[Public version -- redacted to exclude confidential information]

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceedings between

NIKO RESOURCES (BANGLADESH) LTD.
(Claimant)

and

BANGLADESH PETROLEUM EXPLORATION & PRODUCTION COMPANY LIMITED ("BAPEX")
(Second Respondent)

BANGLADESH OIL GAS AND MINERAL CORPORATION ("PETROBANGLA")
(Third Respondent)

(jointly referred to as Respondents)

ICSID Case No. ARB/10/11
and
ICSID Case No. ARB/10/18

DECISION ON THE CORRUPTION CLAIM

Members of the Tribunals
Mr Michael E. Schneider, President
Professor Campbell McLachlan QC
Professor Jan Paulsson

Secretary of the Tribunals
Ms Frauke Nitschke

Date of Decision: 25 February 2019

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GLOSSARY AND ABBREVIATIONS

ACC	Bangladesh Anti-Corruption Commission
ACC Charge Sheet	Charge Sheet No 156, dated 5 May 2008, Court of the Special Judge No 9, Dhaka, in proceedings against Former Prime Minister Begum Khaleda Zia and others, Exhibit R-211
Agreed Statement of Facts	Entered by Niko Canada on 23 June 2011 before the Court of Queen's Bench of Alberta, Judicial District of Calgary (Exhibit R-215)
Agreements	the GPSA and the JVA
Alam Proceedings	Proceedings brought by a Writ Petition No 5673 of 2016 of Professor Samsul Alam on 9 May 2016, decided by the High Court Division of the Supreme Court in a Judgment announced orally on 24 August 2017 and in writing on 19 November 2017.
Awami League	Political Party in Bangladesh; see Sheikh Hasina Government
BAPEX	Bangladesh Petroleum Exploration & Production Company Limited, the Second Respondent
BDT	Bangladesh taka
BELA Proceedings	Proceedings brought by the Bangladesh Environmental Lawyers Association (*BELA*) and others in the Supreme Court of Bangladesh, High Court Division against the Government of Bangladesh, Petrobangla, BAPEX, Niko and others; decided by Judgment of May 2010 (Exhibit CLA-143)

Bhuiyan Agreement	Consultancy agreements with Nationwide Limited Company of Mr Salim Bhuiyan (see Section 10.3.4)
Bhuiyan Confession	"Sworn Statement" by Mr Bhuiyan under Section 164 of the Code of Criminal Procedure, dated 15 January 2008 (ExhibitR-324); retracted on 8 June 2008 (Exhibit C-120), see in particular Section 11.5.1)
BGSL	Bakhrabad Gas System Ltd.
B-MD	BAPEX's Memorial on Damages, 25 March 2016.
BNP	Bangladesh Nationalist Party, in power from October 2001 to January 2007
C-CMC	Claimant's Counter-Memorial on the Corruption Claim, 11 January 2017
C-PHB1	Claimant's First Post-Hearing Brief on the Corruption Claim (CONFIDENTIAL), 12 July 2017
C-PHB2	Claimant's Second Post-Hearing Brief on the Corruption Claim (CONFIDENTIAL), 2 August 2017
C-RC	Claimant's Rejoinder on the Corruption Claim (CONFIDENTIAL), 5 April 2017
Centre or ICSID	International Centre for Settlement of Investment Disputes
Charge Sheet	Court of the Special Judge No 9, Dhaka, Special Case, Charge Sheet No 156, dated 5 May 2008 (Exhibit R-211)
Chattak field	Also spelled Chhatak and Chatak; one of the gas fields covered by the JVA

Compensation Claims	Claims for compensation brought by the Government and Petrobangla in the Court of District Judge, Dhaka, against the Claimant and others for damages alleged to arise from the two blowouts of wells in the Chattak field (see also Money Suit)
Compensation Declaration	The declaration of non-liability requested by the Claimant concerning the Compensation Claims
Convention or ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Corruption Claim	Claim filed by BAPEX and Petrobangla on 25 March 2016 for varying relief as recorded in Section 3 below
Crore	Denotes the number 10 million, 1 crore is 100 lakh
DFAIT	Canadian Department of Foreign Affairs and International Trade
Duggan Affidavit	Sworn statement by RCMP Corporal Kevin Paul Duggan, Calgary, appearing as Informant relating to an office of "an official of the Canadian government", produced in a redacted version as Exhibit R-213.
Exhibit JD	Exhibits produced during the proceedings on Jurisdiction
FBI	U.S. Federal Bureau of Investigation
Feni Field	One of the gas fields covered by the JVA
FOU	Framework of Understanding for the Study for Development and Production of Hydrocarbon from the Non-producing Marginal Gas Fields of Chattak, Feni and Kamta executed on 23 August

	1999 between BAPEX and Niko (Annex A to the JVA)
GOB or Government	The Government of the People's Republic of Bangladesh, the First Respondent until the Decision on Jurisdiction
GPSA	Gas Purchase and Sale Agreement of 27 December 2006 between Petrobangla and the Joint Venture Partners BAPEX and Niko (Exhibit JD C-5)
Investigators	The two witnesses who playedd an active role in the Joint Investigation, Ms Debra LaPrevotte Griffith and Mr Ferdous Ahmed Khan
ICSID Arbitration Rules	Rules of Procedure for Arbitration Proceedings
IOC	International Oil Company
Joint Investigation	Investigation conducted jointly through Mutual Legal Assistance by the Bangladesh ACC, the Canadian RCMP and the U.S. FBI (see Section 8.1)(
Joint Venture Partners	BAPEX and Niko
JV	Joint Venture
JVA	Joint Venture Agreement between BAPEX and Niko, dated 16 October 2003 (Exhibit C-1)
Khaleda Zia	Prime Minister of the BNP Government from October 2001 to January 2007
Lakh	Denotes the number 100'000, 1 lakh is written 1,00,000

Law Minister/Ministry	Minister/Ministry of Law, Justice and Parliamentary Affairs
Mamoon Agreement	Agreements allegedly concluded by Niko in 2002 with Giasuddin al Mamoon (Section 10.3.4)
Mamoon Transript(s)	Transcript of the interrogation of Mr Mamoon by the RCMP on 1 and 2 November 2008 (Exhibits R-316 and R-352)
mcf	Thousand standard cubic feet
Marginal Fields Procedure	See Procedure
MEMR or Ministry	Ministry of Power, Energy and Mineral Resources, Bangladesh
MFE	Marginal Fields Evaluation produced in February 2000 pursuant to the FOU or Study Agreement (Exhibit R-41)
Money Suit	Proceedings brought by the Government and Petrobangla in the Court of the District Judge in Dhaka against Niko and others; see Compensation Claims
MOU	Memorandum of Understanding, proposed as attachment to the 1998 Niko Proposal (Exhibit C-123), not executed
Nationwide	Nationwide Company Limited, Dhaka, the company used by Mr Salim Bhuiyan in the contracts with Niko
Nationwide Consultancy Agreement	Consultancy Agreement between Niko and Nationwide, dated 25 June 2003 (Exhibit R-374), see Section 10.3.4

Nationwide Remuneration Agreement	Agreement fixing the remuneration for the Consultant between Niko and Nationwide, dated 5 July 2003 (Exhibit R-375), see Section 10.3.4
Niko	NIKO Resources (Bangladesh) Ltd, Barbados, the Claimant in both cases, sometimes the term includes also Niko Canada
Niko Canada	NIKO Resources Ltd, Canada, the parent company of the Claimant
Niko Project/Niko Proposal	Niko's 1998 proposal concerning marginal/abandoned gas fields, as presented to the GOB with the letter of 28 June 1998 (Exhibits C-123 and R-265), eventually adopted in a modified form as the JVA
Payment Claim	Claim to payment under the GPSA for gas delivered, decided by the Tribunals' Decision of 11 September 2014
Petrobangla	Bangladesh Oil Gas and Mineral Corporation, one of the Respondents
PDF	Price Deficit Fund (see JVA, Article 24.5 (ii))
Procedure or Marginal Fields Procedure	Procedure for Development of Marginal/Abandoned Gas Fields, adopted in June 2001 and attached as to the JVA as Annex C (Sections 4.1 and 9.4)
PSC	Production Sharing Contract
RCMP	Royal Canadian Mounted Police
R-MC	Respondents' Memorial on Corruption, 23 November 2016
R-MD	Respondent BAPEX Memorial on Damages, 25 March 2016

R-PHB1	Respondents' First Post-Hearing Brief (CONFIDENTIAL), 12 July 2017
R-PHB2	Respondents' Second Post-Hearing Brief (CONFIDENTIAL), 2 August 2017
R-RC	Respondents' Reply on Corruption, 22 February 2017
R-RPO13	Respondents' Responses to Procedural Order No 13, 14 June 2016
RfA I	Request for Arbitration, dated 1 April 2010 and received by the Centre on 12 April 2010 (ARB/10/11)
RfA II	Request for Arbitration, dated 16 June 2010 and received by the Centre on 23 June 2010 (ARB/10/18)
Sheikh Hasina Government	Government of the Awami League under Sheikh Hasina as Prime Minister, 23 June 1996 to 15 July 2001 and since 6 January 2009
Spider Web	Graphic representation of payments associated with Niko and identified during the Joint Investigation, Exhibits R-320 and CH-19 (reproduced below in Section 1)
State Minister	unless otherwise specified: Mr AKM Mosharraf Hossein, State Minister of Energy in the Government of Begum Khaleda Zia
Stratum	Stratum Development Ltd.
Study Agreement	See FOU
Swiss Challenge	Method of competition, as understood in the present case, by which conditions are negotiated with one bidder, submitted to international tender

	with a possibility for the original bidder to match any competing bids (see Section 9.6.1)
SUV	Sport Utility Vehicle
Targeted Period	The years 2001 to the end of the first quarter of 2004 (see Procedural Order No 15 and below Section 2.4.3)
Tk	Bangladeshi taka (also BDT)
Tr	Transcript of the April 2017 Hearing, indicating day and page
Tribunals	Collectively, the two Arbitral Tribunals constituted in ICSID Case No. ARB/10/11 and ICSID Case No. ARB/10/18
UBP	Union Bancaire Privée

1 INTRODUCTION

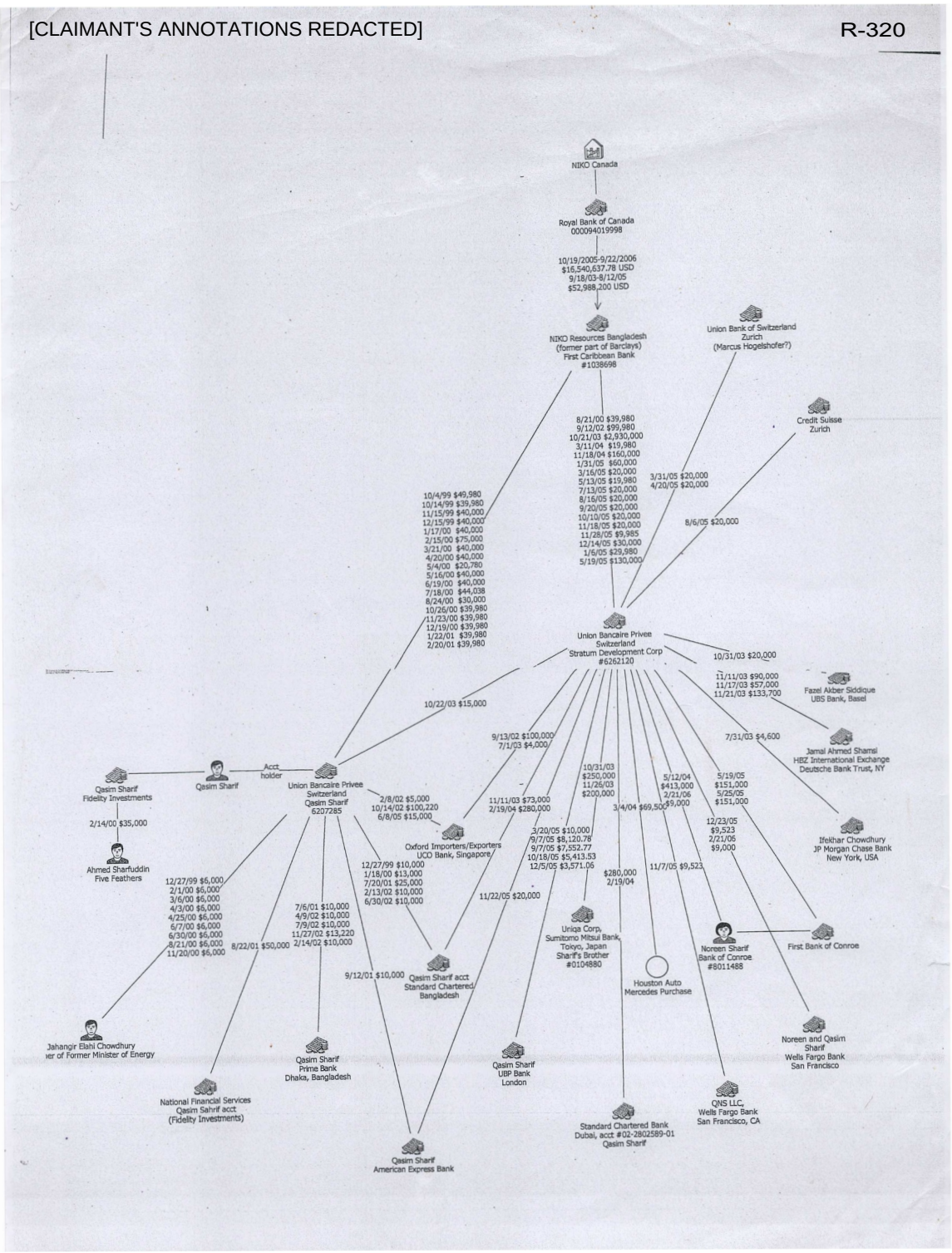
1. This is the fifth Decision by the Tribunals in these Arbitrations, not counting the numerous procedural orders by which the Tribunals had to decide complex procedural issues. The dense record thus generated is a good indication of the complexity of this dispute and explains much of the long duration of these Arbitrations. This complexity arises from a number of factors, among which the fact that they concern two different contracts concluded by the Claimant with different parties in Bangladesh – a Joint Venture Agreement of 16 October 2003 between the Bangladesh Petroleum Exploration & Production Company and Niko Resources (Bangladesh) Ltd (the "**JVA**") and a Gas Purchase and Sale Agreement of 27 December 2006 between Petrobangla and the two Joint Venture Partners (the "**GPSA**"), jointly referred to as the **Agreements** – and different claims, one for the payment of natural gas delivered in Bangladesh (the "**Payment Claim**") and the other for a declaration of non-liability for damage caused by two blowouts of wells drilled in Bangladesh (the "**Compensation Declaration**"). These claims were brought as two distinct arbitration proceedings. Because of some common features, identical tribunals were formed in the two arbitrations and the proceedings were conducted together as agreed during the First Session. While related, the disputes arising out of each of these contracts nevertheless raise very different issues.

2. The part of the dispute which is decided in the present Decision concerns a claim that the Respondents had raised previously in the proceedings on jurisdiction and which they raise now again, although in a far broader scope. They do so notwithstanding that the Tribunals had considered and rejected that claim in its earlier version, that the Respondents had affirmed the agreements which they now wish to have declared void *ab initio,* and that the Tribunals had issued a clear finding that the Respondents were liable for the payment of gas delivered and at a time when the proceedings concerning the other Agreement were well advanced. On 25 March 2016, the Respondents raised a claim that both contracts had been obtained by corruption and that, consequently, no claims of the Claimant could be entertained in international arbitration and that all claims of the Claimant should be dismissed (the "**Corruption Claim**").

3. The Corruption Claim now being presented by the Respondents is characterised by several features which distinguish this case from others which have also involved allegations of corruption.

4. In particular, the corruption on which the Respondents base their case does not consist of a single act by which an investor bribes a civil servant in order to gain some unjustified advantage. The much-quoted *World Duty Free* case is a good example for such a straight forward case of corruption: the investor acknowledged that he had delivered a briefcase full of cash to the President of the country and thus obtained the desired concession. In the present case, the Respondents argue that, during the period when the two Agreements were negotiated and concluded, the country was under the rule of a government which had established an endemic system of corruption which required bribes from anyone wishing to do business in the country. These payments, according to the Respondents, were not made directly by Niko to the targeted civil servants, but through a multitude of payments made to different players in different countries and passing through different accounts of different individuals but destined for a number of other final beneficiaries. This explains why the inquiry which the Tribunals had to conduct in addressing the Respondents' case has been exceptionally complex and time consuming.

5. As the Respondents explained during the proceedings on their Corruption Claim, a vast investigation had been carried out in cooperation between the Bangladesh Anti-Corruption Commission (the "**ACC**"), the Royal Canadian Mounted Police (the "**RCMP**") and the U.S. Federal Bureau of Investigations (the "**FBI**"). The investigation also concerned other companies and generated the vast amount of material just mentioned on which the Respondents rely and which they disclosed only gradually. Many of the payments identified in the course of the investigation were represented graphically on the synthetic table below which found itself in the center of argument and demonstrations at the Hearing and often referred to as "Spider Web".



6. This table represents only those payments of which the Joint Investigation found traces. It does not show that any public official received direct payments from Niko. In order to support the corruption allegation, the Respondents provide additional evidence, seeking to link

some of the payments to public officials at various levels. The conclusions which the Respondents invite the Tribunals to draw from this evidence is based to a very large extent on inferences which, according to the Respondents, justify the conclusion that corruption occurred.

7. The Tribunals have carefully examined this evidence and the conclusions which the Respondents urge them to draw. In this process the Tribunals have noted that the explanations of the Respondents often were at odds with the evidence in the record and ultimately failed to support their conclusions. In many respects these explanations required substantial correction which produce a picture significantly different from that painted by the Respondents. These will be explored in the explanations set out in the body of this Decision. At this stage, the Tribunals give the following two examples:

8. First, the Respondents seek to create the impression that Niko had been disqualified from the oil and gas market in Bangladesh and that it was only through corruption that its proposal to develop marginal and abandoned gas fields could be presented to the Government and the Respondents. They asserted that "*the only way Niko could enter into the oil and gas market in Bangladesh*" was "*the promise and payment of bribes*". The Respondents' witness, Ms LaPrevotte, who, as an agent of the FBI had a leading role in the Joint Investigation in Bangladesh, had also investigated the case of corruption admitted by Siemens and other companies; she asserted: "*In many ways the Niko tender or bid was very similar to Siemens. In both cases at the very onset both companies were deemed unqualified and yet they were both still participating in the tender process*". In the present proceedings it became apparent that the case of Niko was quite different from that of Siemens and that Niko was in fact not "*unqualified*" for the project it had proposed. Indeed, Mr Chowdhury, who in 2002 was Acting Secretary at the Ministry of Power, Energy and Mineral Resources, testified that the Respondents assured him that Niko was sufficiently qualified for "*the exploration of marginal gas fields*".

9. The Respondents failed to acknowledge that at the time Niko presented its offer, they welcomed the proposal because it allowed Bangladesh to recover gas from fields which "*were not rehabilitated due to financial constraints and technical limitations faced by Petrobangla and due to the marginal nature of these fields and uneconomical investment*". Indeed, Niko did recover gas from the Feni field which it sold to Petrobangla at a

price substantially below the price which Petrobangla paid to other suppliers.[1]

10. Secondly, with respect to the central issues concerning the definition of the contract area in the Chattak gas field and the use of the Swiss Challenge as a form of competitive bidding, the divergence in the positions of the Respondents and Niko was resolved by a reference to the Law Ministry. In the Arbitrations the Respondents present this reference as part of Niko's corruption scheme, but the evidence shows that it was BAPEX that proposed it. The opinion was issued by the Law Ministry and signed by five of its senior officials; but the Respondents attribute it to the Minister personally and, without any evidence, reproach him for having failed to "*recuse*" himself.

11. In their search for the true facts, the Tribunals have sought to establish an accurate narrative supported by the evidence in the record. This has led them on many occasions to reject the version presented by the Respondents. They have done so as part of their effort to judge fairly and without any preconceptions. The Tribunals are mindful of the damage caused by the two blowouts in the Chattak field and regret the lengthy delay caused by the interruption of their examination of that serious issue in order to deal with the Corruption Claim.

12. Finally, it should be pointed out that in raising the Corruption Claim in 2016, the Respondents have sought to preserve benefits obtained under contracts they had affirmed long after both the departure of the Government which they describe as kleptocratic and the availability of the evidence on which they now rely. In particular they seek to avoid payment for the gas delivered to Petrobangla at an advantageous price, substantially below that which Petrobangla agreed to purchase other gas. The Tribunals question whether it can be the purpose of the fight against corruption to procure a profit to those who present themselves as victims of corruption.

13. After the presentation of the procedural background and the relief requested, the Tribunals set out below in some detail the factual background as revealed in the course of their extensive analysis of the evidence presented. They then examine the Respondents' request for

[1] 1998 Petrobangla Comments, Exhibit R-267; see also below, Section 4.2.

reconsideration of the Tribunals' Decision on Jurisdiction as well as the legal issues presented by the Respondents' Corruption Claim. Against this background the Tribunals consider the evidence for corruption. As the corruption allegation is directed not merely at the conclusion of each of the two Agreements but against a number of prior actions, the Tribunals have fully analysed that prior conduct in order to determine whether they involved corruption and were caused by it. In particular they have examined the specifically alleged Suspect Payments. This analysis has led to their conclusion on the Corruption Claim.

2 THE ARBITRATIONS AND RELATED PROCEEDINGS

14. A detailed account of the procedural history in the two Arbitrations up to the Tribunals' Third Decision on the Payment Claim is set forth in the Tribunals' Decisions of 11 September 2014, 14 September 2015, and 16 May 2016. It need not be repeated here. The Tribunals at this stage merely recapitulate those parts of the past proceedings which are relevant for their present decision on the Corruption Claim brought by the Respondents in their submissions of 25 March 2016, before summarising the procedure since then.

15. A number of the procedural decisions which the Tribunals were required to take during the present part of the proceedings had an impact on or have some other relevance for the present Decision on the merits of the Corruption Claim. They will therefore be presented in some detail so as to assist in the understanding of the procedural context in which this claim is decided.

16. The **Parties** remain unchanged from the Third Decision on the Payment Claim:

17. The **Respondents**, who have initiated this Corruption Claim, are Bangladesh Petroleum & Production Company, Limited ("**BAPEX**") and Bangladesh Oil Gas and Mineral Corporation ("**Petrobangla**").[2]

18. The Respondents are represented in these Arbitrations by Foley Hoag in Washington, D.C. and by Messrs Md. Ruhul Amin, NDC (Chairman, Petrobangla), Syed Ashfaquzzaman (Secretary, Petrobangla), and Mir Md. Abdul Hannan (Managing Director, Bapex), Imtiaz U. Ahmad Asif, and Moin Ghani in Dhaka.

19. The Claimant, the responding party in the Corruption Claim, is Niko Resources (Bangladesh) Ltd. ("**Niko**"), a company incorporated under the laws of Barbados. Certain allegations raised during the proceedings on

[2] Prior to the Decision on Jurisdiction, the People's Republic of Bangladesh was also a Respondent in these proceedings. The government of the People's Republic of Bangladesh is hereafter referenced as "GOB" or "the Government".

the Corruption Claim also concern the parent company of the Claimant, Niko Resources Ltd. ("**Niko Canada**"), which is incorporated in Canada, although it is not itself a party to these proceedings.[3] Niko Canada and its subsidiaries are referred to collectively in this Decision as the "Niko Group" or also as "Niko".

20. The Claimant is represented in these Arbitrations by Dentons Europe in Paris, Dentons Canada in Calgary, and Messrs Rokanuddin Mahmud and Mustafizur Rahman Khan in Dhaka.

21. **The Tribunals** in these two cases, constituted on 20 December 2010, are composed of Professor Jan Paulsson, Professor Campbell McLachlan QC and Mr Michael E. Schneider, President of the Tribunals. [4]

2.1 Corruption issues during the jurisdiction phase

22. During the proceedings on jurisdiction the Respondents had raised among several other objections against the Tribunals' jurisdictions an objection based on corruption. In the Decision on Jurisdiction the Tribunals addressed this objection, as it was then presented, in considerable detail with respect to their jurisdiction. The decision did not prejudice the question whether the JVA and the GSPA themselves were procured by corruption. The facts considered in the Decision on Jurisdiction, nevertheless, remain relevant for the Tribunals' decision now.

23. The Tribunals refer to the detailed account in the Decision on Jurisdiction and summarise below the essential aspects that remain relevant for the present Decision on the Corruption Claim.

24. The Decision on Jurisdiction considered in particular the following matters:

(i) the conviction of Niko Canada in Canada on account of bribes made to the Minister of Energy in 2005, consisting of a vehicle valued at some CAD 190,000 and approximately CAD 50,000 CAD in non-business related travel expenses;

[3] The Claimant and its nationality were discussed in Section 5 of the Decision on Jurisdiction.
[4] The constitution of the Tribunals is detailed in Section 4.1 of the Decision on Jurisdiction.

