimant failed to deliver the full contracted quantity and thus breached the Contract. However, the Tribunal also finds that a number of deductions made by the Respondent, as detailed below, were not justified under the Contract.

1. Deductions for Shortage, Sweeping and Short Delivery

203. Turning to the deductions made by the Respondent, with regard to the first and largest of the deductions, for "Shortage, Sweeping and Short Delivery", the relevant issues are considered below.

204. The Respondent, in its PHB (paragraph 1.3.1.2), states that it deducted for the total shortage of 1,524.6 MT on the basis that there was a 2.42 kg shortage per bag. Calculations demonstrating how the average was arrived at are set out in paragraph 1.3.1.2 of the Respondent's PHB as follows:

<i>Description</i>	<i>Value</i>
<i>Average Shortage calculated by the Investigation</i>	<i>2.42 per sack</i>
<i>Total sacks to be delivered 31,500 M.T @ 50 Kg/bag</i>	<i>31500 M.T./50 Kgs</i>
<i>Total Shortage @2.42 Kgs per Bag</i>	<i>1524.6 M.T.</i>

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Total Shortage including Sweeping and Non-delivery Short at Destination

Warehouses

Total Shortage at Birgunj	944.41 M.T.
Total Shortage at Bhairwa	688.84 M.T.

Value of Shortage

Birgunj @ of USD 626.5	USD 591,672.87
Bhairwa @ of USD 632.5	USD 435,691.3
Total	USD 1,027,364.17

205. The asserted basis for the shortage of 2.42 kg is set out in paragraph 1.3.1.2 of the Respondent's PHB as follows:

S.No	Description	Nature of Bags (sound) taken as sample	Required Weight (Kg)	Received Weight (Kg)	Difference (Kg)	Average Difference per bag (Kg)
1	Record of Dry Pot Birgunj	105	5250	5134.3	115.7	1.1
2	Preliminary Data of Study Team from Birgunj	75	3750	3435.25	314.8	4.2
3	Preliminary Data of Study Team from Bhairawa	25	1250	1183	67	2.68
Total		205	10250	9752.6	497	2.42

206. The untenability of the above calculations is manifest, as further elaborated below. The samples were taken from 205 bags. If each bag was to contain 50 kg, 205 bags would contain 10,250 kg. The total weight of the 205 bags examined was 9,752.6 kg, and a shortage of 497 kg was found in 205 bags. Thus an "average shortage" in each bag was inferred to be 2.42 kg. This was then multiplied by the total number of bags and the total shortage was calculated to be 1,524.6 MT.

207. The Claimant's contends in paragraph 5.8 of its PHB that:

5.8 The Respondent has failed to establish the method which it has adopted in calculating the deductions. It is agreed by the Respondent that a sample size for 'Representative Sampling' should be in the range of 5 - 10 % of the total quantity. [Transcript - Day 2, 285:23-25 to 286:1-4]. However, in the instant case the sample size was about 0.03% - far too less than any acceptable level of representative sampling. Therefore, to arrive at a shortage of 2.42 kg per bag on such insignificant size of sample is not at all tenable. The Respondent has arbitrarily applied the shortage of 2.42 kg to the entire quantity of supply. It is further submitted that the Respondent's Counsel agreed that the representative sample taken in this instant case 'was not a really standard sampling process'. [Transcript - Day 2, 412: 15-25 to 413:5-10].

208. Thus, while the shortage of 873 MT was accepted by the Claimant, as noted above by the Tribunal, and a deduction for the price agreed; the shortage of 1,524.6 MT (or 1,633.25 MT as noted in the

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next paragraph) was not accepted by the Claimant. This raises the question of whether this shortage could be said to have been proved.

209. The Tribunal observes, as does the Claimant (*see* para. 134 *supra*), that there is inconsistency as to the total amount of urea to which the deducted sum under this item corresponds. On the one hand, the Respondent's letter dated September 27, 2012 (Exhibit R-5), which the Tribunal observes from the evidence on record as the first time the Respondent informs the Claimant of the total alleged shortage, the CIAA Directive (Exhibit R-4) and paras. 1.3.1.2.5 and 1.3.1.3.1.1 of the Statement of Defense indicate a total shortage of **1,524.6 MT** (*see* para. 85 *supra*). On the other hand, the Respondent's final settlement in its letter dated December 18, 2012 (Exhibit C-48) indicates this deduction item to be equivalent to a total of **1,633.25 MT** (*see* table in para. 87 *supra*). In any case, the Tribunal notes that the dollar amount of the deduction (*i.e.*, USD 1,027,364.17) seems not to vary in either case. It can be observed from the table provided by the Respondent in page 13 of its Statement of Defense and page 5 of its PHB, that the breakdown of the calculation of the dollar amount refers to **944.41 MT** total shortage at Birgunj and **688.84 MT** total shortage at Bhairwa, which sums then **1,633.25 MT**.
210. The Tribunal notes again that while the Parties dispute the Respondent's right to the entire deduction, the Claimant concedes that it agreed to some deduction for short delivery. However, the Tribunal observes an inconsistency in the evidence submitted by the Parties. The Claimant's letter dated August 9, 2012 (Exhibit C-42) refers to a sum of 564.45 MT and 308.65 MT, equal to **873.1 MT** (*see* para. 84 *supra*), which is consistent with the Claimant's submission in its Statement of Claim, para. 5.2(6), its Reply, page 18, and its PHB, para. 5.5, as well as Exhibit C-50, referring to an agreed deduction of **USD 548,849.05 for 873.10 MT** of urea. But the Claimant's letter dated January 12, 2013, made reference to **764.45 MT** instead as the amount accepted by the Claimant. Moreover, Respondent refers instead to **873 MT, equivalent to USD 546,977.50**, as the amount accepted by the Claimant to be deducted (*see* paras.105 & 134, and footnote 75).
211. Despite some inconsistency, it is clear that some amount was agreed by the Claimant for the Respondent to deduct for short delivery. In the Tribunal's view, as the amount to be deducted was to be of an agreed amount, a deduction of **USD 548,849.05**²¹⁷ could appropriately be treated as the agreed amount, deduction of which would be justified.

