ICC (INTERNATIONAL CHAMBER OF COMMERCE)

ICC Case No. 18799/VRO/AGF/ZF

SURAL LIMITED V. THE GOVERNMENT OF THE REPUBLIC OF TRINIDAD AND TOBAGO

FINAL AWARD

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30 April 2015

Tribunal:
Ali Malek (Appointed by the respondent)
Charles N. Brower (Appointed by the claimant)
Lawrence Collins (President)

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Final Award

I. THE PARTIES

1. The Claimant, Sural (Barbados) Ltd ("Sural"), is a corporation registered under the laws of Barbados and having its registered office in St. Philip, Barbados. In its Request of Arbitration it gave its address as "Sural (Barbados) Ltd c/o Denaz Law Chambers, Sherwood, Strathclyde Crescent, St. Michael, Barbados".

2. Sural is represented by:

Mr James D Wing
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Mr Gordon McAllister
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3. The Respondent is the Government of the Republic of Trinidad and Tobago and acts through its Minister of Finance as Corporation Sole, Eric Williams Finance Building, Independence Square, Port of Spain, Trinidad and Tobago. The Arbitral Tribunal will refer to the Respondent as "the Government" or "GORTT". It is Answer, GORTT gave its address as "Government of the Republic of Trinidad and Tobago, c/o The Minister of Finance and the Economy, Eric Williams Finance Building, Independence Square, Port of Spain, Trinidad & Tobago, West Indies"

4. GORTT is represented by:

Mr Akbar Ali
AFA LAW

[1] At the time of the Terms of Reference, Mr Jones was at Fasken Martineau.

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II. THE ARBITRAL TRIBUNAL

5. On 21 February 2013 the ICC International Court of Arbitration ("the ICC Court") confirmed The Hon Charles N Brower as co-arbitrator upon Sural's nomination and Mr Ali Malek QC as co-arbitrator upon GORTT's nomination. On 4 April 2013 the Secretary General of the ICC Court confirmed, pursuant to Article 13(2) of the ICC Rules, the Rt Hon Lord Collins of Mapesbury as President of the Arbitral Tribunal upon the joint nomination of the co-arbitrators.

6. Contact information of the Arbitral Tribunal is as follows:

Lord Collins
Essex Court Chambers
24 Lincoln's Inn Fields
London WC2A 3EG,United Kingdom
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III. THE AGREEMENT, THE GOVERNING LAW AND THE ARBITRATION CLAUSE

7. Sural's claim arises under the Unanimous Shareholders' Agreement between Sural and GORTT ("the Shareholders' Agreement"). Although undated, it is common ground between the parties that it was signed by the parties on 3 July 2007.

8. The Shareholders' Agreement contains the following provisions in clauses 29 and 30 for arbitration, choice of law, and choice of jurisdiction.

"DISPUTE RESOLUTION

29.1 The Parties shall use their best efforts to settle amicably through consultation any dispute, which may arise from, in consequence of or in connection with the performance or interpretation of any provision of this Agreement.

29.2 Pursuant to 29.1 above, where the Parties fail to resolve such dispute through consultation, within one hundred and twenty (120) days of the date on which such dispute was referred, such dispute shall be referred for settlement to and by:

i. the officer of the Company who is then responsible for the Company's operations; or

ii. such other officer of the Company as may be designated by the Managing Director of the Company; and

iii. an officer of GORTT who is then responsible for the Project, or such other officer of GORTT as may be designated by GORTT, and,

iv. the officer of SURAL who is then responsible for SURAL's operations, or such other officer of SURAL as may be designated by the President of SURAL as the case may be.

29.3 Pursuant to Clause 29.2 above, such officers referred to at (i) to (iv) may, if they so desire and agree, consult outside experts for assistance in arriving at settlement of such dispute.

29.4 Provided that any of the officers referred to at Clause 29.2 above is at that time a representative on the Board, the person to whom such officer directly reports shall designate an alternate person, for the purposes of this Clause.

29.5 Pursuant to Clause 29.4 above and within sixty (60) days of the date of the referral of any such dispute to such officers referred to at (i) to (iv), where any officer notifies the Parties that the dispute has not been resolved by referral to such officers or otherwise by agreement between the Parties, such dispute shall be referred to arbitration, to be conducted in Miami, Florida.

29.6 The arbitration shall be conducted by a tribunal of three (3) arbitrators (the "arbitration tribunal") in accordance with the rules of arbitration established by the International Chamber of Commerce in the United Kingdom, in effect on the Effective Date and as modified from time to time.

29.7 The English language shall be the language used in the arbitration. The arbitrators shall be

fluent in English and all documents submitted to the arbitrators and to the other Party, and any decision and/or opinion of the arbitrators shall be in English.

29.8 The Parties agree that the arbitration tribunal is hereby authorised to consult with and employ attorneys, accountants or experts that may be deemed necessary to assist them in determining issues or matters of law arising in the course of the arbitration.

29.9 The costs and fees of arbitration shall be determined in the sole discretion of the arbitration tribunal and may be assessed or apportioned to either or both of the Parties in the award.

29.10 The Parties agree that the arbitration tribunal shall have no authority to:

(i) award relief in excess of what this Agreement may otherwise provide; or

(ii) award exemplary damages or any other damages not measured by the prevailing party's actual damages.

29.11 Any arbitral decision and/or award with respect to any dispute submitted to arbitration shall be final and binding upon the Parties and shall not be subject to appeal.

29.12 Each Party consents to the entry of judgment upon and/or enforcement of any such arbitral decision and/or award by any one or more courts of competent jurisdiction.

29.13 Notwithstanding the termination or expiration of this agreement, the provisions of this Clause shall continue in full force and effect provided that any arbitration proceeding was instituted prior to the expiration of four (4) years of the date of termination or expiration of this Agreement.

30. GOVERNING LAW

30.1 This Agreement shall be governed by and construed in accordance with the laws of the Republic of Trinidad and Tobago and, subject to Clause 29, the Parties hereto submit to the exclusive jurisdiction of the Trinidad and Tobago courts in respect of any dispute or matter arising out of or connection with this Agreement".

IV. PROCEDURE

9. It is unnecessary to set out the procedural history in full. What follows is a summary.

10. Sural submitted a Request for Arbitration with the ICC Court on 2 July 2012. On 31 August 2012 GORTT requested an extension until 30 November 2012 pursuant to Article 5(2) of the ICC Rules to submit its Answer to the Request, without prejudice to (i) any jurisdictional challenge; (ii) the existence, scope and validity of the arbitration agreement and validity of the Request; and (iii) whether the Request had been issued without first following the mandatory pre-arbitral procedures under clauses 29.1 and 29.2 of the Shareholders' Agreement. On 11 September 2012 Sural stated that it objected to the requested extension and that it saw no need for an extension

beyond 15 October 2012.

11. By letter dated 24 September 2012 GORTT invited the ICC Court to decline jurisdiction pursuant to Articles 6(3) and 6(4) of the ICC Rules on the grounds that (i) the Request was made outside the 180-day time limit under clause 29 of the Shareholders' Agreement; or (ii) the Request was invalid and premature for failure to follow the mandatory pre-arbitral procedure set out in clause 29.2 of the Shareholders' Agreement.

12. On 15 October 2012 GORTT filed its Answer and Counterclaim, without prejudice to its primary position that the Arbitral Tribunal did not have jurisdiction and that the dispute came within the exclusive jurisdiction of the courts of Trinidad and Tobago.

13. Sural filed an Answer and Defenses to Counterclaim on 7 November 2012.

14. By letter dated 17 October 2012 Sural submitted that the relief requested by GORTT could not be granted as a matter of the ICC Rules and as a matter of substantive law. Sural responded by letter dated 26 October 2012.

15. On 21 February 2013 the Secretariat informed the parties that the ICC Court, at its session of the same date, had decided, pursuant to Article 6(4) of the ICC Rules, the arbitration was to proceed.

16. The parties agreed that the applicable ICC Rules were those in force as from 1 January 2012 ("the ICC Rules"): Sural's letter, 7 November 2012; GORTT's email, 9 November 2012.

17. Terms of Reference dated 5 June 2013 were drawn up by the Arbitral Tribunal in accordance with Article 23 of the ICC Rules. It was agreed that execution of the Terms of Reference was without prejudice to (1) GORTT's contention that the Arbitral Tribunal does not have jurisdiction to determine some or all of the matters referred and that the dispute comes under the exclusive jurisdiction of the courts of Trinidad and Tobago; and (2) the contentions of Sural that the place and seat of the arbitration is Miami, Florida and of GORTT that the place and seat of the arbitration is Trinidad and Tobago.

18. As recorded in paragraph 43 of the Terms of Reference the parties confirmed:

> ".. that at present they know of no basis or reason to challenge the appointment of the members of the Tribunal, subject to Article 14 of the ICC Rules and subject to the Government's objection to jurisdiction".

19. On 18 June 2013 the President on behalf of the Arbitral Tribunal issued Procedural Order 1. The order recorded, as specified in the Terms of Reference, that the Arbitral Tribunal adopted the IBA Rules on the Taking of Evidence in International Commercial Arbitration (2010) as guidelines in these proceedings (para 1). The order also dealt with document production (paragraphs 2-9); witness statements (paragraphs 10-11); expert statements (paragraphs 12-15); the evidentiary hearing (paragraphs 16-23) and Post-Hearing Memorials (paragraph 24).

20. By letter dated 11 July 2013 the Secretariat indicated that the ICC Court at its session of 11 July 2013

fixed 30 December 2014 as the time limit for the final award.

21. The parties made requests for production of documents that were ruled on by the Arbitral Tribunal on 27 November 2013 (as recorded in the Redfern Schedule), 7 February 2014, 5 May 2014, and 23 July 2014.

22. By letter dated 17 January 2014 GORTT applied for security for costs in the amount of £1.4 million as calculated in the witness statement of Mr Ali dated 15 January 2014. The parties exchanged written submissions in connection with this application and the matter was decided on paper.

23. In a ruling dated 3 June 2014, the Arbitral Tribunal dismissed GORTT'S application for security for costs. It reserved the costs of the application. In the course of its ruling, the Arbitral Tribunal held that the seat of the arbitration was Florida. As explained below, this ruling was of a procedural nature rather than by way of a partial final award. The place of the arbitration is decided below (Section IX below).

24. On 16 July 2014, Sural issued a motion for a subpoena requiring Mr Palmieri, formerly of Votorantim, to give evidence. On 29 July 2014 the Arbitral Tribunal dismissed the application It ruled as follows: "The Tribunal has considered the claimant's application for the Tribunal to issue a subpoena requiring Mr Palmieri to give evidence, probably in Atlanta, Georgia, including the email of July 25 and the respondent's reply of July 28. The Tribunal rejects the application: the application is made very late and taking of the evidence may be disruptive of the course of the arbitration and unfair to the respondent; and the tribunal is not satisfied that the evidence would be necessary or material".

25. The parties submitted the following witness statements and rebuttal statements (Bundle C).

26. Sural:

a. Declaration of Renda Butler (20 January 2014).

b. Rebuttal declaration of Mr Butler (21 February 2014).

c. Declaration of Kenneth S. Julien (21 January 2014).

d. Rebuttal Declaration of Professor Julien (20 February 2014).

e. Declaration of Alexander Preziosi (21 January 2014).

f. Rebuttal Declaration of Mr Preziosi (21 February 2014).

g. Witness statement of Alfredo Riviere (21 January 2014).

h. Rebuttal statement of Dr Riviere (21 February 2014).

i. Stephen Singh (21 January 2014).

27. GORTT:

a. Witness statement of Adrian Bernard (17 January 2014).

b. Rebuttal witness statement of Mr Bernard (17 February 2014).

c. Witness statement of Leroy Mayers (20 January 2014).

d. Rebuttal witness statement of Mr Mayers (14 February 2014).

e. Witness statement of Colleen Murray (17 January 2014).

f. Rebuttal witness statement of Ms Murray (13 February 2014).

g. Witness statement of Anand Ramlogan SC (17 January 2014).

h. Rebuttal witness statement of Mr Ramlogan SC (14 February 2014).

28. The parties served the following expert reports.

29. Sural:

a. First Report of Christopher Stobart (30 April 2014).

b. Second Report of Mr Stobart (30 June 2014).

c. Report of Hernando Diaz-Candia (29 April 2014).

d. Report of Chris M. Keller (29 April 2014).

30. GORTT:

a. First Report of David Stern (2 May 2014).

b. Rebuttal Report of Mr Stern (30 June 2014).

31. In addition Mr Stobart and Mr Stern submitted a Joint Statement on matters agreed and not agreed (16 June 2014).

32. Pre-hearing briefs were served by the parties dated 13 August 2014.

33. The oral hearing on the merits was held in Miami at 701 Brickell Avenue on 8-10 September 2014 ("the September Hearing"). A transcription of the evidence was taken and is contained in 6 volumes. In this Award "[V1.5]" refers to the transcript for volume 1 at page 5.

34. The September Hearing was attended by the following persons:

<u>Sural</u>

Mr Wing

Mr Hantman

Mr Jones

Ms Martha Fields (paralegal)

Ms Sally Stauffer (paralegal)

Mr Turner (hearing support)

GORTT

Mr Ali

Ricky Diwan QC

Alan Newman QC

Mr Abbas

Ms. Vyena Sharma (Attorney in the Attorney-General's office)

The Arbitral Tribunal

Lord Collins

The Hon. Charles N Brower

Ali Malek QC

Hearing Reporters

Ms Beverly James

Ms Gina Rodríguez

35. The following witnesses gave oral evidence at the September Hearing.

36. For Sural:

a. Professor Julien [V1.88 - Vl-149].

b. Mr Butler [V2,154- V2,206].

c. Dr Riviere [V2. 208 - V2. 255].

37. For GORTT:

a. Mr Mayers [V3. 263 - V3. 363].

b. Ms Murray [V3. 364-V4. 419].

c. Mr Bernard [V4. 420-V4. 434].

38. Oral evidence was also given by the following experts: Mr Stobart (for Sural) [V4. 435 - V.591] and Mr Stern (for GORTT) [V5. 591 - V6. 664].

39. In accordance with directions of the Arbitral Tribunal, the parties exchanged Post-Hearing Briefs on 3 October 2014.

40. In a letter dated 9 October 2014, GORTT responded to Sural's Post-Hearing Brief pursuant to the liberty to apply given by the Arbitral Tribunal at the September Hearing. It made two points. First, it objected to Sural raising a new legal argument on ratification concerning the alleged acceptance by the Ministry of Energy and Energy Industries ("MEEI") of Sural's offer by MEEI's letter of 2 October 2009 and invited the Arbitral Tribunal to reject it. The Arbitral Tribunal considers that it is able to deal with Sural's primary case without the need to decide on the issue of ratification. Secondly, it confirmed that interest was sought on GORTT's Counterclaim (as set out in its Answer) at its benchmark bond rate as of December 2013 (4,375%) from the date of payment.

41. On 18 December 2014 the International Court of Arbitration of the ICC extended the time for rendering the final award until 27 February 2015.

42. On 22 December 2014, 6 January 2015, 16 January 2015, and 23 January 2015, the Parties submitted Statements of Costs.

43. On 17 February 2015 the Arbitral Tribunal declared the proceedings closed pursuant ICC Rules, Article 27(a).

44. On 19 February 2015 the ICC Court extended the time limit for rendering the final award until 29 May 2015.

45. On 13 March 2015 the ICC Court fixed the costs of the arbitration.

V. FACTS

Introduction

46. In this section of the Award, the Arbitral Tribunal sets out the background facts as it finds them. Most of the facts are contemporaneously documented. In drafting this section of the Award, the Arbitral Tribunal has relied on the submissions of the parties and witness statements and, in

particular, the summary or citation of documents.

The Parties

47. The Sural Group of companies ("Sural Group") is a manufacturer of aluminium-based products including aluminium alloy, rods, cables and wires and aluminium alloy automobile wheels. Dr Alfredo Riviere of Caracas, Venezuela heads the group. He founded the Sural Group in 1978. The term "Sural Group" is used in this Award in the same way that Sural does in its Pre-Hearing Brief at paragraph 3.1 (footnote 41) as the group of companies in the aluminium business owned and/or operated by Dr Riviere and his family. Since 1984 Renda Butler has served as Dr Riviere's second in command in the Sural Group.

48. Sural's Certificate of Incorporation shows that Sural was incorporated as company No 27588 in Barbados on 8 September 2006 with its named directors being Mr Butler and Dr Riviere.

GORTT

49. The government entity that was party to the Shareholders' Agreement was the Minister of Finance ("the MOF") acting as corporation sole, being a separately incorporated corporation pursuant to the Minister of Finance (Incorporation) Act of 1973. By section 7(2)(b) of this Act, the MOF was given the power to enter into contracts and pursuant to this power the MOF entered into the Shareholders' Agreement having been so authorised by Cabinet at its meeting of 15 March 2007 [2].

50. Mr Mayers (who from August 2004 was Permanent Secretary of the Ministry of Energy and Energy Affairs ("MEEA") then referred to as the Ministry of Energy and Energy Industries ("MEEI")) in his witness statement (paragraph 19) gave the following outline of the hierarchy of the various government organisations and Ministries:

"

(a) Trinidad is a Parliamentary Democracy with the executive being the Cabinet headed by the elected Prime Minister. The Executive and Judiciary are separate and independent of each other.

(b) There is a Standing Committee on Energy chaired by the Prime Minister and comprises the relevant Ministers and their Permanent Secretaries such as the Minister for Energy and Energy Affairs; Ministry of Finance and various technocrats such as the Chairpersons and CEO's of the Petroleum Company of Trinidad & Tobago Limited; National Gas Company of Trinidad & Tobago Limited ("NGC"); National Energy Corporation and the Trinidad and Tobago National Petroleum Marketing Company ("NPMC"). In 2010 the SCE was reconstituted to comprise the Prime Minister as Chair, the relevant Ministers and as necessary, the Chairmen of Petroleum Company of Trinidad and Tobago Limited ("Petrotrin"), NGC and NPMC.