(ii) some limited information about the investigation initiated by the ACC in 2007;

(iii) the proceedings brought by the Bangladesh Environmental Lawyers Association ("**BELA**") and others in the Supreme Court of Bangladesh, High Court Division, in 2005 ("***BELA* Proceedings**");

(iv) anti-corruption proceedings alleged to have been initiated by the ACC against Niko's consultant, Mr Sharif; and

(v) the actions of Mr Harb, a Canadian Senator also retained by Niko as a consultant.

25. Having considered the evidence presented during the jurisdiction phase, the Tribunals "*concluded that the Claimant has committed the acts of corruption which were sanctioned [by Canadian authorities] in the Canadian conviction*" concerning the vehicle and the travel expenses but that there was "*no reason to conclude that, […] other acts of corruption were committed by the Claimant or its group.*"[5]

26. Concerning the effect of the acts of corruption committed by the Claimant (i.e. the acts sanctioned by the Canadian conviction, which are discussed in further detail below), the Tribunals noted

> *that the Canadian authorities declared that they were "unable to prove that any influence was obtained as a result of providing the benefits to the Minister". No allegation to the contrary was made in this arbitration. Bearing in mind the quoted finding of the Supreme Court of Bangladesh concerning the absence of "fraudulent means" in the making of the JVA, the Tribunal has no reason to believe that corruption had any influence in the conclusion or the content of the JVA or the GSPA.*[6]

27. The Tribunals further stated that:

> *there is no link of causation between the established acts of corruption and the conclusion of the agreements, and it is not alleged that there is such a link. Instead, the Respondents argue that an attempt to*

[5] Decision on Jurisdiction, paragraph 428.
[6] Decision on Jurisdiction, paragraph 429.

obtain a contract by bribery is sufficient to deny recourse to ICSID arbitration to the party having made such an attempt.

More importantly, the Respondents have not sought to avoid the agreements nor did they state that the Agreements were void ab initio.[7]

28. Following an analysis of the arguments presented concerning the legal impact of corruption on the Tribunals' jurisdiction – including good faith, the clean hands doctrine and international public policy – paragraph 485 of the Decision on Jurisdiction states that:

> *[i]n these circumstances, the Tribunal may not rely on the events subject of the Canadian judgment as grounds for refusing to examine the merits of a dispute which the parties to the agreements have accepted to submit to ICSID arbitration. The Respondents' objection based on acts of corruption must be dismissed.*

29. The Decision on Jurisdiction held *inter alia* that the Tribunals have jurisdiction (i) under the JVA between the Claimant and BAPEX to decide the Claimant's request for a Compensation Declaration and (ii) the Claimant's claim against Petrobangla for payment under the GPSA.

2.2 The Proceedings related to the Payment Claim

30. Following the Decision on Jurisdiction, the Tribunals organised the proceedings on the merits of the two Arbitrations, commencing with the Claimant's Payment Claim. The history of the proceedings on that claim is recorded in the Tribunals' decisions; for present purposes, it will suffice to recall some salient features of relevance to the present Decision on the Corruption Claim.

2.2.1 The Tribunals' First and Second Decision on the Payment Claim

31. On 11 September 2014 the Tribunals issued their **First Decision on the Payment Claim** holding that

> *1. Petrobangla owes Niko USD 25'312'747 plus BDT 139'988'337 as per Niko's invoices for gas delivered from November 2004 to April 2010;*

[7] Decision on Jurisdiction, paragraphs 456-457.

2. Petrobangla must pay simple interest on Niko's invoices at the rate of six month LIBOR +2% for the US Dollar amounts and at 5% for the amounts in BDT; interest is due on the amount of each invoice as from 45 days after delivery of the invoice but not before 14 May 2007 and until it is placed at Niko's unrestricted disposition;

3. The claim for compound interest on the amount awarded under above item (1) and (2) is reserved;

4. The entitlement of BAPEX to payments under the GPSA is not affected by the present decision;

5. The Parties are invited to seek an amicable settlement with respect to the modalities for implementing the [11 September 2014] decision and to report by no later than 30 September 2014;

6. Failing amicable settlement, any Party may seize the Tribunals for recommendations on provisional measures or a final decision concerning the outstanding amounts;

7. The decision on costs of the proceedings concerning the Payment Claim is reserved.

32. Following this decision, the Parties reported that, further to the Tribunals' invitation, they conferred, but did not reach agreement. Upon the Claimant's request, the Tribunals then issued on 14 September 2015 the Decision on the Implementation of the Payment Claim (the "**Second Decision on the Payment Claim**").

33. In the Second Decision on the Payment Claim the Tribunals held that:

i) Petrobangla shall pay into an escrow account USD 25'312'747 and BDT 139'988'337, plus interest (a) in the amounts of USD 5'932'833 and BDT 49'849'961 and (b) as from 12 September 2014 at the rate of six month LIBOR +2% for the U.S. Dollar amounts and at 5% for the amounts in BDT, compounded annually;

ii) The escrow account shall be opened by the Claimant at a reputable, internationally operating bank according to standard conditions in international banking practice and providing that funds in the escrow account shall be released only (a) as instructed by the present Arbitral Tribunals or (b) by joint instructions of Niko and Petrobangla;

iii) Petrobangla shall ensure that the USD amounts paid into the Escrow Account are freely available to Niko without any restrictions

if and when payment to Niko is ordered by the present Arbitral Tribunals;

iv) Until the amounts due as per above (i) have been fully paid to Niko at its free disposition or otherwise released from the Escrow Account, Petrobangla shall continue to pay interest on these amounts at the rate of six month LIBOR + 2% for the U.S. Dollar amounts and at 5% for the amounts in BDT, compounded annually. At the end of each year, the Bank shall inform Petrobangla about any interest earned on the Escrow Account during the course of the year. Petrobangla may deduct the interest so earned from its interest payments for the corresponding period. If the interest earned on the amounts in the Escrow Account during a year exceeds the interest due by Petrobangla, the exceeding amount shall remain in the account without any credit to Petrobangla;

v) If any difficulties occur which prevent the operation of the Escrow Account as intended by the present decision, any Party may address itself the Tribunals for a ruling as required.

2.2.2 The Tribunals' Third Decision on the Payment Claim and the Respondents' requests for reconsideration

34. Following unsuccessful efforts of the Parties to establish an escrow account and an application by the Claimant for an order instructing the Respondents to execute the documents for the escrow account,[8] the **Claimant requested** on 15 December 2015, **an award on the Payment Claim** ordering Petrobangla unconditionally to make payment to Niko of the amounts the Tribunals found to be due and owed.

35. The Respondents commented on 6 January 2016, stating that, in their view, "[*t]here is no difficulty preventing operation of the Escrow Account*", adding that *"[t]he Respondents have not refused to sign the Escrow Agreement. They simply seek the opportunity to do so in conditions that do not create a risk of their officials being held in contempt of court.*" They confirmed Petrobangla's undertaking that it "*has committed to making payment into the escrow account as soon as the injunction is modified or lifted*"; they indicated that the petition for lifting the injunction could be "*resolved within the next 3 (three) months*".

[8] For further details see Third Decision on the Payment Claim, Section 3.2.

36. Before the three months were over, the Respondents filed their Corruption Claim on 25 March 2016 (which forms the subject matter of the present Decision, the procedure of which shall be described in further detail below). On the same occasion, the Respondents also **requested that the Tribunals' earlier decisions be vacated**. They requested:

> *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.*[9]

37. The Respondents submitted on 12 May 2016 information with respect to an injunction by the High Court Division of the Supreme Court, ordering the Respondents and the Government "*not to give any kind of benefit*" to the Claimant or to Niko Canada and "*not to make any kind of payment*" to them.[10]

38. Having heard the Parties on their respective applications, the Tribunals issued on 16 May 2016 their **Third Decision on the Payment Claim**. In that decision the Tribunals explained that they had considered corruption allegations by the Respondents previously. If the new allegations were better founded than the earlier ones and the Tribunals would declare the Agreements void, the Claimant would not have a payment claim but, as per the argument as then presented by the Respondents, "*a claim for the limited relief of restitution under sections 64 and 65 of the Bangladesh Contract Act*". The Tribunals concluded that "*there was no justification for deferring their Third Decision on the Payment Claim or to suspend its effect until the Corruption Claim had been decided. Petrobangla must pay the outstanding amounts forthwith*".[11]

39. In the Third Decision on Payment Claim the Tribunals ordered:

> *(i) Petrobangla shall pay to Niko forthwith and free of any restrictions USD 25'312'747 and BDT 139'988'337, plus interest (a) in the amounts of USD 5'932'833 and BDT 49'849'961 and (b) as from 12 September 2014 at the rate of six month LIBOR +2% for the U.S. Dollar amounts and at 5% for the amounts in BDT, compounded annually;*

[9] Letter Petrobangla of 25 March 2016.
[10] For further details on this procedure see below Section 2.5.
[11] Third Decision on the Payment Claim, paragraphs 100 and 105.

(ii) This payment must be made immediately and is not subject to any contrary orders from the Courts in Bangladesh;

(iii) In view of the difficulties which have occurred in the past with respect to the payment of the amount owed to the Claimant, the Tribunals remain seized of the matter until final settlement of this payment.

40. In accordance with the directions given in the Third Decision on Payment Claim, the Claimant by letter of 2 June 2016 identified the amount owed to the Claimant by the Respondents pursuant to the Third Decision on the Payment Claim.

41. On 27 June 2016, the Tribunals invited the Respondents to provide information regarding the steps the Respondents had taken to make the payment as ordered in the Third Decision on the Payment Claim. The Respondents did not provide the requested information.

42. Instead, the **Respondents requested**, by their letter of 30 June 2016, **that the Tribunals reconsider the Third Decision on the Payment Claim** and suspend the Respondents' obligation to pay until the resolution of the Respondents' Corruption Claim. They argued *inter alia* that they had not fully briefed the issue of restitution for unjust enrichment and, in any event, they denied that, in case the Tribunals accepted the Corruption Claim, they would have to make any payment for the gas delivered by the Claimant.

43. In Procedural Order No. 14 of 29 July 2016, which organised the proceedings on the Corruption Claim, the Tribunals also invited the Claimant to comment on the Respondents' Request for Reconsideration.

44. The Claimant commented 8 August 2016 on the Respondents' Request for Reconsideration, asking that the Tribunals dismiss it. During the Procedural Consultations held between the Tribunals and the Parties by telephone on 10 August 2016, the Tribunals invited the Respondents to comment on the Claimant's 8 August 2016 letter. The Respondents did so on 19 August 2016, reaffirming their request that the Tribunals reconsider their Third Decision on the Payment Claim and suspend Petrobangla's payment obligation until the award. On the same day, the Claimant opposed the Respondents' request. On 17 October 2016, the

Claimant asked that the Tribunals dismiss the Respondents' request entirely.

45. The Tribunals decided the Request for Reconsideration by **Procedural Order No 16** of 11 November 2016. Reserving the question whether applications for reconsideration of decisions on the substance of a dispute are admissible in ICSID proceedings, the Tribunals found that, in any event, the Respondents' request would have to be denied *inter alia* because the mere possibility of annulment of the GPSA was not a sufficient ground to reconsider the Tribunals' decision ordering immediate payment. The Tribunals also invited the Respondents to report within one week on their compliance with the Third Decision on the Payment Claim.

46. Subsequently, on 15 November 2016, the Claimant submitted a letter providing the Respondents with the total amounts as of that date, and the relevant bank account information. On 22 November 2016, the Respondents informed the Tribunals that they had no further information to report with regard to their compliance with the Third Decision on the Payment Claim.

47. The Tribunals have not been informed that Petrobangla has made any payment in compliance with the Decisions on the Payment Claim.

2.3 The Proceedings on the Compensation Declaration

48. Further to Procedural Order No 3, each of the Parties produced two submissions on the merits of the Claimant's request in connection with the Compensation Declaration. Having noted that BAPEX requested the dismissal of the Claimant's request but did not produce any substantive argument and evidence to rebut the Claimant's position, the Tribunals decided by Procedural Order No 7 of 17 October 2014 to appoint experts in the technical fields relevant for their decision. The experts delivered their reports and the Parties were invited to comment thereon.

49. The Respondents then changed counsel and on 9 July 2015 applied for a modification of the procedure. By Procedural Order No 11, on 19 August 2015, the procedure was adapted in partial response to this application.

50. A Hearing on Liability was held from 2 to 7 November 2015 in London, with the appearance of witnesses of fact and experts addressing questions of liability for the two blowouts.

51. The Parties produced Post-Hearing Submissions on liability on 22 January 2016. The procedure on damages had been fixed at the end of the Hearing on Liability, with a Hearing on Damages scheduled for 29 August to 2 September 2016 in Paris. The Tribunals held a further hearing with the Parties on 21 and 22 February 2016 regarding the Compensation Declaration.

52. The Tribunal was engaged in the preparation of the decision on liability when, on 25 March 2016, the Respondents raised the Corruption Claim.

53. The Parties were invited to comment on the implications of the Corruption Claim on the pending proceedings on the Compensation Declaration. Having considered these comments, the Tribunals issued Procedural Order No 13 in which they announced their decision to examine, as a matter of priority, whether the JVA and/or the GPSA were procured by corruption and to suspend, with one exception, the proceedings on all other issues.

54. Specifically, with respect to the Compensation Declaration, the Tribunals considered that the principal bases for the declaration of non-liability sought by the Claimant

> *… 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.*
>
> *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.*

55. The Corruption Claim being resolved by the present decision, the Tribunals will henceforth resume the work on the Compensation Declaration to complete the Decision on Liability for the blowouts.

56. The procedure for these further steps in the proceedings on the Compensation Declaration will be the subject of a further procedural order after consultation with the Parties.

2.4 The Corruption Claim and the proceedings relating to it

57. The Corruption Claim was filed by BAPEX and Petrobangla separately in parallel submissions on 25 March 2016. BAPEX made it a part of its Memorial on Damages, with a voluminous bundle of evidence received by the Tribunals on 5 April 2016. Petrobangla raised its Corruption Claim in a separate letter, also of 25 March 2016, relying on BAPEX's presentation of facts and argument.

58. With respect to the Corruption Issue, BAPEX sought declarations that the JVA was procured through corruption, that therefore the Claimant was not entitled to pursue its claims through the international arbitration system and, relying on the Bangladesh Contract Act, that the JVA was voidable and that BAPEX avoided the agreement.[12] In its separate and parallel letter of 25 March 2016, Petrobangla requested that, in view of the facts and legal consequences presented by BAPEX, the Tribunals find that "*the GPSA was procured by corruption and is thus voidable*". It informed the Tribunals of "*its decision to rescind the GPSA*".

59. The Respondents modified their request for relief on 29 April 2016. Relying, in addition to international law, on Article 102 of the Constitution of Bangladesh, they presented their relief as follows:

> *The Respondents first ask that the Tribunal[s] recognise that the JVA and the GPSA are void under Bangladeshi law and without legal effect. In the alternative, Respondents maintain their request to void the agreements.*

[12] The complete text of the request for relief is reproduced below in Section 3.

60. From the moment of that submission onward, the Respondents pursued the two claims jointly. The Tribunals refer to them as the "**Corruption Claim**" and the corresponding dispute as the "**Corruption Issue**".

2.4.1 Initial consultation of the Parties and decision on treating the Corruption Claim as a matter of priority (Procedural Order No 13)

61. On 18 April 2016, the Tribunals invited the Claimant to comment on the applications by the Respondents; and the Respondents to comment

> *… on the consequences of the avoidance of the JVA and the GPSA with respect to, in particular, past performance, addressing:*
>
> *with respect to the GPSA the question of payments which Petrobangla may owe, in case of a rescission, for the gas received (explaining whether Petrobangla considers owing no payment at all or payment valued for instance at the price agreed in the GPSA or at its commercial value, taking into account the price at which Petrobangla purchases gas from other suppliers);*
>
> *with respect to the JVA, whether any credit must be given to investments made by Niko in performance of the agreement and how such credit is to be valued.*

62. The Parties presented these comments on 29 April 2016, including the Respondents' modified requests for relief.

63. The Claimant argued in its comments on 29 April 2016 that the Corruption Issue now raised by the Respondents had been known for a long time and had been considered by the Tribunals in their Decision on Jurisdiction. This decision was final and binding and could not be reopened. If, however, the Decision were reopened, BAPEX had not offered any justification for doing so. In any event, Petrobangla's request to rescind the GPSA, "*an agreement that had expired by its own terms years ago*", was frivolous and should "*summarily be rejected*".

64. On 10 May 2016 the Respondents communicated to the Tribunals several requests concerning the evidence for their Corruption Claim: one of them concerned the redacted version of an affidavit of Corporal Kevin Duggan of the Royal Canadian Mounted Police (RCMP) with respect to which they sought assistance in obtaining an un-redacted or less redacted version (the "**Duggan Affidavit**", see below Section 2.4.6); another request

concerned information "*relating to the ACC and the Canadian investigation and possibly the US investigation*" which the law firm of Gowlings Lafleur Henderson LLP, the Claimant's previous counsel, had mentioned during the jurisdictions phase (the **Gowlings Information**, see below Sections Sections 2.4.2, 2.4.4 and 2.4.16); a third request had already been made to the Claimant in a letter of 19 April 2016 (produced as Annex C to the Respondents' 10 May 2016 letter) and included communications between 2001 and 2006 on various subjects and between various persons as well as financial records "*showing transfers and/or payments of funds between 2001 and 2006*" (the **Documents Request**, see below Section 2.4.4). With respect to the last of these requests, the Respondents informed the Tribunals that the Claimant had refused to provide the requested documents; the Respondents expressed confidence that no further evidence was required to justify the relief requested, adding that "*we do not at this time seek an order compelling the production of documents by Niko*".

65. The Tribunals considered these submissions and, on **26 May 2016**, issued **Procedural Order No. 13**. They noted that their jurisdiction to decide the Corruption Issue had not been contested and decided to consider the Respondents' claims in this respect and stated: "*Mindful of their responsibility for upholding international public policy, the Tribunals will therefore examine the corruption charges that have been raised by the Respondents*."

66. The Tribunals decided to examine the Corruption Claim with priority. As explained above (Section 2.2.2), the Tribunals had determined in their Third Decision on the Payment Claim of 16 May 2016 that, in the circumstances and given the Respondents' argument on the effect of avoidance of the GPSA and the obligation of restitution under the Bangladesh Contracts Act, the obligation of Petrobangla to make payment for the gas delivered under the GPSA would not be affected. The **proceedings on all other issues were suspended**, except for a request for provisional measures that the Claimant had filed on 19 May 2016 in relation to the Payment Claim.[13]

67. As to the next steps, the Tribunals invited

[13] See above Section 2.4.1.

(a) the Claimant to respond to the Respondents' letter of 10 May 2016 and the request concerning the Duggan Affidavit;

(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.

68. The Tribunals informed the Parties that they intended

> *…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.*

69. The Tribunals added that

> *[i]n 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.*

70. The Tribunals announced their intention to hold a telephone conference, once the Parties' communications had been received and gave instructions concerning the Claimant's request for provisional measures and the *Alam* Proceedings before the High Court Division.[14]

[14] See below Section 2.5.

2.4.2 Organising the procedure on the Corruption Claim (Procedural Order No 14)

71. Following the notification of Procedural Order No 13 of 26 May 2016, the Respondents wrote on 7 June 2016, referring to the Gowlings Information they had mentioned in their letter of 10 May 2016 and "*suggest[ing] that the Claimant should also be asked to provide a list of documents relating to corruption investigations that it, its affiliates and its counsel had and did not produce during the jurisdiction phase*".

72. On 14 June 2016 the Respondents submitted their "Responses to Procedural Order No 13" (**R-RPO13**) containing an account of the negotiations of the JVA and GPSA, accompanied by further supporting exhibits. They attached a list of the names and addresses of persons involved in the negotiations, and a list of documents including records and reports about the negotiations of the JVA and GPSA (Annex A and B).

73. Following correspondence relating to the Payment Claim (see above Section 2.2), the Tribunals on **29 July 2016** issued **Procedural Order No. 14** dealing with the various evidentiary issues that had arisen concerning the Corruption Claim.

74. Procedural Order No 14 gave instructions concerning the gathering of evidence (see below Section 2.4.4) and invited the Parties' views on the scope of the investigation to be conducted and a number of evidentiary issues. It also indicated how the Tribunals intended to proceed further upon receipt of the requested information. They decided the Respondents' requests concerning the Duggan Affidavit and the Canadian Investigations, as will be discussed separately below.

2.4.3 Scope and Nature of the Tribunals' Examination, the Targeted Period and the Procedural Time Table (Procedural Order No 15)

75. The Parties filed on **8 August 2016** their replies to the Tribunals' invitation in **Procedural Order No 14**. They provided information concerning the collection of documentary evidence and the persons involved in the negotiations. They also commented on the scope of the Tribunals' examination and the Targeted Period.

76. The Respondents filed a **Request for Reconsideration** of certain portions of Procedural Order No. 14 on **9 August 2016**, concerning in particular the Canadian Investigation and the Duggan Affidavit (see below).

77. On **10 August 2016**, the Tribunals held a **Procedural Consultation** with the Parties by telephone to discuss the further organization of the Corruption Claim procedure. In preparation of this consultation, the Tribunals sent the Parties a "List of Issues" which the Tribunals had identified. These issues were addressed during the consultation and included the scope of the examination on the Corruption Claim, the Targeted Period, various issues related to evidence, and the use of information obtained or disclosed during these Arbitrations.

78. With respect to the procedural steps and the time table, the Parties agreed on simultaneous document production, followed by a written memorial in which the Respondents were to set out their allegations concerning the procurement by corruption of the JVA and the GPSA, accompanied by the relevant evidence. The Claimant was then to respond in the form of a written memorial containing its case in defence, also accompanied by evidence. The Respondents further requested a second round of written submissions. The Tribunals prepared Summary Minutes of this procedural consultation and sent them on 25 August 2016 to the Parties in draft form for comments; the finalised version was distributed on 29 November 2016.

79. The Tribunals recorded the procedural steps as previously discussed with the Parties in their Procedural Order No 15, which they submitted to the Parties in a draft form. They discussed this draft in another **Procedural Conference** by telephone on **1 September 2016**.

80. **Procedural Order No 15** was then issued on **7 October 2016**. It fixed the steps in the procedure and the procedural timetable as previously discussed with the Parties and settled a number of issues concerning in particular the scope of the Tribunals' examination, including the Targeted Period, the collection of evidence, the requested interventions of the Tribunals with respect to the Canadian Investigation and the Duggan Affidavit and the Respondents' request for reconsideration related thereto.

81. In Procedural Order No 15, the Tribunals explained their view on the **Scope and Nature of the Examination of the Corruption Claim**. They noted the Claimant's insistence on the adversarial nature of ICSID arbitration proceedings, which require that a party state clearly the case which the other party must meet and the decision which it requires the arbitral tribunal to make. They also noted the Respondents' comments, insisting that the Tribunals' decision concerning their exclusive jurisdiction (see below Section 2.5.2) with respect to the Corruption Claim entails an augmented responsibility of the Tribunals and the need for a broad enquiry not necessarily confined to the arguments and evidence which the Parties are prepared to submit to them. The Respondents had recognised, nevertheless, that their position and an approach by which the Tribunals seek "*to get to the truth*" were not incompatible with the adversarial process.

82. In response to the Parties' arguments and requests, as expressed in the various written submissions and during the Procedural Consultations, the Tribunals provided the following clarifications:

> *The Tribunals are not like a criminal court tasked with punishing acts of corruption as such. Their mandate is that of resolving disputes concerning the JVA and the GPSA and specifically the Respondents' request seeking the avoidance of these two agreements on grounds of corruption.*[15]

83. The Tribunals added:

> *For the reasons previously explained, the Tribunals have exclusive jurisdiction to make these determinations. They are conscious of the responsibility that flows for them from their exclusive jurisdiction and from their general obligations as ICSID tribunals. This may lead them to take their own initiatives in the evidentiary process in accordance with the ICSID Arbitration Rules; but they must preserve and protect the adversarial nature of ICSID proceedings, which requires that each Party clearly state its case and identify the evidence on which it relies so that the other Party has the opportunity to address this case.*
>
> *The Respondents have affirmed that "BAPEX and Petrobangla now have evidence to demonstrate that both the JVA and GPSA were procured by corruption". On the basis of this affirmation, the*

[15] Procedural Order No 15, paragraph 3.

> *Tribunals have decided to suspend the proceedings on the remaining issues in these arbitrations and to give priority to the examination of the Respondents' Corruption Claim. In doing so, they may take their own initiative in the evidentiary process on these issues; but in the interest of a rational and efficient conduct of the proceedings and in view of their adversarial nature, the Tribunals are of the view that any requests by the Parties that the Tribunals take such initiatives must be justified with particularity. In any event, the scope of the evidentiary enquiry must be limited to the issue that has to be decided, namely whether the two agreements were procured by corruption.*[16]

84. Concerning the **Targeted Period,** the Claimant had questioned in its submission of 8 August 2016 that this period should include the negotiations for the GPSA; in their view there was no factual basis for examining the period following the conclusion of the JVA. The Respondents had argued that the conclusion of the GPSA was not a necessity and that, irrespective of the price agreed in the GPSA, Petrobangla granted an advantage to the Claimant by concluding the GPSA. The Parties developed their positions further during the Procedural Consultation on 10 August 2016, prior to the Tribunals' resolution of the issue in Procedural Order No 15.