²¹⁷ The Claimant, in the Summary of Claims of its Statement of Claim, para. 6.1.(1), claims from the Respondent a balance "after adjusting cost for 873.10 MTs being USD 548,849.05".

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212. The Tribunal observes that the Respondent's evidence to justify the amount deducted is the CIAA Directive, based on the Expert Report finding of an average of 2.42 kg²¹⁸ of shortage per bag. The Tribunal observes, however, that there is dispute on whether this Report constitutes valid and sufficient justification for the deduction. Aside from the argument regarding the binding nature of such CIAA Directive, the Claimant disputes the validity of the investigation of the Expert Team.
213. Notably, in pages 15 to 18 of its Reply, the Claimant disputes that the sampling was appropriate. Among others, the Claimant states that the size of the sample was not sufficient to constitute a respectable sampling to determine the figure on the entire quantity of 31,500 MT of urea. That sampling seems to have been done of only 205 bags, which would constitute 0.03% on 31,500 MT (*i.e.*, 630,000 bags). In its PHB (para. 5.8), the Claimant submits that a 'representative sampling' should be in the range of 5-10% of the total quantity. Furthermore, the Claimant notes that the sample examined included urea delivered to AICL by other providers as well (*i.e.*, Metals and Minerals Trading Company - MMTC: *see* RER-2, p. 3). Moreover, the neutrality in the composition of the Expert Team is also questioned by the Claimant.
214. During the course of the cross examination, Respondent's expert, Mr. Adhikari, stated that "*it was not possible to follow the scientific, statistical method, because the bags were—most of the bags were torn and then damaged*" (Respondent's Counsel, translating the expert's statement),²¹⁹ and that the Expert Team did not follow any scientific statistics as they were merely a fact-finding mission.²²⁰ Mr. Adhikari further added that the Expert Team had employed a purpose sample method, weighing 'good bags' to determine whether or not they weighed 50 kg.²²¹ In this, Mr. Adhikari admitted that around 5-10% of the bags were inspected. Counsel for the Claimant pointed out that "*0.03 as per them, 0.03 per cent out of the total quantity of 630,000 bags is a purposeful sampling for them*".²²²
215. During the hearings, the Counsel for the Respondent was questioned by the Tribunal regarding the appropriateness of the sampling size employed by the Expert Team, to which the Counsel admitted that "*if I were to do research on any particular thesis, then that would not have been a*

²¹⁸ The Tribunal notes that the Expert Report (RER-2) makes reference to 2.43 kg per bag instead of 2.42 kg.

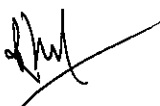
²¹⁹ Hearing Transcript, Day 2, 269:19-21.

²²⁰ Hearing Transcript, Day 2, 270:24-25.

²²¹ Hearing Transcript, Day 2, 273:1-4.

²²² Hearing Transcript, Day 2, 273:7-9.

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really standard sampling process, but this was the case of governmental investigation and a short period for fact finding".²²³