(c) A Sub-Committee of the Standing Committee on Energy is the Natural Gas Export Task Force and

[2] E1/44 at point c. References are to Parties' Disclosure Documents.

this was headed by Professor Kenneth Julien at the time of Alutrint's[3] formation; the membership of the Task Force includes the Permanent Secretaries of the Ministry of Finance; Ministry of Energy and Energy Affairs and various technocrats. The National Gas Export Task Force ceased to operate in 2010;

(d) The National Energy Corporation ("NEC") is a corporation sole wholly owned by the Government of Trinidad and Tobago and was incorporated under the laws of the Republic of Trinidad in 1979. One of its prime mandates is to develop strategies to monetize the country's natural gas reserves through business promotion and identifying new industries.

(e) The Ministry of Finance and the Economy ("MOF") is the corporation sole that signed the Shareholders Agreement on behalf of the GORTT;

(f) The Ministry of Energy and Energy Affairs ("MEEA") is responsible for the management of the country's energy and mineral resources. MEEA presented to Cabinet the proposal for the establishment of the Alutrint smelter and recommended that the MOF negotiate the required equity and loan financing for the project, which was accepted by Cabinet".

The Aluminium Industry Project: origins

51. Trinidad and Tobago has extensive oil and gas resources, particularly natural gas. The project which this arbitration concerns has its origins in Trinidad and Tobago's desire to move from being a mere commodity supplier of oil and gas in international markets to being able to use its natural resources to develop a more diverse and higher-valued economy. Aluminium smelting and production is attractive since it requires large amounts of electricity that can be produced in Trinidad using its gas resources as a feedstock.

52. Professor Julien, a professor and professional engineer, has given public service to GORTT and several State Enterprises. He explained in his evidence (Declaration, paragraphs 8-10) the background to the natural gas industry in Trinidad and Tobago and GORTT's objectives to add substantial value to its natural gas resources. The Sural Group, which did not produce aluminium, was encouraged to consider Trinidad as a preferred destination for the establishment of a downstream facility based on the local production of aluminium. It had a strong interest in creating a Trinidad downstream industry.

53. Mr Butler in his Declaration at paragraph 16 explained the attraction of GORTT to the Sural Group as follows:

"Trinidad & Tobago had been exploring the aluminum business for a long time. GORTT met with and discussed developing an aluminum industry in the country for years with many leading aluminum companies. But my observation was what really attracted GORTT to the Sural Group was that we were in the higher valued added downstream business. Some aluminum smelters produce cast primary products known as 'sows, ingots or billets'. Others (such as the smelters

[3] The Arbitral Tribunal notes this is a reference to Alutrint Limited ("Alutrint").

adjacent to Sural's plant in Venezuela) directly ship to Sural liquid feed aluminum at a significant cost savings. Sural takes its liquid aluminum (not sows, ingots or billets) and creates value added rods, bars and aluminum electrical high tension cables, other wire and automotive parts, which it sells as a final product. I attach materials showing the process in graphic form and a film of the Sural plant. The production of bars, rod and cables is called 'downstream' activities. While a new smelter itself would create jobs, the downstream portion creates higher value added products, uses more sophisticated technology, requires better-trained employees, is less sensitive to volatile world commodity price risk and otherwise promotes the sophistication and diversity of the economy".

Initial Discussions

54. Dr Riviere began initial discussions in 2001 regarding a smelter project with representatives of Prime Minister Basdeo Panday. Professor Julien was part of the discussions and he visited the Sural Group plant in Puerto Ordaz, Venezuela.

55. On 20 May 2002, Dr Riviere wrote to the then Minister of Energy and Energy Industries (the Hon. Eric A. Williams) on behalf of the Sural Group with a proposal for a fully integrated aluminium production and organisation complex[4]. He emphasised the Sural Group's experience in the aluminium fabrication industry and stated that Sural was one of the primary suppliers of aluminium cable and wire in the world. He stated that Trinidad and Tobago had been short-listed as a candidate for the establishment of a fully integrated aluminium project.

56. Dr Riviere stated that the proposed project would have two phases. Phase 1 would be a 125,000 metric tonnes per year ("mtpy") pot line to produce aluminium from imported alumina and the use of all hot-metal aluminium that had been smelted to fabricate aluminium rods, cable and wire, auto parts and other cast products. Phase 2 would be doubling the capacity at reduced cost/tonne of production. From GORTT's side, various requirements were set out in the letter including available infrastructure, land and marine facilities at competitive rates; fiscal incentives; support of a non-recourse project financing plan to international lender; facilitating electric supply at competitively priced rate.

57. In 2003, Mr Butler had communications with Hatch Engineering concerning its work on a pre-feasibility study. Hatch Engineering is an engineering company in the aluminium smelter business. On 24 September 2003 it produced what it described as "Trinidad Aluminum Smelter Pre-Feasibility Study"[5].

58. On 16 April 2004, the Sural Group sent then Prime Minister, Patrick Manning, a proposal concerning the development of an aluminium smelter project. On 27 April 2004, Prime Minister Manning referred the proposal to Professor Julien as Head of the GORTT Natural Gas Export Task Force[6].

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[4] E1/1.

[5] E/2.

[6] E1/3.

59. GORTT appointed the state-owned NEC to the Project Sponsors for the integrated project, which led to the signing of a Memorandum of Understanding between Sural SA and NEC on 10 February 2005 which proposed a framework for taking forward the Project, being the establishment of an aluminium smelting complex with a capacity of 125,000 mtpy.

60. The project is described in the PKF Feasibility Study of 23 March 2005 [7]. It was this project that was approved by GORTT at the Cabinet Meeting on 15 March 2007 [8].

61. In 2005, the Sural Group, in consultation with GORTT, began speaking with representatives of the Chinese government regarding a loan for the Smelter Project as well as constructing it.

62. On 23 March 2005 a Memorandum of Understanding ("MOU") was executed in Beijing between GORTT, the Sural Group and China National Machinery & Equipment Import and Export Corporation ("CMEC"), a Chinese company specialising in engineering projects and the export of machinery and electrical products [9].

63. The intention was for CMEC to be appointed the Engineering Procurement and Construction ("EPC") Contractor for the project.

64. The MOU noted GORTT's intention to establish an aluminum smelting complex with a capacity of 125,000 mtpy in Trinidad and Tobago. It further stated that following a high level delegation from GORTT to China between 19 and 24 March 2005, the Parties had signed the MOU to the effect that "when the Project has been approved by the Government of Trinidad and Tobago, CMEC shall be designated the executive EPC Contractor of the Project" [10].

65. As also noted in the MOU, the intended financing of the smelter (itself estimated to cost USD 2200 per mt, i.e., USD275 million for a 125,000 mt smelter) was to be partly (30%) by equity contributions from the project owners (in addition to which GORTT would contribute land) and 70% from financing loans. The intention at this stage was to enlist CMEC as EPC Contractor to secure access to the Chinese technology and financing from the international financial institutions (most likely Chinese institutions).

66. Dr Riviere negotiated with CMEC for it to design and construct a plant at the price of approximately US$ 2,250 per metric ton. This plant would be a bar, rod, wire and cable facility using Sural's technology. The project was called "integrated" because it included both "upstream" (the smelter) and "downstream" (the bar, wire and rod and cable plant).

67. In April 2005 Sural Group put forward a proposal at a total project cost estimated to be US$ 590 million involving debt finance of US$ 413 million and equity financing of US$ 177 million (30%) split between GORTT and Sural respectively 60% for GORTT (i.e. US$ 106 million) and 40% for Sural (i.e. US$ 71 million) [11]. This equity contribution was subsequently reduced to US$ 140 million under the Shareholders' Agreement. GORTT approved the proposal on 21 April 2005.

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[7] E1/5.

[8] E1/44 (Butler (1) para 25).

[9] El/6.

[10] El/6 at paragraph 4.

[11] E1/9.

Alutrint

68. On 8 April 2005 Alutrint was incorporated in Trinidad and Tobago under the name Trinalco Limited.

69. On 1 June 2005 Trinalco Limited's name was changed to Alutrint. Alutrint was the company that was charged with developing the Smelter Project. Trinalco's minutes of meeting No. 001 held on 22 April 2005 record the Cabinet Approval on 21 April 2005 [12]. The minutes also record that Dr Riviere would be a Director and Mr Butler would be the Managing Director of Alutrint. As the minutes state, Alutrint Ltd "would be assigned with overall responsibility for the Aluminium Transformation Complex- both upstream (smelter) and downstream (with the exception of the Technology Development Centre"). On 3 May 2005 Dr Riviere wrote to Mr Keith Awong confirming that Sural would forward US$ 200,000 directly to CMEC to allow them to continue working on the Technical Project [13].

Letter of Agreement: May 2005

70. It was anticipated that a shareholders' agreement would be signed. A Letter of Agreement was signed dated 18 May 2005 between NEC and Sural CA (as part of the Sural Group) which set out the essential mechanisms of how Alutrint would be run [14]. In short:

a. The Parties would form an Alutrint Board of Directors comprising three representatives from NEC and two from Sural.

b. Alutrint would be responsible for the smelter, rod mill, wire and cable plant with another company (yet to be defined) responsible for the Wheel Development Centre.

c. Each party would absorb its own expenses in relation to the development of the project. Any fees to be paid to third parties would be shared on a 60% (NEC) and 40% (Sural) basis on expenses for the proposed smelter. An Alutrint Bank Account would be developed into which the corresponding portions of the overall project development budget would be deposited from each Party. The split of costs is in accordance with the projected ownership share of each participant in the smelter project.

71. It was necessary to find funding for the bulk of the project. Exim Bank of China was approached and it conducted significant due diligence before agreeing to make a loan. The Minutes of the Alutrint Board Meeting No. 02 on 8 July 2005 [15] record:

"Dr Riviere indicated that meetings were held with CMEC personnel to obtain financing from Exim Bank of China who has shown interest in financing. Exim Bank has indicated that they are willing

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[12] E1/10.
[13] E1/12.
[14] E1/15.
[15] E1/18.

to go up to US$400 million, which includes downstream facilities and they wish to make this a turnkey job.

Dr Riviere stated that the initial financing was stated at 5.5% but with discussions the rate could be lessened to 4% which he said is the lowest rate. At a rate of 4% savings of $6 million in interest; $400 million based on 125 tonnes per year - port facilities, manufacturing plants/downstream. Chairman stated that equity must be there for working capital.

... Chairman indicated that he would speak to the Minister of Finance on the release of funds.

Mr. P Saith said that he would communicate with Ms Allison Lewis Permanent Secretary in the Ministry of Finance indicating the need to change the interest rate from 5.5% to 4% in the letter to the Chinese Ambassador."

72. By letter dated 22 July 2005 the then Prime Minister and Minister of Finance wrote to the Chinese Ambassador [16]. The letter refers to the MOU with CMEC:

"The total investment for the overall project cost is estimated at approximately $570M USD. Thirty percent (30%) of which will be provided as equity by the shareholders. The remaining seventy percent (70%) that is being sought through project financing, amounts to approximately $400M USD

It is anticipated that this financing will comprise of Buyers Credit and Concessionary Financing to the National Energy Corporation (NEC) supported by Guarantees from the Government of Republic of Trinidad and Tobago (GORRT). The GORTT therefore requests that the EXIM Bank of China consider financing for the project through these two facilities, with a net effective rate of 4% for a period of five to seven (5-7) years. This we believe should make the project commercially viable."

EPC Agreement: December 2005

73. Alutrint (as employer) entered into the EPC Agreement with CMEC (as contractor) dated 20 December 2005 [17]. This contract was for both upstream (smelter) and downstream complexes for a total Contract Price of US$ 465 million broken down into US$ 275 million for the upstream and US$ 190 million for the downstream facilities. A condition for the contract coming into effect was Alutrint’s receipt of a final environmental permit from Trinidad and Tobago’s Environmental Management Authority ("EMA"). This permit is referred to as the Certificate of Environmental Clearance ("CEC").

74. On 23 December 2005, the NEC, the owner of the industrial estate in which the project was located applied for an environmental permit for the development, construction, and operation of a 125,000 metric tonnes per year smelter and the related Sural rod, bar, and wire downstream and facilities and associated facilities.

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[16] E1/19.

[17] E1/24.

Mobilisation Fee

75. Alutrint at a Board Meeting held on 3 February 2006 approved payment of a mobilisation fee of US$ 6 million to CMEC[18]. This was to be contributed by NEC in the amount of US$ 3.6 million and Sural in the amount of US$ 2.4 million.

76. On 16 March 2006, the GORTT Minister of Energy and Energy Industries wrote to Prakash Saith, President of NEC, to confirm that GORTT in principle would subscribe to 60% of the equity of Alutrint and to lay out its expectations for the further advancement of the project[19].

77. In March 2006, Alutrint presented a feasibility study to Exim Bank of China for the purpose of obtaining approval of US$ 400 million in project financing[20].

78. By letter dated 3 October 2006, CMEC requested an additional mobilisation fee of US$ 20 million on the grounds that the CEC had been delayed beyond the anticipated date of it being received, and funds were needed to start setting up construction work before the rainy season started[21]. In this regard, a board paper was prepared on 25 May 2006 for consideration by the Alutrint Board identifying the benefits and potential risks of approving an equity call on the shareholders in the amount of the USD 20 million being requested[22]. The main risk identified was the non-approval of the project from a financing or environmental perspective. The paper recommended that Alutrint "source and mobilize USD20m in October 2006, in anticipation of a successful award of the CEC in mid-October 2006".

79. The Minutes of the Meeting of the Alutrint Board on 11 October 2006 record[23]:

"Call for Equity - CMEC Mobilisation

Members considered Board Paper No. 2006-05-23 on the above and noted the following:

Originally CMEC's next payment was predicted to have occurred earlier in 2006. Contractually, a $63,750M USD payment was to have become due upon satisfying two main criteria the Concessionary Loan Agreement and the award of a CEC. However, delays on realizing both of these deliverables, coupled with the benefit of construction during the dry season, have fueled CMEC's request for this advance funding in the sum of $20 M USD.

Approving this equity call would enable a potential pre-construction mobilization prior to the start of the 2007 dry season. The equity injection will also contribute towards the $45M USD commitment required by the EXIM Bank of China which is based on 15% of an assumed $300M USD Export Buyer's Credit Loan.

The main potential risk associated with this equity payment would be a non-approval of the project

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[18] E1/27.
[19] E1/30.
[20] E1/29.
[21] E1/39.
[22] E1/31.
[23] E1/40.

after having committed this equity contribution. This risk may be mitigated by conditionally approving the release of required funds subject to an October 17th 2006, granting of a CEC.

A further risk mitigation measure may be to await a formal commitment from the EXIM Bank, before providing the requested equity... The Concessionary Loan may, however, only be available in the second quarter of 2007.

Members noted that a deferred decision would delay the project by three to six months.

The Chairman noted that the above proposals were all subject to the CEC approval and suggested that the company should look to the shareholders for earlier financing.

The Board, having regard to the recommendations put forward, agreed that a note be prepared for consideration by the shareholders of the proposal made in the Board Paper. However, once a CEC is approved, the Board will support the recommendations of the Board Paper."

80. The minutes for Alutrint's Board Meeting on 17 November 2006 state that the Board further considered the US$ 20 million Mobilisation Fee to CMEC [24]. They show that Mr Philip Julien asked the Board to approve the US$ 20 million for a November disbursement for CMEC.

81. Mr Mayers was appointed as Director and Chairman of Alutrint on 12 February 2007 replacing Mr Anthony Chan Tak. Meeting 2007-01 was held on 8 March 2007 [25]. The Minutes state that Ms Lewis advised the Board that the Shareholders' Agreement had been approved by Cabinet subject to some amendments and vetting by the Attorney General. It was further noted that the CEC Approval was still pending but Mr Philip Julien attending the meeting as the Project and Development Manager reported that a favourable response was anticipated from the EMA.

82. On 15 March 2007 a GORTT Cabinet Meeting sanctioned the Project at an estimated cost of US$ 552 million [26]. The minutes of the Meeting indicated that the Project was to be undertaken in two phases with Phase 1 estimated to cost IJS$ 540 million and Phase 2 at IJS$ 12 million. As to Phase 1, it was contemplated that there would be debt financing of IJS$ 400 million together with equity contributions of approximately US$ 140 million. The minute also referred to the EPC of US$ 465 million with CMEC. A draft shareholders' agreement between GORTT and Sural was also approved on that date.

Issue of CEC: April 2007

83. On 2 April 2007 the EMA issued the CEC subject to several conditions [27]. The process of approval had taken two years, the application for clearance having been made on 22 April 2005. This approval is reflected in the Minutes of Meeting of the Alutrint Board held on 26 April 2007 at paragraph 3.00 (Item 4) [28]. At paragraph 3.00 (Item 5) on the subject of the equity call of US$ 20

[24] E1/41.
[25] E1/43.
[26] E1/44.
[27] E1/45.

million, Mr Mayers stated that the Shareholders' Agreement was to be finalised shortly and there would not be a call for equity until the Agreement was signed. Mr Butler expressed concerns about the delays in payment to CMEC. Mr Mayers indicated that Mr Butler should explain to CMEC that Alutrint was awaiting the approval of the Shareholders' Agreement before payment of the USD20 million could be disbursed. Dr Riviere also spoke of the need for purchasing equipment for downstream facilities. Mr Mayers recommended that this would be considered after disbursement of the mobilisation fee. The members agreed that the Shareholders' Agreement must first be signed and finalised. Thereafter, the CMEC Mobilisation fee in the sum of US$ 20 million would be paid in accordance with Owners' Shareholding Ratio of 60% GORTT and 40% Sural. The Board would thereafter consider any other necessary funding.

84. On 20 April 2007 CMEC sent to Alutrint a memorandum requesting a US$ 20 million advance on its draw-down as a mobilisation fee[29]. The memorandum referred to the fact that payment had not been received from the request from CMEC dated 3 October 2006. On 26 April 2007 the Alutrint board decided that there would be no payment advance until after the shareholders' agreement had been executed[30]. As recorded at paragraph 5 of the Minutes the equity call was approved subject to the shareholders' agreement being finalised and signed.

85. In the minutes, it was recorded that the CEC had now been granted in early April 2007[31]. On the subject of the equity call of US$ 20 million, the Board agreed that the Shareholders' Agreement was to be finalised prior to payment of the mobilisation fee. Thereafter the mobilisation fee was to be paid in accordance with the shareholding ratio of 60:40 (GORTT/Sural). As the Minutes show, Mr Butler emphasised the need for such payment to CMEC and Mr Mayers explained that this would be paid shortly after the Shareholders Agreement was concluded. Mr Mayers further stated that Sural and the Government should "work as a team" to ensure the US$ 20 million was paid to CMEC.