85. Having considered the Parties' positions and argument, the Tribunals explained as follows in that Order:

> *The Tribunals note that the principal focus of the corruption enquiry pertains to the circumstances of the conclusion of the JVA and the allegation that it was procured by acts of corruption attributable to Niko. The Parties agree that the relevant period begins sometime in 2001 and continues until the conclusion of the JVA on 16 October 2003. The Tribunals moreover accept the Respondents' observation to the effect that this period should be extended to the time immediately following signature of the JVA, in the event that evidence emerges of payments triggered by it.*
>
> *Thus the relevant period of time comprises the years 2001 to 2003 as well as the period immediately following the conclusion of the JVA until the end of the first quarter of 2004 ("Targeted Period").*[17]

86. Concerning the GPSA, the Tribunals explained that, in their view,

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[16] Procedural Order No 15, paragraphs 4-5.
[17] Procedural Order No 15, paragraphs 7 and 8.

> *… the conclusion of this agreement with Petrobangla was a necessity once the Feni Field started to produce gas. The critical issue therefore is, in the present understanding of the Tribunals, not the conclusion of the GPSA in and of itself, but its terms.*

87. Concerning these terms and the negotiations related to them, the Tribunals stated:

> *Concerning the GPSA negotiation period (from May 2004 to the conclusion of the GPSA on 27 December 2006), the Tribunals note that, given their present state of understanding, the critical issue was the price Niko would receive for the gas delivered. Niko had requested a price of US$2.35/MCF. However, Petrobangla and the representatives of the Government involved in the negotiations were prepared to pay no more than US$1.75/MCF; they made no concession and the price eventually agreed in the GPSA was US$1.75/MCF. As revealed by the Respondents in these arbitrations, this price is substantially below that paid during the period from 2004 to 2015 to other suppliers of gas. The Respondents have not shown any undue advantage procured to Niko through the GPSA.*[18]

88. The Tribunals thus decided not to include the time during which the the GPSA was negotiated in the Targeted Period; they saw "*no justification for ordering document production for the period relating to the GPSA negotiations*". They pointed out, however, that

> *… the Tribunals have not taken a final view in this respect, and the Parties are not precluded from providing evidence and argument relating to the GPSA negotiation period. In other words, the Tribunals remain prepared to reconsider their position if they are shown that it is justified.*

89. Finally, the Tribunals fixed in Procedural Order No 15 the **steps in the procedure and the Procedural Timetable**. They considered that the allegations on which the Corruption Claim is based were raised by BAPEX in its Memorial on Damages, dated 25 March 2016; such issues had been raised already during the proceedings on jurisdiction and were further discussed in exchanges following BAPEX's Memorial on Damages. The Tribunals, therefore, had envisaged that a single round of submissions would be sufficient. Upon the Respondents' request, however, the Tribunals

[18] Procedural Order No 15, paragraph 10.

… decided to adjust the draft Procedural Order and in particular the proposed procedural timetable so as to afford the parties an opportunity to comment further on the substance of the Corruption Claim and the procedural options taken by the Tribunals. In particular, they wish to afford the Respondents the opportunity to develop their position on the Corruption Claim within the scope of the enquiry defined by the Tribunals and to provide justification of their request of enlarging this scope beyond the limits provisionally defined in the present Procedural Order.[19]

90. The timetable ordered provided for a Memorial on the Corruption Claim by the Respondents, preceded by simultaneous document production and indications on persons available for testimony at the Hearing and followed by the Claimant's Counter-Memorial. Prior to the second round of written submissions (Respondents' Reply and Claimant's Rejoinder), a Status Conference was scheduled. After the second exchange a Pre-Hearing Conference was scheduled to take place in Paris, from 24 to 28 April, with 29 April 2017 in reserve. Post-Hearing Submissions were reserved.[20]

2.4.4 Issues concerning the collection of evidence (Procedural Orders No 14 and 15)

91. In Procedural Order No 13 of 26 May 2016, the Tribunals invited the Parties to produce to the Tribunals information and documents in relation to the negotiation and conclusion of the JVA and the GSPA.

92. With their Response to Procedural Order No 13, the Respondents submitted on 14 June 2016 lists of persons and documents related to the negotiations of the JVA and the GPSA. They also suggested sources of further evidence, and in particular:

(i) the Gowlings Information as mentioned in their letter of 7 June 2006;

(ii) investigations by the Royal Canadian Mounted Police (RCMP) and the Alberta Court of Queen's Bench that "*handled the Niko corruption matter in Canada*" [the "**Canadian Investigations**"]; and

[19] Procedural Order No 15, paragraph 6.
[20] Procedural Order No 15, paragraph 66.

(iii) witnesses mentioned in the Charge Sheet of the Anti-Corruption Commission (ACC).

93. The Claimant's 14 June 2016 submission commented on the Respondents' requests of 14 May 2016. It provided an account of the negotiations, explaining that these negotiations occurred well over a decade ago and that Niko "*ha[s] very different personnel in management today*"; it announced that it was "*continuing to work diligently to gather and examine relevant correspondence*" and sought clarification with respect to the "*document lists/production*" sought by the Respondents and the other procedural issues.[21]

94. In **Procedural Order No 14** of 29 July 2016, the Tribunals gave directions on several issues, including the Canadian Investigations and the Duggan Affidavit (see below Sections 2.4.5 and 2.4.6): With respect to **documentary evidence**, the Tribunals accepted that the description of documents given by the Respondents were relevant places to seek evidence; they wished to proceed along the lines indicated in the Respondents' request. They noted the Claimant's complaint about the "*grossly overbroad*" scope of the Respondent's request but concluded that the searches which the Claimant was conducting were successful to some extent. The Tribunals invited the Claimant in a first stage:

> *(i) To provide information about the status of the research [concerning the documents requested by the Respondents];*
>
> *(ii) To provide information about their system of payments in and to Bangladesh so as to identify possible criteria for a more focused search of relevant documentation;*
>
> *(iii) To state its view concerning the "narrow parameters" that should be applied in the context of the Tribunals' examination of the Corruption Claim;*
>
> *(iv) To inform the Tribunals about its knowledge concerning the Gowlings Information.*

95. The Tribunals invited the Respondents to inform them "*about the respondent companies' record-keeping practices and provide lists of relevant documents*".[22]

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[21] Claimant's Submission on Procedural Order No 13, 14 June 2016, pp. 6, 8.
[22] Procedural Order No 14, sections 1.6 and 1.8

96. With respect to **the persons** that had previously been named by the Parties, the Tribunals invited the Parties

> *(i) To identify the function of each of the named person during the period relevant for the contract negotiations and specify the period during which this function was occupied;*
>
> *(ii) To provide information about the role of the named person in the negotiations of the GPSA and JVA and in the decision of BAPEX and Petrobangla to enter into these agreements;*
>
> *(iii) To identify the present function and domicile of each of these persons and the manner in which they can be contacted.*[23]

97. Responding on 8 August 2016 to the directions in Procedural Order No 14, the Claimant explained that its identification and retrieval of relevant files, while still ongoing, had advanced to the point that it was in a position "*to respond reasonably promptly to a suitably focused documentary evidence request*". It provided explanations about its Bangladesh Payment Systems, before and after the conclusion of the JVA.

98. Concerning the documents to be produced by the Respondents, **the Claimant** suggested that this production should also "include communications and other records (both internal and with any Government representative, entity or instrumentality) regarding the negotiation of the Framework of Understanding (the "**FOU**") and the Marginal Fields Evaluation (the "**MFE**").

99. In this response of 8 August 2016, the Claimant accepted that the requested productions "*encompass records in its possession relating to payments (if any) made to or communications with (if any), the individuals identified*" by the Respondents in their letter of 10 May 2016, with the exception of Qasim Sharif. With respect to the latter, the Claimant pointed out that he was the principal of the Claimant's agents in Bangladesh until the execution of the JVA and served thereafter until late 2005 as Niko's president. It would be "*neither reasonable nor proportionate to require production of all correspondence with Mr. Sharif during the Targeted Period*". The Claimant suggested that the enquiry be

[23] Procedural Order No 14, section 2.2.

limited to payments to him or to Stratum and communications regarding payments to or from the other individuals identified by the Respondents.[24]

100. With respect to the Gowlings Information, the Claimant stated that it was aware that "*an extensive review was undertaken by and under the direction of Gowlings, in conjunction with other external advisors, in connection with the RCMP's investigation into alleged corruption*". It added that "*certain material was provided to Gowlings by the Canadian authorities pursuant to standard Canadian criminal procedure disclosure processes*" and that this disclosure "*was made subject to a strict undertaking limiting the use or disclosure of that information to the defence of the offences with which [Niko Canada] was charged*". It added that it had "*undertaken diligent and reasonable enquiries so as to be in a position to respond to a proportionate and properly focused document production request*".

101. Finally, the Claimant identified in its 8 August 2016 submission the persons that could give evidence and specified their roles. It added the names of three persons that had given evidence in the form of affidavits in the *BELA* Proceedings, each concluding "*under oath that the JVA was valid and that none of the Government, Petrobangla or BAPEX was involved in any fraud or misconduct in entering into the JVA*".

102. In its response to the Tribunals' directions in Procedural Order No 14 concerning the collection of evidence, **the Respondents** explained in their comments on 8 August 2016 the system of correspondence and administrative records. They added that the ACC seized from both Respondents the original correspondence and note sheet folders related to Niko; "*BAPEX and Petrobangla kept a copy of most, but not all, of the seized correspondence*"; and "*some documents were lost or misplaced*" when BAPEX moved offices.

103. The Respondents prepared a list of "*what appeared to be the most relevant documents to provide an account of the negotiations of the JVA and GPSA*", consisting of 33 items. They requested more specific guidance from the Tribunals regarding the types of company records the Tribunals believe might be relevant.

[24] Claimant's letter of 8 August 2016, p. 3.

104. Relying on the World Bank Module on Planning an Investigation of Corruption, the Respondents described the acquisition and analysis of financial information to "*follow the money*" as a "*key aspect of a corruption inquiry*". They requested

> *… financial documents showing transfers or payments of funds to Bangladesh, including from or on behalf of Niko to Mr Qasim Sharif, Mr AKM Mosharraf Hossain, Mr Giasudding Al Mamun, and Mr Selim Bhuiyan, among others. The study of financial information to track payments that might have been used for corruption must be done by specialized financial experts "including financial investigators and experts in financial analysis, [and] forensic accountants […]. Thus, Respondents reserve their right to have a financial expert review all financial information presented by Niko.*[25]

105. In these comments the Respondents went a step further and requested that

> *… Niko be ordered to make its financial records available to an independent financial expert for review. Respondents are prepared to appoint an expert for this purpose and would, of course, agree to have Niko appoint an expert as well. Respondents also believe it would be useful for the Tribunals to appoint its [sic] own expert or experts.*

106. With respect to witnesses the Respondents provided an updated list of the persons involved in the negotiations of the JVA and GPSA (Annex B). They added, however, that they had "*doubts about the availability of the persons named*" and explained that they had "*reached out to some of the persons named to obtain the updated contact information, and many of them have made it clear that they are unwilling or unable to appear before the Tribunals to testify*".

107. Concerning possible witnesses on the side of Niko, the Respondents mentioned "*Edward Sampson, the Executive Chairman of Niko's parent company who worked closely with Mr Ohlson*" who had died in 2004. They added that at the end of 2013 Mr Sampson had retired from his role as Chairman, CEO and President of Niko Canada, but remained one of the largest individual shareholders. The Respondents requested that "*the Tribunals order Niko to provide contact information for Mr Sampson*".

[25] Respondents' letter of 8 August 2016, p. 4; the quoted passage refers to the World Bank, Module 4, RLA-181.

108. The Respondents also explained that Mr Sharif had a large online presence and his contact information in the United States was available and that they could provide this contact information. They made the following request:

> *If Niko is unable to produce [Mr Sharif] as a witness, Respondents request that the Tribunals make a request under the laws of the United States (28 USC 1782) for the district court where Mr Sharif resides to order him to give his testimony in these proceedings.*[26]

and

> *[that] Mr Sharif be called as a witness, and if necessary use the law of the United States (28 USC 1782) to compel his testimony.*[27]

109. Further evidence could be obtained according to the Respondents from the files of the ACC. They asserted that

> *… the ACC is an independent entity and has been unwilling to share information that it intends to use in pursuing the criminal charges in Bangladesh. Petrobangla and BAPEX consider that this evidence is essential to the Tribunals' inquiry into the Corruption Issue. […] According to the Application for Production of Evidence submitted by the writ petitioner [in the Alam Proceedings, see below Section 2.5] an individual consultant to the ACC, Mr. Ferdous Khan, has "substantial evidence of corruption in procurement of the Impugned Agreements" in his possession. The evidence in Mr. Khan's possession includes shared evidence from the Bangladesh, United States, and Canadian law enforcement investigations. Because this evidence is part of the ACC investigation, without authorization from the ACC or a Bangladeshi court order, such evidence is not available to Respondents or these Tribunals. If the court orders it, then the information should be released and be available for these Tribunals.*

110. The Respondents complained that Niko opposed the request by the Writ Petitioner and added that he had withdrawn the application requesting to compel Mr Khan to produce evidence. The Respondents requested that the Tribunals

> *Facilitate access to the evidence in Mr Ferdous Khan's possession by issuing a declaration that could be presented to the court hearing the*

[26] Respondents' letter of 8 August 2016, p. 6.
[27] Respondents' letter of 8 August 2016, p. 8.

Writ Petition that the evidence should be produced and any order compelling the production of evidence would not violate the Tribunals' 19 July Decision [the Decision on Exclusivity, see below Section 2.5].

111. In Procedural Order No 15 **the Tribunals** considered these requests in light of the Parties' written requests and the explanations provided during the Procedural Consultations of 10 August and 1 September 2016.

112. With respect to the production of documents, some issues had been resolved in the Procedural Consultations. Procedural Order No 15 had left the timing of the production to be fixed, and the question of the financial records also had to be decided.

113. The Tribunals noted the Claimant's declaration that, prior to the establishment of its branch in Bangladesh during the latter half of 2003, all payments to Bangladesh were made to Stratum and that Stratum reported on the use of the funds so received. The Claimant had offered to produce the corresponding records as part of the document production. The Respondents considered this as insufficient and requested the appointment of financial experts, as explained above. The Tribunals took the following position:

The Tribunals consider that the production of the records concerning payments to Stratum are a useful start for the investigation; but they accept the Respondents' view that it cannot be excluded that corruption payments took other routes, in particular through companies of the Niko Group other than the Claimant..

114. The Tribunals examined how the Respondents' justified concern could be met "*in the most effective and least disruptive manner*". They reached the following conclusion:

During the September 2016 Procedural Consultation the Claimant stated that it was prepared to produce complete records of all payments to Bangladesh made by any of the companies of the Niko Group. The Tribunals accept this production as a possibly sufficient measure in the production of financial records; but they reserve the right to consider the adequacy of this approach, once the production has been made and the Respondents have had an opportunity of commenting thereon. In particular, the Tribunals reserve the right to order a statement of the auditor of the Niko Group, as it had been announced in the draft of the present Procedural Order prior to the September 2016 Procedural Consultation.

115. In Procedural Order No 15, the Tribunals considered that the Niko Group produced consolidated accounts for the fiscal years ending on 31 March and concluded that any payment from a company of the Niko Group to third parties in Bangladesh must be reflected in these consolidated accounts. They advised the Claimant to make the necessary preparatory arrangements so that the auditor may produce on short notice

> *… a statement identifying any payments during the fiscal years ending 31 March 2001 to 31 March 2004 which the Niko Group made to beneficiaries in Bangladesh, including Stratum, identifying each beneficiary and the amounts received. In view of these directions, the Tribunals see no need, at this stage, to make further directions concerning the financial records of the Niko Group.*

116. With respect to **witnesses**, the Tribunals noted the Claimant's confirmation that it would make available for testimony Mr Hornaday, Mr Adolph, and Mr Goyal. It invited the Claimant to present witness statements describing their testimony and to ensure their presence at the Hearing. With respect to Mr Goyal, whom the Claimant had presented as "*head of finance*", the Tribunals ordered that his "*… witness statement shall include a description of the payments made to Bangladesh during the Targeted Period*".

117. The Tribunals also gave the directions concerning other possible witnesses. They

> *… order[ed] the Claimant to seek to obtain a Witness Statement from Mr Sampson as well as his agreement to attend the Evidentiary Hearing as a witness; if the Claimant is unable to do so, it shall describe the steps it has taken to obtain the Witness Statement and Mr Sampson's appearance at the hearing;*
>
> *… note[d] the Claimant's statement that it has no control over Mr Sharif, has no contact with him and did not know his whereabouts. At the September 2016 Procedural Consultation, the Claimant confirmed that Niko had no contact with Mr Sharif for many years. The Respondents state that they were able to locate Mr Sharif in Houston, Texas. The Respondents are invited to obtain a Witness Statement from Mr Sharif and ensure his appearance at the Evidentiary Hearing. The Tribunals note the Respondents' explanations concerning the possible objections by reason of Mr Sharif's earlier role as agent and officer of companies of the Niko Group. They instruct the Claimant to deliver to the Respondents no later than 14 October 2016 a declaration in the name of all companies*

of the Niko Group by which Mr Sharif had been engaged as agent or officer, releasing him of all obligations which would prevent him to provide the above described Witness Statement and to appear at the Evidentiary Hearing. If the Respondents nevertheless are unable to obtain from him a Witness Statement and to procure his presence at the Evidentiary Hearing, they shall describe the steps they have taken in this respect;

118. Concerning the affidavits from the *BELA* Proceedings, the Tribunals

> *… note[d] the affidavits of Mr Imaduddin, Mr Hossain and Mr Nurul Islam, presented in the BELA proceedings and mentioned in the Claimant's first letter of 8 August 2016. These affidavits shall form part of the record of the present arbitration; both Parties are invited to contact these persons with the objective of ensuring their appearance at the Evidentiary Hearing; if they are unable to do so, they shall describe the steps taken;*

119. The Tribunals also considered the witnesses on the Respondents' side and persons who had been included in their "Annex B". The Tribunals

> *… note[d] the list of possible witnesses attached to the Respondents' letter of 8 August 2016 and the Respondents' statement that they reached out to some of these possible witnesses but that "many of them made it clear that they are unwilling or unable to appear before the Tribunal to testify". At the August 2016 Procedural Consultation the Respondents were unable to identify which persons had been contacted and which of them declared their unwillingness or inability. They were also unable to provide such information at the September 2016 Procedural Consultation. The Respondents are invited to identify by Thursday 27 October 2016 the persons on their list whom they have contacted and indicate those who are prepared to testify before the Tribunals and to appear at the Evidentiary Hearing; this identification shall indicate the subject matters including the time period which the testimony is expected to cover. The Tribunals will then inform the Respondents whom of the persons so identified they require to present a Witness Statement and to appear at the Evidentiary Hearing. The Respondents' right to present Witness Statements of other persons is reserved.*

120. Finally, the Tribunals addressed the Respondents' request concerning the **evidence of Mr Khan** and which had been further discussed at the August 2016 Procedural Consultation. They reached the following conclusion:

The Tribunals understand the explanations provided by the Parties about Mr Khan's evidence in the sense that he does not have any direct knowledge of the JVA and the GPSA nor of the alleged corruption; but that he is said to have in his possession evidence on such alleged corruption. There is no information about the evidence which he is said to have, except that Professor Shamsul Alam, in his application to the Supreme Court of Bangladesh, asserted that Mr Khan had in his possession "substantial evidence of corruption in procurement of the Impugned Agreements".

In these circumstances, the Tribunals see no reason to pursue this allegation any further but leave it to the Parties to produce any relevant evidence which Mr Khan may have.

2.4.5 Requested intervention with the Canadian authorities

121. In the proceedings on the Corruption Claim, the Respondents referred repeatedly to the investigations conducted by the Canadian authorities and requested the Tribunals to intervene with these authorities to gain access to the evidence assembled in the course of these investigations.

122. A **first request** was made by **the Respondents** in their submission of 14 June 2016, proposing as source of information "*the Royal Canadian Mounted Police [RCMP] and the Alberta Court of Queen's Bench that handled the Niko corruption matter in Canada*", and suggesting an application "*under the Canada and Alberta Evidence Acts to obtain testimony of witnesses in Canada and documentation from the Canadian proceedings and investigations*". The Respondents explained that

> *The RCMP undertook an investigation of a breadth and depth which is not possible in the context of ICSID proceedings. According to Corporal Duggan, the Niko investigation involved assistance of the United States Federal Bureau of Investigation, the City of London Police, the World Bank, and the United States Department of Justice, eight completed Mutual Legal Requests, 16 Production Orders, and 20 people interviewed in six different countries.*

123. These explanations relied as sole basis on a PowerPoint presentation by Corporal Duggan, which the Respondents produced as Exhibit R-290.

124. The **Tribunals** considered the Respondents' suggestion in their Procedural Order No 14. They noted that Corporal Duggan's presentation

identified as the bribe which these investigations revealed the two gifts which were the grounds for the conviction in 2011. They also noted in the Agreed Statement of Facts for that conviction, that "*The Crown is unable to prove that any influence was obtained as a result of providing the benefits to the Minister.*"[28] The Tribunals concluded:

> *It results from these documents that the Canadian investigations have been completed and that they established the two bribes just mentioned and the absence of proof for any influence being obtained as a result of these bribes. This information is known to the Tribunals and has been examined in detail in the Decision on Jurisdiction.*
>
> *The Tribunals have no reason to believe that, by examining the evidence gathered by the Canadian authorities, they would be able to discover cases of bribes by Niko which had escaped the attention of the Canadian authorities. The Tribunals therefore see no useful purpose in requesting from the Canadian authorities information and documents gathered in the course of the Canadian investigations.*
>
> *The Tribunals will pursue their investigation of the Corruption Claim by considering other evidence.*

125. On 9 August 2016, the Respondents filed a **request for reconsideration** of the decision in Procedural Order No 14 regarding evidence from the Canadian investigation. They requested that the Tribunals

> *… reconsider their decision not to request information and documents gathered in the Canadian investigation*

and

> *… obtain and review all evidence of corruption in the procurement of the JVA and the GPSA, including the evidence gathered in the Canadian investigation and explained in the Duggan Affidavit.*[29]

126. The Respondents announced in that reconsideration request that they intended to produce an expert opinion of Mr Scott C. Hutchison, a barrister and former Canadian Crown prosecutor (1989 to 2005), on the "*legal significance of a plea bargain (referred to as 'resolution agreement') in Canada*"; they did submit this opinion on 12 August 2016.

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[28] Agreed Statement of Facts, In the Court of Queen's Bench of Alberta, 23 June 2011, Exhibit JD C-15, paragraph 58.
[29] Respondents' Request for Reconsideration of 9 August 2016, paragraphs 16 and 27.

127. The Respondents argued that the conviction of Niko was the result of a "resolution agreement" and that such an agreement does not allow the conclusion that no other acts of corruption had been discovered. Relying on Mr Hutchinson's opinion they argued:

> *… while the decision to proceed with a charge is a signal the prosecutor believes that he or she can prove that the case beyond reasonable doubt, the opposite is not true: a decision not to proceed does not permit an inference that the Crown does not have a provable case with respect to other changes, especially if that decision is part of a resolution agreement. In the context of a resolution discussions, the Crown may decide not to pursue charges that will present significant legal and logistical challenges.*[30]

128. Mr Hutchinson himself stated that the charge against Niko "*moved forward in an atypical fashion*" and that, in the circumstances, "*it is not possible to know whether or not there were other possible allegations that the police and Crown 'walked away from' as quid pro quo within the efficient resolution agreement presented to the Court*". He went on to discuss the "*many reasons why a prosecutor might, quite properly, determine not to proceed with a charge or potential charge in the context of resolution discussions*". He described the "*overriding question […] by reference to whether, in view of all the circumstances (including any charges to which the accused is prepared to plead guilty), it is in the public interest to pursue the charges to verdict*". He then gave three concrete examples, stating that the list is not exhaustive. These examples related essentially to a balance between the charges to which the accused pleaded guilty and the state resources needed to prosecute any remaining allegations. When considering "*marginal value*" of prosecuting any "*remaining allegations*", the Crown will take account of "*any increased penalty or social labelling that might be achieved*". In other words, the Crown

> *… may determine that allegations which are marginal or which will present significant legal or logistical challenges to prove may be withdrawn or not proceeded with as part of a broader resolution agreement.*[31]

129. The Respondents also argued that different standards of proof applied to Canadian prosecutors who must meet the standard of "*beyond*

[30] Respondent's Request for Reconsideration of 9 August 2016, paragraph 8.
[31] Scott Hutchison Opinion, 12 August 2016, p. 5.

reasonable doubt", while in international arbitration the lower "*balance of probabilities*" standard applied.