216. Regarding the farmer interviews and seeking opinions, Mr. Adhikari confirmed that, as stated in the report, very few opinions were sought and none from farmers.²²⁴
217. The Counsel for the Respondent, with reference to the evidence of the Expert, Mr. Babu Ram Adhikari, stated "*my submission is that he has signed the report, he is bound by that report*".²²⁵
218. In light of the foregoing, the Tribunal finds that the Respondent has not proven the application of a "universally recognized standard" to the inspection of the bags. For instance, the sample size used does not seem appropriate (RER-2, p. 41, Table 1, indicating a total of 205 bags taken as a sample). Also, the allotted time of 12 days (RER-2, p.3) to carry out the investigation seems to have constrained the accuracy of the investigation and, thus, of the report. Therefore, the Tribunal does not find the Expert Report either conclusive or convincing evidence supportive of the Respondent's argument that the extrapolation of the average shortage of 2.42 kg per bag to the entire 31,500 MT was justified.
219. Given the inconsistencies indicated above, the Tribunal is unable to hold that the whole of the total presumed shortage of 1525.6 MT (or 1,633.25 MT), based on an average shortage of 2.42 kg per bag, as claimed by the Respondent, has been proved. Therefore, the corresponding deduction for the whole alleged shortage could not be justified beyond the 873.1 MT, equivalent to USD 548,849.05, as settled in preceding paragraphs 210 and 211.
220. As the Claimant complains, the Tribunal finds in the record no other evidence submitted supporting the calculation and deduction for short delivery made by the Respondent. On the contrary, the Claimant's following arguments may have some bearing:
- a. Delay in initiating shipping put pressure on the mechanical bagging system at the Vizag warehouse, which went undetected due to heavy workload.
 - b. Delay in unloading damaged the bags, due to weather, *e.g.*, rain.
 - c. Use of hooks in unloading may have caused holes that caused leakage from bags.

²²³ Hearing Transcript, Day 2, 413:6-10.

²²⁴ Hearing Transcript, Day 2, 278:20-25, 279:1-10.

²²⁵ Hearing Transcript, Day 2, 279:17-19.

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221. Going back to the issue of the CIAA Directive, the Respondent has argued that it was under a duty to abide by it and could, therefore, not make the final payment without making the deduction.

On this:


- a. It is convincing that the CIAA is a fact finding/investigative body pursuant to Article 239 of the 2015 Constitution of Nepal (corresponding to Article 120 of the 2007 Interim Constitution of Nepal), and that the CIAA seems to have been investigating corruption allegations as per its constitutional mandate.
- b. However, the CIAA Directive (Exhibit R-4) reads: "*After investigation on complaints on issues of underweight on the 30,000 M.T. urea purchased by [AICL] from [IPL] by the [CIAA], it was found out that out of 31,500 M.T. Urea or 6,30,000 sacs of Urea, each sac was short by 2.42 kg and hence, a total 30,492 sacs or 1524.60 MT were short of the actual quantity. For the quantity of short weight [AICL] is required to deduct amount equivalent to shortage quantity from the remaining payable to IPL by AICL due to shortage and sweeping.*" The Respondent contends that this deduction was made pursuant to a direction made by the CIAA, a constitutional body established under the CIAA Act. The CIAA Rules made under Section 37 of the CIAA Act contemplates that investigations under the Act would be in relation to abuse of authority by persons holding public office, which could in certain cases constitute corruption (*see* Rules 5 and 6, and also Rules 26 and 27).

222. In the Tribunal's view, the CIAA's exercise of powers could not extend to directing a party not to make any payment due under a contract for supply of goods. The deduction of the USD 1,027,364.17 claimed by the Respondent, which it sought to justify as being in compliance with the CIAA's direction, cannot be sustained.

223. The Respondent argues that the CIAA Directive was an event amounting to *force majeure* under the Contract as per the ICC Force Majeure Clause 2003, which prevented it from completing payment.

224. In the Tribunal's view, the Respondent's submission that the CIAA Directive constituted *force majeure* justifying the deduction is not sustainable as it was not the exercise of power by the CIAA in the circumstances of the case, and thus could also not be invoked as *force majeure*.

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225. It is the Tribunal's view that the Claimant's argument that the Indian Government's measures caused the delay in delivery constituting *force majeure* may not be so invoked pursuant to the terms of the Contract as further elaborated below in Section VII.C.3.
226. There remains the issue of the duty to inspect the goods pursuant to Clause 13 of the Conditions of Contract, which reads:

Societe Generale De Surveillance (SGS) [sic] or recognized independent reputed surveyor at sellers cost shall inspect the commodity at the place of loading. SGS or recognized independent reputed surveyor shall issue an inspection certificate of quality and quantity of the fertilizer to certify that the goods are in good order and condition and confirms to the specifications herein stated. The certificate of non contamination should also be issued by SGS or recognized independent reputed surveyor based on appropriate test of actual goods. Expenses incurred for such inspection shall be on the Supplier account.

However, on arrival of fertilizer at unloading point, i.e: AICL warehouses in Nepal, AICL shall inspect the fertilizer by SGS or other third party independent authorized surveyor.

In case if the goods are claimed to be not in conformity with required specification, AICL will evidence with reference thereto. In case it is proved, supplied will be responsible to substitute the said fertilizers by required quality free of cost otherwise payment will be withheld.