86. By letter dated 12 June 2007[32], Alutrint wrote to Dr Riviere referring to Alutrint's call (that had been made at the Board Meeting in 2006) for an injection of equity in the sum of US$ 4 million. The letter noted that although GORTT had paid its full equity contribution in December 2006, Sural still had to pay US$ 2.1 million. The letter stated that the need for funds had become "dire" and critical to meet recurring expenditure and third party commitments and that Alutrint wished to settle this matter in advance of making another call for equity.

Shareholders' Agreement

87. The Shareholders' Agreement was entered into on 3 July 2007. The detailed provisions of this agreement are considered in Section VI below.

[28] E1/47.
[29] E1/48.
[30] E1/47.
[31] E1/47.
[32] E1/48.

After the execution of the Shareholders Agreement

88. Ms Murray in her first statement at paragraph 36 stated that she recalls that on the day the Shareholders' Agreement was signed Mr Butler called her into his office in Tunapuna and informed her that the agreement had been signed and that she should proceed to make the call for equity for the CMEC Mobilisation Fee.

89. By letter dated 4 July 2007, Alutrint wrote to the Sural Group making a request for equity contribution further to the prior Board Decision and attached a Note to justify the request that had been prepared by Mr Butler [33]. The Note stressed the capital costs benefit of an early mobilisation fee, namely that it would reduce future price escalation and also allow CMEC to make up lost time. The letter also enclosed a draft Shareholder's Resolution agreeing to the provision of the mobilisation fee. The resolution was to be signed by the Minister in the Ministry of Finance and by Dr Riviere. This Resolution was never signed.

90. GORTT paid its share of US$ 12 million of the equity call to CMEC on 30 July 2007 [34].

91. Sural's position at that time was that it would make the equity call payment. On 16 July 2007, Dr Riviere indicated to Alutrint that the disbursement would be done within 30 days [35]. On 2 August 2007, Dr Riviere wrote to the MOF stating that under the Shareholders' Agreement "it was required to make payment within 45 days from the Equity call" and that therefore it would make payment before 31 August 2007 [36]. On 27 August 2007 CMEC wrote to Alutrint pointing out that the request had been made for the US$ 20 million mobilisation fee in October 2006 and April 2007 "but haven't got the payment until August 2007" [37].

92. At the Alutrint Board meeting on 27 September 2007 [38], Dr Riviere indicated that Sural would pay its equity portion of US$ 8 million by 15 October 2007. At the Alutrint Board Meeting of 23 November 2007, Dr Riviere stated that the "outstanding equity owed by Sural" in the amount of US$ 8 million would be with Alutrint by 28 November 2007 [39].

93. By Order dated 13 September 2007, the High Court granted leave to the public objectors to appeal the granting of the CEC [40]. The parties to the proceedings were the Environmental Management Authority and the objectors, with the NEC and Alutrint listed as "interested parties".

Notice of material breach: December 2007

94. On 10 December 2007 the MOF served on Sural a notice of material breach of the Shareholders'

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[33] E1/54.
[34] E1/57; El/60; E1/68 and E1/77.
[35] E1/57.
[36] E1/60.
[37] E1/65.
[38] E1/68.
[39] E1/78.
[40] E1/67.

Agreement, citing Sural's failure to contribute US$ 8 million representing its share of the US$ 20 million advanced to CMEC [41]. The letter stated:

"With respect to the said call for equity, the deadline expired on August 15, 2007 by which date Corporation Sole had made its contribution in the sum of $12 Million USD. Sural to date has not provided its share in the amount of $8 million USD despite your written commitments to do so by 15 August 2007 (reference email copied to Corporation Sole on July 16, 2007), as well as subsequent promises of October 15, 2007 and November 28, 2007, as articulated and minuted in Alutrint Board meetings.

In the circumstances and in accordance with clause 26 of the Shareholders Agreement, Notice is hereby given to SURAL to rectify this material breach of the Shareholders Agreement. Based on your prior acknowledgements of due dates, we hereby request immediate rectification of the said breach."

95. The Minutes of the Board Meeting 2007-06 on 20 December 2007 [42] record:

"On the matter of outstanding equity owed by SURAL the Chairman confirmed that Corporation Sole by letter dated December 10, 2007 notified SURAL of its breach of the Shareholders Agreement for failure to pay up moneys pursuant to that Agreement."

Sural's disengagement from Smelter project: December 2007

96. By letter dated 28 December 2007 [43] Dr Riviere wrote to the then Prime Minister of Trinidad and Tobago. Professor Julien had been involved in the drafting of this letter. Mr Butler stated in his Declaration at para 41 that Sural by this time had decided "to seek disengagement from the smelter project". Precisely why Sural had decided to disengage is a matter of dispute between the parties but it is clear that Mr Riviere was seeking to achieve this. The letter stated that Sural could not meet its obligations under the Shareholders' Agreement because "...the recently introduced stringent restriction on Currency Exchange Control in Venezuela has constrained the amount of US dollars that Sural had sought to purchase in exchange for Bolivars".

97. What the letter proposed was a separation between the smelter and downstream portions of the project. The matters sought in the letter included the following:

a. The Shareholders' Agreement being "suitably modified" to remove Sural's obligations as a 40% shareholder.

b. Sural being repaid its equity investment in Alutrint and GORTT being provided with 100% ownership of the smelter element of the complex.

c. The establishment of a 60/40 GORTT/ Sural NEWCO to build the rod mill, wire and cable plants.

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[41] E1/83.

[42] E1/86.

[43] E1/89.

d. The grant to NEWCO of a 20 year contract for 75,000 tonnes per year at a discounted price from the new smelter once it is in production.

e. Sural being given an option to purchase a 40% share in the smelter to be exercised within 3 years.

98. It emerged from Sural's evidence in this arbitration (referred to below) that the reason why it did not comply with the equity call was not foreign exchange difficulties, as suggested at the time of its letter of 28 December 2007 [44], but because it did not want to continue with the upstream smelter. In other words, Sural wanted to disengage from the smelter aspect of the Shareholders' Agreement.

99. Mr Riviere explained in his Declaration at paragraphs 4-6 how he decided that Sural should "divorce itself from capital responsibility for the smelter portion of the project" (paragraph 4) and "decided not to cause Sural to pay the $8 million capital call" (paragraph 5). He also covered this in his Rebuttal Statement at paragraphs 11-12 as follows:

"I was concerned that the legal challenges could delay the project for years with resulting cost escalations and with the project burdened by the unbudgeted costs of Alutrint staff that would be severely underutilized. I became even more concerned when GORTT removed Mr. Butler from his position as Alutrint's managing director. The cash draw-down schedule attached to the [the Shareholders' Agreement] had limited the equity contributions of both Sural and GORTT to a total of US $140 million. That amount would be insufficient if delays caused substantial cost overruns, overruns that were already occurring by the summer and fall of 2007.

While I was searching for a solution, I stated in board meetings that Sural would contribute its US $8 million despite my diminishing confidence that the legal proceedings would be resolved as quickly as GORTT officials confidently predicted (and the inevitable cost overruns which would therefore follow). Sural had already paid approximately US $6 million to Alutrint or for its benefit. I finally concluded that Sural could not pay an additional US $50 million for a project whose construction had not commenced but whose budget assumed it had. The project needed to be restructured".

100. Mr Butler's evidence in his Declaration at paragraph 41 was to a similar effect:

"On December 18, 2007, Mr. Riviere made arrangements for the payment of the US $8 million so there could be no question of a default, no matter how unjustified the claim was. [...] Two days later the Alutrint board met. Colleen Murray, Alutrint's counsel, informed the board that October 2008 was a possible date for the start of trial concerning the permit. [...] It was further disclosed that Alutrint had been running a deficit simply due to its administrative costs at the rate of US $5.2 million per year and that an additional cash injection from shareholders would be required just to meet expenses through the end of March. These facts cemented Sural's decision to seek disengagement from the smelter project".

101. At the Cabinet Meeting of 21 February 2008 [45], the Cabinet approved the severing of the upstream

[44] E1/89.

[45] E1/97, 311-312.

and downstream elements of the contractual Project involving a renegotiated contract with CMEC at substantially increased price (of US$ 516 million) for just the upstream element.

102. The Prime Minister did not respond to Sural's letter of 28 December 2007. Dr Riviere issued a follow up letter of 29 March 2008 again to the then Prime Minister (copied to MEEI) [46].

103. In the letter Dr Riviere explained that Sural had arranged project financing from Merrill Lynch for US$ 110 million. Dr Riviere accepted that Sural was at risk of being removed from the project as a result of failing to meet the equity call, noting that:

"I am very anxious to receive a response to this letter in order that the necessary legal steps be made to provide for this disengagement before April 10, 2008.

The reason for my anxiety for seeking formal disengagement before April the 10th is based upon the fact that at this date Sural can be unilaterally removed from the entire project, because of not meeting fully its commitment for equity at that date, for reasons already disclosed to you. If this happens the project will be delayed even further as there is no agreement in place between the GORTT and Sural for this investment."

104. Dr Riviere stated in the letter that "....because of Currency Exchange restrictions in Venezuela, we are inhibited at this point in time to make the substantial investment required for the entire project" [47].

105. The MOF sent a response on 4 April 2008 stating [48]:

"We have considered your request to restructure the Project due to your inability to meet your equity requirements. We now advise that in accordance with Clause 26.1 of the [Shareholder's Agreement] dated 3rd July 2007 we are amenable to terminating by mutual agreement. We are prepared to have this termination take effect from 2nd April 2008.

To date we are unable to confirm the exact value of your investment as a full audit of Alutrint Limited's accounts must first be conducted. Thereafter we will be in a position to refund whatever monies are due to you."

Votorantim

106. At about this time, Dr Riviere started making inquiries with the Votorantim Group concerning it becoming Sural's partner in a restructured project. Votorantim is one of the largest industrial conglomerates in Latin America operating in various sectors.

107. On 12 April 2008, Dr Riviere and Mr Butler travelled to Trinidad and Tobago with representatives of Votorantim and introduced Votorantim to Prime Minister Manning. Votorantim was interested

[46] E1/101.
[47] E1/101.
[48] E1/102.

in a smelter that was twice the size of the 125,000 mtpy plant. On 18 April 2008, Votorantim sent Dr Riviere a letter thanking him for the introduction to GORTT[49]. On 23 April 2008 a seven member team from Votorantim visited the Sural Group in Venezuela. On 25 April 2008 a Confidentiality Agreement was executed between the Natural Gas Export Task Force (as Sub-Committee of the GORTT Standing Committee on Energy) and Votorantim[50].

108. On 8 May 2008 Dr Riviere wrote to Mr Marco Palmieri (Corporate Director of Business Development of Votorantim Metals Ltda) about a meeting that had taken place between Dr Julien and Mr A C Reuter[51]. Mr Reuter was the vice-chairman of the industrial group Carmargo Correa and was the person who had introduced to Mr Riviere to Votorantim. Mr Palmieri replied on the same day about putting a proposal to GORTT[52].

109. On 23 May 2008 the MEEI, Mr Mayers, wrote to Votorantim inviting it to put forward proposals on a project[53]. This was described as "...a 250,000 MPTA smelter, initially of 125,000 tonnes in the first phase and the additional 125,000 in the second phase, downstream plants, the power plant and the marine facilities". Mr Palmieri forwarded this email to Dr Riviere stating that he was "...sure that we will come to an agreement on our JV, and that our proposal to build and operate the Alutrint smelter will be very appealing to GORTT"[54].

110. On 5 June 2008, a meeting took place in Atlanta, Georgia to finalise the Votorantim proposal to GORRT.

Votorantim/ Sural June 2008 Proposal

111. On 7 June 2008 Sural and Votorantim sent GORTT the joint proposal to buy 60% of the shares in Alutrint (GORTT to have 40% of the shares) through a NEWCO to be owned by Votorantim and Sural[55].

112. The joint proposals included the following:

"In response to your letter dated May 23, 2008, we are pleased to submit a binding proposal to be an Equity Partner in the Alutrint Aluminium Complex ("the Proposal") in connection with a potential acquisition of 60% of the Alutrint shares. This proposal is presented by a joint venture ("NewCo") formed by Votorantim Metals Ltda. ("Votorantim") and Sural C.A. ("Sural"), the "NewCo" and GORTT to be referred to herein as the "Shareholders".

The Proposal is subject to the following terms and conditions:

- Negotiation of a mutually acceptable Shareholders Agreement, upon GORTT taking 40% of the

[49] E1/104.
[50] E1/105.
[51] E1/107.
[52] E1/107.
[53] E1/110.
[54] E1/111.
[55] E1/116.

project and NewCo the remaining 60%

- Execution of an energy supply contract, on the bases presented in the attached Proposal.

- Execution of Power Plant Construction and Operation Contract by GORTT with an experienced Power Plant Operator.

- Resolution of certain environmental issues with respect to the smelter, port, and power plant as may be identified.

- A negotiated contract for the construction of the smelter project between GORTT, NewCo and CMEC."

113. In an undated letter Sural wrote to Votorantim setting out the terms on which it would participate in the project with Votorantim [56]. The letter was attached to an email from Dr Riviere to Mr Palmieri dated 9 June 2008 [57]. The letter stated:

"Further to our discussions, this letter will confirm Sural's commitment to participate, together with Votorantim in the Alutrint Aluminium Complex Project ("the Project"). While we are currently negotiating a memorandum of understanding ("MOU") to set forth the details of our collaboration, at this time we are prepared to commit to the following terms and conditions, that shall remain unchanged regardless of the final terms of the MOU:

1. Votorantim and Sural will be partners in a special purpose company ("Newco") in which Votorantim shall detain 83.5% of the share capital and Sural shall detain 16.5% of the share capital;

2. Upon winning the bid to be submitted to the Government of Trinidad Tobago (GORTT), Newco will be the Joint Venture Partner with the GORTT in the Project, it being agreed that such joint venture will be constituted with 60% share capital detained by Newco and 40% by the GORTT.

3. Votorantim shall pay Sural a transfer fee equal to US$40 million for its participation in the Project contingent on (i) the beginning of the construction of phase 1 (at which time Votorantim will pay US$ 15 million) and (ii) on the execution of the second phase of the Project at which time Votorantim will pay the remaining amount of US$25 million

4. Finally, it is agreed that Sural shall have a put option and Votorantim shall have a call option regarding Sural's share capital in Newco, to be exercised by either party at a time to be agreed, but no later than 12 months after beginning of the full operation of the Project, it being further agreed that that the exercise price shall be a fixed pre-determined price of US$ 60 million plus the full amount of equity contributed by Sural to the Project."

114. In addition to the proposal by Votorantim/Sural, a proposal was put forward by Century Aluminium. On 9 June 2008 [58] MEEI wrote to Alutrint indicating GORTT's agreement for Alutrint to seek a revised bid from CMEC that included a 2nd Pot line in Phase II for a total output for 250,000

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[56] E1/115.
[57] E1/117.
[58] E1/118.

MT/year. Reference was made in an attachment to that letter to the development of a strategy "for the disengagement of Sural from the Smelter element".

115. Cabinet Minute 2391 [59] and cabinet note 28 August 2008 [60] set out in some detail how the project had developed. The cabinet note explained how Sural had experienced difficulties in meeting the financial calls of Alutrint. It referred to Sural's letter dated 29 March 2008 [61] to the Prime Minister in which "Sural indicated that it wished to dedicate its limited available resources to the downstream element of the complex and effectively, the Government was free to seek and reach agreement with another company, in its stead". It also explained how "Sural indicated its continued commitment to the development of a cable and wire plant and wished to retain a 60% portion of the Alutech Company with GORTT holding the remaining 40% equity". The note referred to seeking expressions of interest "...as possible equity partner for the GORTT in the future development of the project". It went on to consider Votorantim's proposal that "...included Sural as partner, with Votorantim holding 49.9% of the 60% shareholding, and Sural carrying 10.9%" with Votorantim agreeing to take up Sural's interest in the event that Sural could not finance its equity in the project. The note included an analysis of a proposed Project Agreement with Votorantim.

116. The note (at page 2) also made reference to the fact that on 15 May 2008 the Cabinet, on the recommendation of the Standing Committee on Energy, agreed to appoint a "Project Team chaired by the Chairman of the Natural Gas Export Task Force and comprising of the Permanent Secretary, Ministry of Finance and the Acting President, National Energy Corporation of Trinidad and Tobago Limited, with the authority to co-opt personnel as required, to execute the mandate as outlined.....(iv) Development of a strategy for the disengagement of Sural from the Smelter element" [62].

117. The cabinet minute number 2814 (dated 6 October 2008) [63] and the Note for Cabinet dated 6 October 2008 [64] dealt with the approval of an EPC contract between Alutrint and CMEC for Phase 1 of the proposed 250,000 metric ton per year smelter complex [65]. The contract was entered into on 30 October 2008 [66].

118. On 5 November 2008 Votorantim (Mr Palmieri) wrote to Dr Riviere explaining how the Project was no longer viable in its present form [67]. It put forward two conditions involving a transfer fee paid by Votorantim to Sural equal to US$ 25 million and a put option regarding Sural's share capital in Newco.

119. On 17 February 2009 Sural wrote to Prime Minister Manning stating that it had invested US$ 10 million as a shareholder in Alutrint and another US$ 6 million in support of the project [68]. The letter

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[59] E2/126.
[60] E1/125.
[61] E1/101.
[62] E1/125.
[63] E2/127.
[64] E2/127.
[65] E2/128.
[66] E2/129.
[67] E2/130.
[68] E2/138.

concluded by stating "...Sural cannot and will not renounce its shares in the Alutrint smelter project".

120. At the cabinet meeting on 12 March 2009 it was decided to terminate the Shareholders' Agreement and to negotiate with Sural for the acquisition of its shares, subsequent to which Sural was to be invited to propose its future participation in the development of the aluminium industry [69]. At the same meeting it was agreed that Votorantim should be GORTT's partner in the Alutrint Project on the basis of the revised project scope set out in the Minutes. The revised scope was for a 250,000 mtpy smelter capacity in two phases with downstream plants described with Phase 1 construction commencing on 1st Quarter 2009. By letter 19 March 2009, Mr Mayers, on behalf of MEEI, wrote to Professor Julien informing him of the decisions of the Cabinet at the meeting of 12 March 2008 [70].