130. The **Claimant responded** on 19 August 2016 and opposed the request. It argued that the probative value of evidence and the question whether evidence should be produced is "*exclusively for the Tribunals' appreciation*". The Claimant rejected the Respondents' "*speculation as to what was in the mind of the Crown in entering into the resolution agreement with Niko Resources Ltd.*" and denied that there is any evidence in the record "*that the Canadian authorities declined to address other alleged incidents of corruption they felt could be substantiated*". The Claimant argued that the Respondents have failed "*to disclose the totality of the information at their disposal regarding their corruption allegations*" and stated that the Respondents have "*not identified what specific information they believed the Canadian authorities might have that would be relevant to their allegation of bribery relating to the JVA or GPSA*".

131. **The Tribunals** addressed the Request for Reconsideration in their Procedural Order No 15. They examined whether there was any justification to reconsider their conclusion in Procedural Order No 14 that there was no reason to believe that "*by examining the evidence gathered by the Canadian authorities, they would be able to discover cases of bribes by Niko which had escaped the attention of the Canadian authorities*" or that these authorities "*declined to address other alleged incidents of corruption that they felt could be substantiated*".

132. The Tribunals first recalled that the evidence before them did not contain any indication that the proceedings before the Canadian authorities were concerned with any acts of corruption other than the two gifts to the Minister. They noted that Niko Canada was not even charged in relation to any other alleged incidents of corruption. They referred again to the passages in the Agreed Statement of Facts that the Crown was "*unable to prove any influence obtained as a result of providing the benefits to the Minister*" and, when fixing the sentence, had taken into account that Niko had "*never been convicted of a similar offence nor had it been sanctioned by a regulatory body for a similar offence*".

133. Having noted Mr Hutchison's observations about the impossibility to know whether there were or were not any allegations about other acts of corruption, the Tribunals nevertheless examined the scenario on which

the Respondents rely. The Tribunals sought to determine whether it is likely that there might be evidence that the Canadian authorities did not pursue and which could be of relevance for the Tribunals' examination of the Corruption Claim. The Tribunals explained:

> *The Respondents allege payments of large sums of money which actually caused the conclusion of these two agreements. Quite obviously, had such charges been established, they would have justified a punishment significantly more severe than that which the Alberta Court deemed adequate for the two gifts of a total value of less than 200'000 Canadian Dollars and which the court found had no effect on the conclusion of the agreements. The argument of the Respondents thus amounts to saying that the Canadian authorities may have disregarded the large payments by which Niko obtained illegal advantages and, instead, based themselves merely on the two gifts to the Minister which remained without effect on the award of the GPSA. The assumption is difficult to accept, unless one were to assume that the other acts of corruption were so uncertain and so difficult to establish that it was not in the public interest to engage the required resources to pursue them.*
>
> *The Tribunals conclude that any other evidence gathered by the Canadian authorities either does not concern corruption of the gravity alleged by the Respondents or was so far from constituting conclusive evidence that it would not have justified the devotion of substantial public resources to pursue a prosecution. This conclusion is relevant for the Tribunals' decision, even if one considered possible differences in the standard of proof,*[32] *an issue that has not yet been decided by the Tribunals.*

134. The Tribunals also considered the feasibility of the process by which the Respondents requested the **Tribunals to address themselves to the Canadian authorities**. The Respondents suggested that the Tribunals make a request under the Canada and Alberta Evidence Act "*to obtain testimony of witnesses in Canada and documentation from the Canadian proceedings and investigations*". According to the Respondents, the "*Canadian courts grant such requests on the principles of international comity if the evidence sought to be obtained is relevant, necessary, not otherwise available, and identified with reasonable precision*".[33] The Claimant argued that the Respondents "*grossly oversimplified*" the processes on which the Respondents relied. It pointed out that the

[32] See Hutchison Opinion, pp. 6 and 7.
[33] Respondents' Responses to Procedural Order No 13, paragraph 42.

document to be requested would invite action by an "*agent or instrumentality of the Crown*". The requests therefore would bring into play issues of immunity or prerogatives. The Claimant also listed a number of other difficulties that the proposed process would have to face.

135. The Tribunals took no view on the feasibility of the process to obtain the evidence from the Canadian authorities but noted

> *… that such a request would engage the Tribunals in proceedings before domestic judicial authorities, an action which does not fall in the ordinary activity of arbitral tribunals. […]*

136. The Tribunals noted the Respondents' affirmation that "*BAPEX and Petrobangla now have evidence to demonstrate that both JVA and GPSA were procured by corruption*",[34] and continued:

> *While the Tribunals have the power to take their own initiative in the evidentiary process on the Corruption Claim, they are of the view that, before applying to other jurisdictions with applications concerning proceedings that have been closed by these other jurisdiction[s], the Tribunals must give priority to the evidence announced by the Respondents and other sources available to the Tribunals. As they are in no position to assess the reliability or indeed the very existence of any relevant evidence of the type said to be in the hands of the Canadian authorities, the Tribunals do not consider it justified to intervene with these authorities in the manner called for by the Respondents.*

137. For these reasons the Tribunals denied in Procedural Order No 15 the Respondents' request concerning the intervention with the Canadian authorities. The Tribunals did, however, reserve the right to reconsider this decision once they had evaluated arguments and evidence produced by the Parties in respect of the Corruption Claim.

2.4.6 The Duggan Affidavit

138. In its Memorial on Damages of 25 March 2016, BAPEX explained that its counsel "*recently obtained a redacted version of the affidavit of the Royal Canadian Mounted Police ('RMCP') official conducting the investigation of*

[34] R-MC, paragraph 60.

Niko's activities, Corporal Kevin Paul Duggan".[35] The redacted version of the affidavit was produced with this memorial as Exhibit R-213.

139. The Respondents produced correspondence between counsel in which the Respondents requested the Claimant to cooperate with the Respondents in an application to Justice Tilleman of the Court of the Queen's Bench in Alberta to remove some or all of the redactions. According to advice which the Respondents said they received from Canadian counsel, "*the process to obtain an order from Justice Tilleman will be significantly quicker if Niko cooperates and does not oppose the removal of the redactions related to it*".[36]

140. In response, the Claimant announced that it would address in the arbitration the application that BAPEX had made and which the Claimant had been invited to comment. In any event the Claimant considered the Respondents' application as "*spurious, improper and an abuse of the arbitration process*".[37]

141. The Respondents then requested on 10 May 2016 "*an order from the Tribunals to compel Niko's cooperation to seek [a less redacted] version from the Canadian courts*". In its response of 14 June 2016, the Claimant objected to this application, denying any evidentiary value of the affidavit which it described as a "*recitation of second- or third-hand hearsay concerning events of which the author had no personal knowledge*". The Claimant also insisted on the prejudice which the use of the Duggan Affidavit would cause to Niko "*who will never have any opportunity to cross-examine Corporal Duggan or the hearsay declarants whose statements he references*".

142. The Tribunals dealt with the Respondents' request in Procedural Order No 14. They noted that there were no indications that the Claimant would have an opportunity to question Corporal Duggan or the persons quoted by him. They understood that the information contained in the affidavit related to the Canadian investigation. For the reasons considered in the context of their decision concerning this investigation, the Tribunals

[35] B-MD, paragraph 28.
[36] Letter by the Respondents to the Claimants, dated 18 April 2016 and produced in the Arbitrations by the Respondents on 10 May 2016.
[37] Letter by the Claimant to the Respondents, dated 21 April 2016, produced in the Arbitration by the Respondents on 10 May 2016.

concluded that it "*cannot be expected to provide useful additional evidence for acts of corruption allegedly committed by Niko in Bangladesh*". Therefore, the Tribunals denied the Respondents' request.

143. **The Respondents** applied on 9 August 2016 **for reconsideration** of the Tribunals' ruling concerning the Duggan Affidavit. Relying on the explanations of Mr Hutchison, referred to above, the Respondents explained that the Tribunals could make an application to a court under the Canada and Alberta Evidence Act "*to order the examination of*" Corporal Duggan and "*command [his] attendance […] for the purpose of being examined*". Corporal Duggan thus would be available for cross-examination and Niko's due process concerns could be resolved. They also argued that the Duggan Affidavit described several interviews in his Affidavit relating to events beginning in 2002 that are entirely separate from the 2005 acts for which Niko pleaded guilty.

144. **The Claimant** responded on 19 August 2016, contesting the probative value of the Affidavit and arguing that the appearance for cross examination of Corporal Duggan would not resolve the due process issue.

145. **The Tribunals** dealt with the Respondents' Application for Reconsideration in Procedural Order No 15. The Tribunals noted that, in order to have Corporal Duggan appear, the Tribunals would have to engage in proceedings with the Canadian Courts.

> *[B]ut there is no indication that such proceedings could ensure his appearance at the place of the hearing. It would seem that the hearing would have to be moved to Canada or Corporal Duggan would have to be heard in the absence of the Tribunals by letters rogatory or similar proceedings.*[38]

146. Concerning the evidentiary value of the Affidavit, the Tribunals observed:

> *As far as can be seen from the redacted text, the "Affidavit" is not direct evidence of the events which it describes but an account of statements by others. Examining him as witness, therefore, does not solve the serious concerns of due process if the Tribunals were to rely on his testimony without having heard the authors of the declarations on which Corporal Duggan relies.*[39]

[38] Procedural Order No 15, paragraph 39.
[39] Procedural Order No 15, paragraph 38.

147. They noted that "*Corporal Duggan's 'Affidavit' is correctly described as 'Information to Obtain a Production Order' in an investigation of an offence by 'an official of the Government of Canada.'*"[40]. The Tribunals considered the explanations by Mr Hutchison in the opinion that the Respondents had presented and concluded:

> *Such a document is presented in support of an application for a production order or, as described in the relevant title of Mr Hutchison's opinion, "orders preauthorising investigative activities". Their purpose is to present to a judge with information on oath and in writing "that there are reasonable grounds to believe that a federally created offence had been committed and the production order would likely result in evidence of that offence being produced". Mr Hutchison explains that the standard of "reasonable grounds to believe" is "similar to the American concept of probable cause". In other words, what was required of Corporal Duggan, in Mr Hutchison's opinion, must be distinguished from the standard of proof required for a conviction on criminal charges.*[41]

148. The Tribunals also considered the offence to which Corporal Duggan's Affidavit related:

> *…the offence identified in Corporal Duggan's "Information to Obtain a Production Order" is that of "an official of the Government of Canada" (presumably a Senator), who used his office "to lobby on behalf of a private company" (presumably Niko Resources Ltd.). There is no evidence in the file to show that the production order requested by Corporal Duggan was ultimately issued, as stated by Mr Hutchison. If the order had been issued, it would, in the words of Mr Hutchison, justify Corporal Duggan's reasonably grounded belief that the Senator did indeed commit the lobbying offence of which he was suspected. While it may contain the description of actions by Niko Resources Ltd. or the Claimant (assuming that the relevant redacted passages concern them), the "Duggan Affidavit" does not concern an offence of any of the Niko companies. For this reason, too, its probative value is less than what the Respondents attribute to it.*[42]

149. The Tribunals concluded by denying the request for reconsideration.

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[40] Procedural Order No 15, paragraph 38.
[41] Procedural Order No 15, paragraph 41; citing Hutchison Opinion, pp. 1, 7.
[42] Procedural Order No 15, paragraph 43.

2.4.7 Confidentiality Issues (Procedural Order No 17)

150. On 8 August 2016, the Claimant raised concerns as to "*the collateral use*" of documents from the arbitration in other proceedings, specifically in Writ Petition No 5673 of 2016 brought by Professor Alam against Niko and others before the High Court Division of the Supreme Court.[43] The Claimant sought protective measures against the use of documents and information from the present arbitration proceedings in these other proceedings (the "**Collateral Use**"). The Claimant requested the Tribunals

> *… to impose protective measures relating to the use or disclosure of documents or information exchanged in connection with the Tribunals' examination of the Corruption Claim.*

151. Complaints in this respect had been raised by the Claimant already in its Request for Provisional Measures of 19 May 2016 by which it sought *inter alia* a declaration that these Tribunals have exclusive jurisdiction over specified questions, a request that the Tribunals addressed in their Decision on Exclusivity of 19 July 2016.

152. The issues of Collateral Use and confidentiality, as they had been raised in the Request for Provisional Measures and then in the application of 8 August 2016, were subject of several submissions by the Parties concerning the modalities of a confidentiality regime and were discussed by the Tribunals and the Parties during Procedural Consultations in August and September 2016. Provisional directions were given by the Tribunals in Procedural Order No 15 of 7 October 2016. The Tribunals then established, by Procedural Order No 17 of 11 January 2017, the confidentiality regime to be followed.

153. During the 1 September 2016 Procedural Consultation, the Parties informed the Tribunals that they had reached "*an agreement in principle regarding restrictions concerning the access to the record of these Arbitrations (section 9 of Draft Procedural Order No 15, 'Collateral Use'). The Parties indicated that they would file further information by 15 September 2016.*"[44]

154. In Procedural Order No 15 of 7 October 2016 the Tribunals noted that no such further information had been received and invited the Parties to

[43] The proceedings are discussed below in Section 2.5.
[44] Summary Minutes, paragraph 5.

"*report forthwith on the progress achieved*" concerning confidentiality restrictions. The Tribunals ordered

> *[u]ntil further notice, the Respondents' Counsel are instructed not to make any document produced by the Claimant available to any person other than the legal team of their law firm.*[45]

155. In November 2016 the Parties reached agreement on the terms of a Confidentiality Undertaking which Mr Carl F. Jenkins of Duff & Phelps, financial expert retained by the Respondents, executed on 9 November 2016 and pursuant to which Confidential Information was provided to him. This Confidentiality Undertaking was produced by the Claimant as Appendix A to its letter of 9 December 2016. The Claimant explained in this letter:

> *Through successive drafts over the ensuing days [following 1 November 2016] the parties negotiated the content for a confidentiality undertaking of the experts as the basis upon which the Claimant's financial information would be provided to the Respondents' experts for their review and potential use in the arbitration. On 14 November Niko was provided with a copy of the confidentiality undertaking that had been executed by Carl F. Jenkins of Duff & Phelps on 9 November.*

156. When the Respondents filed on 23 November 2016 their Memorial on Corruption, they provided a version in which footnote 153 was redacted, that is to say the only passage which used information identified as confidential. The footnote referred to two supporting exhibits (R-374 and R-375) also identified as confidential. As the Parties were unable to agree on the manner to proceed with the confidential information and exhibits, the Tribunals instructed the Parties as follows:

> *Until the confidentiality issue is agreed by the parties or decided by the Tribunals, the confidential documents and all their content may be made available to the Respondents' counsel only.*

157. On 9 December 2016 the Claimant provided further explanations about the Parties' attempt to reach agreement on the terms of the confidentiality order and proposed a draft of Procedural Order No 17, setting out a comprehensive confidentiality arrangement. The Respondents

[45] Procedural Order No 15, paragraph 69.

commented on 15 December and suggested amendments to the Claimant's draft.

158. On 11 January 2017, the Tribunals issued **Procedural Order No 17** addressing the then **pending confidentiality issues**. Relying on the proposals made by the Parties in their consultations, the Tribunals adopted the following definition of the term "**Confidential Information**" and "**Derivative Materials**":

> *i. The Confidential Information of the Claimant ("Confidential Information") comprise all records and information of the Claimant produced or provided by it, and its current or former employees, agents or consultants, in relation to the Corruption Claims further to Procedural Order No 15 of 7 October 2016 or any subsequent Procedural Orders issued by the Tribunals, and shall include witness statements of current or former employees, agents and consultants of the Claimant, and such other information as agreed by the parties or directed by the Tribunals, but shall not include such records and information that:*
>
> > *a) are already in or come into the possession of the Respondents; or*
> >
> > *b) are or become part of the public domain other than through or as a result of any act or omission on the part of the Respondents or any of the persons that have Confidential Information with the agreement of the Parties;*
>
> *ii. Any records of any nature whatsoever, including without limitation pleadings, memorials, witness statements, submissions of the parties and transcripts of examinations of witnesses and the parties' submissions, that incorporate or quote from the Confidential Information ("Derivative Materials") shall be treated as Confidential Information.*

159. The Tribunals considered the need for a confidentiality regime and appropriate modalities. They noted that confidential documents from these Arbitrations had found their way into the hands of a third person and were used to support claims by unrelated persons in court proceedings against the party having produced the documents. The Tribunals found this undesirable and disruptive to the present proceedings and noted that the Respondents themselves were prepared to make commitments with the objective of preventing such leaks in the future. As no solution other than that adopted by the Tribunals in

Procedural Order No 15 and quoted above had been agreed or proposed, the Tribunals concluded that "*protection by regulating access to Confidential Information must be provided in some form*". The Tribunals also noted that the Parties had been able to agree on a specific Confidentiality Undertaking for the Respondents' expert.

160. The Tribunals also noted that in their Memorial on Corruption the Respondents relied only on two of the confidential documents produced by the Claimant and referred to them only in a footnote. The Tribunals concluded:

> *In these circumstances, it appears to the Tribunals that, at this stage of the proceedings, the confidentiality issue, while remaining of importance, has a rather narrow scope of practical application. The Tribunals are conscious that a confidentiality regime which they might order must strike a balance between the interest of the Claimant in the protection of the Confidential Information produced in the arbitration and the interest of the Respondents in making use of these documents in an effective manner.*
>
> *Given the difficulties which the Parties had in devising a general confidentiality regime striking such a balance and the limited practical scope which the issue has had until now, the Tribunals concluded that this balance can be struck more effectively on a case by case basis, considering the needs in specific situations as they may arise and following the approach in the partial agreement actually reached by the Parties.*

161. The Tribunals concluded that a general confidentiality regime did not appear necessary at that stage; but they reserved the possibility to reconsider their position if the evolution of events so required. The Tribunals concluded with the following order:

> *(i) It is confirmed and clarified that access to the Confidential Information disclosed by the Claimant to the Respondents shall be restricted to the lawyers and staff of Foley Hoag concerned with the Corruption Claim.*
>
> *(ii) This restriction applies also to Derivative Materials in which the content of this Confidential Information is reported or reproduced.*
>
> *(iii) An exception is provided for disclosure according to the agreed Confidentiality Undertaking executed by Mr Jenkins of Duff & Phelps on 9 November 2016.*

(iv) Further written submissions filed in these proceedings containing Confidential Information shall be submitted to the ICSID Secretariat which will transmit the same to the Members of the Tribunals, to counsel for the Claimant and to Foley Hoag.

(v) If the Respondents wish to make such Confidential Information and Derivative Materials available to any other person, including personnel of BAPEX and Petrobangla, they shall seek agreement with the Claimant. Failing such agreement, the Respondents may apply to the Tribunals, as described above.

162. On 29 January 2017 **the Respondents** wrote to the Tribunals, applying for **a reconsideration of Procedural Order No 17**. They argued:

> *As a general matter, counsel for Respondents notes that this Procedural Order, forbidding us from sharing information filed in the arbitration with our client, prejudices our ability to present our claims and violates principles of procedural fairness.*

163. The Respondents argued that, when Professor Alam obtained material from the Arbitrations, there was no confidentiality obligation in place and they argued that there was a "*growing consensus that transparency and public access to pleadings should be the rule*". The Respondents concluded:

> *Counsel for Respondents strongly believe that an order allowing all relevant parties (the Parties to the arbitration, all counsel, and witnesses) to view and use documents submitted to the Tribunals for the purposes of this arbitration with the understanding that such documents should be kept confidential and must not be shared with others would be sufficient. There is no justification to leap to the extraordinary measure of ordering that one Party to the arbitration is prohibited from reviewing the pleadings, exhibits, and witness statements while the other Party has full access to all the materials.*

164. The matter was discussed during the Status Conference on 30 January 2017. At that occasion the Claimant explained that the disclosure of documents during document production

> *… was made further to Procedural Order No 15, relying in particular on paragraph 69. If Respondents wished to use the documents, such use is subject to the procedure and restriction in this provision.*[46]

[46] Summary Minutes of the Status Conference, paragraph 11.

165. The Claimant accepted, however, that its Counter-Memorial produced on 11 January 2017 and the witness statements and expert reports could be released to the Respondents without redaction, except for the witness statement of Mr Adolph which it wished to review before such release. Concerning 14 documents identified as "confidential" in the Claimant's index of exhibits, the Claimant proposed the use of an electronic portal which would allow designated persons in the Respondents' organisation to inspect the documents on a screen without being able to make copies.

166. At that occasion it was agreed that the Parties would follow up rapidly on these proposals, including questions of jurisdiction in case of a breach of the undertaking.

167. When the Tribunals considered the matter again in their Procedural Order No 18, they noted that

> *Contrary to what had been envisaged at [the Status Conference], no proposal for a modification of the arrangements concerning confidential documents was proposed or agreed.*
>
> *The Tribunals conclude that no change is required. The Tribunals' instructions remain in force.*[47]

2.4.8 The Parties' written submissions on the merits of the Corruption Claim

168. Following the Procedural Timetable set in Procedural Order No 15, the Parties filed the following written submissions on the merits of the Corruption Claim:

169. On 23 November 2016, the Respondents filed a 99-page **Memorial on Corruption** accompanied by an Annex A (a chart depicting payments and influence), together with the following documents:

- Witness Statement of Ferdous Ahmed Kahn, dated 23 November 2016;
- Witness Statement of Muhammad Imaduddin dated 16 November 2016;

[47] Procedural Order No 18, paragraphs 126 and 127, emphasis added.

- Witness Statement of Md. Nural Islam dated 20 November 2016;
- Witness Statement of Debra LaPrevotte Griffith dated 21 November 2016;
- Witness Statement of Md. Maqbul-E-Elahi dated 23 November 2016;
- Exhibits R-270 and R-302 through R-373; and
- Legal Authorities RLA-111 (*bis*), RLA-158 (*bis*) and RLA-184 through RLA-243.

170. As mentioned above, the Respondents' submission was filed in redacted and unredacted versions, with the unredacted, confidential version being sent by counsel at Foley Hoag to counsel for the Claimant. Further to discussions between the Parties and the Tribunals' directions concerning confidentiality (see above) the unredacted version was made available only to the Claimant's counsel, counsel at Foley Hoag, the Members of the Tribunals and the ICSID Secretariat.

171. On 11 January 2017, the Claimant filed its 127-page **Counter-Memorial on the Corruption Claim**, together with the following documents:

- Witness Statement of Brian Adolph dated 11 January 2017;
- Witness Statement of Amit Goyal dated 10 January 2017;
- Witness Statement of William Hornaday dated 10 January 2017;
- Expert Report of Christopher P. Moyes dated 10 January 2017;
- Exhibits C-122 through C-189; and
- Legal Authorities CLA-095 through CLA-173.

172. On 31 January 2017 the Claimant provided an updated submission, identifying the materials marked as confidential and applying the Tribunals' rulings in Procedural Order No. 17. The distribution of this submission followed these rulings.

173. On 22 February 2017, the Respondents filed their unredacted and redacted 193-page **Reply on the Corruption Claim,** together with the following documents:

- Second Witness Statement of Debra LaPrevotte Griffith, dated 15 February 2017;
- Witness Statement of Khairuzzaman Chowdhury, dated 16 February 2017;

- Second Witness Statement of Ferdous Ahmed Khan, dated 17 February 2017;
- Exhibits R-275, and R-376 through R-406; and
- Legal Authorities RLA-111(*ter*), RLA-158(*ter*), and RLA-244 through RLA-341.

174. On 5 April 2017, the Claimant filed its 157-page **Rejoinder on the Corruption Claim**, together with

- Witness Statement of Brian Adolph, dated 4 April 2017;
- Exhibits C-190 through C-235; and
- Legal Authorities CLA-174 through CLA-212.

2.4.9 The 30 January 2017 Status Conference

175. The Procedural Timetable set out in Procedural Order No 15 provided that a status conference would be held between the first and the second exchange of written submissions. The Tribunals explained the purpose of this conference as follows:

> *As pointed out above, the Tribunals have reserved, in light of the Respondents' objections to certain of the Tribunals' decisions on the scope of the enquiry of the Corruption Claim, to reconsider their scope decisions once they have received the Parties' Memorials. For this purpose and in order to examine the status of the case on the Corruption Claim after the first round of written submissions, the Tribunals wish to use some of the time initially reserved for the Evidentiary Hearing. Therefore, the Tribunals have decided to hold a Status Conference on 30, with possible extension to 31 January 2017 at which the Tribunals wish to consider with the Parties the case as it presents itself in the light of the Parties argument and evidence. The Parties are invited to reserve these two days for an in-person meeting in Paris. Depending on their assessment of the issues as they emerge from the first exchange of Memorials, the Tribunals reserve, however, the possibility, in consultation with the Parties, to adopt other modalities for this meeting, such as a video or telephone conference. They will inform the Parties of the modalities envisaged within the week following the receipt of the Claimant's Counter-Memorial.*[48]

[48] Procedural Order No 15, paragraph 63.

176. When filing its Counter-Memorial on 11 January 2017, the Claimant took the initiative and made proposals for the issues to be discussed at the Status Conference, including the justification for hearing certain witnesses. In the correspondence that followed, the agenda items for the conference were considered. In view of the issues that had been identified, the Tribunals and the Parties were of the opinion that an in-person meeting was not necessary and agreed that the conference be held by telephone on 30 January 2017.

177. Concerning the subjects to be discussed at the conference, the Tribunals informed the Parties that they did not see the need for reconsidering the scope of the enquiry of the proceedings on the Corruption Claim. The Tribunals nevertheless invited the Parties to file a request for reconsideration of the scope of the enquiry if they saw the need for it.