227. From the first paragraph of this provision, the Claimant seems to have had the duty to inspect at the place of loading, but from the second paragraph thereof, the Respondent appears to also have had a duty to get SGS or an independent body to survey the goods at the unloading point to make sure that there were no discrepancies. The Respondent does not appear to have done the inspection. The Respondent did not argue this to have been done; it only argued that it was the duty of the Claimant to inspect at the place of loading. On the other hand, the Claimant supplied the TCI certificates (Exhibit C-55),²²⁶ which would comply with the inspection requirement of this provision, assuming that TCI is indeed a 'recognized independent reputed surveyor', which is not disputed, and assuming that the TCI certificates are considered valid for the Claimant to comply with this condition despite the Respondent's challenge [*see* Exhibit R-8 and Hearing Transcript, Day 2, 392:11-394:9].
228. Lastly, with regards to the promissory estoppel and unjust enrichment argument raised by the Claimant, the Tribunal notes that the Parties do not dispute that the Respondent re-sold the bags received in the first 10 rakes without any loss, neither was there loss concerning the underweight bags in the last three rakes given that those were re-standardized. Furthermore, as a result of the

²²⁶ It may be noteworthy that when the Claimant was questioned by the Tribunal as to why the document Exhibit C-55 was being adduced now at the hearing and had not been done so earlier, the Claimant stated that while they had failed to submit the document as evidence, it is referred in Exhibit R-3 and had been mentioned earlier (Hearing Transcript, Day 2, 232:1-11), and that it was being adduced now because the Respondent had falsely alleged that no inspection had been carried out (Hearing Transcript, Day 2, 232:11-20). However, in its Post-Hearing Brief, para. 3.7, the Claimant argues that this is no new evidence as the Respondent has the originals in its custody, control and possession, and thus, has not taken the Respondent by surprise.

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Tribunal's finding that any deduction over and beyond the agreed amount of 873.1 MT of USD 548,849.05 is not justified, the Tribunal does not find it necessary to address these arguments further. The damages that the Respondent claims as counter-claim for damages to its reputation and good standing and loss of revenue will be considered separately below as they are not related to the loss that the Respondent may have sustained directly for the underweight bags.

229. In sum, the Tribunal finds that the amount agreed between the Parties for **873.10 MT of USD 548,849.05** may be treated as being validly deducted, but any deduction beyond this amount under this head could not be justified.
230. With regard to other deductions, the issues involved are considered below along with the Tribunal's findings.

2. Deductions for Additional 15%

231. First, the Tribunal recalls that Clause 14 of Conditions of Contract reads:

Goods should be insured up to final destination i.e. AICL warehouse in Nepal at its total CIF price plus 15% of sum against all risks including TPND, SRCC, water damage etc. The validity of insurance policy must be at least 30 days after final date of delivery at designated AICL warehouses in Nepal. Any excess limit clause in insurance policy will not be acceptable.

For any shortage/damage/non-delivery ascertained by the surveyors, AICL will deduct its insured value from balance payment / P. Bond. This deducted amount will be refunded upon realization of claim from insurance company. The procedure for insurance claim by the buyer will be supported by the supplier.

232. It seems that pursuant to this provision of the Contract, it was indeed the buyer who would have to lodge an insurance claim. From a plain reading of the provision "[f]or any shortage/damage/non-delivery ascertained by the surveyors, AICL will deduct its insured value from balance payment / P. Bond. This deducted amount will be refunded upon realization of claim from insurance company", it appears that the insurance may have covered shortage and that once and if the insurance paid, the deducted amount would have to be refunded to the seller. Thus, although it appears that AICL did have the right to make this deduction, the failure by AICL to even lodge the insurance claim has eliminated the possibility for IPL to recover this amount from the insurance company.
233. The Tribunal finds, therefore, that the deduction of an additional 15% was, in the present case, not justified.

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3. Deductions for Late Delivery (Liquidated Damages)

234. The Respondent argues that this deduction directly arose out of the late delivery, and Clause 12 of the Conditions of Contract expressly provides for liquidated damages as a penalty.

235. Clause 12 of the Conditions of Contract provides as follows:

12. Liquidated Damage/Penalty.

In the event of supplier failing to complete the supply of the goods under this contract on or before the date for completion or before any extended date as herewith provided, except in such circumstance provide for in clause 11 the Supplier will pay liquidated damage at the following rates which will be realized from the balance payment or any deposit of Performance Bond or any money payable to the supplier.

- i. for delay of 1 to 15 days – 0.5% of CIF value of delayed quantity*
- ii. for delay of 16 to 30 days – 1.0% of CIF value of delayed quantity*
- iii. for delay of 31 to 45 days – 1.5% CIF value of delayed quantity*
- iv. for delay of over 45 days – 5% of CIF value of delayed quantity.*

236. The Tribunal notes that the Claimant stated in its letter to the Respondent dated September 16, 2011 (Exhibit C-11), that it was ready to load and deliver the urea.²²⁷

We are pleased to inform that our urea shipment to Vizag has completed discharge of 31500 MT urea for supply to AICL, Nepal.

We have also received Vizag customs clearance for export to Nepal and already indented for the first Rake which we expect to load on 17th September, 2011.

We regret the delay in above supply which was mainly due to continuous heavy rains at Vizag and acute congestion at port, which resulted in 15 days delay in berthing and discharge of vessel.