121. On 25 March 2009, Mr Mayers of MEEI wrote to Mr Palmieri conveying the Cabinet decisions to select Votorantim as the Government partner for the Alutrint Project "but without prejudice to possible future participation by Sural in the development of the Aluminium Industry in Trinidad and Tobago" [71].

122. On 29 May 2009 Votorantim wrote to Dr Riviere [72]. The letter opened with a reference to a meeting on 24 May 2009 and stated "...we hereby confirm that the various letters exchanged between Votorantim and [Sural] during 2008, regarding potential participation in the Project, lost their purpose and became moot upon the severe changes in the world's economic environment, affecting the Project's feasibility". The letter contained an offer, subject to various conditions to pay US$ 15 million to Sural. Sural did not accept.

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123. On 9 September 2009 Sural wrote to MEEI referring to the equity call of US$ 20 million made by Alutrint on 4 July 2007 [73]. It stated that due to the "stringent Currency Exchange Control imposed by Venezuela" it had presented the joint proposal with Votorantim for the development, construction and operation of 250,000 tons per year. It asserted that the proposal had been made in accordance with clause 26.2 of the Shareholders' Agreement.

124. In the letter, Sural stated:

"After the world financial crisis, the original proposal presented by Votorantim and Sural was left aside and Votorantim entered into direct conversations with GORTT. As a consequence of these conversations the original proposal will be modified, but Sural wants to strongly express that it continues to be, fully committed to the full realization of the aluminium development in Trinidad and Tobago. Sural is prepared to work with GORTT and Votorantim to facilitate the development, construction and operation of the Alutrint Aluminium Complex. In addition,

[69] E2/140.
[70] E2/141.
[71] E2/142.
[72] E2/145.
[73] E2/165.

Sural continues committed to the project and would dedicate available funds to Alutech for the construction and operation of the downstream alloy-rod mill, wire and cable plants and the Development Center for which it currently owns state of the art technology and equipment. As discussed previously, this facility would provide a significant economic impact.

To take these 2 ideas forward, Sural wishes to propose the following:

1. According to the unanimous shareholder agreement article 14.1, Sural offers the sale of 40% of its share participation in Alutrint thus providing GORTT with 100% ownership of the smelter complex.

2. GORTT will proceed with Votorantim for the development, construction and operation of the Alutrint Aluminium Complex.

3. GORTT would detail an agreement with Sural in Alutech for the construction and operation of the downstream alloy-rod mill, wire and cable plants and the Development Center.

4. To assure the viability of its downstream investment (item 3, above) Sural would like to have an option to re-enter the smelter project should Votorantim not proceed with future investments in the Alutrint capital base. In the event Votorantim does not acquire additional equity capital beyond its initial 10% and/or were to express a desire to reduce its ownership in the Alutrint Aluminium Complex, GORTT shall give an option to Sural to substitute Votorantim in the Alutrint structure and would also give Sural similar rights as agreed with Votorantim."

125. The then Minister at MEEI Mr Conrad Enill responded by letter dated 2 October 2009 stating [74]:

"As regards the specific points raised in your letter, the Government accepts your offer for the sale of 40% of the share participation in Alutrint Limited. On the question of whether Sural had complied with the Alutrint equity call made on July 04, 2007 for the sum of US$20 mn and whether that call was met by the joint proposal from Votorantim and Sural is a matter which will be addressed by Minister of Finance.

With respect to items three and four in your letter, I am requesting the Natural Gas Export Task Force to meet with Sural to discuss these proposals.

Notwithstanding the above and in order to expedite the process I would like to suggest that you make an offer to the Minister of Finance for the sale of Sural's share participation in Alutrint Limited."

126. The Arbitral Tribunal will consider below the effect of this exchange of letters and whether they gave rise to a contractual obligation on the part of GORTT to acquire Sural's shareholding in Alutrint as alleged in Sural's primary claim.

127. By letter dated 26 October 2009, Dr Riviere replied to MEEI stating he would make an offer to the MOF and requested a meeting with Mr Conrad Enill [75].

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[74] E2/166.

[75] E2/167.

December 2009 agreement with Votorantim

128. On 4 December 2009 GORTT (acting through its Minister of Energy and Energy Industries) entered into an agreement with Votorantim for its participation in Alutrint and providing for it to make initial contributions totalling US$ 30 million for a 10% interest in the 250,000 mtpy smelter and downstream facilities and with an option to acquire an increased shareholding on the basis of increased equity contributions [76].

129. One of the conditions of the agreement was that it would not come into effect unless and until Sural's equity participation and the Shareholders' Agreement were terminated.

130. Preamble D of the agreement provided as follows:

"(D) GORTT acknowledges and agrees that Votorantim's participation as an equity partner in the Project is based on certain conditions and requirements outlined in the Proposal. This Agreement records the mutual understandings and general agreement of Votorantim and GORTT regarding certain of the terms and conditions in the Proposal for Votorantim's participation in the Project and certain other matters related thereto. This Agreement reaffirms and amends the Proposal to the extent provided herein".

131. The conditions precedent at clause 2 of the agreement provided:

(i) (Clause 2(a) (iii)): "Termination of Sural Participation. Sural shall no longer be a shareholder of Alutrint and shall have no further involvement or participation in Alutrint or the Project. GORTT shall deliver to Votorantim documentary evidence, in form and substance satisfactory to Votorantim and GORTT, as to the full termination of Sural's involvement in the Project and in Alutrint for so long as Votorantim maintains an equity investment in Alutrint. Such termination shall be without prejudice to the possible future involvement of Sural in the development or the aluminium industry or Trinidad and Tobago, it being understood that Votorantim shall have no obligation to guarantee or to promote Sural's future involvement".

(e) (Clause 2(f)): Termination of Prior Contractual Arrangements. With the exception of the Smelter Construction Contract, GORTT shall have terminated, or shall have caused the termination of, all existing contractual arrangements with Sural and with CMEC relating to the Project (including any equity participation of, or any contractual commitment by or with Sural) executed prior to the date hereof, including, without limitation, the following:

(i) Memorandum of Understanding, dated March 23, 2005, among GORTT, Sural, the National Energy Corporation of Trinidad and Tobago Limited (NEC) and CMEC;

(ii) EPC Contract, dated December 20, 2005, between Alutrint and CMEC;

(iii) [Shareholders' Agreement], dated July 3, 2007, between GORTT and Sural Barbados Limited;

(iv) Contract Agreement, dated December 20, 2005, between Alutrint and CMEC, together with the

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[76] E2/169.

Conditions of Contract (including Annexes);

(v) Technical Specifications (including the Alutrint Aluminium Smelter Technical Design Agreement signed November 4, 2005 and the Engineering Proposal for Alutrint Aluminium Smelter Part 1 - Commercial Documents, dated September 21, 2005; and

(vi) Interpretation Agreement, executed as of December 20, 2005, between Alutrint and CMEC.

Any claims arising from the period prior to the signature by Votorantim of definitive documentation relating to the Project will be GORTT's sole responsibility and obligation, and GORTT shall indemnify and hold Votorantim harmless with regard to any such claims."

132. At a Cabinet meeting on 4 March 2010, it was agreed that the Shareholders' Agreement be terminated and that GORTT would make an offer to acquire all of Sural's equity shareholding in Alutrint with the offer price being the value of Sural's equity contribution adjusted for inflation [77]. A team was appointed to negotiate the purchase of Sural's interest in Alutrint. On 15 March 2010 Minister Enill wrote to Dr Riviere stating that GORTT had appointed a team to negotiate the purchase of Sural's interest in Alutrint [78].

133. On 9 April 2009 a meeting took place between representatives of GORTT and Sural. At the meeting Sural valued Alutrint at US$ 350 million and asserted that its 40% shareholding was worth US$ 140 million. But since Alutrint was non-operational, it stated that it would accept US$ 45 million. GORTT disputed this valuation. It argued that Sural's total equity injection was US$ 5.8 million and that this was exceeded by GORTT's payment of Sural's share of the equity call.

134. By letter dated 21 April 2010 Sural wrote to MEEI stating "we formally accept to sell the 40% shares of Sural in Alutrint, in accordance with clauses 26 and 27 of the Shareholders Agreement, under the following conditions" [79]. It asserted that the market value of 40% of the shares in Alutrint was US$ 146,262,000. Taking into account its obligation to fund according to exhibit B of the Shareholders Agreement, the amount due was US$ 96,262,000 but it was prepared to reduce the sum claimed "...in order to achieve an agreement, and also considering that the smelter is not operating yet" to US$ 45 million. On 17 May 2010 it advanced a reduced claim: US$ 20 million on signing a settlement agreement and US$ 15 million in instalments [80].

Change of Government: May 2010

135. On 27 May 2010 the Manning Government (People's National Movement party) was defeated in a general election by the United National Congress headed by the new Prime Minister Kamla Persad-Bissessar.

136. The new Government decided to abandon several projects including the Alutrint smelter and

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[77] E3/172.
[78] E3/173.
[79] E3/175.
[80] E3/182.

downstream industry.

137. Mr Ramlogan SC in his witness statement (para 50) explains that at a Cabinet meeting that took place on 8 September 2010 it was agreed to discontinue the Project with immediate effect. He explains that this was done on the basis that:

"(a) There was in fact no project because of lack of CEC approval and the prospects of the Court of Appeal reinstating the CEC were not promising and indeed in November 2010 the EMA withdrew its appeal;

(b) There were concerns about the issue of HF standards and whether the revised project (250,000 metric tonnes per year) would be able to comply with the required HF standards;

(c) There were concerns about the economic viability of the project".

Government Budget Statement: September 2010

138. On 8 September 2010 the new government announced its budget to the Parliament. The then Minister of Finance, Mr Winston Doorkeran made the following statement in connection with Alutrint:

"Mr Speaker there has been great uncertainty about both the Alutrint and rapid rail projects. There has been much public criticisms of these projects rising from legitimate concerns. In addition to the health and environmental risk, there is also serious concern as to Alutrint's viability and the optimal use of our gas. This project shall cease and an alternative strategy will be put into place for the south west peninsula." [81]

139. As explained below, Sural contends that the GORTT's statement cancelling the Project was a repudiation of the Shareholders' Agreement. This forms the basis of Sural's alternative claim.

140. In a letter dated 8 November 2010 Sural wrote to the MEEI referring to its formal offer of selling its shares for US$ 45 million of 17 May 2010 [82]. Sural stated it required confirmation by 10 December 2010 as to whether GORTT was willing to hold amicable settlement talks otherwise Sural would move to Stage 2 of the Dispute Settlement Process under clause 29 of the Shareholders Agreement.

141. Sural on 6 December 2010 wrote a further letter to the MEEI seeking discussions on Sural participating in the Downstream Project alongside CMEC [83].

142. By letter dated 11 January 2011 Sural wrote to the MEEI stating that a dispute had arisen between GORTT and Sural as to the amount in which Sural is entitled to claim upon GORTT's decision to terminate the Smelter Project [84]. In this letter, Dr Riviere stated:

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[81] E3/189 at p 346.

[82] E3/195.

[83] E3/197.

[84] E3/198.

"SURAL have [sic] also sent several letters trying to settle the dispute in an amicably way. Attached are the letters sent in April 21, 2010; June 21, 2010; September 24, 2010; and December 6, 2010.

Since SURAL has not received any response, we conclude that GORTT it is not prepared to settle this dispute and thus the parties have failed to resolve this dispute amicably through consultation.

Pursuant to section 29.2 of the Shareholders' Agreement, SURAL now calls on GORTT to refer the said dispute for further settlement to and by:

(i) the officer of Alutrint Limited who is responsible for the Company's operations or such other designated officer;

(ii) an officer of GORTT who is responsible for the Project or such other designated officer; and

(iii) an officer of SURAL.

In the event that GORTT fails to respond to this letter within fourteen (14) days from the date hereof, or notifies SURAL that it does not wish to avail itself of the mechanism set out in section 29.2 of the Shareholders' Agreement then SURAL will be entitled to conclude that all efforts to settle its dispute amicable [sic] has failed and, in accordance with Clause 29, SURAL intends to refer such dispute to arbitration to be conducted in Miami, Florida."

143. On 11 February 2011, Sural wrote to the MEEI as follows [85]:

"[w]e have not had an acknowledgement or even a response to our letter of January 11, 2011. We are of the opinion that we have now exhausted all best efforts to settle amicably through consultation the existing dispute between GORTT and SURAL in accordance with Clause 29.1 of the [the Shareholders' Agreement],

Subsequently, and in accordance with Clause 29.2 of the [Shareholders' Agreement], the said letter dated January 11, 2011 referred the dispute for settlement in accordance with the procedure set in the USA. The parties are now required to attempt to settle the dispute within sixty (60) days i.e. on or before March 14, 2011 otherwise a party may notify the other that the dispute has not been resolved.

We reiterate our willingness to meet and settle this matter.

Should the current course of conduct continue, i.e. the failure to meet or respond within the next ten (10) days, we will have no choice but to conclude and notify you that the dispute has not been resolved and refer this matter to arbitration to be conducted in Miami, Florida, in accordance with Clause 29.5 of the [Shareholders' Agreement]."

144. By letters sent on 16 March 2011, Sural's lawyers Johnson Camacho and Singh ("JCS") wrote to the Attorney General and also the Ministers of Energy and Energy Industries and Finance in identical terms stating that a dispute had arisen between Sural and GORTT "arising out of the failure by GORTT to comply with certain contractual obligations relating to ALUTRINT including its decision

[85] E3/199.

not to proceed with the Aluminium Smelter"[86]. The letters stated that Sural intended to refer this alleged dispute to ICC Arbitration.

145. Sural received a response from the Solicitor General in a letter dated 18 March 2011[87]. The first paragraph of the letter stated that the Solicitor General acted on behalf of the Attorney General. This letter did not address the substance of Sural's various letters to date, concluding that "the Honourable Attorney General is unable to understand how it is that not proceeding with the smelter can be the subject of a 'dispute' under the [Shareholders' Agreement]."

146. By letter of 28 March 2011 JCS wrote to the Solicitor General reiterating Sural's alleged claim for damages and stating that Sural intended to issue a Notice of Referral to arbitration shortly[88].

147. The Solicitor General responded by letter dated 11 April 2011 stating that the previous discussions referred to by JCS in the course of the preceding two years were related to Sural's proposed sale of its shares and equity in Alutrint and were not regarding any alleged "breaches" by GORTT of the Shareholders' Agreement[89]. Further the Solicitor General noted that despite being a fully participating member of Alutrint, Sural had never suggested filing for a fresh CEC following EMA's withdrawal of its appeal against the CEC Quashing Order.

148. JCS responded by letter dated 15 April 2011 acknowledging that although there were amicable discussions regarding the buyout of Sural's shares there was no commitment given by the GORTT on such a buyout, JCS stated that if GORTT wished to meet for discussions then a date should be set for a meeting[90].

149. By letter dated 10 May 2011 the Solicitor General responded to JCS emphasising that GORTT was not in breach of its obligations to Alutrint and asserted that Sural was in breach of its obligations under the Shareholders' Agreement to make equity contributions[91]. Further the Solicitor General stated that the quashing of the CEC Order meant the Project had to be stopped and this had clearly frustrated the arrangements between Sural and GORTT. The letter contended that there was nothing that had been properly the subject of the clause 29 procedure.

150. On 15 June 2011 the Permanent Secretary to the MEEA confirmed GORTT's willingness to meet to seek to resolve the issues raised in Sural's letter of 11 January 2011[92].

151. A meeting was scheduled for 2 September 2011[93] but GORTT rescheduled this to 16 September 16 2011[94]. Following this meeting, Sural instructed its local counsel to inform GORTT that, notwithstanding the lack of agreement at the meeting, "we remain ready and willing to use our best efforts, through consultation, to settle this long outstanding matter"[95].

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[86] E3/200 (dated 16 March 2010 in error).

[87] E3/201.

[88] E3/202 (dated March 2010 in error).

[89] E3/203.

[90] E3/204.

[91] E3/205.

[92] E3/207.

[93] E3/210.

[94] E3/211.

152. On 9 January 2012 the Permanent Secretary of GORTT wrote to Mr Steve Mohammed, the Acting Chief Executive Officer of Alutrint, advising that the "....Government agreed that the Alutrint Smelter Project....be discontinued with immediate effect" [96].

153. Sural filed its Request for Arbitration on 2 July 2012.

VI. THE RELEVANT CONTRACTUAL PROVISIONS

154. It is necessary to deal with certain provisions of the Shareholders' Agreement.

(i) Arbitration / Governing law

155. The Arbitral Tribunal has identified the relevant provisions above (see Section III).

156. This arbitration has proceeded on the basis that there is no material difference between the laws of Trinidad and Tobago and those of England and Wales. Both parties made extensive reference in their submissions to English case law.

(ii) The Scope and Cost of the Project

157. There were a number of clauses in the Shareholders' Agreement that dealt with the scope and costs of the project.

158. The Recitals provide as follows:

"RECITALS

WHEREAS:-

A. GORTT as part of its programme for national development and economic diversification, is interested in the investment and employment that an aluminium smelter plant and downstream facilities could provide to Trinidad and Tobago and desires to participate in the ownership of such plant and facilities.

B. SURAL is a major manufacturer of aluminium based products including aluminium, alloy rods, aluminium cables and wires, and aluminium alloy automotive wheels and has knowledge and experience in the planning, design, and engineering of an aluminium smelter plant and downstream facilities.

C. The Parties have agreed to form Alutrint Limited a company incorporated under the Companies Act, Chap. 81:01 with its registered office at the Corner of Rivulet and Factory Roads, Brechin

[95] E3/215.

[96] E4/231.

Castle, Couva in the island of Trinidad (hereinafter referred to as 'the Company') for the purpose of ownership, construction, commission, start-up, operation and maintenance of the Smelter and the market and sale of the Products (hereinafter referred to as 'the Project').

D. The Company is a [sic] limited by shares and is at the time of execution of this Agreement authorized to issue an unlimited number of ordinary shares.

E. The Parties have agreed to become shareholders in the Company and subscribe in cash for shares in the Company in the following proportions (hereinafter referred to as 'the Shareholders Proportions'):

(i) GORTT - 60% of the total issued shares

(ii) SURAL - 40% of the total issued shares

F. The Company and CMBC entered into an EPC agreement on December 20, 2005 for the engineering, procurement and construction, commissioning and start-up of the Smelter.

G. The parties have agreed to enter into this Agreement for the purpose of defining the relationship between the shareholders in the management of, affairs and dealings with the Company".