178. The Respondents presented their views on 17, 26 and 29 January 2017, objecting to the agenda items proposed by the Claimant. They insisted on extending the scope of the enquiry, seeking "*to acquire additional evidence confirming Niko's corruption, including, wherever possible, facilitating gathering of evidence from all available sources and in coordination with domestic courts and investigators*" (i.e. the Canadian investigation and financial records between 2001 and 2006). They requested that the Status Conference focus on these aspects.

179. At the 30 January 2017 Status Conference the principal agenda items discussed were

- the weight to be given to statements by persons without direct knowledge of the specific facts relating to these cases or those not appearing at the April 2017 Hearing,
- the Respondents' compliance with the Tribunal's Decision of 19 July 2016,
- Petrobangla's compliance with the Third Decision on the Payment Claim,
- the scope of the Tribunals' enquiry on the Corruption Claim, including the Targeted Period,
- requests to the Canadian authorities and appointment of a forensic expert,
- the treatment of confidential documents and protective measures,

- organization of the Pre-Hearing Conference, and
- witness notification deadlines.

Several of these items form part of issues that continued to be considered in subsequent procedural steps and shall be dealt with in their respective context.

180. Summary Minutes were prepared and submitted in draft form to the Parties. A final version of these Summary Minutes dated 4 February 2017, taking account of the Parties' comments, was distributed to the Parties.

2.4.10 The Respondents' New Application for an Intervention by the Tribunals before the Canadian Courts and Procedural Order No 18

181. In their letter of 26 January 2017, the Respondents had insisted again that the Tribunal take initiatives with the Canadian authorities. They wrote:

> *Specifically, Respondents maintain that the Tribunals should reconsider, as envisaged in Procedural Order No. 15, seeking evidence from the Canadian investigation and ordering Claimant to open its financial records for the entire relevant period (2001-2006) to review by an independent financial expert. Regarding the Canadian investigation, Respondents were able to obtain a lot of evidence from Mr. Khan, but there is a good deal of evidence that he could not provide. For instance, we do not have 1) the video of the Qasim Sharif interview for which there is a transcript in the record or the transcript or video of a prior interview of him; 2) the transcript or video of an interview of Selim Bhuiyan; 3) transcripts or videos of the numerous other interviews conducted in the Niko investigation; or 4) other evidence of corruption in obtaining the JVA and GPSA referenced by Corporal Duggan in his affidavit. […]*
>
> *Therefore, Respondents request that these items be the main items for discussion on the Status Conference agenda, as originally indicated by the Tribunals.*

182. The matter was indeed discussed extensively at the Status Conference. On that occasion, as recorded in the Summary Minutes:

> *The Claimant stated that the Respondents have obtained extensive evidence from the Canadian investigations and have even produced in these arbitrations documents bearing the stamp of the RCMP. In the Claimant's view, there is no reason to believe that a request by these Tribunals to the Canadian authorities would produce any additional evidence which the Respondents could consider helpful for their case. The Canadian investigation did not lead to any prosecution other then what has been already considered by the Tribunals.*

183. The Respondents were given the opportunity to provide the records of their earlier enquiries they made with the RCMP and the response they received. They were also invited to provide argument about the powers of an ICSID Tribunal to make such enquiries with domestic authorities and information about any precedent in ICSID arbitration.

184. The Respondents provided such explanations on 3 February 2017 and requested the Tribunals to "*issue a letter to the Alberta Court of Queen's Bench requesting the assistance of the Court in obtaining … evidence*".

185. With their explanations, the Respondents provided correspondence between a Canadian law firm and the Department of Justice of Canada. This included a request for "*the assistance of Corporal Duggan with respect to potential testimony before ICSID*" of 5 July 2016, and a reply from the Department of Justice of 19 October 2016 stating that "*the RCMP is unable to accede to the request in these circumstances, and the RCMP members are not in a position to voluntarily attend the arbitration*".[49]

186. In their letter of 3 February 2017 the Respondents also described the process which they requested the Tribunals to follow:

> *The process would be for the Tribunals to issue a letter to the Alberta Court of Queen's Bench requesting the assistance of the Court in obtaining evidence. Respondents would then engage Canadian counsel to make an application in the Court for an originating order based on the letter. The RCMP would be named as respondent and Niko Canada would be given notice and an opportunity to be heard. Canadian counsel informs us that, if Niko and the RCMP do not oppose the application, the process could be completed in a matter of*

[49] Annex A to the Respondents' letter of 3 February 2017.

weeks. If there is opposition, the process could take many months, as hearings would be necessary to decide upon the application.

187. The Respondents' explanation continued by offering "*to provide the Tribunals with a draft of a letter to the Canadian Court …*".[50] The Tribunals invited the Respondents to provide such a draft which the Respondents did on 10 February 2017.

188. In the draft, the Respondents proposed **a request addressed to the Alberta Court of Queen's Bench**, on ICSID letterhead but signed by the President of the Tribunals, requesting from that court an order "*to compel the testimony and production of documents from the RCMP and testimony from Corporal Kevin Duggan of the RCMP …*". The orders requested from the Alberta Court were drafted as follows:

> *1) The RCMP will provide the Tribunals with the following documents and video recordings obtained or created during the course of the investigation of Niko and that are still in its possession:*
>
> *a. Video of interview of Mr. Qasim Sharif on December 16, 2010 and video and transcript of interview of Mr. Qasim Sharif on May 20, 2008;*
>
> *b. Video and transcript of interview of Mr. Selim Bhuiyan;*
>
> *c. Videos and/or transcripts of interviews of former Chief Financial Officers mentioned at paragraph 25 of the Duggan affidavit;*
>
> *d. Video and/or transcript of March 12, 2009 interview of former accounting employee mentioned at paragraph 93 of the Duggan affidavit;*
>
> *e. Video and/or transcript of December 11, 2009 interview of former employee mentioned at paragraph 115 of the Duggan affidavit; and*
>
> *f. Transcripts or videos of other interviews conducted in the Niko investigation and other evidence of corruption in obtaining the JVA and GPSA referenced by Corporal Duggan in his affidavit.*

[50] Letter of 3 February 2017, p. 5.

2) Corporal Duggan will be examined under oath before the ICSID Tribunals and counsel for BAPEX and Petrobangla and then cross examined by counsel for Niko in relation to his investigation of Niko that led to its conviction on June 24, 2011.

3) The place, timing, and method of the requested production and Corporal Duggan's examination will be determined by the Tribunals in consultation with the RCMP to be as convenient to Corporal Duggan and the RCMP as possible.

189. The draft which the Respondents requested the Tribunals to address to the Alberta Court also provided:

> *The Tribunals are willing to cooperate with Corporal Duggan and the RCMP as much as possible to avoid any undue burden. Such cooperation could include payment of the cost for Corporal Duggan's appearance or having him provide testimony by video link from Calgary.*

and

> *The Centre is willing, as able, to provide similar assistance to the Courts of Canada when requested. The Centre, as reimbursed by the parties, is willing to reimburse the Alberta Court of Queen's Bench for any costs incurred in executing this request.*

190. The Claimant responded to the Respondents' letter on 15 February 2017, arguing *inter alia* that "*the [ICSID] Convention does not contemplate ICSID Tribunals' resort to national courts*". The Respondents commented on 28 February 2017.

191. **The Tribunals** addressed the Respondents' request of 26 January 2017, as amplified by the 3 February 2017 letter and in the draft letter to the court of 10 February 2017 (collectively referred to as **the Application**) on **23 March 2017 in Procedural Order No 18.** Other issues which were also addressed in the order will be considered separately below.

192. The Tribunals considered the Parties' conflicting views concerning the powers of an ICSID Tribunal to make a request to the Alberta Court as in the Respondents' application. The Respondents relied on ICSID Arbitration Rule 34.2 (b) and Article 43 of the Convention and quoted Professor Gary Born on the availability of judicial assistance; but they conceded that they "*have not been able to find a reported case in which*

an ICSID tribunal has sought such assistance".[51] The Claimant contested the Respondents' interpretation of Arbitration Rule 34.2 (b). Arguing that the Convention is a stand-alone dispute settlement regime, the Claimant concluded that "*contrary to accepted practice in commercial arbitration, resort to national courts for provisional measures in aid of arbitration is not permissible unless the parties explicitly agree to it*".[52]

193. The Tribunals considered the Parties' argument and concluded:

> *There is no dispute between the Parties that, in commercial arbitration, tribunals may seek assistance from national courts in the manner described by Professor Born. Such intervention may be seen as inherent in a tribunal's function if and to the extent to which this is necessary to a fair examination of the parties' cases.*
>
> *Nevertheless the Tribunals are mindful of the fact that the system of arbitration created by the Contracting States to the ICSID Convention was particularly designed to operate without the involvement of national courts. Consent to arbitration under the Convention is, unless otherwise stated, 'deemed consent to such arbitration to the exclusion of any other remedy'.[53] The ability to seek provisional measures from national courts in aid of arbitration, which is a common feature of commercial arbitration, is excluded from ICSID arbitration unless the parties have stipulated otherwise in their instrument of consent.[54]*
>
> *Article 43 of the ICSID Convention, which deals with evidence, specifically empowers an ICSID tribunal, under paragraph (a) to call upon the parties to produce documents or other evidence. In this regard the Convention lays the primary responsibility on the parties to assist the Tribunal by bringing forward the evidence necessary to the fair disposition of the dispute.*
>
> *The Contracting States also permit the ICSID tribunal to visit the scene "and conduct such inquiries there as it may deem appropriate." It contains no general power upon tribunals to compel the appearance of witnesses. A proposal to include such a power was defeated during the Convention's framing.[55] The Convention does not confer an express power upon tribunals to seek the assistance of national*

[51] Letter of 3 February 2017, p. 2.
[52] Letter of 15 February 2017, p.2.
[53] ICSID Convention, Article 26.
[54] ICSID Convention, Article 39 (6).
[55] C. Schreuer et al., "The ICSID Convention: A Commentary", Cambridge University Press, 2009, paragraph 51, p. 653.

courts in this regard and consequently creates no international obligation on the part of Contracting States to render assistance to an ICSID tribunal in evidence gathering.

For the purpose of this decision, the Tribunals are content to assume, without finally deciding, that, despite the absence of such an express power, an ICSID tribunal may, in an appropriate case where it is satisfied that a request under Article 43(a) of the Convention would be unavailing, be entitled to issue a request for assistance in the collection of evidence to a national court or (in what would likely be the more suitable step) to permit a party to pursue such a request directly. Although no such power is expressly included in the Convention and Rules, neither is it expressly excluded. It might be said that such a request for assistance, when issued under the control of the tribunal, supports its exclusive jurisdiction and does not undermine it, since it submits no part of that jurisdiction to the national court. Article 44 does confer upon tribunals broad powers to decide any question of procedure not covered by the Convention and the Rules.

194. Having assumed in favour of the Respondents that they had the power to request the assistance of national courts, the Tribunals considered whether the Respondents had made out a sufficient case to exercise it in the present case.

195. The Tribunals considered prior requests by the Respondents for similar interventions and the information which the Respondents provided for the evidence in their possession and that which they requested. They noted the close cooperation between the Canadian and Bangladeshi authorities and the exchange of information between them and the assistance from Mr Khan. Specifically, the Tribunals did not accept the Respondents' argument that the Respondents lacked access to the evidence from the joint Bangladeshi/Canadian investigation. They noted that the Respondents had not alleged that any of the items of evidence they seek to obtain through the Alberta Court were not included in the 'vast majority' of the evidence gathered and exchanged in this investigation.

196. Furthermore, the Tribunals considered the probative value of the evidence which the Respondents sought through the Tribunals' assistance. They noted the Claimant's comments on the items of evidence identified by the Respondents on 10 February 2017:

> *… [the Respondents] are seeking further hearsay evidence together with testimony of someone with no direct knowledge of the circumstances from whom they seek to elicit opinions about the hearsay evidence. Indeed, the Respondents now even go so far as to submit in their 10 February letter that the Tribunals should hear from Corporal Duggan because he heard the individuals interviewed and can provide his views as to their credibility and the credibility of their unsworn statements. To accede to such an approach would make a mockery of the concepts of fairness and due process, and would discredit the arbitral process.*[56]

197. In conclusion, the Tribunals noted:

> *By their letter of 10 May 2016, the Respondents expressed their belief that no "further evidence is needed for the Tribunal to grant [their] requests for relief". Since then they have produced additional documents and witness statements. They have described the very broad investigation of Niko's corruption conducted jointly by the Bangladeshi, Canadian and U.S. authorities and provided evidence gathered during the course of this investigation. They have failed to demonstrate that the evidence for which they now request the Tribunals' assistance is not available to them and, if it were not available to them, what steps they have taken to obtain it in Bangladesh. In any event the limited probative value of the requested evidence does not justify the intervention of the Tribunals in a complex and most unusual procedure.*

198. For these reasons, the Tribunals dismissed the Respondents' Application requesting the Tribunals to make the request to the Court in Alberta as presented in the Respondents' draft letter of 10 February 2017.

2.4.11 Other Pre-Hearing Evidentiary Issues addressed in Procedural Order No 18 and the Pre-Hearing Conference on 10 April 2017

199. In its letter of 11 January 2017, the Claimant proposed as one of the Agenda Items at the Status Conference issues concerning the **Witness Statements of Mr Khan and Ms LaPrevotte Griffith** produced by the Respondents:

> *The Tribunals' weighting of hearsay statements and, in particular:*

[56] Letter of 15 February 2017, pp. 6-7.

a. Whether it will be useful for "witnesses" with no personal knowledge of the facts they address, such as Mr. F. Khan and Ms. LaPrevotte Griffith, to testify at the Evidentiary Hearing and for Niko to prepare to cross-examine such "witnesses";

b. Whether the Tribunals will assign any weight to statements by persons who will not testify at the Evidentiary Hearing (e.g., Messrs. Mamoon, Bhuiyan and others). This may inform the scope and content of the Parties' second round of submissions.

200. The Respondents objected to such restriction in the Tribunals' consideration of the evidence. They insisted that the named persons be heard, arguing that they are "*entitled to marshal the evidence and make arguments without a referee making calls mid-play*".[57]

201. At the Status Conference the Claimant clarified that it does not seek the exclusion of the evidence in question; rather the Claimant argued that no or very little weight should be given to any such evidence. According to the Claimant, advance clarification of this aspect could be of assistance to the Claimant when deciding whether to call Mr Khan and Ms LaPrevotte Griffith to testify at the April 2017 Hearing, or otherwise assist in the preparation of its forthcoming submission. The Respondents announced during the Status Conference their intention of calling Mr Khan and Ms LaPrevotte Griffith to appear for testimony at the April 2017 Hearing.

202. The Tribunals considered the issue further in Procedural Order No 18. They noted the Claimant's objections concerning the hearsay nature of much of the two witness statements. They pointed out, however, that they are not bound by strict rules on the admissibility of evidence and stated that the Claimant's observations would be taken into consideration at the assessment of the testimony.

203. The Tribunals concluded

The Tribunals admit the appearance of Mr Khan and Ms LaPrevotte Griffith as witnesses. Following the procedure previously adopted for other witnesses, witness statements are accepted as direct testimony if the witnesses appear for examination when called upon to testify.

[57] Letter of 17 January 2017, p. 2.

204. In their letter of 26 January 2017 the Respondents requested that the **Targeted Period** be extended beyond the time fixed in Procedural Order No 15. The request was discussed at the Status Conference on 30 January 2017.

205. In support of their request the Respondents argued that, prior to the BNP government, Niko laid the grounds for corruption and for making payments with the objective of corruption. While confirming that the corrupt system within the Government was limited to the period under the BNP Government between 2001 and 2006, the Respondents stated that the Sheikh Hasina Government was not corrupted but individual actors may have been. The Respondents referred to Footnote 36 at p. 17 of their Memorial on the Corruption Claim. They continued to hold that the FOU was tainted by corruption and requested that the Targeted Period be extended to the time prior to the BNP Government. The Respondents stated that, after the end of the BNP Government in early 2007,[58] no corrupt payments were received by the Government from Niko.

206. The Claimant did not support the requested extension of the Targeted Period. Concerning the reference to Footnote 36, the Claimant observed that the official identified in Footnote 36 of the Memorial is an Honourable Advisor to the Prime Minister on Energy, a position he has held since 2009.[59]

207. The Tribunals considered the issue in Procedural Order No 18. They repeated what they had pointed out on previous occasions; they are not in the position of a criminal investigator or court charged with punishing acts of corruption. Their mandate at this stage of these Arbitrations is to determine whether the JVA and the GPSA were obtained by corruption. Acts of corruption which were not causal for the conclusion of the two agreements do not appear to be decisive for this determination. The Tribunals concluded:

> *It is the Respondents' case that BAPEX and Petrobangla themselves were not corrupted but were instructed by corrupted members of the Government to execute the JVA and the GPSA. No such corrupted*

[58] The Claimant disagreed with the Respondents' timing of the end of the BNP coalition. They state that BNP left office in October 2006 followed by a caretaker government.
[59] Summary Minutes of the Status Conference, paragraph 10.1.

> *Government instructions are alleged for the period prior to the BNP government. The Tribunals, therefore, see no justification for extending their examination beyond the Target Period, as defined in Procedural Order No 15. They do not exclude, however, evidence outside the Target Period and will consider it.*

208. In the correspondence leading up to the Status Conference on 30 January 2017, the Respondents made an application concerning the **appointment of a financial expert by the Tribunals**. In their letter of 26 January 2016, they wrote:

> *Specifically, Respondents maintain that the Tribunals should reconsider, as envisaged in Procedural Order No 15, […] ordering the Claimant to open its financial records for the entire relevant period (2001-2006) to review by an independent financial expert.*

209. Further to the Tribunals' directions in Procedural Order No 15, the Claimant had produced financial records. The Respondents considered these productions as insufficient. They produced with their letter of 23 November 2016 the opinion of Duff & Phelps, "*a global financial firm with expertise in complex valuation, disputes, compliance and regulatory consulting, among other topics*". In this opinion, the firm stated:

> *The documents provided by Niko were unorganised, incomplete, and do not meet the level of documentation needed to conduct a proper corruption examination.…*[60]

210. The matter was discussed at the 30 January 2017 Status Conference: the Claimant stated that it did not see any justification why it should commission such a forensic expert concerning its own records. Concerning the Respondents' complaint about the insufficiency of the records on Niko's payments which it produced, the Claimant asserted that the Respondents did not argue that channels of payment other than those indicated by the Claimant were used; rather they questioned the Claimant's explanations concerning the use of the funds transferred to Bangladesh. The Respondents confirmed that, other than the note by the Duff & Phelps, their experts had not produced any opinion on the documents disclosed by the Claimant. The Respondents stated that the Claimant had not provided the necessary information that experts would need to conduct an analysis of possible corruption emanating from Niko's accounts.

[60] Duff & Phelps Memo, 22 November 2016, pp. 2-3.

211. Following the Status Conference, the Respondents made an application on 14 March 2017, specifying the documents that experts would need to conduct an analysis of possible corruption emanating from Niko's accounts. They requested that the Tribunals order the production of the following groups of documents:

(i) complete records of all payments to Bangladesh, including to third parties made by any of the companies of the Niko Group, pursuant to the Claimant's commitment which had been recorded in Procedural Order No 15;

(ii) relying on the opinion of Duff & and Phelps, "*complete records*" should include: "*copies of checks, deposit slips, records of electronic transfers, invoices to support payments, receipts, and general legers to understand the payments between Niko, Stratum, Mr Sharif, Mr Bhuiyan, Mr Mamoon and others, including payments through intermediaries and foreign accounts*;"

(iii) all reports by Mr Sharif or Stratum "*on the use of the funds*" received from Niko;

(iv) correspondence and other documents, pertaining to payment negotiations or received by Five Feathers for any service provided.[61]

212. The application was considered in Procedural Order No 18. The Tribunals referred to the Witness Statements of Mr Khan and Ms LaPrevotte Griffith, from which the Tribunals concluded that the joint investigation included extensive examination of the financial transactions of the Niko Group. They observed that the Respondents had access to this investigation and noted that, by some of the evidence produced with their submissions on the Corruption Issue, the Respondents had shown that at least some of the evidence now requested from the Claimant was in their possession. The Tribunals concluded:

> *In these circumstances, the Tribunals see no justification to order the Claimant to produce documents of a type that had been made available already by the Niko Group and others during the course of the joint investigation and of which at least the "vast majority" is in*

[61] Letter from the Respondents, 14 March 2017, pp. 2-3.

the possession of the Bangladesh authorities and available to the Respondents. The request is denied.

213. In their letter of 14 March 2017, the Respondents also requested that the Claimant produce "*records in any format held by or available to Claimant or its former counsel pertaining to the ACC, Canadian, or U.S. investigations of Niko's activities in Bangladesh*". The request concerning these **criminal investigations** resumed an earlier request raised by the Respondents on 10 May 2016 and discussed above in particular in Section 2.4.1 in the context of the "Gowlings Information". The request had had been addressed by the Claimant already in its response of 8 August 2016.

214. In Procedural Order No 18, the Tribunals noted that the vast majority of such records are located in Bangladesh and that some of those documents had previously been produced by the Respondents in these Arbitrations. The Tribunals further noted that the Respondents "*had not made any effort to identify with any specificity documents which are relevant and material for the Tribunals' decision and to which they do not have access*". The Tribunals concluded that "*[i]n these circumstances, the Tribunals see no justification for ordering the Claimant to produce the requested records*".

215. Finally, the Respondents presented in their letter of 14 March 2017 requests for "**Relevant and material correspondence key to Niko's corrupt scheme in Bangladesh**". The requested documents were described as follows:

> *(i) correspondence, including but not limited to email messages, not[62] sent to or by Respondents, and other documents concerning*
>
> *a. the possibility of, prospects for, or possible means of convincing the relevant government entities to hear and consider Niko's proposals;*
>
> *b. the possibility of, prospects for, or possible means of securing a JVA without a competitive bid process (i.e., the Swiss Challenge process);*

[62] The Tribunals presumed that the word "not" is an error.

c. *the possibility of, prospects for, or possible means of including Chattak East in the JVA;*

d. *Claimant's contracts with Stratum, including preparatory drafts;*

e. *any opinion drafted by Claimant's counsel, Moudud Ahmed & Associates, in relation to Claimant's alleged investment;*

f. *Niko's efforts to propose or support a proposal for the Ministry of Energy to seek a legal opinion from the Law Ministry at the time Moudud Ahmed was Law Minister;*

g. *the rationale behind Niko's decision to hire Senator Harb;*

h. *Claimant's contracts with Mr. Bhuiyan's company, Nationwide, including preparatory drafts, and anything pertaining to the payment negotiated or received by Mr. Bhuiyan or Nationwide for any service provided and any discussion of Mr. Bhuiyan's role in assisting Niko to procure the JVA and GPSA.*

(ii) As Claimant already consented to provide, all "records in its possession relating to payments (if any) made to or communications with" Barrister Moudud Ahmed, Mr. AKM Mosharraf Hossain, Mr. Khandker Shahidul Islam, Mr. Selim Bhuiyan, former Prime Minister Khaleda Zia, Tareq Rahman, and Giasuddin Al Mamun; and

(iii) Communications, including but not limited to email messages, regarding the negotiation and finalization of the FoU, the JVA, or the GPSA, between any company in the Niko group or their officers and/or agents and Mr. Qasim Sharif.[63]

216. In Procedural Order No 18, the Tribunals noted the very broad scope of the request and pointed out that most of its items did not identify documents with specificity but described subjects of enquiry. They added, giving examples, that some of these subjects did not necessarily imply corruption. They also pointed out that some of the requested evidence would seem to be available in Bangladesh, irrespective of the results of the joint investigation, while other subject areas identified in the request must also have been considered by the Joint Investigation.

[63] Numbering as per Procedural Order No 18, paragraph 116, FN 70

217. For these and other considerations set out in Procedural Order No 18, the Tribunals concluded that they saw

> *… no justification to initiate now, one year after the Corruption Issue had been raised by the Respondents, such measures which, at best, would be duplicative of the joint investigation performed by organisations of incomparably greater means of investigation.*

218. The Tribunals noted, however, that the production of some of the documents in the list, as pointed out by the Respondents, had previously been ordered by the Tribunals. They therefore ordered

> *(i)* ***the Claimant*** *forthwith to comply with any order for the production of documents made by the Tribunals that have not yet been complied with;*
>
> *(ii)* ***the Respondents*** *to produce within one week of receipt of this P.O. and by reference to each of the document production orders made by the Tribunals or accepted by the Claimant, a list identifying documents that have been received and those that remain outstanding;*
>
> *(iii)* ***the Claimant*** *to produce within one week of the receipt of the list as per the previous paragraph the documents so identified as outstanding or, for those documents which it does not produce, the reasons why this is so.*

219. The Tribunals announced:

> *The Tribunals may draw adverse inferences if it appears to them that the documents so produced by the Claimant are incomplete and without convincing explanations for missing documents.*[64]

220. Following these directions, the Respondents produced on 31 March 2017 a list of categories of documents that Niko was said to have failed to produce. On 7 April 2017, the Claimant responded to the various points that had been raised in this respect by the Respondent and asserted that it had "*fully complied with all document production orders of the Tribunals as well as Niko's commitments to these Tribunals*".