We shall now make our best efforts to load urea rakes at every 3-4 days interval.²²⁸

237. The Claimant stated in this letter that it had completed discharge of the 31,500 MT urea to Vizag, ready for delivery. According to the Claimant, that cargo came via MV Zarsan on September 1, 2011, and the 31,500 MT of urea for IPL was part of it (Exhibit C-51, under #8), and that 31,500.50 MT of urea was discharged for IPL at Vizag (Exhibit C-51, under #29). The discharge of the total content of the cargo on MV Zarsan was completed on September 16, 2011, having started on September 10, 2011 (Exhibit C-51, under #34).

238. The Tribunal found no specific evidence in file that IPL received customs clearance for export and had indented the first rake.

²²⁷ See Hearing Transcript, Day 1, 110:11-12.

²²⁸ Exhibit C-11.

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239. Concerning the statement that the Claimant “*regret[s] the delay in above supply which was mainly due to continuous heavy rain at Vizag and acute congestion at port, which resulted in 15 days delay in berthing and discharge of vessel*”, it is not clear to the Tribunal whether the delay referred therein is relevant in the determination of the delay in delivery to AICL under the Contract for which late delivery penalty was deducted by the Respondent.
240. The Tribunal observes that the Respondent has given no explanation on why the Respondent requested the Claimant on September 17, 2011 not to dispatch the urea.
241. On the Claimant’s argument of the delay being due to *force majeure*, the relevant Contract provision (Clause 10 of the Conditions of Contract) reads:
- 10. Terms of Force Majeure*
- However, the Supplier shall be responsible for the delayed delivery of goods due to any Governmental procedure outside Nepal. Such delay in government procedure outside Nepal cannot be construed as force majeure. The cost, which may incur due to such delay, shall be borne by the Supplier.*
- If any force majeure occurs in the country of origin mentioned in this contract, then supplier will have to deliver goods from any other origin acceptable to AICL so as to meet delivery schedule.*
242. This clause states that “*delay in government procedure outside Nepal cannot be construed as force majeure.*” This reflects the intention of the Parties when they signed the Contract regarding the scope of application of the *force majeure* clause. It then further provides that “*the cost, which may incur due to such delay, shall be borne by the Supplier.*” On a strict reading of this provision, it appears to support Respondent’s argument that *force majeure* does not apply to events outside of Nepal.
243. The Tribunal is of the view that in light of the express provisions of Clause 10 of the Conditions of Contract, delay due to governmental procedure outside Nepal cannot be considered *force majeure*, and any cost which may result from such delay would have to be borne by the supplier as per the terms of the Contract.
244. As regards delivery, there are several specific references in the Conditions of Contract (*i.e.*, Clauses 4, 7, 8, 13 and 14). The Claimant’s submission is, in sum, that there has been no delay in the delivery as the supplies were made by December 30, 2011. Thus, according to the Claimant, the goods were already in the Respondent’s possession before re-standardization took place, and once the goods were in the possession of the Respondent, the plea that delivery had been kept in abeyance is not a position that the Respondent can legitimately take.

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245. The Tribunal observes that the Respondent's position regarding the amount deducted for late delivery is inconsistent on its face. The Respondent deducted USD 361,597.99 for late delivery charges of 14,760 MT, based on the calculation of Exhibit R-11.²²⁹ However, the chart in Exhibit R-11 shows a total amount of 14,759.60 MT delivered allegedly with delay, amounting to USD 356,730.65 in penalty amounts calculated pursuant to Clause 12 of the Conditions of Contract.²³⁰ The Tribunal observes that there is a difference of USD 4,867.34 between the amount calculated in Exhibit R-11 and the amount ultimately deducted by the Respondent based on the figures provided in the exhibit. Thus, the Respondent justifies only the deduction of USD 356,730.65 for liquidated damages on the basis of the calculations shown in Exhibit R-11, and USD 4,867.34, which the Respondent deducted in excess, is not based on the justifications provided in Exhibit R-11 and should, therefore, be added to the amount of unjustified deductions that the Respondent should pay to the Claimant.
246. In addition, Exhibit R-11 shows that, with respect of the last three delivery items relating to deliveries made in Bhairahawa on February 1, 2012, no delay details are stated. Deduction, however, was made of USD 88,265.39 with respect to these last three deliveries of 4,117 MT according to Exhibit R-11. Not having been justified, this deduction of USD 88,265.39 should be added to the amount that the Respondent should pay to the Claimant.
247. Now, as to the rest of the deducted amount, the Claimant argues that the Respondent has not provided proof of the facts and figures in Exhibit R-11 and has objected to the entirety of this exhibit. According to the Claimant, this exhibit shows the dates of re-standardisation and not the actual date of receipt of the urea supplied.²³¹ The Claimant submits that under the Contract, liquidated damages are to be paid only when there is delay in delivery, but all deliveries were made before the alleged "Date Receivable" (i.e. "1-Feb-12").²³² The Claimant further submits that the Respondent has committed "a grave error in taking the date of re-standardisation as the date of receipt of supplies made".²³³ The Claimant argues that liquidated damages under the Contract are not payable when delivery is made in time and re-standardisation is carried out

²²⁹ Statement of Defense, para. 1.3.4.1. See table in para. 83, *supra* and Exhibit C-48.