159. The term "Smelter" was defined in clause 1.1 (Definitions) as follows:

"'Smelter' means the tangible, intangible and real property of the aluminium smelter plant capable of processing a nominal 125,000 metric tonnes of molten aluminium *per annum* and which includes an anode plant with annual production output of 75,000 tonnes of anodes, a rod mill, wire and cable plant, downstream facilities and such additional common assets as determined by the Board; together with all improvements, modifications and expansions made thereto;"

160. Project costs were covered in clause 5 as follows:

"5. PROJECT COSTS & FINANCE

5.1 The Shareholders have agreed that total investment cost to build and commission the aluminium smelter plant, anode plant, the rod mill, wire and cable plant, is estimated to be approximately Five Hundred and Forty Million United States Dollars ($540,000,000) ('Total Investment Cost').

5.2 The Total Investment Cost will be financed on the basis of a ratio of approximately seventy (70) percent debt and thirty (30) percent equity.

5.3 Equity contribution from the Shareholders shall be in the Shareholders Proportions and amount in the aggregate to approximately One Hundred and Forty Million United States Dollars (US$140,000,000), to be contributed as follows:

5.4 (i) GORTT - 60%

(ii) SURAL - 40%".

161. The debt to equity ratio of 70% to 30% reflected the fact that US$ 400 million was to be by way of long term debt financing from the Exim Bank of China and the remainder by way of equity funding.

(iii) Duration

162. The duration of the Shareholders' Agreement was prescribed by clause 2 as follows:

"2. TERM

This Agreement shall continue in full force and effect from the Execution Date until the earlier of the first to occur of:

(i) the fifth anniversary of the Execution Date provided that the EPC contract has not come into full force and effect as provided for therein; or

(ii) the fiftieth anniversary date of the Execution Date; or

(iii) termination in accordance with the provisions of Clause 26".

163. It was common ground between the parties that the Execution Date of the Shareholders' Agreement was 3 July 2007 being the date by which it was signed by both parties.

(iv) Shareholdings

164. Under the terms of the Shareholders' Agreement, the parties agreed to become shareholders in Alutrint and to subscribe in cash for shares on the basis of a 60:40 proportion up the maximum of their respective equity contributions (i.e. respectively US$ 84 million and US$ 56 million or such other amount they agreed to).

165. This is clear from Recital E and clause 5.4 (referred to above). In addition clause 6 provided:

"6. CAPITALISATION and DISTRIBUTIONS

6.1.1 From time to time, as and when the Company requires cash, the Company shall call on the Shareholders to subscribe for shares in the Company, by giving forty five (45) days *prior* written notice to the Shareholders, of its demand and each Shareholder agrees that upon such demand it shall subscribe in cash for shares in the Company provided such calls for cash are in accordance with:

(i) the maximum equity contributions of the Shareholders as outlined in Clause 5.3 and the Cash Drawdown Schedule; or

(ii) such other amount as may be agreed to by all the Shareholders.

6.1.2 Pursuant to Clause 6.1.1, where the Company calls upon the Parties to subscribe for shares in the Company, the Parties shall subscribe in cash for shares in proportion in their shares held in the Company at that time".

(v) Disposal of shares by a shareholder

166. It is Sural's case that GORTT was under a contractual obligation to purchase its shareholding in Alutrint. There were a limited number of ways by which a party could dispose of its shares within the framework of the Shareholders' Agreement.

167. Clause 13.1.1 provided:

"13.1.1 From the date of formation of the Company to a date five (5) years from the Hand Over Date, the Shareholders agree that no Shareholder shall be permitted to withdraw from the Company or sell its Shares in the Company".

168. The "Hand Over Date" was defined as 6 months from the date on which CMEC completed its obligations under the EPC Contract.

169. Clause 13.1.2 provided for the procedure after the period referred to in clause 13.1.1. It stated:

"13.1.2 Thereafter the period referred to in Clause 13.1.1 above and for the duration of the Agreement, if

(a) a Shareholder wishes to sell all or part of the Shares it owns in the Company (hereinafter referred to as 'the Shareholder wishing to self) the Shareholder wishing to sell, shall notify the other Shareholders by a written notice of sale to this effect; or

(b) a Shareholder receives an offer in good faith from a third party (hereinafter referred to as 'the external offer') for the purchase of all or part of its Shares owned in the Company (hereinafter referred to as 'the Solicited Shareholder') and the Solicited Shareholder wishes to accept such offer, within ten (10) days of the date of the receipt of the external offer, the Solicited Shareholder shall notify the other Shareholders by a written notice of sale to this effect, forwarding a copy of the external offer.

13.1.3 For the purpose of 13.1.2 above, the external offer is considered to be made in good faith, solely if it is accompanied by a letter of credit issued by a bank confirming the availability of the funds required for the purchase of the Shares held by the solicited Shareholder".

170. Clause 14 gave a shareholder a first option to buy the other shareholder's shares. It provided:

"14. FIRST OPTION TO PURCHASE

14.1 If a Shareholder wishes to sell its Shares pursuant to Clause 13.1.2, the other Shareholder shall have a first option to purchase:

(i) the total number of Shares offered by the Shareholder wishing to sell; or

(ii) the total number of Shares considered by the external offer,

for a consideration equivalent to either of the following amounts:

(a) In the case of the Shareholder wishing to sell, at a purchase price being the higher of their fair market value or three times the invested capital paid by the Shareholder wishing to sell, or

(b) In the case of a solicited Shareholder, at the purchase price and terms corresponding to those provided by the external offer.

14.2 For the purpose of 14.1(a), the fair market value shall be:

(i) Such value as agreed between the parties to the sale and purchase of such shares; or

(ii) In the event the parties are unable to agree on the fair market value, within ninety (90) days after the service of the notice of sale, such sum as shall be certified by appraisers appointed by agreement of the parties to such sale and purchase shall be the fair market value on the date when the notice of sale was served. For all intents and purposes, the costs of the appraisers shall be borne in equal proportions by the parties to the sale and purchase of the Shares and in so acting, such appraisers are instructed to act as experts and not as arbitrators and their decision shall (save in respect of manifest error) be final and binding".

(vi) Termination

171. Clause 26 provided for a contractual procedure for termination as follows:

"26. TERMINATION

26.1 This Agreement may be terminated by mutual agreement of the Parties or by notice in writing by either Party, upon the occurrence of any of the following events:

(i) Material breach of terms and conditions of this Agreement, by either Party, including failure by a Shareholder to perform its obligations to provide cash in accordance with the Cash Drawdown Schedule;

(ii) If a Shareholder (being a company) becomes bankrupt or goes into liquidation whether compulsory or voluntary (except for the purposes of bona fide reconstruction or amalgamation with the consent of the other Shareholder, such consent not to be unreasonably withheld); or

(iii) If a Shareholder appoints an administrator or if a receiver, administrator or manager has otherwise been appointed;

26.2 (i) Subject to clause 26.1 above, the Party claiming the right to terminate shall give written notice to the party in default, specifying the breach complained of and, if capable of remedy, may require remedy of the breach within one hundred and twenty (120) days of the date of receipt of such notice; and

(iii) In the event that the Party in default fails to remedy, or take reasonable action with a view to diligently and expeditiously remedy the said breach, the Party claiming the right to terminate may, after the expiration of the said one hundred and twenty (120) days notice referred to above, terminate this Agreement.

26.3 This Agreement shall terminate immediately if an effective unanimous resolution is passed by the Shareholders to wind up the Company.

26.4 Despite the expiration or termination of this Agreement, it shall continue to bind the Shareholders to such extent and for so long as may be necessary to give effect to the rights and obligations embodied therein".

(vii) Variations, waiver and amendments

172. Clause 31 dealt with amendments. It provided:

"31.1 This Agreement may be amended, varied or modified with the written consent of all Shareholders".

173. Clause 32.5 dealt with waivers as follows:

"32.5 Waivers

32.5.1 No failure or delay by any Party hereto to insist on the strict performance of any covenant, agreement, term or condition of this Agreement, or to exercise any right or remedy, consequent upon the breach thereof, shall constitute a waiver of any such breach or any subsequent breach of such covenant, agreement, term or condition.

32.5.2 No waiver of any breach shall affect or alter this Agreement, but each and every covenant, agreement, term and condition of this Agreement shall continue in full force and effect with respect to any other then existing or subsequent breach thereof'.

174. Clause 32.6 contained an Entire Agreement clause:

"32.6 Entire Agreement

This Agreement constitutes the entire agreement of the Parties and supersedes and terminates all prior agreements written or oral between the Parties with respect to this transaction or the matters herein provided for".

(viii) Notices

175. Clause 33 dealt with notices as follows:

"33.1 Any notices and other communications required to be given under this Agreement shall be in writing and shall be delivered by hand, telegram, telex, facsimile or registered mail, addressed to the Shareholder as stated below"

If to GORTT:

Minister of Finance

Ministry of Finance

Eric Williams Financial Complex

Independence Square

Port of Spain

Attention: Permanent Secretary

Fax: (868) 627 6108

If to SURAL:

Sural Barbados Limited

Sherwood

Strathclyde Crescent

St Michael

Barbados

Attention: Managing Director

Fax: (246) 436 5618

With copy to:

Sural CA

AV Francisco de Miranda

Cristal Piso 9 Torre Oeste

Caracas 062

Venezuela

Attention: Dr Alfredo Riviere

President & CEO

Fax: 0 11 582 122 855 377

33.2 Each notice sent by any of the methods specified above shall be effective on the date of actual receipt, with notices given by registered mail being deemed received on the date shown in the return receipt.

33.3 Any Party may change its address or the name of its representative for the purpose of receiving notices, by giving at least ten (10) days prior written notice of the change to the other Party".

VII. ISSUES

176. On 3 September 2014 the parties submitted to the Arbitral Tribunal an agreed list of issues ("List of Issues"). This list was expressed to be "without prejudice to the full scope of the issues raised by the parties in their written submissions". The Arbitral Tribunal does not consider that it is necessary to determine all of the issues in the list as some do not arise in the light of the Arbitral Tribunal's decisions. References below to numbered issues are to this list.

177. The List of Issues was stated as follows (omitting footnotes):

"1. *Jurisdiction*

1.1 Is the law governing the interpretation of the arbitration agreement in clause 29 of the Shareholders' Agreement [] the laws of Trinidad & Tobago (which follows English law) or US law and is this an issue that the Tribunal has already determined at paragraph 22 of its Ruling of 3 June 2014 as being the laws of Trinidad & Tobago?

1.2 Are the staged pre-arbitration consultation provisions of clause 29 of the [Shareholders' Agreement] conditions precedent to the tribunal's jurisdiction?

1.3 Did Sural comply with the conditions precedents and if so what dispute or disputes did Sural refer to arbitration?

2. *Liability*

2.1 Was Alutrint's purported equity call of 4 July 2007 duly authorized and valid? If so, did this call

operate such that Sural was contractually obliged to contribute USD 8 million of the total equity call of USD 20 million (either within 45 days of the written notice pursuant to Clause 6.1.1 of the [Shareholders' Agreement] or at all?)

2.1.1 Was the purported equity call of 4 July 2007 pursuant to the [Shareholders' Agreement] or pursuant to the previous 18 May 2005 letter agreement? If it was pursuant to the 18 May 2005 letter agreement, was the capital call binding on Sural on the basis that it was not a party to that agreement, or otherwise?

2.1.2 To the extent the purported equity call was validly made, did Sural's purported noncompliance constitute a breach of clauses 5 and/or 6 of the [Shareholders' Agreement]? Further, or in the alternative, was Sural excused from complying with the purported equity call due to budget increases and contemporaneous restructuring efforts and/or did it cure any failure to comply?

2.1.3 Was Sural in material breach of the SA within the meaning of clause 26 of the [Shareholders' Agreement] or alternatively in repudiatory and/or renunciatory breach of the [Shareholders' Agreement] by reason of its noncompliance with the purported equity call and/or decision to seek a restructure of the contractual project and not make any further equity contributions? Is the Government precluded from asserting material and/or repudiatory and/or renunciatory breach by Sural by reason of the application of the doctrines of waiver or estoppel, or otherwise; and whether in relation to budgetary increases, the restructuring efforts, and/or failure to give notice of termination of the Shareholders' Agreement, or otherwise?

2.1.4 If Sural repudiatorily and/or renunciatorily breached, did the Government accept the breach so the [Shareholders' Agreement] came to end? If so, at what date? Alternatively, did the Government waive any default or is it estopped from asserting a termination of the [Shareholders' Agreement]by failing to give notice of a termination, and/or by seeking to progress the Votorantim proposal and/or by otherwise affirming the [Shareholders' Agreement]?

2.1.5 Did the Government repudiate, renounce and/or materially breach the [Shareholders' Agreement] by refusing to negotiate with Sural under section 14.1 and/or by cancelling the project in September 2010?

2.2 Did the Parties agree to vary the terms of the [Shareholders' Agreement], such that Sural could sell its interest in Alutrint to the Government, pursuant to the valuation mechanism in clause 14, notwithstanding the five-year restriction on dispositions under clause 14 by reason of the exchange of correspondence of 9 September 2009 and 2 October 2009? This raises a number of sub-issues:

2.2.1 Was Sural's proposal of 9 September 2009 a contractual offer for the sale of its interest in Alutrint pursuant to clause 14 (Exhibit 165)?

2.2.2 Was the Minister of Energy and Energy Industries' letter dated 2 October 2009 a contractual acceptance of Sural's alleged offer of 9 September 2009?

2.2.3 If the letter of 2 October 2009 was an acceptance, was it binding on the Government notwithstanding the requirements of Clause 31.1 of the [Shareholders' Agreement], which required any variation to be with the written consent of all shareholders?

2.2.4 If there was a binding agreement did it: (i) amount to a variation of the [Shareholders' Agreement] such that the five-year restriction contained in Clause 13.1.1 of the [Shareholders' Agreement] no longer applied; (ii) incorporate the valuation mechanism contained in clause 14 of the [Shareholders' Agreement]?

2.2.5 Did the Government subsequently breach the [Shareholders' Agreement] by failing to negotiate a valuation of Sural's interest in Alutrint, pursuant to clause 14?

2.3 Following a change of government in May 2010, did the new Government's announcement in the budgetary speech of 8 September 2010 that it intended the project to 'cease' constitute a renunciation of the [Shareholders' Agreement] (Exhibit 189)? If not, did any other conduct of the Government constitute a repudiation of the [Shareholders' Agreement]? If so, at what date was such repudiation capable of acceptance by Sural?

2.3.1 If the Government did renounce and/or repudiate the [Shareholders' Agreement], did the Sural subsequently accept this renunciation by its letter of 24 September 2010 or otherwise, thereby permitting Sural to assert a claim for damages for loss of interest in Alutrint? [Shareholders' Agreement]

2.3.2 Alternatively, was Sural precluded from accepting any alleged renunciation and/or repudiation because the [Shareholders' Agreement] had already come to an end?

2.3.3 Is Sural entitled to rely upon Clause 27 of the [Shareholders' Agreement] in the context of its case on repudiation and if so did it comply with the conditions precedent to its application?

3 *Relief*

3.1 To what relief, if any, is Sural entitled, pursuant to clauses 14 and/or 27 of the [Shareholders' Agreement], as a result of the Government's alleged refusal to negotiate a valuation of Sural's interest in Alutrint? This raises a number of sub-issues that are not specifically addressed in this List of Issues but are addressed in the parties' written submissions.

3.1.1 What is the amount of Sural's 'invested capital' within the meaning of these clauses to the extent the valuation provisions contained therein are applicable?

3.2 To what relief, if any, is Sural entitled as a result of the Government's alleged repudiation of the Shareholders' Agreement?

3.3 From what date should Sural's alleged damages, if any, be calculated?

3.4 Is the Government entitled to claim damages in the sum of USD 5 million (or such sum as the Tribunal may consider due) by way of counterclaim and/or set off in respect of the Government's alleged payment of USD 5 million in respect of Sural's purported failure to pay the equity call of USD 8 million?

3.5 How should costs be allocated in these arbitral proceedings?

3.6 Is either party entitled to interest in respect of any of its claims, and if so, at what rate, and for what period?"

VIII. JURISDICTION

Introduction: GORTT's Reservations

178. At paragraph 448 of its Written Opening Submissions, GORTT identified four jurisdictional reservations. At the end of the September Hearing, the Arbitral Tribunal discussed with GORTT the extent to which any of the reservations needed to be determined because they were maintained by GORTT [V6,666 -V6. 673].

Reservation 1

179. The first reservation turned out to be a disagreement on the correctness of the Arbitral Tribunal's procedural ruling on security for costs in which the Arbitral Tribunal indicated that it considered that Florida was the seat of arbitration.

180. The Arbitral Tribunal confirmed at the September Hearing that the security for costs ruling was a procedural ruling only and it was open to the parties to make further submissions on the issue of place of the arbitration. It does not seem to the Arbitral Tribunal that this is in fact a jurisdictional reservation: it is a dispute as the correctness of the Arbitral Tribunal's decision and not one going to jurisdiction.

Reservation 2

181. The second reservation was based on the premise that Sural was making corporate claims that involved complaints against Alutrint which was not a party to the Shareholders' Agreement or the arbitration agreement. However no corporate claims were being pursued by Sural by the time of the September Hearing and GORTT confirmed at the hearing that this reservation was no longer applicable [V6. 671].

Reservation 3

182. The third reservation concerned a number of claims.

a. The first related to a relief seeking the appointment of an appraiser or to oversee an appraiser determination. However this was not being claimed by Sural by the time of the September Hearing and GORTT's counsel confirmed that the reservation was no longer relevant [V6. 672].

b. The second concerned a claim in respect of the Joint Proposal of 7 June 2008 however this too was not pursued by Sural and it was confirmed by GORTT that the reservation was no longer applicable [V6,673].

c. The third was a reservation to all claims because it was alleged that clause 29.1 of the Shareholders' Agreement was not satisfied. This reservation is live and it is considered below.

Reservation 4

183. The fourth reservation concerns Sural's alleged public international law contentions. However Sural was not maintaining any such claims and GORTT confirmed that the reservation had fallen away [V6,675].

Reservation: Clause 29.1

184. The only jurisdictional reservation that remains concerns clause 29.1 of the Shareholders' Agreement. See: Issues 1.2 and 1.3.