[64] Procedural Order No 18, paragraphs 122 and 123.

2.4.12 The Pre-Hearing Conference of 10 April 2017 and Procedural Order No 19

221. On 10 April 2017, the President of the Tribunals held a **pre-hearing conference** with the Parties by telephone to discuss the organisation of the Hearing on the Corruption Claim. Prior to this telephone conference, the Parties were invited to propose any items that they wished to have addressed during the telephone conference.

222. The following persons participated in the Pre-Hearing Conference: Mr Michael E. Schneider, President of the Tribunals; Ms Frauke Nitschke, Secretary of the Tribunals; Mr Barton Legum, Mr Gordon Tarnowsky, Mr Anthony Cole, Ms Anne-Sophie Dufêtre, Ms Marie-Hélène Ludwig and Mr Brian Adolph for the Claimant; and Mr Derek C. Smith, Ms Erin Argueta, Ms Melinda Kuritzky, Mr Oscar Norsworthy and Mr Moin Ghani for the Respondents. The Parties confirmed that they had no objection to the Pre-Hearing Organisational Meeting being conducted by the President alone.

223. During the telephone conference the Parties agreed to a number of matters concerning the organization of the Hearing. They were invited by the President to confer following the conference on other questions of hearing procedure in order to reach an agreement, including time allocation, sequence of witness examination and confidentiality procedures. The Parties' agreed proposals in this regard, were subsequently transmitted to the Tribunals on 13 April 2017, including a tentative Hearing Agenda.

224. Summary Minutes of the 10 April 2017 Pre-Hearing Telephone Conference were also sent to the Parties on 15 April 2017.

225. Further to the discussion with the Parties during the Pre-Hearing Conference and the Parties' subsequent communications, the Tribunal issued **on 15 April 2017 Procedural Order No 19**, settling the Hearing organisation, including Agenda and time allocation principles, witness examination and confidentiality procedures.

226. Procedural Order No 19 also addressed issues relating to **document production**.

227. Further to the Tribunals' directions in Procedural Order No 18, the Respondents had produced on 31 March 2017 a chart identifying, by reference to each of the production orders, the documents that they had received and those which, in their opinion remained outstanding. In the accompanying letter, the Respondents noted the Parties agreement to produce "*relevant documents*" as recorded in Procedural Order No 15. They commented that

> *Niko provided a small number of documents relevant to the procurement of the JVA and GPSA, including Board Minutes and select financial documents […] However, Niko provided no internal communications. In particular, Niko provided no record of communications with Qasim Sharif related to the procurement of the JVA and GPSDA, except one e-mail that was internally forwarded in 2008 regarding his statement to the Joint Task Force.*

228. The Respondents recognise that prior to Procedural Order No 15 another e-mail had been submitted (Exhibit C-98, an e-mail of 13 November 1998 with attachment). They insisted on the importance of Mr Sharif for the JVA negotiations and quoted Mr Hornaday:

> *Qasim Sharif was undoubtedly Niko's lead representative in the negotiations with BAPEX, Petrobangla and the Ministry in relation to the JVA".*[65] *The most detailed record of the process of procuring the JVA from Niko's perspective is likely contained in Mr Sharif's communications with Robert Olson, Ed Sampson and others in Niko's management.*

229. Pointing to the role of Mr Sharif in Niko's payments to and in Bangladesh, the Respondents added "*his communications regarding the procurement of the JVA and GPSA are highly likely to contain relevant and material evidence related to the Corruption Claim*".

230. The Claimant responded on 7 April 2017, asserting that "Niko has fully complied with all document production orders of the Tribunals as well as Niko's commitments to these Tribunals." It addressed each of the categories of missing documents alleged by the Respondents and concluded by requesting that the "Tribunals should reject the assertions made in the Respondents' 31 March 2017 submission."

[65] The quotation is taken from William Hornaday Witness Statement in the Corruption Claim, 10 January 2017.

231. The issue was addressed at the Pre-Hearing Conference:

> *Responding to the Claimant's 7 April 2017 letter concerning document production, the Respondents stated that they disagree with the position expressed in the letter and continue the production incomplete; but they do not consider further submissions on the topic necessary. The Tribunals will examine the matter and will draw the conclusions as they consider appropriate.*

232. In Procedural Order No 19 the Tribunals noted the following position:

> *The Tribunals have taken note that the Respondents, having considered the Claimant's letter of 7 April 2'17, confirm their view that the Claimant's document production was incomplete but see no need for further submissions on the topic. The Tribunals reserve their position concerning the question whether the production was complete and, if they consider it incomplete, reserve the conclusions that may be drawn from it.*

233. The Respondents then wrote on 17 April 2017 to insist that the Claimant's responses to the document production requests were inadequate. Relying on Procedural Order No 18, where the Tribunals had announced the possibility of adverse inferences, the Respondents requested that the Tribunals "*draw all appropriate adverse inferences*" and identified three issues where such inferences had to be drawn. The Claimant objected to the request by its letter of 18 April 2017.

234. The Tribunals will consider the request below in Section 8.6.

235. Procedural Order No 19 also addressed the issue that had arisen with respect to **the Respondents' correspondence with the FBI**, forming part of the United States Department of Justice.

236. On 6 April 2017 the Respondents had communicated to the Centre for transmission to the Tribunals copy of a letter to Ms LaPrevotte, authorising her to testify at the Hearing in the present Arbitrations. The letter referred to an earlier letter, dated 10 November 2016, which the FBI had addressed to the Respondents' counsel, expressing the authorisation for Ms LaPrevotte to provide written testimony and for that testimony, dated 20 November 2016 and 15 February 2017. The letter also specified the limitations in the scope of the authorised testimony and referred to advice given by the Respondents' counsel according to whom

"*in ICSID proceedings the oral testimony of a witness is limited to the scope of the witness' written testimony*".

237. When communicating on 7 April 2017 to the Tribunals its suggestions for the agenda items of the Pre-Hearing Conference, the Claimant included an item entitled the "*Respondents' Failure to Produce Documents Placing in Context FBI Communications*". It explained that the Respondents "*repeatedly rely upon correspondence from the US Department of Justice/FBI in these proceedings*" and mentioned specifically the letter transmitted on 6 April and Exhibits R-376 and R-377, two letters from the FBI to the Respondents' counsel dated 10 November 2016. One of these letters contained the authorization just mentioned; the other accompanied documents which the FBI provided in response to a request by the Respondents' counsel for documents. The Claimant explained that it had requested the Respondents on 21 March 2017 to produce their correspondence with the FBI but had received no response. It requested the Tribunals

> *To order the Respondents to produce the communications with the Department of Justice/FBI preceding Exhibits R-376, R-377 and the 3 April 2017 letter produced by the Respondents yesterday as well as the materials referenced in Exhibit R-376.*

238. At the Pre-Hearing Conference on 10 April 2017 the Claimant repeated the request. The Respondents stated that there may be considerations of privilege preventing counsel to make the requested disclosure. The Respondents' counsel undertook to verify the matter and revert by 14 April 2018.[66]

239. In **Procedural Order No 19** the Tribunals gave the following instructions:

> *Further to the Claimant's request, the Respondents are instructed*
>
> *(i) To produce to the Claimant by Friday, 14 April 2017 the documents they received from the FBI as mentioned in the letter of 10 November 2016;*
>
> *(ii) to list by the same date their correspondence exchanged with the FBI regarding Ms. LaPrevotte Griffith's testimony.*

[66] Pre-Hearing Conference, Summary Minutes, 5; the Respondents have provided further detail about the exchange at the conference in their letter of 17 April 2017.

> *If the Respondents are of the view that any such document or correspondence is protected and may not be disclosed to the Claimant and/or the Tribunals, they shall explain the grounds for such protection and propose any protective measures which may make production possible.*
>
> *The Claimant may comment on the Respondents' production and accompanying explanations by Wednesday 19 April 2017.*[67]

240. The Respondents wrote to the Tribunals on 17 April, explaining that their counsel had "*consulted regarding privilege and then produced to Claimant the communications from Foley Hoag to the FBI*". The Claimant produced this correspondence as Exhibit C-236 with its letter of 18 April 2017.

241. In their letter of 17 April 2017 the Respondents also raised objections to the "*appropriateness of the timing or content of Claimant's request for an order of production of documents from the Tribunals*". With respect to the request for the production of the documents received from the FBI, the Respondents explained that they had not understood that a decision concerning that production had been made and added:

> *Claimant's late hour application for an order of production of documents so close to the hearing is entirely inappropriate. This is a constantly-shifting fishing expedition regarding Respondents' efforts to gather evidence (and not the evidence itself) in the hopes of finding something to use as a last minute distraction at the hearing.*
>
> *Respondents have nothing to hide and can provide these documents to Claimant. However, considering Claimant's tactical manoeuvre, Respondents request that the full Tribunals consider the inappropriate timing of Claimant's request and order that Claimant not make use of the documents during the hearing. If Niko has comments on the documents, it may make them in a post-hearing brief with an opportunity for Respondents to respond in writing.*

242. The Claimant responded on 18 April 2017. It maintained that the Respondents' production did not fulfil the requirements of Procedural Order No 19, pointing out that the accompanying attachments had not been provided, notably the description of the arbitration attached to the 14 October 2016 e-mail. It also complained that the Respondents had not produced the "*materials they requested from the FBI*" and mentioned specifically the "*opening EC written by Agent LaPrevotte for the*

[67] Procedural Order No 19, paragraphs 18 and 18.

Bangladesh Corruption ML/Forfeiture case" and "*[a]ll 302s related to Salim Bhuiyan, Mosharraf Hossain, Fiver Feathers and Mohamed Khan*". The Claimant pointed out that it made its request on 21 March 2017; there was neither a "*constantly-shifting fishing expedition*" nor any justification for preventing reference to the documents at the hearing, once they had been produced.

243. The issue was then addressed at the Hearing.

244. Finally, Procedural Order No 19 addressed issues concerning the **treatment of confidential documents at the Hearing**. During the Pre-Hearing Conference the Parties had agreed "*to confer on the arrangements to be made at the hearing with respect to the use of confidential documents produced by the Claimant*".[68]

245. The Parties did indeed agree on such arrangements. The Respondents communicated their agreement by e-mail of 13 April 2017 and the Tribunals recorded it in Procedural Order No 19. That order provided that only Foley Hoag retains copies of any confidential documents, no portion of the Hearing discussing confidential Niko documents need be held in camera (in other words, party representatives may remain in the room during discussion of confidential Niko documents). However, a separate transcript with distribution limited to the Secretariat, Members of the Tribunals and to Foley Hoag and Dentons will be prepared of such discussions.

246. The Tribunals added: "*Otherwise, the Tribunals' instructions on confidentiality as confirmed by Procedural Order No 18 remain in force.*"

247. In their letter of 17 April 2017, the Respondents explained that by the quoted agreement, they had not waived any rights with respect to the decisions of the Tribunals on confidentiality. They added:

> *Respondents did not by this agreement waive any rights with respect to the decisions of the Tribunals on confidentiality. Respondents and Claimant have reached practical arrangements to allow the proceedings to go forward. However, we maintain our position that Respondents, their officers, and Boards of Directors should be provided unfettered access to all materials presented in the course of*

[68] Summary Minutes, paragraph 4.

these proceedings. This is a fundamental procedural right that must not be abridged. Counsel for Respondents has withheld documents marked by Claimant as confidential because I has been ordered to do so by the Tribunals. This has limited the free exchange of information between counsel and client.

2.4.13 The Hearing on the Merits of the Corruption Claim (24 to 29 April 2017)

248. A Hearing on the Corruption Claim was held from Monday 24 April 2017 through Saturday 29 April 2017 at the ICC Hearing Centre in Paris.

249. Besides the three Members of the Tribunals and the Secretary, the following persons attended the Hearing:

For the Claimant:

- Mr Barton Legum, Mr. Gordon Tarnowsky, Mr Anthony Cole, Ms Anne-Sophie Dufêtre, Ms Marie-Hélène Ludwig, Mr David Bocobza, and Mr Taylan Aygun of Dentons;
- Mr Mustafizur Rahman Khan of Rokanuddin Mahmud & Associates;
- Mr Brian Adolph, Mr William Hornaday, and Mr Amit Goyal of Niko Resources Ltd.; and
- Mr Christopher of Moyes of Moyes & Co.

For the Respondents:

- Mr Derek Smith, Ms Erin Argueta, Ms Diana Tsutieva, Ms Melinda Kuritzky, Mr Joseph Klingler, Mr Oscar Norsworthy, and Ms Angelica Villagran of Foley Hoag;
- Mr Moin Ghani; Mr Abul Mansur Md Faizullah and Mr Syed Ashfaquzzaman of Petrobangla;
- Mr Mohammad Nowshad Islam of BAPEX;
- Mr Ferdous Ahmed Khan, Ms Debra LaPrevotte Griffith, Mr Khairuzzaman Chowdhury, and Mr Maqbul-E-Elahi; and

- Mr Nazimuddin Chowdhury of the Energy and Mineral Resources Division, Government of Bangladesh.

250. Mr Ferdous Ahmed Khan, Mr Khairuzzaman Chowdhury, Ms Debra LaPrevotte Griffith, Mr Maqbul E. Elahi, Mr Brian Adolph, Mr William Hornaday, and Mr Amit Goyal testified as fact witnesses, and Mr Christopher Moyes testified as an expert witness. Mr Muhammad Imaduddin and Md. Nural Islam, who had provided witness statements, were not called to testify.

251. The Parties were given an opportunity to examine the experts and fact witnesses, developed their arguments orally, and responded to questions from the Tribunals. In the course of the Hearing the Parties introduced additional documents. All of these are listed in the Summary Minutes of the Hearing.

252. Before the start of the examination of Ms LaPrevotte Griffith, the Tribunals recalled the 3 April 2017 letter from the FBI regarding her testimony. They pointed out that the restrictions imposed by her employer would be respected, but that such restrictions might have to be considered in the assessment of her testimony. In that testimony, she made a point of not naming certain persons who had otherwise been identified on the record of these arbitrations.[69]

253. An audio recording was made of the Hearing and a transcript was prepared by Ms Georgina Ford and Mr Ian Roberts of Briault Reporting Services. The **confidentiality arrangements** envisioned by Procedural Order No. 19 were applied in the following manner: no person was required to leave the hearing room when a confidential document was referenced; however, the transcript of the entire oral procedure was treated as confidential material, and delivered only to Dentons and Foley Hoag at the end of each hearing day. In accordance with the Parties' agreement, the confidential transcript was later reviewed by the Parties and a redacted version of the transcript prepared. This redacted version was distributed to all representatives for the disputing Parties on file with ICSID. Further to the Parties' agreement, the audio recording of the Hearing was provided to the Members of the Tribunals and counsel at Dentons and Foley Hoag.

[69] See Summary Minutes of the Hearing, paragraph 9.

254. With respect to the Respondents' correspondence with the FBI, as it had been addressed in Procedural Order No 19, the Respondents produced documents from this correspondence to the Claimant during the first hearing day. During the evening hours following Day 1 (24 April 2017), the Claimant introduced from among these documents a 32-page exhibit into the record (C-237, "Department of Justice, Federal Bureau of Investigation"). It was decided that these documents could be referred to during the hearing and commented on in the post-hearing submissions.

255. At the request of the Tribunals the Respondents produced a document entitled "Table of Payments Referenced in R-320", recorded as Exhibit RH-14, representing of all payments by Niko or its agents/consultants which, in the Respondents' view, the Tribunals have to consider when examining the corruption allegation. Exhibit R-320, frequently referred during the Hearing as "spider web", was presented in a marked version by the Claimant as Exhibit CH-19. Other documents produced concerned the area of the gas fields in the JVA, in particular the Chattak field, including a maps of the area, marked to show the contours of that field (Exhibit CH-18) and procurement regulations.

256. **Summary Minutes** of the Hearing were prepared by the Tribunals and distributed to the Parties after the Hearing. The Parties agreed on corrections and redactions to the confidential version of the transcript of the Hearing on the Corruption Claim as confirmed by the Parties' email communications of 2, 6, 17 and 19 June 2017. A redacted version of the transcript was prepared by the court reporter and distributed to the Parties on 29 June 2017.

2.4.14 Post-Hearing developments (Procedural Orders Nos 20 and 21)

257. At the end of the Hearing the Tribunals gave directions for the remainder of the proceedings on the Corruption Claim. These directions were confirmed and developed in **Procedural Order No 20** of 17 May 2017. In particular the Tribunals fixed the time for the Post-Hearing Submissions. They invited the Parties to agree on a page limit. The Tribunals instructed the Claimant to provide information and documents concerning the Deloitte audit (see below Section 2.4.16).

258. The Respondents were instructed to

> *3.1 produce any law and regulations that, in their opinion, required that BAPEX and Petrobangla adopt a competitive process when concluding the JVA and the GPSA with Niko, in addition to those which the Respondents have produced already at the hearing (Exhibit RH-16 "Procurement Manual") and thereafter (Exhibits R-408 "Manual of Office Procedure" and R-409 "Public Procurement Regulations 2003" of which the Tribunals confirm receipt);*
>
> *3.2 identify the provisions in these laws and regulations which in their opinion do require that this process be followed for the conclusion of these two agreements;*
>
> *3.3 identify any petroleum project (for exploration or for marginal/abandoned fields) other than the BAPEX/Niko JVA, which was awarded after the Second Round of PSC bidding (Exhibit R-212) to companies not controlled directly or indirectly by the GOB, indicating for each of these projects whether a competitive procedure was applied and if so, specifying the modalities and the regulations applied; and*
>
> *3.4 identify any GPSA concluded by Petrobangla which was concluded in a competitive procedure.*
>
> *[…]*
>
> *4.1 produce the proposal from Petrobangla to the Minister, which in the opinion of Mr Chowdhury must have been made after his departure from the Ministry (Transcript Day 3, p. 153); and*
>
> *4.2 clarify whether there is a 1996 regulation on the award of exploration and production sharing contracts to which reference was made at the hearing…*

259. The Tribunals also decided that, except for the documents listed in Procedural Order No 20 or requested by the Tribunals, there shall be no further evidence produced in the proceedings on the Corruption Claim. Subject to this exception, the **evidentiary record for the proceedings on the Corruption Claim was closed**.

260. As the Tribunals had announced at the end of the Hearing, a **list of questions** was attached to Procedural Order No 20 as Annex A, which the Tribunals invited the Parties to address in their Post-Hearing

Submissions without thereby restricting the questions the Parties wished to address in their Post-Hearing Submissions (see below Section 2.4.16).

261. In accordance with the Tribunals' instructions during the Hearing, the Respondents notified the Tribunal on 12 May 2017 that they had undertaken a search for procurement regulations in force leading up to the signing of the JVA and transmitted two documents which the Respondents proposed to add to the record: a Manual of Office Procedure (Purchase) (1978) (Exhibit R-408) and Public Procurement Regulations (2003) (Exhibit R-409). In response to questions in Procedural Order No 20, the Respondents presented on 22 May 2017 further explanations about requirements of a competitive process in Bangladesh, in particular with respect to petroleum projects and produced documents which were admitted in the record as Exhibits R-410, R-411 and R-412.[70] They explained that they were "*unable to find any 1996 regulations on the award of exploration and production sharing contracts*".

262. At the Hearing an issue had arisen concerning the correct identification of Annex E to the January 2003 draft JVA (R-306). On 15 May 2017, the Respondents submitted a document identified as this Annex E (numbered Exhibit R-306a[71]). The Claimant contested on 25 May 2017 that the document submitted by the Respondents was indeed Annex E to the January 2003 draft JVA.

263. On 4 June 2017, the Tribunals issued **Procedural Order No 21** which addressed primarily further proceedings with respect to the Deloitte audit (below Section 2.4.16). In addition, this procedural order recorded the production of certain documents and noted the Parties' agreement on the word count of the Post-Hearing Submissions. The Deloitte audit issue and the related claim for privilege was decided by **Procedural Order No 22** (see below Section 2.4.16).

264. The Parties submitted their First Post-Hearing Submissions on 12 July 2017; the Respondents' submission was replaced on 13 July 2017 by a corrected version. The Parties had agreed on a limit of 46,000 words for the first and 30,000 for the second round. Since their first submission exceeded the agreed page number, the Respondents were ordered to

[70] See Procedural Order No 21 (CONFIDENTIAL), paragraph 14.
[71] See Procedural Order No 20 (CONFIDENTIAL), paragraph 5.

submit a corrected version, respecting the agreed limit; they did so on 20 July 2017. Further to the agreed confidentiality arrangements the Parties subsequently filed a redacted version of their First Post-Hearing Brief.

265. On 2 August 2017, the Parties filed confidential, unredacted versions of their Second Post-Hearing Submissions in accordance with the procedural calendar established in Procedural Order No. 20. The Parties filed redacted versions of their Second Post-Hearing Submission, the Respondents on 4 August and the Claimant on 8 August 2017.

266. Following these submissions, the Respondents made a further application concerning the RCMP proceedings which the Tribunals denied by their letter of 11 September 2017 (see below Section 2.4.17 and Section 8.3).

267. A further issue was introduced in the examination of the Corruption Claim by the Judgement of the High Court Division of the Supreme Court in the *Alam* case, delivered orally on 24 August 2017 and in writing on 19 November 2017. The Respondents communicated this judgment to the Tribunals on 21 November 2017. The Tribunals allowed submissions concerning the *Alam* Judgment and its relevance for the Decision on Corruption. These submissions were filed on 21 November, 11 and 21 December 2017. The Judgment will be discussed below in Sections 2.5 and 6.4.

268. Procedural Order Nos. 20, 21 and 22 were published on the ICISD website, as is the case for all decisions of the Tribunals. As they contained personal identifying information and potentially sensitive financial information, it was decided, following consultation with the Parties, that only redacted versions of these Orders would be published.

2.4.15 The Tribunals' Post-Hearing questions to the Parties

269. As **Annex A to Procedural Order No 20, of 17 May 2017**, the Tribunals put a number of **Questions to the Parties** as follows:

> *Following the Hearing in Paris from 24 to 29 April 2017 the members of the two Tribunals have deliberated and have identified a number of issues which they invite the Parties to address in their Post-Hearing Submissions. The list of these issues, which is set out below, is by*

no means limitative and the Parties are free to address all issues which they consider relevant for the Tribunals' Decision on the Corruption Claim. Where a Party specifically is invited to address an issue, the other Parties are not precluded from addressing the same issue.

Most of the issues identified in the present list, or certain aspects of them, have been argued in the Parties' prior submissions. The Tribunals wish to hear the Parties' explanations on these issues in the light of the evidence and argument delivered at the April 2017 hearing. To the extent to which a Party wishes to maintain its earlier position unchanged, it is invited to simply identify the relevant passages in its earlier submissions, rather than repeating these in the Post-Hearing Submission. The Parties are invited to identify with precision the evidence on which they rely in support of their positions.

The questions in the present list appear at this stage of the Tribunals' reflection to be of possible importance, but they prejudge nothing.

Save in relation to the additional evidentiary matters that were raised at the hearing and are the subject of Procedural Order No 20, the Parties are directed to address these questions solely from the evidence on the arbitration record.

A. Corruption payments

1. *The Tribunals understand the Respondents' position to be that BAPEX concluded the JVA because it was instructed to do so by the Minister and that these instructions were procured by corruption. Do the Respondents rely on any other governmental acts which were required for the conclusion of the JVA and which were allegedly procured by corruption?*

2. *The Claimant is invited to specify the total amount the Niko Group spent on the procurement of the JVA, identifying separately the payments made to each of its consultants (Five Feathers, Mr Sharif/Stratum Development Corporation and, directly or indirectly, Mr Bhuiyan/Nationwide Co Ltd).*

3. *The Respondents have shown on their Exhibits R-320 (referred to at the hearing as the "Spider web") and RH-17 payments (a) by Niko to the UBP accounts of Mr Sharif (6207285) and Stratum (6262120); (b) outgoing from these accounts, and have identified which of the latter they consider as suspect. The Respondents are invited:*

3.1 to identify for each of the suspect payments its ultimate addressee, the chain of payments (in the alleged "layered approach") leading to him/her and the supporting evidence.

Where some or all of the links in the chain to the alleged ultimate addressee cannot be proven, but must be presumed in view of the circumstances, the Respondents are invited:

3.2 to identify the specific circumstances and explain why they justify the assumption that the payment, directly or indirectly, was made to the ultimate addressee;

3.3 to specify the acts or omissions by which the recipient of the payment was to assist Niko; and

3.4 to state whether Niko knew or ought to have known of the suspect payments and their final addressee and to identify the grounds on which such actual or presumed knowledge must be accepted.

4. Specifically in relation to the payments that Respondents allege were made by Mr Bhuiyan to Mr Mamoon and Minister Hossain, and without restricting the generality of question 3, the Respondents are invited to identify the evidence that they rely upon as establishing that:

4.1 the payments were made;

4.2 they were derived from funds emanating from the Claimant;

4.3 they provided funds or a benefit in kind to a State official;

4.4 were made for the purpose of inducing BAPEX to conclude the JVA and Petrobangla to conclude the GPSA; and

4.5 the Claimant knew or ought to have known that the payments were made for this purpose and on its behalf.