²³⁰ Mr. Shakya, Counsel for the Respondent, stated during the hearing that evidence of the delay is provided by Exhibit R-11, where liquidated damages were calculated as 14,759.60 MT. *Cfr.* Hearing Transcript, Day 2,397:3-10. Mr. Shakya stated: "After restandardisation, so they were handing over the deliveries on the basis of each lot that they have restandardised, and we have noted all the dates and the amounts that we accepted the deliveries." (Hearing Transcript, Day 2,398:21-25).

²³¹ Claimant's Post-Hearing Brief, para. 6.2.

²³² Claimant's Post-Hearing Brief, para. 6.2.

²³³ Claimant's Post-Hearing Brief, para. 6.2.



thereafter. The Claimant further argues that the Contract Clause relating to liquidated damages must be strictly construed.²³⁴ In addition, the Claimant argues that even if the re-standardisation date is adopted, the Respondent had stopped the re-standardization process from February 2012 until about the first week of April 2012, and, therefore, that time should rightly be excluded from the calculations.²³⁵ Furthermore, the delivery date should be counted from the 7th day of the establishment of the LC, so the “*Date Receivable*” in Column 2 of Exhibit R-11 should be taken as February 9, 2012 instead of February 1, 2012.²³⁶

248. The Tribunal finds that Exhibit R-11 shows that the delay claimed by the Respondent for the deduction for late delivery was due to the re-standardization process, which the Respondent has not denied.²³⁷ The Tribunal agrees that delay due to re-standardization when goods were in possession of the Respondent cannot provide any justification for liquidated damages for late delivery pursuant to Clause 12 of the Conditions of the Contract. The Tribunal also finds that, as noted above, the goods having been taken into possession by the Respondent for re-standardization would, in the circumstances, be treated as having been delivered, and that, in such case, the supplier was not to pay liquidated damages as provided by Clause 12 of the Conditions of the Contract. The Tribunal, therefore, concludes that the entire deduction made by the Respondent for late delivery is unjustified.

4. Deductions for Shortage of Spare Empty Bags

249. Pursuant to paragraph 8 of the Contract and Clause 7 of the Conditions of Contract, the Claimant was to provide 1% of spare bags to accommodate any contingencies related to sweeping or repacking. For any shortage of spare bags, USD 1.00 for each bag would be paid by the supplier. The Claimant’s obligation in this regard is not disputed.

250. It is not disputed either that re-bagging was carried out once a shortage was identified. However, this re-bagging at the Claimant’s expense, and with its agreement, and, thus, should have included the cost of the extra bags.

²³⁴ Claimant’s Post-Hearing Brief, para. 6.2.

²³⁵ Claimant’s Post-Hearing Brief, para. 6.2.

²³⁶ Claimant’s Post-Hearing Brief, para. 6.4.

²³⁷ See Hearing Transcript, Day 2,398:4-402:3

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251. Furthermore, during the hearing, the Claimant conceded this point and accepted that it “*could have missed out supplying the exact quantity*”.²³⁸
252. The Tribunal, therefore, finds that this deduction was justified.

5. Deductions for LC Amendments and Extension Charges

253. According to Clause 5(vi) of the Conditions of Contract, LC amendment charges are to be paid by the party at fault.
254. The Tribunal notes that no convincing evidence has been provided justifying these charges or proving that the amount deducted was the cost in fact incurred due to LC amendments and extensions, and that those amendments and extensions were caused by the Claimant. The Tribunal does not find Exhibit R-12 sufficient such evidence to prove this expense or that it was caused by the Claimant.
255. Moreover, the Tribunal notes that while the delay in delivery from the Claimant may have caused the LC amendments, the Respondent’s requests to change delivery destinations and amounts may also have required amending the LCs (*see paras. 75, 76 & 79 supra*).
256. The Tribunal, therefore, finds that, in the absence of convincing evidence this deduction cannot be treated as justified.

6. Deductions for Weighing Charges

257. The Tribunal notes that no evidence has been provided by the Respondent for this deduction. What is more, the Respondent has offered no argument regarding its calculation.
258. Therefore, the Tribunal finds that, in the absence of evidence, this deduction cannot be justified.

7. Deductions for Labour Charges

259. The Tribunal notes again that no sufficient evidence has been provided by the Respondent of this deduction, nor has it provided justification for its calculation. The Tribunal does not find Exhibit R-13 to be sufficient such evidence.

²³⁸ Respondent’s Post-Hearing Brief, p. 11. *Cfr.* Statement of the Counsel for the Claimant at Hearing Transcript, Day 2, 365:16-17.

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260. The Tribunal, therefore, finds that this deduction is not justified.

