

Niko Resources (Bangladesh) Ltd.

v.

**Bangladesh Petroleum Exploration & Production Company Limited (“Bapex”), and
Bangladesh Oil Gas and Mineral Corporation (“Petrobangla”)
(ICSID Case Nos. ARB/10/11 and ARB/10/18)****Procedural Order No 13**

(Concerning the Further Procedure Regarding the Corruption Issue and Related Issues)

Having examined the requests of the Respondents dated 25 March 2016 together with the supporting documentation (the Supporting Documentation); the Parties’ submissions of 29 April 2016, which included BAPEX’s amended requests for relief; and the Respondents’ letter of 10 May 2016 as well as their undated letter communicated to the Secretariat on 12 May 2016, the Tribunals consider as follows:

1. On the basis of their 25 March 2016 submissions, the Respondents seek declarations that the JVA and the GSPA (the Agreements) have been procured through corruption and that the Claimant is *“not entitled to use the international arbitration system to pursue claims”* related to the Agreements.
2. Accordingly, BAPEX seeks a declaration that the JVA is void or, in the alternative, is voidable, recognising that, in this alternative, BAPEX avoided the JVA. It seeks compensation for *“Niko’s corrupt procurement of the JVA, including all losses resulting from the two blowouts that occurred in the Chattak Field”*.
3. On the same basis, Petrobangla considers the GPSA as void and, if it were voidable, declares its rescission. As stated in Petrobangla’s 25 March 2016 letter, it requests *inter alia “that the Tribunal vacate its Decision on the Payment Claim of 11 September 2014 as well as its 14 September 2015 Decision on Implementation of that prior decision, and enter an award dismissing Niko’s claims”*.
4. In the present order the term *Avoidance* shall be used as including all consequences invoked by the Respondents by which the Agreements lose their binding effect, irrespective of the legal basis and the terms employed by the Respondents.
5. The Tribunals note that, with respect to their own claims, neither of the Respondents questions the Tribunals’ jurisdiction, which is based on the arbitration clauses in the Agreements; with respect to these claims, they seek relief from the Tribunals. In any event, the Tribunals have not seen in the Respondents’ argument and in the Supporting Documentation any expression of doubt with respect to the Tribunals’ ruling as to the validity of the arbitration clauses.

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6. It therefore falls upon the Tribunals to proceed to decide the claims before them, including the Respondents’ requests of 25 March 2016, as amended on 29 April 2016.
7. The Tribunals are conscious of the seriousness of corruption offenses. In their Decision on Jurisdiction, they have recognised that, as a principle of international public policy, the prohibition of bribery overrides the general principle of party autonomy otherwise widely upheld in international and comparative law. The Tribunals have noted that other ICSID tribunals have taken the initiative of examining alleged acts of corruption without being restricted by the specific allegations of the Respondents and their burden of proof with respect to them. Mindful of their responsibility for upholding international public policy, the Tribunals will therefore examine the corruption charges that have been raised by the Respondents.
8. Since the claims brought before the Tribunals are based either on one or the other of the Agreements or on their Avoidance on grounds of corruption, the Tribunals have decided to examine with priority the question whether either one or both Agreements were procured by corruption (the Corruption Issue).
9. The Tribunals have considered whether the allegation of corruption and the requests for Avoidance should have any impact on the pending proceedings at the present time, when no determination has been made with respect to the question whether the Agreements were indeed tainted by corruption. The Tribunals have examined in particular whether the possibility that the Agreements could be avoided would require that the proceedings on issues other than the Corruption Issue be suspended.
10. With respect to the Payment Claim, the Tribunals consider on the one hand the uncontested facts that gas was actually delivered to Petrobangla, that the GPSA regulated the price to be paid by Petrobangla for the gas received by it, that the Tribunals have fixed the price which Petrobangla had to pay for the gas delivered and that they have decided that there was no justification for Petrobangla to withhold payment to Niko.
11. On the other hand, the Tribunals note that, in its 29 April 2016 submission, Petrobangla recognises the legal obligation of the enriched party to return, within the limits of its enrichment, the benefits received under an agreement “discovered to be void” or which has been voided (citing Section 65 of the Bangladesh Contracts Act). The Tribunals also have taken note that Petrobangla recognises that, in such situations, the enrichment must be determined by reference to the objective value of the gas which it received under the GPSA. In Petrobangla’s understanding this value may not take into consideration the higher prices which Petrobangla at the time agreed to pay to other suppliers of gas but should be limited to the agreed price which it considered “the best measure of the objective value of the gas to Petrobangla”.