GORTT's Submissions

185. GORTT's argument appears at F3, paragraphs 354-361 of GORTT's Written Opening Submissions and at D2, paragraphs 126-127 of GORTT's Written Closing Submissions.

186. In summary, GORTT contends as follows:

a. Clause 29.1 requires the parties to use their best efforts to settle any dispute through consultation for a defined period of 120 days from the date on which the dispute was referred.

b. A referral under clause 29.1 requires a notice in writing as mandated by clause 33.1.

c. No contractual termination under Clause 26 took place. Clause 29.1 was never invoked and no notice of a dispute requiring consultation under clause 29.1 was ever issued.

d. There was no waiver of the procedure in clause 29.1.

187. The Arbitral Tribunal notes that in its Written Opening Submissions at paragraph 360 GORTT argued that Sural had never made a claim prior to 30 April 2014 "on the basis of the parties having agreed the Joint Proposal of 7 June 2008 and Sural having a 40% interest in that proposal". However by the time of the oral hearing, Sural did not bring a claim on this basis (See below: Section X, A Introduction) and so the point does not arise for determination.

Sural's Submissions

188. In summary, Sural's response is as follows:

a. It accepts that section 29 of the Shareholders' Agreement sets out a three-stage resolution process.

b. Stage 1 is contained in section 29.1 and Sural used its efforts to settle disputes amicably. Reliance is placed on Sural's letter dated 24 September 2010 [97] to the MEEI and a letter dated 8 November 2010 to the MEEI [98].

c. Stage 2 is contained in section 29.2. This was invoked in Sural's letter of 11 January 2011 to the MEEI [99]. Reliance is also placed on Sural's letter of 11 February 2011 [100].

d. Stage 3 is contained in section 29.5. The filing of its Request for Arbitration constituted escalation of the dispute to stage 3.

Decision

189. Under all potentially applicable laws (United States federal law, and the law of Florida and the law of Trinidad and Tobago) the Arbitral Tribunal has power to determine its own jurisdiction and the enforceability of the parties' arbitration agreement.

190. Clause 29 is headed "Dispute Resolution". Clause 29.1 provides that the parties "...shall use their best efforts to settle amicably through consultation any dispute." The Parties have disputed whether or not Sural complied with clause 29.1.

191. It is a matter of fact as to whether the procedure in clause 29 was followed. The Arbitral Tribunal considers the procedure was followed.

192. As to Stage 1, the Arbitral Tribunal considers that Sural's letter of 24 September 2010 [101] is clear in showing Sural's wish to resolve disputes and specific reference is made in that letter to clause 29. The letter states at its fourth paragraph: "... we should start formal conversations to try and come to a satisfactory conclusion of our participation in Alutrint arising from the decision of the Honourable Government of Trinidad and Tobago to terminate the Alutrint project in which SURAL has 40% participation, all in compliance and as provided in clause 29 of the shareholder agreement".

193. GORTT did not respond to the invitation to start formal conversations. On 8 November 2O1O [102] Sural wrote seeking "...confirmation before December 10th, of the fact that GORTT is committed to use their best efforts to settle amicably through consultation". Moreover the letter was proceeding on the basis that the parties were acting under the Stage 1 procedure: "In default of confirmation

[97] E3/192.

[98] E3/191.

[99] E3/198.

[100] E3/199.

[101] E3/191.

[102] E3/195.

of this fact, we would understand that 'amicable consultation' has failed, and that we should now move to stage 2 of the Dispute Settlement Process as provided in Clause 29 of the Agreement".

194. GORTT contends that a referral under clause 29.2 requires a notice in writing as mandated by clause 33.1. If there is any such requirement, the Arbitral Tribunal considers that Sural's letter of 24 September 2010[103] meets this requirement. As to Stage 2, the Arbitral Tribunal considers that Sural's letter of 11 January 2011[104] is in accordance with clause 29.2, to which it explicitly refers.

195. As to Stage 3, the Arbitral Tribunal considers that Sural is right in its construction of the 60 days provision in clause 29.5. It considers that very clear language would be required to preclude a party from pursuing a claim because arbitration was not commenced within 60 days of the referring of a dispute to officers of Sural and GORTT. Properly construed, the effect of clause 29.5 is to prevent the parties from commencing an arbitration until 60 days have elapsed rather than extinguishing a claim where the proceedings are not started within 60 days.

196. The Arbitral Tribunal considers therefore that Sural was entitled to file a Request for Arbitration on 2 July 2012. The Arbitral Tribunal is satisfied that the facts here demonstrate compliance with the requirements of clause 29 (Issue 1.3).

197. It follows that all of GORTT's jurisdictional challenges fail and that the Arbitral Tribunal has jurisdiction to determine the claims asserted in these proceedings.

IX. PLACE OF THE ARBITRATION

Introduction

198. Clause 29.5 of the Shareholders' Agreement stated that the arbitration was "to be conducted in Miami, Florida". Sural argued that this meant that Florida was the seat (place) of the arbitration, and GORTT argued that it was a mere reference to the convenient place of the arbitration, and that Trinidad and Tobago was the seat. In its Ruling on GORTT's Application for Security for Costs on 3 June 2014, the Arbitral Tribunal ruled that Florida is the seat of arbitration (which is equivalent to the place of the arbitration): paragraph 25.

199. This decision had little practical effect on the course of the arbitration proceedings. For example:

a. The decision not to award security for costs would have been the same even if the place of the arbitration was Trinidad & Tobago.

b. On the first day of the September hearing [V1.10-V1. 16], Sural requested that witnesses of fact be barred from attending the hearing until after their evidence had been completed. This request was made by reference to Florida and US law, but the Arbitral Tribunal had power to accede to the request both under the ICC Rules and Trinidad & Tobago law. The Arbitral Tribunal acceded to this

[103] E3/192.
[104] E3/198.

request for sequestration of factual witnesses and company representatives [V1.26].

c. The Arbitral Tribunal's jurisdiction to award costs in favour of the prevailing party is not in dispute.

200. Both parties invited the Arbitral Tribunal to make a determination of the place of the arbitration by way of a final award. The Arbitral Tribunal accedes to the request. The place of the arbitration is important for determining whether it is the Courts of Florida or the Courts of Trinidad and Tobago that exercise supervisory jurisdiction over this arbitration and any award. The Arbitral Tribunal's decision is therefore potentially relevant, although it is not for the Arbitral Tribunal to rule on the effect of its determination in court proceedings.

201. At the September Hearing, the Arbitral Tribunal pointed out that it was open to the parties to make further submissions on the issue of the place of the arbitration since its ruling on security for costs was only a procedural ruling (See: Issue 1.1). This opportunity was taken up by GORTT. Sural at paragraph 17.1 of its Post-Hearing Brief relied on the Arbitral Tribunal's procedural ruling.

GORTT's Submissions

202. In its Post-Hearing Brief at paragraph 125 GORTT contended as follows:

"In its Ruling on security of 3 June 2014, the Tribunal suggested that the reference to courts of Trinidad & Tobago was a drafting error. GORTT does not accept that it is open to the Tribunal to reach this conclusion since it is not a submission made by either party, no evidence has been put forward to suggest this and no application for rectification has been made. In the circumstances, it is submitted that the issue of construction before the Tribunal does require it to reconcile the question of seat of the arbitration with the parties' choice of the exclusive jurisdiction of the courts of Trinidad & Tobago subject only to arbitration. GORTT submits that this was a designation of the courts of Trinidad & Tobago as the supervisory courts and hence a Trinidad & Tobago seat of arbitration".

Decision

203. GORTT is right to point out that the Arbitral Tribunal in its ruling stated at paragraph 23 (final sentence) of its ruling:

"In addition, it is likely that the submission to the exclusive jurisdiction of Trinidad and Tobago courts in clause 30 was an error, since the clause is headed 'governing law'."

204. GORTT points out that neither party had sought to rely on the doctrine of mistake in their submissions on the seat issue. However, whether an error had taken place or not forms no part of

the Arbitral Tribunal's reasoning in support of its decision that seat of the arbitration is Florida.

205. All that the Arbitral Tribunal was intending to do in the final sentence of paragraph 23 of the ruling was to point out a matter that reinforced its conclusion that Miami, Florida is the seat of the arbitration. This is why the final sentence opens "In addition...". Whether or not a drafting error actually took place is not relevant.

206. The Arbitral Tribunal confirms its procedural ruling of 3 June 2014 as if it was incorporated verbatim in this Award. It is annexed to this Award. For the reasons given in that ruling, the Arbitral Tribunal decides that the place of the arbitration is Miami, Florida, USA.

X. CLAIMS

A. Introduction

207. Sural in its Pre-Hearing Brief at para 1.6 summarised its two claims against GORTT as follows (see also para 3.60).

"First, in October 2009, the Government agreed to vary the terms of the Shareholders' Agreement, such that it could buy out Sural's interest in Alutrint, pursuant to clause 14.1 before the expiry of the five-year prohibition. Sural offered to sell its interest to the Government under section 14.1 in a letter of September 9, 2009. In a response letter of October 2, 2009, the Government accepted Sural's offer. The Government then breached the terms of the varied Shareholders' Agreement, and specifically its obligation to negotiate a purchase price for Sural's interest, when in September 2010, the Government's Cabinet announced its intention to terminate the Shareholders' Agreement.

Second, and in the alternative, Sural contends that the Government's renunciation of the entire project constituted a repudiation of the Shareholders' Agreement, which Sural subsequently accepted".

208. In the Conclusion to its Post-Hearing Brief, Sural confirmed that the first claim at paragraph 1.6 of its Post-Hearing Brief, was its primary case and that the cancellation of the project by GORTT was its secondary claim. At paragraph 18.6 Sural set out the relief it sought as follows:

"WHEREFORE, [Sural] respectfully requests judgment against the Respondent the Government of the Republic of Trinidad & Tobago as follows: (a) the amount of US $56.9 million, the value of its 40% interest in Alutrint in September 2010; (b) in the alternative, damages of three times its invested capital of US $5,730,133 totalling US $17,190,399 million; (c) in the alternative, reliance losses of US $5,730,133 of wasted costs; (d) pre- and post-award interest at the Florida statutory interest rate; (e) legal fees, costs, and disbursements; (f) dismissal of the Respondent's counterclaim; and (g) such other or further relief as the Tribunal deems just and proper."

B. Sural's Primary Claim

Introduction

209. As stated in paragraph 3.60.1 of its Pre-Hearing Brief, Sural claims that GORTT "was contractually obliged to buy out Sural's interest pursuant to an October 2009 agreement to apply section 14.1 of the Shareholders' Agreement to the purchase. Sural offered to sell its share to [GORTT] under section 14.1 in a letter of September 9, 2009. In a response letter of 2 October 2009[105], GORTT accepted Sural's offer. This constituted a variation of the Shareholders' Agreement, which [GORTT] then breached". See: Issue 2.2.

Sural's Submissions

210. In summary, Sural's case is as follows:

a. The exchange of letters dated 9 September 2009[106] and 2 October 2009[107] constituted a binding contract. In particular, reliance is placed on what is said to be an unqualified expression of assent to the terms of Sural's offer: "[GORTT] accepts your offer for the sale of 40% of the share participation in Alutrint Ltd". This was recognised by GORTT in its Cabinet Minutes dated 4 March 2010[108]: "The Minister of Energy and Energy Industries, on behalf of [GORTT] accepted the offer by Sural for the sale of its share participation...".

b. The acceptance contained in the letter of 2 October 2009[109] was by MEEI acting on behalf of GORTT. It did not have to be by MOF. Even if MEEI lacked actual authority to accept on behalf of GORTT, it had apparent authority.

c. The parties agreed to vary the 5 year restriction in clause 13.1.1 of the Shareholders' Agreement.

d. GORTT having accepted the variation to the Shareholders' Agreement and Sural's offer to sell its shares pursuant to section 14.1, the parties were obliged to try and agree on a purchase price. The terms of clause 14.1 are set out above.

e. The relief sought by Sural is for damages for breach of contract. It asserts that for damages purposes, September 2010 "is the proper date to calculate Sural's loss" (Sural Pre-Hearing Brief, paragraph 5.8). As to the correct way of measuring loss, Sural contends: "[GORTT's] repudiation of the Shareholders' Agreement entitled Sural to damages pursuant to the formula in section 14. The correct method for determining the fair market value of Sural's interest is, as both parties' experts have agreed, discounted cash flow, and not loss of profit" (Sural Pre-Hearing Brief, paragraph 4.28). Reliance is placed on the evidence of Mr Stobart.

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[105] E2/166.
[106] E2/165.
[107] E2/166.
[108] E3/172.
[109] E2/166.

GORTT's Submissions

211. In summary, GORTT's case is as follows.

a. Sural's letter of 9 September 2009 [110] was not an offer pursuant to clause 14.1 of the Shareholders' Agreement. GORTT argues that "By its letter of 9 September 2009, Sural was sounding out the then Prime Minister about various issues of principle it wanted addressed as a means to resolving the parties' respective positions,and interests and moving forward" (GORTT, Written Opening Submission paragraph 227(1)).

b. An offer pursuant to clause 14.1 had to be addressed to MOF. The letter of 9 September was addressed to the MEEI. Sural recognised this in Dr Riviere's letter of 26 October 2009 [111] stating: "Regarding the offer for the sale of 40% of Sural's share of participation in Alutrint, I have worked with the financial model and I will make an offer to the Minister of Finance, according to the unanimous shareholder agreement article 4.1 (sic)".

c. "The MEEI was in any event not accepting the proposal that was being put forward and that involved a number of elements, which would need to be worked through. Items 3 and 4 of the proposal which were all interlinked and involved major further commitments on the part of GORTT to Sural, and were not agreed to even on an in principle basis" (GORTT, Written Opening Submission paragraph 227(3)). In other words, the proposal was an umbrella proposal involving a number of elements all of which had to be accepted.

Decision

212. The Arbitral Tribunal considers that the legal principles applicable to this claim are not in dispute and are set out below. The issue is whether parties reached a binding agreement. This is a matter of the law of Trinidad and Tobago.

213. First, there must be an offer that is capable of acceptance: *Chitty on Contracts* 31st ed (2012) at paragraphs 2-001 and 2-003.

214. Second, it is clear that a communication may fail to take effect as an acceptance because it does not coincide or it purports to vary the terms of an offer. In Midgulf International Limited v Groupe Chimique Tunisien [2010] EWCA Civ 66 at [45] Tomlinson LJ referred to the following principle in *Chitty on Contracts,* 31st ed (2012), at 2-032: "A communication may fail to take effect as an acceptance because it attempts to vary the terms of the offer... On the other hand, statements which are not intended to vary the terms of the offer, or to add new terms, do not vitiate the acceptance, even where they do not precisely match the words of the offer...The test in each case is whether the offeror reasonably regarded the purported acceptance 'as introducing a new term into the bargain and not as a clear acceptance of the offer'".

215. The Arbitral Tribunal considers that no enforceable agreement was reached for the sale of Sural's

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[110] E3/165.

[111] E2/167.

shares in Alutrint. The background facts are summarised above. By September 2009 Sural had effectively disengaged from the smelter element of the project. GORTT and Votorantim were seeking to progress a different project to that contemplated by the Shareholders Agreement since it involved a 250,000 mtpy smelter and revised downstream facilities without Sural. However Sural remained interested in the downstream element through Alutech comprising a rod mill, wire and cable plant and development and also wanted to be able to get back into the project in the future.

216. This is reflected in Sural's letter of 9 September 2009 [112]. It refers (page 2) to two ideas. The first idea was Sural continuing to be "... fully committed to the full realisation of the aluminium development in Trinidad and Tobago". This involved working with GORTT and Votorantim. The second idea was dedicating "available funds to Alutech" for the downstream element. The letter continues "To take these 2 ideas forward, Sural wishes to propose the following". The four items are then set out (mentioned above) and the letter concludes "Sural look forward to the opportunity to continue working with GORTT to develop this interesting and important project forward".

217. In the Arbitral Tribunal's view, it is not possible to look at the four items mentioned in the letter in isolation: in other words, they were presented by Sural as a package. Sural was not simply proposing the sale of its 40% participation in Alutrint. Sural was also looking for an agreement with Alutech (item 3) and it was also looking for an option to re-enter the smelter project (item 4). The Arbitral Tribunal considers it is right to construe the letter as involving an umbrella proposal involving a number of elements that were interdependent. It was not a contractual offer for the sale of its interest in Alutrint pursuant to clause 14. See: Issue 2.2.1.

218. MEEI's letter of 2 October 2009 [113] addressed the four items as follows:

a. As to item 1: it was stated that GORTT "accepts your offer for the sale of 40% of the share participation in Alutrint Ltd". But this acceptance was not complete or unqualified, because it was suggested to Sural that it "make an offer to the Minister of Finance for the sale of Sural's share participation in Alutrint Limited". This suggests that MEEI was proceeding on the basis that no binding offer had been made by Sural and that it would need to deal with the MOF on the issue of any sale under clause 14.1.

b. As to items 3 and 4: the Minister (Mr Enill) stated "I am requesting the Natural Gas Export Task Force to meet with Sural to discuss these proposals". It is therefore clear that there had been no acceptance of items 3 and 4 and therefore the parties were not in agreement on them.

219. In the Arbitral Tribunal's view it is clear that the parties had not reached agreement. Even if, contrary to the Arbitral Tribunal's view, Sural's letter of 9 September 2009 [114] amounted to a contractual offer, the terms of the alleged acceptance in MEEI's letter of 2 October 2009 [115] do not correspond to the offer. Moreover the Arbitral Tribunal does not consider MEEI's letter of 2 October 2009 [116] as a counter-offer because it was too unspecific. See: Issue 2.2.2.

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[112] E3/165.
[113] E3/166.
[114] E3/165.
[115] E3/166.
[116] E2/166.

220. The fact that the parties did not consider Sural's letter of 9 September 2009 as being an offer under section 14.1 of the Shareholders' Agreement is confirmed by the fact that on 26 October 2009[117] Sural indicated that it would "...make an offer to the Minister of Finance, according to the unanimous shareholder agreement article 4.1 [sic]".

221. Sural in its Post-Hearing Brief at paragraph 6.14 contends that the reference in this letter to "an offer" can "only reasonably be interpreted as meaning an offer for the price that Sural was willing to accept for its interest in Alutrint; essentially Sural's calculation of fair market value". The Arbitral Tribunal cannot agree with this construction of "an offer". On its natural meaning, it is a reference to an offer for shares in accordance with clause 14.1: it is not a reference to a valuation or figure.