8. Deductions for Railway, Truck Detention and Short Delivery

261. Concerning the deduction made by the Respondent pursuant to a different contract (Contract No. IPL/FERT/NEPAL/2011/02/DAP, dated June 29, 2012, between the Parties), the Respondent admitted that this deduction related to another matter. The Respondent claims that it was made with the Claimant's approval. Accordingly, the Respondent stated that on this basis, it was done according to the contractual provisions, and asked the Tribunal to validate the deductions.²³⁹ However, when pressed for further clarification at the hearing, Counsel for the Respondent stated that this 'express approval' was a verbal instruction,²⁴⁰ given by the local agent, Mr. Sunil Shrestha.²⁴¹ The Claimant, in turn, objects to this deduction and claims that it did not approve it (PHB, p. 16).

262. In light of the fact that the deduction was made pursuant to a different contract and that it related to another matter, the deduction cannot be justified under these circumstances. The Respondent attempted to justify the deduction pursuant to a different contract by claiming the Claimant expressly approved it in the form of a verbal instruction given by the Respondent's local agent.

263. Considering the Claimant's denied any such approval and the deduction was brought pursuant to a different contract, the deduction cannot, in the Tribunal's view, be justified.

9. Extra Inventory Cost

264. Concerning the Claimant's claim for damages, IPL has failed to furnish any evidence or documents sufficient to prove any freight, demurrage and inventory carrying costs in the form of any rental agreement and/or any payment bills or vouchers thereof. Therefore, the Tribunal finds that the Claimant failed to provide sufficient evidence for the extra inventory cost. Consequently, the Tribunal holds that this claim is not sustainable.

²³⁹ Hearing Transcript, Day 2, 417:4-14.

²⁴⁰ Hearing Transcript, Day 2, 415:17-19.

²⁴¹ Hearing Transcript, Day 2, 415:24-25, 416:1.

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10. Interest

265. The Tribunal, having found some of the deductions made by the Respondent unfounded, considers that the Respondent has effectively deprived the Claimant so far of receiving payment for part of the price of the goods under the Contract.
266. The Tribunal considers that the Claimant should, thus, be compensated and is entitled to payment of interest on the amounts that were unduly and unilaterally withheld by the Respondent until now.
267. The Tribunal notes that the Respondent requests a maximum interest of 10% , as provided under Nepalese law, which governs the Contract, while the Claimant has applied a rate of 18% p.a. (Exhibit C-50). The Tribunal notes also that the Contract contains no provision on interest.
268. The Tribunal notes that pursuant to the Contract Act, the supplier has the right to receive payment for the full quantity of goods accepted by the Respondent. The Tribunal also notes that Article 33 of the Arbitration Act provides that, except when otherwise provided for in the agreement, when an award provides for payment of any amount by one party to another, payment will be made at an interest rate determined by the arbitrator with consideration to the business related to the disputed. The interest rate cannot be higher than the rate of interest currently charged by commercial banks in respect to similar transactions. Furthermore, no interest can be charged for the period between the date of decision and the time limit prescribed for the implementation of the award under said Act, which is, according to Article 31 thereof, 45 days from the date when the parties receive a copy of the award. The Tribunal further notes that under the UNCITRAL Rules it may award interest.
269. Regarding the Country Code invoked by the Respondent, the Tribunal observes that Number 4 of Part 1 (On Preliminary Matters) of the Code provides that the matters set forth in separate laws made in specific subjects shall be governed by such laws, and those matters not set forth in such laws shall be governed by the Code. In the opinion of the Tribunal, the foregoing gives the Country Code a supplementary character.
270. According to Article 33 of the Arbitration Act, the interest rate "*must not be higher than the rates charged by commercial banks for similar transactions.*" As per the Nepal Central Bank, general and Treasury bond interest rates, the interest rates in Nepal vary from 7% to approximately 10%.

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The Respondent, in its submission,²⁴² provides that Chapter 17 on General Transaction of the Country Code states:

...an interest on the interest shall not be collected; and even if so collected, it shall be returned. If the deed does not provide for interest, interest may not be collected. If a deed provides for an interest that is less than ten percent of the principal per year, then it shall be as per the deed. If a deed provides for charging and paying an interest but does not specify the rate or figure of interest or provides for payment of interest that is more than ten percent of the principal per year or where making recovery of interest by the creditor from the debtor on the other grounds requiring the recovery of interest pursuant to law, making recovery of interest by the creditor from the debtor on the other grounds requiring the recovery of interest pursuant to law, no such recovery of interest shall be made as to exceed ten percent of the principal per year. Even in cases where a deed does not provide for interest but for payment of profits, the provisions that apply to interest shall be applicable.

271. Therefore, the Tribunal finds that it would be appropriate to calculate simple interest instead of compound interest at a rate of 10% PA.
272. According to the Guideline published by the Chartered Institute of Arbitrators on awarding interest, Article 2(1) states: "Arbitrators should determine the date or dates when liability for interest starts to accrue." Accordingly, it would be appropriate to identify two dates to calculate the interest from: (1) the date of last delivery, December 2011 (*see* para. 77 *supra*), or (2) the last letter detailing the Respondent's accounts, December 18, 2012 (Exhibit C-48). The Tribunal is inclined to prefer the interest period starting from December 18, 2012.
273. Thus, the total principal amount to be paid to the Claimant by the Respondent is USD 857,304.18 (as detailed at para. 284.a *infra*, as per the decisions of the Tribunal explained above), at a rate of 10% interest per year, making the daily interest amount payable USD 234.71.
274. The Tribunal finds that the Respondent should pay the Claimant interest on the amounts improperly withheld, at 10% PA from December 18, 2012, until the date the payment is ultimately made, excluding the period of 45 days following the day this Award is rendered pursuant to Article 31 of the Arbitration Act.