5. The Claimant is invited to specify which concrete services it expected from Five Feathers and Mr Bhuiyan/Nationwide Co Ltd and under their respective contracts in consideration of the payments that the Claimant agreed to make to those consultants, and what services they actually provided, identifying any documents on record which are evidence for such services. It is also invited to state what information it had

about how the payments under its contracts with those consultants were made; if not made directly, why the route of payment used was adopted, and the use of the funds paid to each of the consultants and when such knowledge was obtained.

B. The Joint Venture Agreement

6. The Respondents are invited to identify, on the basis of the evidence that is on the record or will be produced by the Respondents pursuant to Procedural Order No 20:

6.1 the precise provisions which, in their view, required BAPEX, Petrobangla and/or the GOB to apply competitive procedures for the selection of Niko as party to the JVA;

6.2 any other petroleum project (for exploration or for marginal/abandoned fields) after the Second Round of PSC bidding (Exhibit R-212) which were awarded to companies not controlled directly or indirectly by the GOB, indicating for each of them whether a competitive procedure was applied and if so specify the modalities and the regulations applied; and

6.3 the commercial conditions of such other projects in comparison with the Niko-BAPEX JV.

7. The Claimant is invited to explain the changes on which it relies in order to justify why the Swiss Challenge method was ultimately abandoned for the selection of Niko as party for the JVA.

8. In this respect, the Parties are invited to explain whether, in their view, there was a change in approach from the MoU to the FoU and, if so, how this change and the circumstances leading to it were documented. Did this change, if it occurred, imply renunciation of the competitive procedure in the form of a Swiss Challenge?

9. The Claimant relies on Niko's letter to the Ministry, dated 5 April 2001 (Exhibit C-133), containing the passage "The 'Swiss Challenge' method may be adopted for developing the gas

fields."[72] *Do the words "may be adopted" mean that (a) the choice of this method is optional, (b) the use of this method is authorised or (c) something else?*

10. *The Parties are also invited to state their position on the question whether, as argued by the Claimant, the terms of the JVA, as actually concluded, were more favourable to BAPEX than prior drafts of the JVA considered during the negotiations.*

11. *Both Parties are invited to explain as of when the Chattak area was first treated as two distinct fields, one as marginal/abandoned field, the other as exploration target, and how this was documented.*

C. The GPSA

12. *The Tribunals understand the Respondents' principal argument to be that the GPSA is derived from the JVA and that the gas supplied under the GPSA came from the Feni field from which the Claimant, jointly with BAPEX, was authorised to produce under the JVA. As a result of the purported nullity of the JVA or its avoidance, the GPSA also is void or has been avoided. The Respondents are invited to identify the other acts of corruption on which they rely as having caused the conclusion of the GPSA.*

13. *With respect to these other acts, the Respondents are invited to specify: what bribes were allegedly paid, when these payments were made, to whom and how? What advantages did Niko gain from the alleged bribes?*

D. Other factual issue

14. *When did BAPEX and Petrobangla have, or should be deemed to have had, knowledge of the facts now alleged in sufficient detail and reliability to invoke the nullity of the agreements or declare their avoidance?*

[72] This wording is quoted from the translation of the letter produced during the proceedings on Jurisdiction and quoted in the Decision on Jurisdiction, paragraph 2); the translation in Exhibit C-133 is different (for the complete text of the two translations see below Section 4.1; the difference in the translation and the reference to Exhibit C-133 has given rise to some misunderstanding on the Claimant's side (see C-PHB 1 (CONFIDENTIAL), paragraph 149); the Respondents understood the translation issue (R-PHB 1 (CONFIDENTIAL), paragraph 152 and Footnote 262).

E. Legal issues

15. *Standard of proof in case of corruption allegations: when determining the standard of proof for allegations that agreements were procured by corruption, what allowance must be made for (a) possible efforts of concealing the corruption activity and resulting difficulties to prove corruption and causation and (b) the gravity of any finding of corruption for the persons concerned?*

16. *The relevant date of knowledge: What is the effect, as a matter of the applicable law, of the date at which BAPEX and Petrobangla had knowledge about corruption (see question 14) upon the extent of the right (if any) of BAPEX to avoid the JVA and Petrobangla to avoid the GPSA on 25 March 2016?*

17. *The case of a corrupt government: assuming the decision-making bodies of a country are corrupt to the point that they require corrupt payments for performing governmental acts,*

    17.1 do such payments qualify as corruption?

    17.2 If they do so qualify, may the government subsequently rely on the corrupt payments which it had required for the purpose of avoiding the act and preserving the benefit without having to make its corresponding performance?

    17.3 Does it make a difference in these circumstances whether the party having made the corrupt payments did or did not receive an undue advantage from the corrupt payment?

    17.4 Is there a relevant distinction to be made between the corrupt government and its instrumentalities?

    17.5 What is the situation when the composition of the government changes and the corrupt structures are no longer operating?

18. *Payments to persons claiming to have the power to prevent the desired governmental act: the Parties are invited to take position on the question of how payments must be considered which are addressed to persons who have no governmental function and are not otherwise involved in the decision-making process but who claim that they have the power to prevent the transaction if no payment is made to them.*

19. *What is the evidentiary standard to be applied when determining whether Niko "ought to have known" the ultimate destination of its payments?*

20. *What are the rules in ICSID arbitration and under the law of Bangladesh concerning the time limits for raising defences based on corrupt payments?*

21. *If and to the extent that the agreements are voidable and were effectively avoided by BAPEX on 25 March 2016,*

    21.1 does the avoidance have retroactive effect and, if so, what is the fate of the performance received by the Parties under the avoided agreements?

    21.2 What remedies do the Tribunals have power to award under the Arbitration Agreement and article 18 JVA?

    21.3 What remedies, if any, is each Party entitled to as a matter of law in that event?

2.4.16 The "Deloitte Audit" and the Claimant's claim for privilege (Procedural Order No 22)

270. During his oral examination at the April 2017 Hearing, Mr Hornaday referred to an **audit** that **Deloitte** had conducted in the context of the investigation involving the Claimant's parent company, Niko Canada. Mr Hornaday did not provide any detailed information about this audit nor about the way in which the outcome of the audit had been reported to Niko Canada and how Niko Canada had treated the same. However, Mr Hornaday indicated that a PowerPoint presentation existed. Counsel for the Claimant later confirmed its existence.

271. At the Hearing, the Respondents requested the production of the PowerPoint slides and other documents related to the Deloitte audit. The Claimant asserted privilege, arguing that the Deloitte audit had been carried out at the request of Niko's Canadian counsel. The Respondents objected to the assertion of privilege in these circumstances. The Claimant was given the opportunity to examine whether these documents were indeed covered by privilege and to state its position by 8 May 2017.

272. In Procedural Order No 20 of 17 May 2017, the Tribunals ordered the Claimant to

> *1.1 produce to the Tribunals and the Respondents a list of*
>
> *(a) all documents which were produced by Deloitte as part of the audit of the corruption issue, to which Mr Hornaday referred in his oral testimony (the Deloitte Audit List) and*
>
> *(b) documents derived from these documents, such as the PowerPoint presentation mentioned by Mr Hornaday and the minutes of Board Meetings at which the Deloitte report was discussed;*
>
> *1.2 identify on the Deloitte Audit List those documents for which Niko claims privilege, and state the reasons for the privilege claim (submission on privilege); and*
>
> *1.3 produce to the Tribunal and the Respondents those documents for which no privilege is claimed.*

273. In its response of 22 May 2017, the Claimant asserted privilege for the documents concerning the Deloitte investigation. It explained that Deloitte had been engaged by Gowlings (see above Section 2.4.1) in support of the legal advice that these solicitors were providing to Niko Canada. With this response the Claimant produced the letter by which Gowlings engaged Deloitte[73] (the **Deloitte Engagement Letter**, referred to by the Claimant as the Deloitte Retainer Agreement), the Deloitte Audit List, Niko Canada Board Meeting Minutes and Audit Committee Meeting Minutes, partially redacted. Further documents were referenced in an updated version of the Deloitte Audit List filed on 26 May 2017. The Claimant explained:

> *The additional Deloitte generated material comprises further interview notes/summaries as well as a general description of what we understand to be voluminous internal working papers generated by Deloitte pursuant to their engagement by Gowlings under the Retainer Agreement dated 27 February 2009. It is our understanding that such Deloitte internal working papers reside in different locations within Deloitte's record keeping systems and comprise working notes, annotations and similar items generated by Deloitte team members for the purpose of performing its mandate pursuant to its engagement by Gowlings. As with the other Deloitte generated materials, solicitor-*

[73] Exhibit C-238 (CONFIDENTIAL).

client privilege and litigation privilege is asserted in all such work product as outlined in Niko's submission of 22 May 2017.

274. The Respondents objected that the redactions made in the documents produced by the Claimant did not identify which of the redactions were made on the basis of an assertion of privilege. The Claimants produced on 29 May 2017 new versions of these documents in which they had marked the passages for which they claimed privilege.

275. The Respondents disputed that the Deloitte documents were covered by solicitor-client privilege or litigation privilege and sought the production of

any and all documents related to Deloitte's investigation and report

and

deny[ing] Claimant's assertion of privilege over these documents.[74]

276. The Respondents also argued that any privilege that may have attached to the Deloitte documents was waived by Mr Hornaday's testimony at the April 2017 Hearing. The issue of waiver was discussed by the Parties in their submissions of 5, 9 and 16 June 2017.

277. Having examined the possibility of appointing an expert familiar with the Canadian law of privilege to inspect the documents for which the Claimant asserted privilege and to advise on the question whether these documents are indeed covered by privilege, the Tribunals decided to refrain from doing so: the Parties had argued in depth the relevant rules and principles of Canadian law and the Tribunals concluded that, on the basis of those principles, in the light of the Parties' submissions, the Respondents' request and the Claimants' privilege assertion could be decided without the Tribunals having to inspect the documents concerned. In these circumstances, the Tribunals concluded that the additional delay which would inevitably have been caused by the appointment of such an expert and its work was unjustified.

278. The Tribunals issued their decision in **Procedural Order No 22 on 27 July 2017**.

[74] Respondents' Response on Privilege of 9 June 2017 (CONFIDENTIAL), p. 14.

279. On the basis of the factual evidence before them, the Tribunals concluded that in early 2009 (or thereabouts) Niko Canada became aware of an "*investigation of allegations of improper payments made by Niko Resources Ltd. and/or its subsidiary in Bangladesh and other locations*".[75] Niko Canada retained Gowlings who in turn engaged Deloitte to conduct the enquiry. The questions which the Tribunals had to address, therefore, were whether the documents and information produced in Deloitte's investigation were covered by one or the other privilege invoked by the Claimant and, if they were, whether this privilege had been waived.

280. Concerning the question of the law applicable to the resolution of these questions, the Tribunals noted that the Parties had argued the case by reference to Canadian law; that the documents the Respondents sought to be produced were generated by an investigative service provider in Canada; that this was done at the initiative of a Canadian law firm; that the firm in question had been retained by a Canadian company; that the inquiry related to a Canadian investigation; and finally that the lawyer-client relationship on which the Claimant relied was between a Canadian law firm and its Canadian client. The Tribunals concluded that the question whether and to what extent this relationship was covered by legal privilege thus clearly is subject to Canadian law.

281. The Tribunals noted that in Canadian law the solicitor-client privilege and litigation privilege were treated differently and examined separately depending on whether, in the light of Canadian law, the documents were protected by one or the other of these privileges.

282. With respect to the **solicitor-client privilege**, the Tribunals accepted that Deloitte had acted as auxiliary to Gowlings in preparation for legal advice to their client, Niko Canada and Niko Bangladesh. They concluded that

> *… some and possibly many of the documents for which the Claimant asserts privilege do indeed attract solicitor-client privilege or at least may require redaction. The decision of their production requires further information from the Claimant and an examination of the documents themselves possibly by an independent expert.*[76]

[75] Deloitte Retainer Agreement, 27 February 2009, Exhibit C-238 (CONFIDENTIAL), p. 1.
[76] Procedural Order No 22, paragraph 57.

283. With respect to the notes on interviews conducted by Deloitte, the Tribunals accepted the proposition that with respect to persons from the Niko Group interviewed by Deloitte and conveying confidential information in reliance on solicitor-client privilege, the notes were covered by that privilege. But since the persons whose interviews were recorded in the notes had not been identified to the Tribunals, the Tribunals concluded

> *… the Tribunal cannot know which of these interviews are covered by the solicitor-client privilege as part of the "internal investigation" and which were conducted with outside persons with respect to whom no solicitor-client privilege can be admitted.*[77]

284. In the circumstances described in their conclusions on solicitor-client privilege, the Tribunals decided, before seeking assistance (in particular in order to ensure that the documents were examined by an independent expert), to reserve their position on this type of privilege and to turn to the other type of privilege under Canadian law.

285. **Litigation privilege** under Canadian law is understood, in terms expressed by the Claimant as applying

> *to communications and documents where the dominant purpose for their creation was for use in connection with contemplated litigation.*[78]

286. Or, as explained by the Respondents:

> *The principal issue in determining whether litigation privilege applies to a particular document is whether the dominant purpose of the communication or document was for litigation.*[79]

287. The Tribunals considered in particular a passage from a decision of the Alberta Court of Queens Bench in which that court quoted the Alberta Court of Appeal in *Mosely vs. Spray Lakes Sawmills* (2008):

> *The key is, and has been since this Court adopted the dominant purpose test in Nova, that statements and documents will only fall within the protection of the litigation privilege where the dominant purpose for their creation was, at the time they were made, for use in contemplated or pending litigation. While a lawsuit need not have*

[77] Procedural Order No 22, paragraph 63.
[78] Claimant's Submission on Privilege of 22 May 2017, p. 77, citing Legal Authority CLA-218, paragraphs 36, 60.
[79] Respondents' Response on Privilege of 9 June 2017 (CONFIDENTIAL), p. 12.

been initiated, and while a lawyer need not have been retained at the time the statement or document was made, the party claiming privilege must establish that at the time of creation the dominant purpose was use in litigation... The test is a strict one. As has often been stated, it is not enough that contemplated litigation is one of the purposes.[80]

288. Having examined the evidence, in particular the Minutes of the Niko Canada Board meetings and the instructions to Deloitte, the Tribunals concluded that the internal investigation, since it was initiated by Niko's engagement of Gowlings and then continued by the engagement of Deloitte, had as the dominant if not sole purpose the preparation of Niko's defence against court or other proceedings relating to the allegations of corruption in Bangladesh. To that extent, the Tribunals held that the investigations by Deloitte and the documents and information produced by them are covered by the litigation privilege as protected by Canadian law.[81]

289. It was undisputed between the Parties that the litigation privilege, in contrast to the solicitor-client privilege, is limited in time. The Tribunals therefore examined whether the purpose of the investigation had come to an end with the completion of the Canadian proceedings and the conviction of Niko Canada in June of 2011. The Tribunals considered the decision of the Supreme Court of Canada in *Blank v. Canada (Department of Justice)* in which the issue had been discussed in depth. In that case the Supreme Court had stated that "*the duration and extent of the litigation privilege are circumscribed by its underlying purpose, namely the protection essential to the proper operation of the adversarial process*" and "*the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate*".[82]

290. The Tribunals noted that when consulting Gowlings, the Niko Board of Directors [redacted] The Deloitte audit was intended to prepare Niko's case in this matter. This is also the issue in

[80] *Keith Turnbull & KPMG LLP v. Alberta Securities Commission & Merendon Mining Corp. Ltd.*, 2009 ABQB 257, 2009 CarswellAlta, 663, RLA-373, paragraph 28.
[81] Procedural Order No 22, paragraph 88.
[82] *Blank v. Canada (Department of Justice)*, 2006 SCC 39,CLA-218, paragraphs 42 and 43.
[83] [redacted]

the present proceedings on the Respondents' Corruption Claim. The fact that the parties are different does not prevent the application of the privilege: in the *Blank* decision, the Supreme Court accepted that the "*protected area*" of litigation privilege may apply even if "*the parties were different and the specifics of each claim were different*".

291. The common ground between the present Arbitrations and the investigation for which the Deloitte documents were produced is evidenced also by the fact that the Respondents themselves rely in support of their Corruption Claim heavily on the RCMP, ACC and FBI investigation which formed the basis for the litigation against which Niko Canada sought advice and defence from its solicitors.

292. The Tribunals concluded that the Claimant's defence against the Respondents' Corruption Claim is so closely related to the Gowlings-Deloitte investigation that the "*protected area*" of the litigation privilege of the latter extends to the former. The Tribunals accepted that the Claimant may assert litigation privilege against the Respondents' request for production of the Deloitte documents.[84]

293. Finally, the Tribunals examined whether the Privilege had been waived by the statements made by Mr Hornaday at the April 2017 Hearing. The Tribunals found that the beneficiary of privilege attaching to the Deloitte documents are Niko Canada and possibly also Niko; these companies did not waive their privilege.

294. Nor did Mr Hornaday himself waive the privilege, whether expressly or by relying on any of the documents. Indeed, he mentioned the documents only when the Respondents' counsel in cross-examination questioned him about the existence of that type of an inquiry. He then did not reveal any confidential information about the documents. According to his testimony, he could not reveal confidential information about the Deloitte documents since he had not seen them; their substantive content was withheld from him and he was excluded from attending the oral report presented in combination with the PowerPoint presentation. Niko had thus demonstrated clearly its intention to preserve the privilege protection of the documents, just as it had avoided disclosure to outsiders.

[84] Procedural Order No 22, paragraph 98.

295. The Tribunals concluded that litigation privilege asserted by the Claimant with respect to the Deloitte documents has not been waived.

296. In light of these considerations, the Tribunals decided in Procedural Order No 22:

> *(i) The Claimant is entitled to invoke litigation privilege against the production of the Deloitte Documents.*
>
> *(ii) In view of the decision under (i) the assertion of solicitor-client privilege concerning these documents does not need to be resolved;*
>
> *(iv) The Respondents' request for production of the Deloitte Documents is denied.*

2.4.17 The Respondents' further RCMP application

297. After the evidentiary record for the Corruption Claim had been closed by Procedural Order No 20 of 17 May 2017, **the Respondents** wrote to the Tribunals on 23 August 2017, communicating a letter which the Deputy Commissioner, Federal Policing, of the Royal Canadian Mounted Police had addressed on 21 April 2017 to the Attorney General for Bangladesh (the "**RCMP letter**") in response to a request from the latter dated 26 March 2017. The RCMP letter described the request as follows:

> *In your letter, you ask that the RCMP meet with your designee, Mr. Ferdous Khan, to discuss your request that the RCMP grant permission for Corporal Kevin Paul Duggan to provide a written statement and be available to be cross-examined in Paris, France during the scheduled hearing (April 24-29, 2017), and to grant permission for Corporal Duggan to use relevant evidence in possession of the RCMP for his witness statement.*

The letter next referred to the Tribunals' Procedural Orders Nos 14 and 15 and concluded:

> *The Tribunal has indicated that it does not wish to hear from the RCMP, either through documentary evidence or through live witnesses. In light of these Procedural Orders and the position of the ICSID, the RCMP will be unable to voluntarily participate in the matters before the Tribunal.*

> *The RCMP is impartial with regards to the matters before the ICSID. If further involvement is required by either the Claimant (Niko) or Respondents (Bapex and Petrobangla), the RCMP would need a request from the Tribunal, which it would then consider before determining how to proceed.*

298. The RCMP letter concluded by stating: "*[i]f you feel that this information is relevant to the proceedings, or will assist in resolving this outstanding matter, please feel free to provide a copy of this letter to the Tribunal.*"

299. When they submitted this letter to the Tribunals on 23 August 2018, the Respondents explained the circumstances in which they had received it:

> *Respondents were informed after the Hearing on the Corruption Claim of the response from the RCMP to a direct request from the Attorney General to obtain the additional evidence in possession of the RCMP and the testimony of its officers. The RCMP denied the request of the Attorney General based on the agency's reading of Procedural Orders Nos. 14 and 15, by which the RCMP understood that the Tribunals did "not wish to hear from the RCMP, either through documentary evidence or through live witnesses." However, the RCMP indicated that it would consider providing the testimony and evidence of Corporal Duggan and another agent if the Tribunals so request. The RCMP invited the Attorney General to submit its letter to the Tribunals for consideration. In light of the timing of our receipt of this letter and the Tribunals' prior procedural orders, Respondents were hesitant to raise again the issue of the RCMP's evidence. However, because Claimant has successfully asserted privilege for the evidence and report it possesses from the Deloitte investigation at the same time that it continues in its Post Hearing Briefs to contest the sufficiency of the evidence in the record, Respondents feel it is necessary to bring this letter to the Tribunals' attention. The RCMP's invitation opens the possibility for the Tribunals to obtain the RCMP's evidence directly, without having to go through the Canadian Court procedures previously described by Respondents.*

300. The Respondents insisted on the importance of the evidence and testimony of the officers of the RCMP involved in the investigation and asserted:

> *Their testimony and evidence is not available to Respondents through any other means. Accordingly, to the extent the Tribunals consider giving any credence to Claimant's arguments regarding the sufficiency of the evidence, Respondents would request that they*

accept the RCMP's offer and request the testimony of its agents and the additional evidence in its possession.

Respondents have presented more than sufficient evidence to prove that Niko established its investment and procured the JVA and GPSA in bad faith, illegally, and by corruption. It should thus be unnecessary for the Tribunals to reopen the evidentiary proceedings on corruption. Nevertheless, in light of Claimant's assertion of privilege and its continued arguments challenging the sufficiency of the evidence, Respondents feel compelled to bring this option for gathering additional evidence to the Tribunals' attention.

301. **The Claimant** responded on 25 August 2017, arguing that the Respondents' submission is "*inadmissible on its face and therefore requires no response*". It was, however, prepared to provide a response upon the Tribunals' direction.

302. **The Tribunals** considered the correspondence concerning the RCMP letter and the Respondents' conditional request. They saw no justification for re-opening the evidentiary proceedings on the Corruption Claim for steps as indicated in the Respondents' letter of 23 August 2017, and informed the Parties on 11 September 2017 that they would address the matter in due course "*when this may become necessary*". The reasons for their decision are explained below in Section 8.3 in the context of the evidence considered by the Tribunals.

2.5 The *Alam* Proceedings and Judgment (Writ Petition No 5673 of 2016), the Claimant's Request for Provisional Measures and the Tribunals' Decision pertaining to the Exclusivity of the Tribunals' Jurisdiction

303. As mentioned above, the Respondents modified the grounds for their Corruption Claim under the law of Bangladesh and, on 29 April 2016, introduced Article 102 of the Bangladesh Constitution as new foundation for their claim in the Arbitrations. On 9 May 2016, **Professor M. Samsul Alam** relied on the same Article 102 of the Bangladesh Constitution and addressed to the Supreme Court of Bangladesh, High Court Division, an application which was registered as **Writ Petition No 5673 of 2016**.[85] The petitioner was described in the Petition itself as "*a reputed energy*

[85] A copy of the Writ Petition was produced by the Respondents in the Arbitrations by their letter of 12 May 2016 to the Secretariat.

expert and one of the leading activists in the protection of natural resources of the country".

304. Respondents to this Petition were (1) the Government of Bangladesh, represented by the Secretary, Energy Division, Ministry of Energy, Power and Mineral Resources, (2) Petrobangla, (3) BAPEX, (4) Niko and (5) Niko Canada.

305. On 12 May 2016, the High Court Division issued a Rule Nisi, ordering the respondents to the petition

> *… to show cause as to why the [JVA and the GPSA] should not be declared to be without lawful authority and of no legal effect and thus void ab initio; and also why the assets of respondents No 4 and No 5, including shareholding interest in Tullow Bangladesh Limited concerning Block-9 should not be attached and seized to provide adequate compensation for the 2005 blowouts, and/or such other or further order or orders be passed as this Court may deem fit and proper.*

306. The Court also ordered that, pending the proceedings on the Writ Petition

> *… the operation of the impugned JVA and the impugned GPSA be stayed for 1 (one) month from date. The respondents no. 1 - 3 are directed not to give any kind of benefit to the respondents no. 4 and 5 and not to make any kind of payments to the respondents no. 4 and 5 or any of their affiliates or subsidiaries, including payments made in pursuance of the gas supplied from Block-9 which is 60% owned by the respondent no. 5 during the period of stay.*

307. The Respondents notified the Writ Petition and the Order of the High Court Division of 12 May 2016 to the Tribunals.

308. On 19 May 2016, **the Claimant** addressed a **Request for Provisional Measures** to the Tribunals, which was subsequently amended on 1 June 2016. The Claimant's request, as amended, sought an order from the Tribunals:

> *Declaring that these Tribunals have exclusive jurisdiction over the questions of: (i) the validity of the JVA and GPSA as concerns Niko, BAPEX and Petrobangla, and their successors, predecessors, assignors and assignees; (ii) whether Niko is liable to BAPEX or any of its successors, predecessors, assignors and assignees and if so, what compensation is due; and (iii) any requests for interim or*

provisional measures concerning any matter within the exclusive jurisdiction of these Tribunals, including any injunction, stay of payment, attachment or other relief.