222. This letter strongly suggests that the parties were proceeding on the basis that the procedure under clause 14.1 had not at that stage been triggered and that in order to start it an offer had to be made to the MOF. Sural did not in fact make an offer to the MOF and there is no evidence to indicate that the parties considered that the procedure in clause 14.1 had been operated. It is striking that no suggestion was made by Sural at the time that the process referred to in clause 14 should be followed or implemented.

223. This all shows that Sural understood that there was no contractual acceptance and any agreement would need to be with the MOF.

224. In the Arbitral Tribunal's view the reality was that Sural was looking for a package from GORTT involving the sale and purchase of its Alutrint shares, the continued involvement of Alutech and an option to allow it to re-enter the project at a later date. No agreement was ever reached on this package and it is impossible to construe the exchange of correspondence as reaching a binding offer on Sural's shares in Alutrint when it is clear that Sural was only interested in an agreement on all the items in its letter of 9 September 2009[118].

225. It is the Arbitral Tribunal's decision that this claim fails. It is not necessary to express any view on the other grounds relied upon GORTT to say that no contract was concluded other than to observe that if a contract had been established, it is unlikely that the Arbitral Tribunal would have found that it did not bind GORTT because its agreement had been given by the MEEI rather than the MOF (see: Issue 2.2.3). It seems to the Arbitral Tribunal that MEEI was acting on behalf of GORTT (as recognised by the Cabinet Minutes of 4 March 2010[119]). It follows from the Arbitral Tribunal's findings that GORTT was not in breach in failing to negotiate a valuation of Sural's interest in Alutrint pursuant to clause 14: Issue 2.2.5. Since there was not binding agreement, Issue 2.2.4 (concerning the effect of the restriction in clause 13.1.1) does not arise for determination. The Arbitral Tribunal does not consider that Clause 27 of the Shareholders' Agreement is relevant on the issue of repudiation (Issue 2.3.3). Moreover Sural never served a valid notice of termination under clause 26 (as required by clause 27.1).

226. Sural's primary claim is dismissed. Any issues that might have arisen had the primary claim been accepted are moot and it is inappropriate to rule on them (Issue 3.1)

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[117] E3/167.
[118] E3/165.
[119] E3/172.

C: Sural's Alternative Claim

Introduction

227. Sural's alternative claim is referred to in its Pre-Hearing Brief at paragraph 4.30 as follows: "....should the Tribunal find that [GORTT] did not breach clause 14 of the Shareholders' Agreement, Sural's case, in the alternative, is that [GORTT's] statement on September 8, 2010 cancelling the Project was a repudiation of the contract. Sural subsequently accepted this repudiation and has a consequent right to damages".

228. In summary, Sural's alternative claim is as follows.

a. The Shareholders' Agreement at all times remained effective.

b. Sural did not commit any breach of the Shareholders' Agreement in not paying the equity call. This is because the equity call was invalid. Alternatively, non-payment was not a material breach and Sural remedied any breach.

c. Sural did not abandon or withdraw from the Shareholders' Agreement or agree to its mutual termination without compensation.

d. If there was any breach of the Shareholders' Agreement, GORTT subsequently affirmed the contract.

e. The new Government of Trinidad and Tobago decided to terminate the Project and this intention was made manifest on 8 September 2010 [120] in a budgetary speech. By reason of clause 12 of the Shareholders' Agreement both parties were under an obligation to promote and develop the business of Alutrint. As stated in paragraph 4.34 of the Pre-Hearing Brief: "The Minister's budgetary speech would certainly lead a reasonable person to the conclusion that [GORTT] did not intend to fulfil its obligation under Section 12 of the Shareholders' Agreement".

f. As to acceptance of GORTT's alleged repudiation, Sural relies on its letters of 24 September 2010 [121] or 9 February 2012 [122]. If necessary, it also relies on its Request for Arbitration dated 2 July 2012.

g. As to damages: "As with Sural's primary case set out above, Sural's damages for [GORTT's] repudiation of the Shareholders' Agreement should be assessed by reference to the value of Sural's interest in Alutrint on September 8, 2010, the date of the breach. On that date, Christopher Stobart states that Sural's interest was worth US$ 56.9 million" [123].

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[120] E3/189.

[121] E3/191.

[122] E4/239.

[123] Sural Pre-Hearing Brief para 4.42.

GORTT's Submissions

229. In summary, GORTT responds to the Sural's alternative claim as follows.

a. It contends that Sural committed a repudiatory breach of the Shareholders' Agreement by its failure to pay the equity call on 4 July 2007[124] and its decision to withdraw from the contractual project (Written Opening Submissions, paragraphs 289-298 and 336). GORTT accepted Sural's repudiatory breach by conduct (Written Opening Submissions, paragraph 299-312).

b. Alternatively, GORTT's Request for Proposals together with Sural's responsive submission of the Joint Proposal of 7 June 2008[125] brought the Shareholders' Agreement to an end by mutual agreement (Written Opening Submissions, paragraphs 313-314).

c. It contends that if GORTT was in repudiatory breach (contrary to its case) then Sural had no right to terminate because Sural was in continuing repudiatory breach of the Shareholders' Agreement (having disengaged) and could not rely upon any alleged repudiation by GORTT since it could only demand performance from GORTT if it was willing to continue under the Shareholders' Agreement (Written Opening Submissions, paragraph 338).

d. Sural cannot invoke the clause 26/27 procedure to claim "fair market Value" for the sale of shares. It cannot prove that the contractual project would have been profitable.

Decision

230. Sural's alternative claim raises a number of issues which need to be considered by the Arbitral Tribunal.

Whether Sural was in Breach in Failing to pay the Equity Call

231. The first issue is whether Sural was in breach of the Shareholders' Agreement in not paying the equity call of 4 July 2007[126]. See: Issue 2.1. This issue is relevant to two matters. First, to the question whether the Shareholders' Agreement came to an end in 2008 or on a later occasion. Second, to GORTT's Counterclaim where it is alleged that GORTT made a payment in part of the shortfall of the required advance payment to CMEC as a result of Sural's alleged failure to pay the equity call.

232. The Arbitral Tribunal finds that Sural was in breach of the Shareholders' Agreement in failing to pay the equity call. The facts are set out above. What they show is that Alutrint, acting through its board of directors, approved the making of the equity call by Alutrint as soon as the Shareholders' Agreement had been signed at its board of directors meeting of 26 April 2007[127]. They also show

[124] E1/54.
[125] E1/116.
[126] E1/54.
[127] E1/47.

that Alutrint, acting pursuant to the authorisation given by the Alutrint board, made the equity call on 4 July 2007[128], the day after execution of the Shareholders' Agreement. Alutrint was thereby acting pursuant to clause 6.1.1 of the Shareholders' Agreement.

233. The conclusion that Sural was in breach by not meeting the equity call is entirely consistent with the way that Sural saw the position. It repeatedly acknowledged its obligation to meet the equity call and assured Alutrint and the MOF that it would make the payment. The relevant correspondence is summarised in the Facts section above: see in particular Dr Riviere's email to Alutrint of 16 July 2007[129], Dr Riviere's letter to the MOF of 2 August 2007[130], Dr Riviere's indications to the Alutrint board at the meetings of 27 September 2007[131] and 23 November 2007[132], and Dr Riviere's letter to the Prime Minister of 29 March 2008[133] recognising that GORTT could terminate the SA for material breach in respect of the equity call.

234. Sural advances a number of arguments in support of its contention the equity call was invalid and that it was not obliged to pay. The arguments are set out in Sural's Post-Hearing Brief at section 2 which is headed: "The purported equity call of 4 July 2007[134] was invalid and unauthorised, and Sural is not bound by an agreement with a separate legal entity - in any event, the call was unenforceable because of the explosion in the project's budget". Each of the arguments is considered below.

235. First, Sural contends that the equity call was not made pursuant to the Shareholders' Agreement, but rather under the terms of the Letter of Agreement dated 18 May 2005[135] (Sural Post-Hearing Brief, paragraph 2.1.1) (see: Issue 2.1.1). The Claimant, Sural (Barbados), Ltd. was not a party to this contract. The GORTT's counterparty was Sural CA and, as such, the Letter Agreement and any equity calls made thereunder are not binding on Sural.

236. The Arbitral Tribunal rejects this argument. The board minutes of 26 April 2007[136] make it clear that the Alutrint board was approving an equity call being made on the shareholders pursuant to the terms of the Shareholders' Agreement once executed, not based on the Letter of Agreement. In other words, the equity call was made under the Shareholders' Agreement rather than the Letter of Agreement.

237. Secondly, Sural contends that the letter of 4 July 2007[137], which requested the parties' inject capital into Alutrint and attached a supporting board resolution, made clear that the shareholders were required to consent to the call. The letter includes a section to be signed by Sural CA to indicate this consent. Sural CA did not provide consent. (Sural Post-Hearing Brief, paragraph 2.2).

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[128] E1/54.
[129] E1/57.
[130] E1/61.
[131] E1/65.
[132] E1/77.
[133] E1/101.
[134] E1/54.
[135] E1/15.
[136] E1/47.
[137] E1/54.

238. The Arbitral Tribunal rejects the argument that the equity call required a shareholders' resolution as well as Alutrint board approval. Clause 6.1.1 of the Shareholders' Agreement requires an equity call from Alutrint the validity of which is dependent upon board approval. The shareholders had already contractually obliged themselves to pay any such call pursuant to the terms of clause 6.1.1. The Arbitral Tribunal agrees that it is not necessary to consider the Re Duomatic principle (that a company may be bound by the informal unanimous consent of its shareholders) for the reasons given in Sural's Post-Hearing brief at paragraphs 2.3-2.4.

239. The Arbitral Tribunal notes that this analysis is entirely consistent with the evidence adduced at the September Hearing.

a. Mr Mayers' explained, by agreeing to the shareholders' agreement, the parties had agreed to Alutrint making equity calls and the draft shareholder's resolution attached to the equity call of 4 July 2007 [138] was unnecessary [V3,290-1].

b. Ms Murray described the draft shareholders' resolution attached to the equity call of 4 July 2007 [139] as being probably 'overkill' [V4. 397].

c. Mr Butler accepted that, as far as he was aware, Sural did not challenge the validity of the equity call and that the purpose of his note attached to the equity call was to emphasise the importance of expeditious disbursement of the monies [V2,178].

240. Thirdly, Sural contends that the equity call was made to Sural CA rather than Sural (in Barbados). (Sural Post-Hearing Brief, paragraph 2.4). The Arbitral Tribunal rejects this argument. The Shareholders' Agreement at clauses 33.1 and 33.2 provides that notices to Sural could be made by giving notice to Sural CA at its Venezuela address.

241. Fourthly, Sural contends an equity call could only be made in exchange for the issue of shares in formal subscriptions and that no subscriptions were sought nor shares offered (Sural Post-Hearing Brief, paragraph 2.4).

242. This argument is wrong. Under clause 6.3 of the Shareholders' Agreement Alutrint was to issue shares following the issuing and payment of the equity call under clause 6.1. But since Sural never made its contribution to the equity call and so there was no obligation to issue shares.

243. Fifthly, Sural submits that any obligation to comply with the equity call ceased "in the context of an explosion in the contractually-stipulated project budget incorporated in clause 5...The capital call was issued on 4 July 2007. [140] Just over one month later, Renda Butler's trip to China revealed that the budget would increase by at least US$ 81 million" (Sural Post-Hearing Brief, paragraph 2.5). See: Issue 2.1.2. Sural states that it has found no English authorities to support this submission but relies on two American cases: Related Westpac LLC v. JER Snowmass LLC, 2010 WL 2929708, at **2-4, 6, 7 (Del. Ch. July 23, 2010) and Maxx Private Investments, LLC v. Drew/Core Development, LLC, 2008 WL 4514246, at **12, 13, 16 (Mass. Super. July 31, 2008).

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[138] E1/54.
[139] E1/54.
[140] E1/54.

244. The Arbitral Tribunal rejects this submission for four reasons.

a. First, under clause 5.1 of the Shareholders' Agreement, the budget was not fixed but was "estimated to be approximately" US$ 540 million. Whilst the total equity calls on the shareholders under clause 5.3 was fixed at US$ 140 million, the Shareholders' Agreement did not preclude the possibility that the budget would increase.

b. Secondly, in order to impugn an equity call by reason of increases to the budget, the Arbitral Tribunal considers that Sural would have had to satisfy the requirements of Force Majeure within clause 23.1 of the Shareholders' Agreement. Force Majeure is a defined term of the Shareholders' Agreement and means "an event which the cause of causes are not reasonably within the control of the Party claiming Force Majeure and which cannot be overcome by the exercise of reasonable diligence...." Sural does not argue that it can invoke this clause and the facts are far removed from a situation where this doctrine can be invoked.

c. Thirdly, the Arbitral Tribunal cannot see any principled basis for arguing that there was an implied term of the Shareholders' Agreement that a budget increase overrode the equity call obligation.

d. Finally, the Arbitral Tribunal does not gain any assistance from the two American cases relied on by Sural. They are fact specific turning on the wording of the contracts considered and do not establish any point of principle applicable in the present case.

245. Sixthly, Sural contends that the board minutes of 26 April 2007 [141] do not evidence a valid equity call (Sural Post-Hearing Brief, paragraph 2.6). It claims that the evidence given by Mr Mayers and Ms Murray did not show approval of the equity call.

246. This submission is rejected by the Arbitral Tribunal for the following reasons:

a. The board minutes of 26 April 2007 [142] under "matters for approval" refer to the equity call. It is also referred to in the section "matters arising". It is clear that the equity call was on the agenda for the meeting for approval under the title of "Disbursement of $20MUSD CMEC Mobilisation Fee".

b. The approval was confirmed in the oral evidence relied on by GORTT. Mr Mayers stated this at [V3,294-5] as well as Ms Murray at [V4,395-8] at [V4. 399-401]. The Arbitral Tribunal therefore rejects Sural's submission that this evidence did not show approval of the equity call.

c. The approval was also confirmed by Mr Butler of Sural who attended the meeting [V2,175].

247. The Arbitral Tribunal rejects Sural's submission that it cured any breach of contract in failing to pay the equity call (Issue 2.1.2). The fact that Sural made efforts to restructure the project does not give rise to an excuse for nonperformance of its obligations. There is no evidence to suggest that the Shareholders' Agreement was varied to allow a substitute performance by Sural.

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[141] E1/47.

[142] E1/47.

Consequences of Sural's breach

248. The next issue to consider concerns the effect of the breach in failing to pay the equity call and whether it was repudiatory in nature. See: Issue 2.1.3.

249. The Arbitral Tribunal considers that a contractual right to terminate arose. The key events are these:

a. On 3 July 2007 [143] the Shareholders' Agreement was executed. In accordance with the Alutrint Board approval of 26 April 2007 [144] considered above, on 4 July 2007 [145] Alutrint wrote to Dr Riviere as President of the Sural Group requesting the cash injection. This letter complied with clause 6.1.1 of the Shareholders' Agreement and Sural was contractually obliged to comply with the equity call made 45 days following the letter.

b. Sural never complied with the equity call, in breach of clause 6.1.1 and in material breach of the Shareholders' Agreement within the meaning of clause 26.1(i) of the Shareholders' Agreement in consequence of which the MOF issued a notice of material breach of the Shareholders' Agreement requiring remedy pursuant to clause 26 on 10 December 2007 [146].

c. Sural recognised that it was in material breach of the Shareholders' Agreement: see its letter of 29 March 2008 [147].

d. In fact, GORTT never issued a termination notice under clause 26 of the Shareholders' Agreement.

250. The Arbitral Tribunal considers that the legal position can be summarised as follows.

251. First, it is settled law that a common law right to terminate can coexist with a contractual right to terminate. The law is set out in *Chitty on Contracts,* 31st ed (2012) at paragraph 22-049 as follows:

"The fact that one party is contractually entitled to terminate the agreement in the event of a breach by the other party does not preclude that party from treating the agreement as discharged by reason of the other's repudiation or breach of condition, unless the agreement itself expressly or impliedly provides that it can only be terminated by exercise of the contractual right."

252. Secondly, the presumption is that a contractual method of termination does not exclude the common law right to accept a repudiatory breach of contract as discharging the innocent party from further liability: Dalkia Utilities v Celtech [2006] 1 Lloyd's Rep 599, Modern Engineering (Bristol) Ltd v Gilbert Ash (Northern) [1974] AC 689.

253. Thirdly, as to whether a breach is repudiatory, the legal test has been described in different ways,

[143] E1/53.
[144] E1/47.
[145] E1/54.
[146] E1/83.
[147] E1/101.

but the essence is that a breach is repudiatory if it goes to the root of the contract, frustrates its commercial purpose or if a party intends to perform in a manner substantially inconsistent with its obligations; *Chitty on Contracts,* 31st ed (2012), paragraphs 24-001, 24-041.

254. Finally, in determining whether Sural repudiated the Shareholders' Agreement it is necessary to look not only at the fact of non-payment of the equity call but to the totality of Sural's conduct at the time. The evidence shows that the failure to pay the equity call reflected Sural's decision that it would not participate in the contractual project but only in a restructured project. The reason for this was that shortly after the Shareholders' Agreement was entered into, it became apparent the economic returns were not as Sural wanted them to be because of the substantial increase in capex to fund the project. See the Facts above at paragraphs 98-100 above. Sural's position is clearly put in Dr Riviere's Declaration at paragraph 12:

"Sural had already paid approximately US $6 million to Alutrint or for its benefit. I finally concluded that Sural could not pay an additional US $50 million for a project whose construction had not commenced but whose budget assumed it had. The project needed to be restructured."

Whether Sural remedied the breach/ Acceptance of the repudiation/ Affirmation

255. The next issue to consider is whether Sural remedied any breach of the Shareholders' Agreement. This is tied into the issues of whether or not GORTT accepted any repudiation by Sural and whether it affirmed the Shareholders' Agreement or that GORTT waived its right to terminate the Shareholders' Agreement. See: Issues 2.1.3 and 2.1.4.

256. Sural argues in its Post-Hearing Brief at paragraph 3.4 that GORTT affirmed the Shareholders' Agreement by electing not to terminate the agreement at Cabinet Meetings and by accepting Sural's offer for the sale of its shareholding in Alutrint pursuant to clause 14.1. It also contends that there was "... a waiver of the materiality of any purported breach committed by Sural" (Sural Post-Hearing Brief, paragraph 3.5).