D. RESPONDENT'S COUNTER-CLAIMS

275. The Tribunal notes that no evidence has been provided in support for the Respondent's claim for damages. The Tribunal finds it startling that no credible argument was even made to justify the amount claimed. Therefore, the Tribunal finds the counter-claims unsustainable and are, thus, rejected.

²⁴² Statement of Defense, para 2.2.5.1.

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E. COSTS

276. The Parties' claims for costs include the costs of the Parties' legal representation as well as those of the Tribunal and the PCA.
277. Pursuant to Article 42 of the UNCITRAL Rules, the costs of the arbitration, as defined in Article 40, "*shall in principle be borne by the unsuccessful party or parties*". However, said provision allows the arbitral tribunal to apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
278. Costs are, therefore, to be awarded to the successful party and against the unsuccessful party, unless the circumstances of the case justify a different approach. In this case, however, the Tribunal finds no clear successful party.
279. While most of the deductions made by the Respondent were found by the Tribunal as unjustified, the Tribunal dismisses the Respondent's counter-claims and the Claimant's claim on damages. In light of this, the Tribunal finds that, in the present circumstances of the case, each Party should each bear its own costs of legal representation and other costs incurred in connection with the arbitration, and the Parties should share in equal parts the fees and expenses of the Tribunal and the PCA.
280. The Tribunal and the PCA's fees and expenses are as follows:

Dr. Kamal Hossain:

Fees: USD 8,885.81
Expenses: USD 2,711.24

Justice Jha:

Fees: USD 8,976.22
Expenses: USD 2,397.17

Judge Vaidya:

Fees: USD 8,977.58
Expenses: USD 0.00

PCA:

Fees: USD 8,977.57
Expenses: USD 2,848.80

Other Tribunal Expenses: USD 9,973.68

Total: USD 53,748.07

281. The Parties have each paid USD 30,000.00 to the PCA as deposit towards the costs and expenses of the Tribunal and the PCA, totaling USD 60,000.00. In addition, the Claimant paid EUR 1,500.00 (equivalent to USD 1,725.00, according to the Claimant's cost submission) as the PCA's fees for acting as appointing authority in this arbitration.

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282. The costs of the arbitration disbursed by the PCA as detailed in the preceding paragraph 280 total USD 53,748.07. These costs include all those costs detailed in Article 40(2) (a), (b) and (c) of the UNCITRAL Rules. The remainder of the deposit shall be returned to the Parties by the PCA in equal parts.
283. The Tribunal finds that the Respondent should pay the Claimant EUR 750.00, which corresponds to its half of the fees of the appointing authority.



VIII. DISPOSITIF

284. In view of the foregoing, the Tribunal unanimously decides that:

- a. the Respondent shall pay the Claimant **USD 1,125,769.44** as the amount improperly deducted, on the following basis:
 - i. For shortage, sweeping and short delivery: USD 478,515.12 (total deducted amount of USD 1,027,364.17, minus the agreed deduction of USD 548,849.05 for 873.10 MT of urea);
 - ii. For added 15%: USD 154,104.63;
 - iii. For balance deduction on late delivery (liquidated damages): USD 361,597.99;
 - iv. For LC amendment and extension charges: USD 3,522.30;
 - v. For weighing charges: USD 2,557.00;
 - vi. For labour charges: USD 2,299.28; and
 - vii. For railway, truck detention and short delivery under a different contract: USD 123,173.12;
- b. the Respondent shall pay the Claimant interest on the amount of USD 857,304.18, at a rate of 10% PA, simple interest, from December 18, 2012, to the date of its final satisfaction, excluding the period of 45 days following the date of this Award;
- c. the Parties shall bear their own legal and other costs incurred in connection with this arbitration;
 - a. the Parties shall bear the costs of arbitration (other than legal representation and assistance) in equal shares;
 - b. the Respondent shall pay the Claimant **EUR 750.00**, which corresponds to its half of the fees of the appointing authority; and
 - c. all other claims and relief requested by the Parties are dismissed.

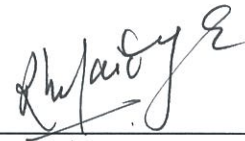
Done in Kathmandu, Nepal, the place of arbitration, on December 2, 2016.



Honourable Justice (Retired)
Mr. Sachchida Nand Jha



Dr. Kamal Hossain
(Presiding Arbitrator)



Honourable Judge (Retired)
Mr. Raghav Lal Vaidya