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12. In view of these statements by the Respondents, the Tribunals have concluded that, in case of Avoidance of the GPSA, Niko would be entitled to compensation on the basis of Petrobangla’s enrichment and that this enrichment would be at least in the amount of the price that would have been due under the GPSA as confirmed by the Tribunals in the First and Second Decisions on the Payment Claim.
13. Having weighed these considerations, the Tribunals, by their Third Decision on the Payment Claim, issued today, have ordered that this payment obligation must be implemented forthwith.
14. The Tribunals have also examined the consequences of a possible Avoidance of the JVA on the claim for a Compensation Declaration and the non-liability of Niko for the two blow-outs in 2005. The principal basis for this declaration of non-liability are the obligations of Niko as Operator under the JVA. Although they seek compensation from Niko, the Respondents have so far not explained the basis for Niko’s liability in case of Avoidance of the JVA. Since, in the hypothesis considered here, the JVA would be avoided, claims for compensation by Niko must be determined by reference to norms and standards of a different origin. The Parties’ arguments in the proceedings concerning the Compensation Declaration therefore would have to be reconsidered in case of Avoidance of the JVA.
15. Consequently, before they can examine the Claimant’s request for non-liability and the Respondents’ request for compensation for the losses resulting from the two blow-outs, the Tribunals must first decide the Corruption Issue and the question whether Niko’s liability must be determined by reference to the norms and standards prescribed by the JVA or by reference to those applicable in the absence of the JVA.

In view of these considerations, the Tribunals now make the following

ORDER

- (i) The Tribunals will now, as a matter of priority, examine whether the JVA and/or the GPSA were procured by corruption (the Corruption Issue).
- (ii) For the purpose of this examination the Tribunals invite the Parties to produce to the Tribunals information and documents in relation to the negotiation and conclusion of the JVA and the GSPA. Initially the Tribunals invite
 - (a) the Claimant to respond to the Respondents’ letter of 10 May 2016 and the request concerning the Duggan affidavit;

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- (b) the Claimant to provide a list of compliant documents in response to the Respondents’ Annex C attached to the 10 May 2016 letter, and an account of the negotiations for the two Agreements, identifying *inter alia* the persons involved in the negotiations, both on the side of Niko and on the side of Petrobangla, BAPEX and the Government of Bangladesh;
- (c) the Respondents to provide a list of documents, including company records and reports about the negotiations, as well as an account of the negotiations for the two Agreements, identifying *inter alia* the persons involved in the negotiations, both on the side of Niko and on the side of Petrobangla, BAPEX and the Government of Bangladesh, and describing the role in which they were involved.
- (d) When identifying the persons involved in the negotiations, the Parties are invited to provide their names and the addresses for potential future witness notification purposes.
- (iii) The Tribunals intend to hear as witnesses persons who were involved in the negotiation and conclusion of the JVA and the GPSA, including those involved in the Government approval of these Agreements. In light of the communications from the Parties and on the basis of their own examination of the available information, the Tribunals will in due course decide whom they wish to hear. The Parties will also be given the opportunity to identify the persons they wish to examine.
- (iv) The Parties are invited to produce the information indicated under (ii) and (iii) above by Tuesday 14 June 2016.
- (v) In their responses, the Parties may include suggestions regarding the Tribunals’ further reception and examination of evidence, including indications of other sources of possibly relevant information.
- (vi) Upon receipt of the Parties’ communications as per the above instructions, the Tribunals intend to hold a telephone conference with the Parties.
- (vii) The Tribunals confirm receipt of the Claimant’s Request or Provisional Measures, dated 19 May 2016. They invite comments from the Parties by Monday 30 May 2016 on the following matters:
 - (a) the Respondents are invited to comment on the Request. In these comments, they are requested to reveal

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- the contents of the statements made by their representative at the hearing on the Writ Petition on 12 May 2016;
 - the circumstances under which information about and documents from the present arbitration proceedings have been released to third persons;
 - any communications, direct or indirect (as for instance through their counsel), with the Petitioner Professor Shamsul Alam in the course of the last two months.
- (b) the Claimant is invited to inform the Tribunals whether, in light of the Tribunals’ Third Decision on the Payment Claim and the present Procedural Order, it wishes to amend its Request.
- (viii) The proceedings on all issues other than the Corruption Issue and the Claimant’s Request for Interim Measures of 19 May 2016 are suspended. The suspension applies to the Parties’ procedural requests concerning the Compensation Claim, in particular the Claimant’s request of 16 March 2016 concerning the Respondents’ submission of 5 March 2016 and the Respondents’ request of 21 March 2016 concerning a drilling manual of Niko and other documents. If these requests are still pertinent and pursued when the Tribunals’ examination of the Corruption Issue has been completed, the Parties may renew them.

[Signed]

On behalf of the two Arbitral Tribunals

Michael E. Schneider

President

26 May 2016