257. As pointed out in the Facts Section above, following the increase in the budget of the contractual project and Sural's decision to disengage from the smelter part and focus on the downstream aspect, attempts were made to restructure the project. Sural points out that GORTT did not purport to terminate the Shareholders' Agreement whether under clause 26 or at common law on the basis that Sural was in repudiatory breach. In addition, Sural points to clear indications that GORTT considered that the Shareholders' Agreement was not terminated until the cancellation of the project after the change in government in 2010.

258. It is not necessary to repeat the facts stated above, but Sural was, at least initially involved in the possible restructuring. What follows is a summary of the key events.

259. As stated in the Facts section (paragraph 101 above), at the Cabinet Meeting of 21 February 2008 [148],

[148] E1/97, 311-312.

the Cabinet approved the severing of the upstream and downstream elements of the contractual Project involving a renegotiated contract with CMEC at substantially increased price (of US$ 516 million) for just the upstream element. Sural remained involved in the downstream aspect of the revised project but as stated in its letter of 28 December 2007 [149] sought to have an option to re-enter the smelter project at a later stage. This is a matter that came up again and which is considered above in the context of Sural's primary case concerning the exchange of correspondence in September/ October 2009.

260. The parties sought to progress matters by inviting tenders for a restructured integrated project involving a 250,000 mtpy smelter and lower cost downstream facilities producing lower quality products. The formal Request for Proposals for this restructured project was issued on 23 May 2008 [150], further to discussions with Sural and Votorantim that had taken place in April 2008. Sural and Votorantim submitted a responsive joint proposal on 7 June 2008. [151] As recorded in the Cabinet Minutes of 15 May 2008 [152], this tender was responsive to the disengagement of Sural from the contractual project.

261. Sural contends in its Post-Hearing Brief at paragraph 5.2: "As explained above, far from abandoning or withdrawing from the project, Sural took immediate action to save it once it was clear that the low construction costs contemplated by the CMEC contract and otherwise could not be maintained. Sural was present, involved and a factor in the restructuring efforts from beginning to end because it had irrefutable contract rights in the restructured project".

262. The Arbitral Tribunal disagrees with this analysis. The scope of the project in the Shareholders' Agreement was never expanded or amended. It is right that the parties (initially Sural/Votorantim) and then Votorantim alone sought to come up with a new project with GORTT that would have involved Sural in some capacity, but nothing reached the stage of any binding commitment to a revised project. It is therefore not right for Sural to contend that it had "...irrefutable contract rights in the restructured project". Sural had no such rights.

263. The Sural-Votorantim proposal was selected as the preferred proposal in preference to Century Aluminium subject to negotiating suitable terms as recorded in the Minutes of 28 August 2008 [153]. But the Arbitral Tribunal finds that discussions did not progress to contractual agreements because Votorantim reviewed the project in October 2008 by reason of economic reasons including increased capex costs, increased power costs and the global financial crisis. It decided to withdraw from the proposal involving Sural and instead put forward its own limited commitment proposal that ultimately led to the Votorantim agreement of 4 December 2009. [154]

264. As considered in the Facts section above at paragraphs 132-134, consideration was given to acquiring Sural's interest in Alutrint but this never happened. The new Government decided to cancel the project.

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[149] E1/89.

[150] E1/110.

[151] E1/116.

[152] E1/108/379 at item (5).

[153] E2/136.

[154] E2/169.

265. The Arbitral Tribunal does not consider that GORTT's cancellation of the project was a repudiatory breach of the Shareholders' Agreement as alleged by Sural. (Issues 2.1.5, 2.3, 2.3.1 and 2.3.2))). The reality was that the contractual project was dead by the end of 2007 by reason of Sural's refusal to pay the equity call and its decision to disengage from the contractual project and to seek a new agreement which never happened.

266. Both parties sought to restructure the project but failed. While a restructuring was a possibility, if it did not involve Sural, it is very likely that its interest in Alutrint would have been bought out. In the Arbitral Tribunal's view it would not be right to hold that GORTT was in repudiatory breach for cancelling a project that was already effectively dead by the end of 2007.

267. The better legal analysis is that GORTT by cancelling the Shareholders' Agreement GORTT accepted Sural's repudiatory breach of contract. (Issue 2.1.4). The Arbitral Tribunal makes this finding. It is the case that GORTT attempted to keep the Shareholders' Agreement alive by looking at ways of restructuring the project at the stage when nothing was being done to advance the contractual project. But once these attempts failed, the Arbitral Tribunal considers that GORTT was entitled to terminate the Shareholders Agreement at common law because of Sural's conduct.

268. The Arbitral Tribunal does not consider that by attempting to restructure the Shareholders' Agreement or not serving a notice of termination or considering the Votorantim proposal or any other conduct on the part of GORTT, GORTT affirmed the Shareholders' Agreement or precluded itself from relying on Sural's conduct to bring about the end of the Shareholders' Agreement. See: Issues 2.1.3 and 2.1.4.

269. The party not in breach does not have immediately to elect to treat the contract as discharged by breach. But if he delays and does nothing, he risks being treated as having affirmed the contract, and also risks losing his right to terminate if the party in breach cures the breach: see *Chitty on Contracts,* 31st ed (2012) paragraph 24-002. By not treating the contract as discharged at common law by reason of Sural's conduct, the risk was that Sural might continue performance of the Shareholders' Agreement. However this never happened. Sural never had any intention of performing the Shareholders Agreement once it had decided to disengage at the end of 2007 because of what it considered to be the unacceptable increases in cost.

270. The fact that GORTT did not spell out this analysis when it brought about the termination of the Shareholders' Agreement is not relevant The general principle stated in *Chitty on Contracts,* 31st ed (2012) paragraph 24-014:

"**No reason or bad reason given.** The general rule is well established that, if a party refuses to perform a contract, giving a wrong or inadequate reason or no reason at all, he may yet justify his refusal if there were at the time facts in existence which would have provided a good reason, even if he did not know of them at the time of his refusal.... The general rule is the subject of a number of exceptions.... Secondly, a party may be precluded by the operation of the doctrines of waiver or estoppel from relying on a ground which he did not specify at the time of his refusal to perform.... However there does not appear to be any separate principle which would preclude a party from setting up a different ground simply because it would be unfair or unjust to allow him to do so."

271. The Arbitral Tribunal dismisses Sural's alternative claim. For the avoidance of doubt the Arbitral Tribunal confirms its view that there was no conduct on the part of GORTT that amounted to a repudiation of the Shareholders' Agreement (Issue 2.3).

272. Since the alternative claim does not arise, it is not necessary to say anything about its damages claim. (See: Issues 3.2 and 3.3).

D: GORTT's Counterclaim

(i) Introduction

273. In its Answer, GORTT asserted a Counterclaim (at paragraph 11) in the sum of US$ 5 million. See: Issue 3.4. In its Answer, para 11 GORTT contends that Sural failed to pay its share of the mobilization fee requested by CMEC and "GORTT was forced to make good US$ 5 million of this outstanding sum as a result of Sural's continuing material breach of the [the Shareholders' Agreement] [...] GORTT is entitled to recovery of these sums as damages for breach of contract, alternatively as a debt".

GORTT's Submissions

274. In summary, GORTT relies on the following matters in support of its Counterclaim (see its Opening Submissions at Section G):

a. Sural's failure to pay the equity call of 4 July 2007[155] was a breach of the terms of the Shareholders' Agreement.

b. In an effort to mitigate its losses arising out of that breach and Sural's withdrawal from the contractual Project, GORTT alone met the cash requirements of Alutrint. In the period 2008 to 2009 GORTT made payments of USD 52.4 million to Alutrint following Sural's disengagement, 40% of which should have been paid by Sural.

c. Out of the funds provided by GORTT, Alutrint authorised the payment of USD 5 million to CMEC to partly make up for the shortfall of USD 8 million from Sural in respect of the breach of equity call: see Alutrint Board Minutes of 11 May 2010[156].

d. GORTT is therefore entitled to be compensated in respect of those funds that should have been paid by Sural in fulfilment of its obligations had it not disengaged from the contractual Project and which GORTT paid in mitigation: see *Chitty on Contracts* (31st Ed) at 26-099.

[155] E1/54.
[156] E3/178.

Sural's Submissions

275. In summary, Sural submitted as follows:

a. GORTT fails to particularise its claim, and is put to strict proof of their legal and factual sufficiency.

b. No valid equity call was given (for the reasons outlined above). Sural had no liability to pay the equity call.

c. GORTT has failed to adduce any evidence to support its US$ 5 million debt claim against Sural. At no time did GORTT intimate that this sum — which it alleges *Alutrint* paid to CMEC — would or did constitute a debt on Sural's part owed to GORTT. There is no provision in the Shareholders' Agreement which permits one shareholder to make a payment on behalf of another, nor has GORTT adduced any evidence to suggest a variation of the contract to that effect.

d. Mr Bernard's evidence in his Rebuttal Witness Statement at paragraph 12 that: "Alutrint paid part of the shortfall in respect of Sural's non payment of the equity call, in the amount of USD 5 million on 12 May 2010 from funds that had been contributed by GORTT" is not supported by any documentary evidence.

Decision

276. The Arbitral Tribunal dismisses GORTT's Counterclaim. Although it considers that Sural was under a liability to pay the equity call, this does not mean that GORTT was entitled to pay the sum that Sural should have paid to Alutrint and seek to recover that sum from Sural.

277. The Arbitral Tribunal agrees with Sural's submission that there is no provision in the Shareholders' Agreement which permitted GORTT to make this payment.

278. The Arbitral Tribunal also agrees with Sural's submission in its Post-Hearing Brief at para 14.3: "the payment to CMEC was made out of Alutrint's cash reserves. These were not funds specifically received from the Government to cover CMEC's mobilisation fee, and Alutrint did not later seek reimbursement of this sum from the Government. This was a voluntary payment, made by a third party, and cannot legally form the basis of a claim by the Government against Sural".

279. Since the Arbitral Tribunal has dismissed GORTT's Counterclaim, it does not need to rule on its claim for interest in respect of the Counterclaim (referred to its letter of 9 October 2014). All interest claims (Issue 3.6) are moot.

XI. COSTS

Introduction

280. It is necessary to decide and allocate the costs of these arbitral proceedings. See: Issue 3.5.

281. Article 37 of the ICC Rules, provides as follows (as far as is relevant):

"Article 37: Decision as to the Costs of the Arbitration

1) The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.

……..

3) At any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs, other than those to be fixed by the Court, and order payment.

4) The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

5) In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

…."

Sural's Submissions

282. In summary, Sural submitted on costs as follows:

a. The Arbitral Tribunal has jurisdiction to award prevailing party attorneys' fees and costs pursuant to US federal law of Florida's state arbitration code (Sural Post-Hearing Brief paragraphs 16.5 - 16.7). Clause 29.9 of the Shareholders' Agreement confers a power on the Arbitral Tribunal to award costs.

b. "Recognising the Tribunal's discretion to award costs to either party, Sural request that it be awarded its reasonable costs to be paid in full by the Respondent" (Sural Post-Hearing Brief, paragraph 16.8).

283. In a declaration dated 22 December 2014, Mr Wing itemised costs and expenses that were claimed on behalf of Sural. These amounted to US$3,339,569.96. He also claimed the ICC fee paid by Sural to date of US$408, 685.91.

GORTT's Submissions

284. In summary, GORTT submitted on costs as follows:

a. Sural's claims should be dismissed and GORTT's counterclaim awarded and that it should be awarded all of its substantial costs.

b. Sural had put GORTT "....to enormous costs in addressing manufactured and contrived claims, wide ranging and wild factual and expert allegations, and shifting allegations that continued to change even at the evidentiary hearing". It relied on allegations that Sural had made in submissions but which were not pursued by the time of the September hearing (Post-Hearing Brief at para 129 ff).

c. GORTT should be awarded all or the majority of its costs, not only if it entirely succeeds, but also more generally to take account of the matters which it identified in its Post-Hearing brief.

285. On 22 December 2014, GORTT served a document entitled "Schedule of Respondent's Legal and Other Costs". The total claim was £1,859, 656.54. The elements of the claim were as follows:

a. Legal Costs of AFA Law inclusive of Disbursements: £1,294,541.50.

b. Experts Costs (Forensic Accountants) £277,080.73.

c. Witness Expenses: £28, 297.46.

d. ICC Administrative Expenses and Arbitrators' Fees: £254,959.46.

e. Transcription Costs: £4,777.09.

286. In a letter dated 6 January 2015, Sural wrote to the Arbitral Tribunal and invited it to instruct GORTT to provide more details about its claims for legal and other costs. On 7 January 2015 GORTT stated that it opposed this application.

287. On 9 January 2015 the President wrote to the parties stating that the Arbitral Tribunal considered GORTT had not provided sufficient information about the costs and expenses it was claiming. In particular he directed "....the Respondent to produce to the Claimant and the Tribunal copies of the bills delivered to it by its legal advisers, and if those bills do not show the hourly rates charged by Mr Ali and his associates, and the amounts charged by Mr Diwan and Mr Newman (and if they are on a time basis, with the rates), that information should be given".

288. On 16 January 2015 GORTT provided further information about its legal fees and costs.

289. On 23 January 2015 Sural wrote to the Arbitral Tribunal on the level of fees claimed by GORTT. At paragraph 8 of the letter it pointed out that Mr Ali had charged 1,138 hours at an hourly rate of £525. Based on information from Mr Ali's firm website, it was pointed out that this hourly rate was substantially higher than the basic hourly rate of between £375 and £475. On the higher hourly

rate of £475, this represented an uplift of £56,900. The Arbitral Tribunal agrees with Sural's observation "While the Government was at liberty to compensate Mr Ali as it saw fit, it is not reasonable to attempt to charge an uplift from one's published rates to Sural"

Costs of the Arbitration

290. On 29 August 2014 the ICC Secretariat notified the parties that since one of the arbitrators, Mr Malek, was an Iranian Citizen "the currency used to calculate and make the payments contemplated by the ICC Rules of Arbitration should not be US Dollar, but the Euro". Accordingly all costs of the arbitration fixed by the ICC Court are in Euro (6).

291. At its session on 12 March 2015, the ICC Court fixed the arbitrators' fees and the ICC administrative expenses, together with the Arbitral Tribunal's expenses, amounting in total to 6640,000 (this amount having been entirely paid by the parties each as to 6320,000).

292. This sum has been drawn upon from advances made by the parties.

Decision

293. The parties have agreed that the ICC Rules 2012 apply and by Article 37(4) the Arbitral Tribunal has the power to award costs, which by Article 37(1) include "the reasonable legal and other costs incurred by the parties to the arbitration". Article 37(5) provides: "In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each has conducted the arbitration in an expeditious and cost-effective manner".

294. Clause 29.9 of the Shareholders' Agreement provides: "The costs and fees of the arbitration shall be determined in the sole discretion of the arbitration tribunal and may be assessed or apportioned to either or both the Parties in the award".

Legal and Other Costs

295. Ultimately the award of costs is a matter for the Arbitral Tribunal's discretion. Both parties sought their legal and other costs incurred in connection with this arbitration.

296. The Arbitral Tribunal considers as a matter of discretion that it should take into account the outcome of the case. This is the approach the parties took in their respective submissions on costs and is in line with the practice of international arbitration.

297. GORTT is the party that has prevailed in this arbitration and so the starting point of the Arbitral Tribunal's analysis is that GORTT is entitled to recover its costs in a reasonable amount which have been reasonably incurred. In assessing the reasonableness of GORTT's costs, it is necessary to take

into account the fact that Sural had success on certain issues. The Arbitral Tribunal has the following matters in mind.

298. The security for costs application made by GORTT which was dismissed. Costs were reserved on that application. In the course of that application the Arbitral Tribunal indicated that it considered that the seat/place of the arbitration was Florida and this decision has been confirmed in this Award. Sural therefore prevailed on this issue. In addition, GORTT's Counterclaim was dismissed and so Sural succeeded on this claim. The Arbitral Tribunal considers that Sural's success on these matters should be reflected in a reduction in the amount of costs to be awarded to GORTT.

299. Based on these premises, the Arbitral Tribunal must now decide how to allocate the arbitrators' fees and expenses between the parties and determine GORTT's reasonable recoverable legal and other costs.

Costs of the Arbitration

300. The parties each paid €320,000 as advances toward the arbitration costs. Considering the outcome of case, and the fact that GORTT had to defend the itself against the claims made in these proceedings, the Arbitral Tribunal determines that the Sural should pay the majority of the total of arbitrators' fees and expenses and the administrative costs. Considering that GORTT did not succeed on all issues and its Counterclaim was dismissed, it holds that 90% of this sum should be borne by Sural. Therefore Sural shall be ordered to reimburse GORTT the sum of €288,000 in arbitrators' fees and expenses.

Legal and other costs

301. As to the legal and other costs, the Arbitral Tribunal considers that GORTT should recover about 90% of its recoverable costs. The 10% reduction reflects the fact that GORTT did not succeed on all the issues in the case. In the Schedule of its Legal and Other Costs (omitting the ICC Administrative Costs of £254,959.76), the overall total was £1,604,696.78.

302. The Arbitral Tribunal considers that from this sum, it is appropriate to deduct £56,900 (the uplift in Mr Ali's costs). The base figure for costs is therefore £1,547,796.78. With a 10% deduction and taking into account that it is likely that there are going to be elements of the costs claim that are on the high side and therefore irrecoverable, the appropriate figure is assessed by the Arbitral Tribunal to be £1,370,000. The Arbitral Tribunal considers this is a reasonable sum and notes that it is less than the amount Sural claims in these proceedings. This sum must be paid by Sural to GORTT.

XII. OPERATIVE PART

303. For the foregoing reasons, the Arbitral Tribunal DECLARES AND AWARDS as follows by way of a Final Award:

(1) The place of the arbitration is Miami, Florida, USA.

(2) Sural complied with clause 29 of the Shareholders' Agreement before commencing this arbitration.

(3) Sural's claims are dismissed.

(4) GORTT's Counterclaim is dismissed.

(5) Sural do pay GORTT:

(a) £1,370,000 representing GORTT's legal and other costs.

(b) 90% of GORTT's costs of the arbitration, namely, €288,000.

(6) All other requests and claims are rejected.