Ordering BAPEX and Petrobangla to consent to the removal of the interim injunction in Writ Petition No. 5673 before the Supreme Court of Bangladesh, High Court Division, and to take all measures to request and support the removal or discontinuance of such interim injunction and dismissal of the Writ Petition.

309. The Respondents were invited to comment on the original and amended versions of the Request and expressed their opposition to them on 1 June 2016 and 15 June 2016, respectively. Further submissions in connection with the Claimant's Request were made by the Respondents on 7 and 12 July 2016 and the Claimant on 11 and 13 July 2016.

310. On 23 June 2016, the Claimant provided an update regarding developments the Claimant considered relevant to its request for provisional measures and the Tribunals' Third Decision on the Payment Claim. The Claimant additionally requested that the Tribunals adjust the timing of their decision on provisional measures and address Petrobangla's disrespect for the Third Decision on the Payment Claim.

311. On 27 June 2016, the Tribunals granted the Respondents' request to provide comments on the Claimant's 23 June 2016 letter, inviting them to do so by 30 June 2016. At the same time, the Respondents were invited to inform the Tribunals regarding the steps that had been taken to make payment as ordered in the Third Decision on the Payment Claim.

312. On 30 June 2016, the Respondents responded to the Claimant's 27 June 2016 letter requesting, *inter alia*, reconsideration of the Tribunals' Third Decision on the Payment Claim.

313. By instructions of 14 July 2016 the Tribunals informed the parties that the evidentiary record on the Claimant's original and amended requests for provisional measures was closed.

314. On 19 July 2016 the Tribunals dealt with the Claimant's request of 19 May 2016 by a Decision Pertaining to the Exclusivity of Tribunals' Jurisdiction (the "**Decision on Exclusivity**") which recalled that the Government of Bangladesh had delegated to Petrobangla and to BAPEX

the exercise of its rights and powers with respect to the JVA and the GPSA, as recorded in the Preamble of the JVA and referred to in the GPSA. While they found that they do not have jurisdiction *ratione personae* over the Government, the Tribunals confirmed that they "*have exclusive jurisdiction to determine the issues that are validly brought before them*". Concerning the relationship with the courts in Bangladesh,

> *[t]his finding does not affect the personal jurisdiction of the courts in Bangladesh in other respects. These courts may well receive and determine claims by persons over which the Tribunals do not have jurisdiction and adjudicate such claims. In making their decision involving other parties, the courts of Bangladesh, however, are bound to conform to and implement the decisions rendered by these Tribunals that are within the competence of these Tribunals. This means, for instance, that it is for these Tribunals, and the Tribunals alone, to decide whether the JVA and the GPSA were procured by corruption, whether the blow-outs were caused by Niko's breach of the standards it had to observe under the JVA and the amount of the damage caused by such a breach. When seized by a claim of a party not subject to the jurisdiction of the Tribunals, a court in Bangladesh may entertain that claim but it must conform its decision to those of the Tribunals.*
>
> *If it were otherwise, the international commitments of the State of Bangladesh, bound by its adherence to the ICSID Convention and its decision to delegate the Chattak and Feni investments to Petrobangla and BAPEX, could be rendered ineffective by the simple expedient of any third parties claiming to be affected in their rights by the actions and occurrences over which the Tribunals have jurisdiction, bringing claims before the courts of Bangladesh and having these courts render decisions which conflict materially with the decisions of the Tribunals operating under the ICSID Convention and thereby also conflicting with Bangladesh's obligations as a party to that Convention. […]*
>
> *Such a conflicting position is indeed now taken by the Respondents when they argue that a court in Bangladesh may order measures in conflict with the decisions of the Tribunals, simply because the application is made by a person not party to the Convention and the Arbitrations. On the basis of this position the Respondents argue that, for instance a payment ordered by these Tribunals under the ICSID Convention could be prevented by the order of a court in Bangladesh simply because the order is made at the request of a person not party to these proceeding.*

Accepting this position would subvert the international obligations assumed by Bangladesh by virtue of its decision to become a party to the ICSID Convention. The Tribunals are not prepared to give effect to such a position.[86]

315. The Tribunals considered the substance of the relief requested by the Claimant and the circumstances in which it was requested and granted it in these terms:

> *1. Declare that the Tribunals have sole and exclusive subject matter jurisdiction with respect to all matters which have validly been brought before it, notably*
>
> *The validity of the JVA and the GSPA, including all questions relating to the avoidance of these agreements on grounds of corruption;*
>
> *The liability of Niko under the JVA for the blow-outs that occurred in the course of its activity in the Chattak field and the quantum of the damage for which it may be responsible in case such liability were found to exist;*
>
> *The payment obligations of Petrobangla towards Niko under the GSPA for gas delivered, the jurisdiction for injunctions seeking to prevent such payments and to retract such injunctions;*
>
> *2. Order BAPEX and Petrobangla*
>
> *to intervene with all courts and other authorities in Bangladesh that are or may be concerned with issues identified above under (1) to bring to their attention the exclusive jurisdiction of the Tribunals in respect of these issues and the international obligations of the State of Bangladesh resulting therefrom under the ICSID Convention; and*
>
> *to take all steps necessary to terminate any proceedings and orders by the courts in Bangladesh which are in conflict with this order.*

316. By letter of 25 July 2016, **the Respondents** noted their **objection to the Decision on Exclusivity**, stating that they reserved all rights to post-award remedies and recorded "*that their compliance with the Tribunals' order and obligations deriving thereunder is without prejudice to such disagreement and Respondents' substantive and procedural rights*". The Tribunals noted these objections in Procedural Order No 14 and invited

[86] Decision on Exclusivity, paragraphs 12 - 15.

the Respondents to inform the Tribunals about the manner in which they had complied with the Decision.

317. On 8 August 2016, the Respondents responded in writing. With regard to the Writ Petition, the Respondents stated that they were "*preparing to file an affidavit as soon as possible requesting the termination of proceedings inconsistent with the order of the Tribunals, and in particular the prohibition on payments to Niko*".

318. On 12 and 16 August 2016, the Claimant responded to the Respondents' letter, arguing that neither Respondent had taken any steps in the *Alam* Proceeding to give effect to the Tribunals' Decision on Exclusivity.

319. On 16 August 2016, the Respondents notified the Tribunals that they had filed on 14 August 2016 an Application in connection with the Writ Petition informing the court of the Tribunals' Decision on Exclusivity and requesting it to issue an order vacating the order prohibiting payments to Niko. A copy of this application was attached to the Respondents' letter. In a letter of 19 August 2016, the Respondents disputed the Claimant's characterization of the Respondents' actions in connection with the *Alam* Proceedings and their compliance with the Decision on Exclusivity.

320. The issue of **compliance with the Tribunals' Decision on Exclusivity** was addressed during the Procedural Consultation on 1 September 2016. The Tribunals then informed the Parties on 29 September 2016 that they

> *… see as the first priority in the present stage of the proceedings the decision on the Respondents' Corruption Claim. At the present stage and unless new developments require urgent action from them, they do not see a need for further correspondence in continuation of the Parties' letters 12, 16 and 19 August 2016 relating to the compliance with the Tribunals' decision of 19 July 2016 pertaining to the exclusivity of their jurisdiction.*

321. The matter was again addressed at the Status Conference on 30 January 2017:

> *The Respondents referred to their submission of 14 August 2016 filed with the court hearing the writ petition of Professor Alam, stating that since then, they have been awaiting the court's decision. The Claimant asserted that no efforts have been made by the*

Respondents to lift the injunctions. The Respondents objected to this statement.[87]

322. Despite the Respondents' submission to the High Court Division concerning the Tribunals' Decision on Exclusivity, that court continued with its proceedings on the *Alam* Writ Petition. It held Hearings on 11 April 2017, and on several days during the months of July and August 2017.[88]

323. On 10 August 2017, the Claimant complained to the Tribunals that the Government presented arguments supporting a finding of corruption and judgment in favour of the petitioner and that the Government contested the application of the exclusive jurisdiction of these Tribunals, as recognized in the Decision on Exclusivity, to the Writ Petition proceedings. The Claimant noted that the only step taken by Petrobangla and BAPEX in the *Alam* Proceedings had been the application that the Respondents had transmitted under cover of their letter of 16 August 2016 to these Tribunals. That application, so the Claimant maintained, only half-heartedly requested vacation of the Court's order staying payments to Niko and its affiliates. The Court had taken no action on that application, and the Respondents had done nothing to pursue the application. The Claimant asserted that the conduct of Petrobangla and BAPEX, and of the Government of Bangladesh, can be reconciled neither with their obligations under Article 26 of the ICSID Convention nor with the Tribunals' order that Petrobangla and BAPEX "*take all steps necessary to terminate any proceedings and orders by the courts in Bangladesh which are in conflict with*" the Decision on Exclusivity. No specific action was, however, requested from the Tribunals.

324. The Respondents responded on 16 August 2017, stating that the Respondents "*have no authority over the Government of Bangladesh and cannot respond to accusations against the Government in these arbitration proceedings*". The Respondents requested the Tribunal to ignore the Claimant's letter of 10 August 2017.

325. The **High Court Division** delivered its **judgment** orally on 24 August 2017 and the Respondents informed the Tribunals on the same day. The

[87] Summary Minutes, paragraph 8.
[88] See *Professor M. Shamsul Alam v. Government of Bangladesh*, Writ Petition 5673 of 2016 (High Ct. Div.), Judgment, 24 August 2017, p.1.

Respondents provided the following information about the proceedings and the oral judgment:

> *As the Parties informed the Tribunals earlier this month, the Court chose to hear the merits of the petition before deciding on Respondents' August 2016 application to vacate the stay on Niko's assets and conform its decision to these Tribunals' Decision on Exclusivity. The Court did not immediately decide Respondents' application, and leading up to the Hearing on the Corruption Claim, there was no further action regarding the rule the Court had issued in May 2016 pursuant to the Writ Petition. Respondents believed it would remain undecided pending the decision of these Tribunals. In late March 2017, however, Claimant applied to the High Court to discharge the rule based on res judicata because of the 2009 decision in the case brought by the Bangladesh Environmental Lawyers Association (BELA). Following that application, the Court again took up the matter and, as reported by Claimant, began hearing arguments on the merits of the case in July. Respondents made no arguments on the merits of the Writ Petition*
>
> *Today the High Court, acting under Article 102 of the Constitution of Bangladesh, announced its decision that, based on undisputed facts of Niko's corruption, the JVA and GPSA are void ab initio.*

326. The Claimant added on 25 August the following further explanations:

> *On 24 August 2017, a panel of the High Court Division of the Bangladesh Supreme Court announced in open court its decision to grant the writ petition in full. The Court thus, without hearing a single witness and based on a minimal evidentiary record, purported to decide, among other issues, the questions that have been fully briefed and submitted to these Tribunals for decision after a full evidentiary hearing. As observed by the Respondents in their letter of 24 August, the decision announced by the Court was to find the JVA and the GPSA void ab initio The Court directed the Government to confiscate all assets of Niko and one of its affiliates as compensation for the 2005 blowouts. It did so despite having also failed to hear any evidence on Niko's liability for those blowouts, any evidence as to any damages allegedly suffered, or any evidence to justify seizing assets of a separate company with no role in the blowouts or the procurement of the JVA or GPSA. As noted in our letter of 10 August 2017 and confirmed in their letter of 24 August, the Respondents took no practical steps to oppose the writ petition and presented no argument to the Court.*

327. On 11 September 2017, the Tribunals confirmed that they had reviewed the Parties' communications of 10, 16, 24 and 25 August 2017 concerning the proceedings before the High Court Division of the Supreme Court of Bangladesh. They noted that this correspondence did not contain any specific request for action on the part of the Tribunals. They announced that they would address these matters in due course when this may become necessary.

328. The written version of the High Court Division's Judgment in Writ Petition 5673 of 2016, containing the detailed reasons of the Court (the "***Alam* Judgment**"), was issued on 19 November 2017. As the Parties had announced to the Tribunals following the oral delivery of the Judgment, the Court declared the JVA and the GPSA "*to be without lawful authority and of no legal effect and thus void ab initio*". The assets of Niko and Niko Canada, including their shareholding in interest in Tullow Bangladesh Limited concerning Block-9 were attached.

329. The decision of the High Court Division was reached in proceedings according to Article 102 of the Bangladesh Constitution, without taking of any evidence and based solely on affidavits presented by the Parties and on what the Court considered as "*undisputed facts and evidence*".[89] On that basis the Court concluded that Niko "*had set up a corrupt scheme for obtaining benefits from the Government of Bangladesh and were able to procure the [JVA and the GPSA] through corrupt and fraudulent means*".[90]

330. In the writ proceedings, the Government of Bangladesh entered an "*affidavit-in-opposition to the application for the discharge of the Rule but did not contest the Rule*", i.e. the orders sought by the Petitioner. The Government brought to the attention of the Court "*important evidence and documents and documents gathered through Mutual Legal Assistance ("MLA") arrangements between Bangladesh, Canada, and the United States. [Petrobangla and BAPEX] did not file any affidavits in opposition contesting the Rule.*"[91]

[89] *Alam* Judgment, paragraph 50.
[90] *Alam* Judgment, paragraph 42.
[91] *Alam* Judgment, paragraph 13.

331. The Court took note of the Tribunals' Decision on Exclusivity but sought to distinguish the case before it by referring to the "*judicial review powers*" it had under the Bangladesh Constitution.[92]

332. The Tribunals examined the relevant factual assumptions of the Court, its position concerning the Decision on Exclusivity, the interpretation of Article 102 of the Constitution and other relevant matters relating to the *Alam* Judgment. They address these issues below, in particular in Section 6.4.

333. The Respondents communicated the written version of the *Alam* Judgment on 21 November 2017 to the Tribunals. They asserted

> *The judgment of the Supreme Court is relevant to the Tribunals' decision on the Corruption Claim because "[t]he validity, interpretation and implementation of [the JVA and GPSA] shall be governed by the laws of Bangladesh."*
>
> *[…]*
>
> *In determining the Corruption Claim, these Tribunals must apply the laws of Bangladesh as articulated in the jurisprudence of the Supreme Court and should give particular consideration to the Supreme Court's judgment in determining how the laws of Bangladesh would be applied. Respondents are prepared to provide a more detailed assessment of the significance of this judgment should the Tribunals invite further input from the Parties on this matter.*

334. The Tribunals sought clarification about certain dates noted on the Judgment and invited the Claimant to comment on the document, allowing further comments from the Respondents.

335. In its submission of 11 December 2017, the Claimant described the Judgement as "*fundamentally illegitimate*". It asserted that the Judgment:

> *… was issued by a court with no authority to resolve disputes of fact or to hear more than summary evidence. The judgment's disingenuous assertions that disputed facts were undisputed and its leaps of logic confirm its results-driven, partial approach. The Respondents assert that the Writ Petition Judgment is persuasive*

[92] *Alam* Judgment, paragraph 48.

authority. Review of the document leads to the conclusion that it is neither persuasive nor an authority legitimately considered in this forum.

336. In a further submission of 11 December 2017, the Respondents insisted on the relevance of the *Alam* Judgment:

> *The judgment confirms prior Supreme Court jurisprudence relied on by Respondents to show that the JVA and GPSA are void ab initio under Bangladeshi law [and it] confirms that the acts admitted by Niko were corruption under the laws of Bangladesh and Niko violated these laws in the establishment of its investment.*

337. The Parties developed their arguments in these and in subsequent submissions filed on 21 December 2017. The Tribunals will consider the arguments below, in particular in Section 6.4 of the present Decision.

2.6 Other relevant proceedings before the courts in Bangladesh and their repercussions in the Arbitrations

2.6.1 The *BELA* Proceedings (Writ Petition 6911 of 2005)

338. On 12 September 2005 the Bangladesh Environmental Lawyers Association (*BELA*) and others, filed Writ Petition 6911 of 2005 before the Supreme Court, High Court Division (the "***BELA* Petition**"). Based on Article 102 of the Constitution, the petition was directed against

(a) the Government of Bangladesh, represented by the Secretary, Energy Division, Ministry of Power, Energy and Mineral Resources

(b) the Secretary, Ministry of Law, Justice and Parliamentary Affairs,

(c) the Secretary, Ministry of Environment and Forest,

(d) Petrobangla,

(e) (BAPEX), and others, including

(f) Niko (Bangladesh).

339. The Petitioners challenged the legality of the JVA and sought a declaration that the JVA was made without lawful authority and of no legal effect, as having been "*procured through flawed process effected and induced by resorting to fraudulent process and forged document by [Niko]*";

the petition made other charges of the same type but did not mention corruption.

340. In opposition to the petition, affidavits by Mr Mohammad Hossain, Mr Muhammad Imaduddin and Md. Nural Islam were presented on behalf of BAPEX, Petrobangla and the Government, providing an account of the negotiations of the JVA and attesting that the JVA was valid and that none of the Government, Petrobangla or BAPEX was involved in any fraud or misconduct in entering into the JVA. In the Arbitrations, Mr Imaduddin and Mr Islam presented witness statements, in which they explained that they had not signed the affidavits and that the affidavits did not represent their personal knowledge.[93]

341. The High Court Division dismissed the petition in a Judgment that was delivered orally on 16 and 17 November 2009 and in writing on 2 and 3 May 2010 (the "***BELA* Judgment**").[94] The Judgment found that

> *… the JVA was not obtained by flawed process resorting to fraudulent means.*[95]

342. To that extent the Petition was denied. The remainder of the Petition, relating to the compensation for the blowouts, succeeded insofar as the Court made the following order:

> *Niko is directed to pay the compensation money as per the decisions to be taken in the money suit now pending in the Court of the Joint District Judge or as per the mutual agreement among the parties. The respondents are restrained by an order of injunction from making any payment to [Niko]. This order of injunction shall remain in force till disposal of the money suit or till amicable settlement amongst the parties.*[96]

343. The *BELA* Proceedings have been mentioned briefly in the Decision on Jurisdiction[97] and were described in further detail in the First Decision

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[93] Muhammad Imaduddin Witness Statement, paragraph 6; Md. Nurul Islam Witness Statement, paragraph 7.
[94] Exhibit CLA-143.
[95] *Bangladesh Environmental Lawyers Assoc. (BELA) v. Bangladesh*, Writ Petition 6911 of 2005 (High Ct. Div.), Judgment, 17 November 2009, CLA-143, p. 40.
[96] *BELA* Judgment, CLA-143, p. 42.
[97] Decision on Jurisdiction, Section 9.3.2, paragraphs 402 to 405.

on the Payment Claim.[98] These details need not be repeated here. Other aspects of the proceedings are relevant, however:

344. In the *BELA* proceedings, the Government and both Respondents opposed the Petition, "*controverting all the material statements made in the Writ Petition*".[99] The Judgment summarises in some detail the separate affidavits in opposition, filed by the Government and the Respondents and their denials of the allegations of the Petitioner. The Judgment records that they asserted having performed their "*duties and responsibilities in compliance with all the relevant laws and regulations of Bangladesh including the Constitution*", upholding "*the best interests of the nation*", and that they were not "*involved in any fraud or misconduct in entering into execution of the Joint Venture in question*".[100]

345. There is no indication in the Judgment or in the affidavits produced in the course of the proceedings by the Respondents[101] that any corruption was involved in the conclusion of the JVA.

346. The *BELA* Petition was directed only against the JVA; at the time when it was filed, the GPSA had not yet been concluded. By the time the Judgment was issued, the GPSA had been concluded and the Judgment makes some references to it. In particular it states that under the GPSA Petrobangla pays US$1.75 per MCF while under identified other contracts Petrobangla pays US$2.75 or even US$2.90.[102]

347. The injunction against payments to Niko remained in place despite the Tribunals' decisions concerning the Payment Claim. When the Tribunals issued their Decision on Exclusivity, the Respondents wrote on 8 August 2016 to inform the Tribunals that they "*had already requested to have the stay on payments to Niko lifted before the Tribunals' 19 July decision*". They explained that the request for review had remained without success:

> *The review petition is pending and under consideration of the Personal Secretary to the Honorable Chief Justice (High Court Division of the Supreme Court). However, there has been a difficulty in retrieving the case file in order to reopen the matter. The Supreme*

[98] First Decision on the Payment Claim, Section 7.2, paragraphs 162 to 175.
[99] *BELA* Judgment, CLA-143, p. 17.
[100] *BELA* Judgment, CLA-143, p. 17 for the Government; similarly p. 20 for Petrobangla and BAPEX.
[101] Affidavit-in-Opposition on behalf of Respondent No. 5 BAPEX, *BELA v. Bangladesh*, Exhibit C-104, and Affidavit-in-Opposition on behalf of Respondent No. 4 Petrobangla, *BELA v. Bangladesh*, Exhibit C-105.
[102] *BELA* Judgment, CLA-143, p. 37.

> *Court requires the original file to reopen the case to consider the review petition, but it appears that the office of the court clerk is unable to locate the file of the original case, which, at the end of proceedings, was transferred to the records section on 25 April 2010. Counsel for BAPEX and Petrobangla made a submission to the court on 16 June 2016 seeking to have the court recover the file so that it can address Respondents' original petition, and, when this is resolved, Respondents will make a submission informing the court of the Tribunals' decision on exclusive jurisdiction and reiterating the request to terminate the stay.*[103]

348. The Claimant objected on 12 August 2016, addressing different proceedings pending in Bangladesh, including the *BELA* Proceedings:

> *… the BELA Injunction arguably still exists, and Petrobangla continues to assert that it operates to prevent payment for gas delivered from Feni field (and thus payment pursuant to the Third Decision in the Payment Claim). All of these issues are within the exclusive competence of the Tribunals. Neither Petrobangla nor BAPEX have taken any steps in this proceeding to give effect to the Tribunals' Decision on Exclusivity. The only action referenced by the Respondents in their 8 August letter is a 16 June 2016 inquiry by Petrobangla's counsel as to the whereabouts of the court file. This predates the Decision on Exclusivity. Respondents have done nothing to bring the Decision on Exclusivity to the attention of the court.*

349. The Respondents protested on 19 August 2016 against this description of their action. They argued that they had "*done everything possible under the procedures of the Supreme Court of Bangladesh to have that injunction reviewed and reversed*" but failed to succeed because the file could not be found. They added that they would make a further submission with the Court.

350. On 29 November 2016 the Tribunals invited the Respondents to report on their action in this respect. The Respondents replied on 7 December 2016, confirming that

> *the court's file in the BELA suit was transferred to a filing facility and could not be located, which has prevented the court from addressing the matter.*

[103] Respondents' letter of 8 August 2016, p. 7-8.

351. They added that despite a complaint with the Registrar of the court "*the file has not been traced and the court has not taken up the review petition*". They added that Bangladeshi counsel for the Respondent will continue to follow up on this matter. They announced that they would be able to make further submissions with the court "*when the Supreme Court is addresses the petition for review and is in a position to consider such further submission*".

352. Since then no further information has been provided about search for the file and any action on the *BELA* injunction.

2.6.2 The Money Suit No 224 of 2008

353. In June 2008 both the Government of Bangladesh (represented by the Secretary, Ministry of Energy and Mineral Resources) and Petrobangla, as Plaintiffs, filed before the District Judge in Dhaka, Money Suit No 224 of 2008 against (i) Niko Resources (Bangladesh), (ii) Brian J. Adolph, (iii) Peter Mercier, (iv) GSM Inc. (v) George M. Lattimore, as Defendants. The Plaintiffs sought Tk. 746,50,83,973/- as damages for the losses caused by the two blowouts, plus 12% interest (the "**Money Suit**").[104]

354. The Claimant relies on the proceedings it brought before the present Tribunals, seeking the Compensation Declaration; it takes the position that the claims in the Money Suit are in the exclusive jurisdiction of these Tribunals (see above Section 2.3).

355. The proceedings in the Money Suit are still pending. These proceedings and related requests for provisional measures have been discussed in the First Decision on the Payment Claim. Following the Tribunals' Decision on Exclusivity, the Claimant raised the status of the Money suit on 12 August 2016:

> *Petrobangla is actively and vigorously pursuing in this forum claims that fall within the Tribunals' exclusive jurisdiction. The court is currently hearing witness testimony from various officers and representatives from Petrobangla, the Government of Bangladesh, and BAPEX on the blowouts and the consequences of the blowouts at Chattak. On 25 July 2016, Niko filed an application for adjournment*

[104] *People's Republic of Bangladesh v. NIKO Resources (Bangladesh) Ltd.*, Money Suit No. 224/2008 (2d Court of Joint District Judge), Complaint, 15 June 2008, Exhibit C-6.

based on the Tribunals' Decision on Exclusivity. Petrobangla did nothing to support Niko's application. Indeed, the Respondents make no mention of actions taken in the Money Suit in their 8 August letter, ignoring the Tribunals' Decision and direction in Procedural Order No. 14. The court heard this application on 1 August 2016. By order dated 8 August 2016, the court rejected Niko's application for adjournment. It should be noted that on 24 May 2016 the High Court Division directed the Money Suit court "to proceed to complete the trial of the suit as expeditiously as possible preferably within 4 (four) months from the date of receipt of this order." The court has indicated that it will set dates on biweekly intervals. Therefore, dates are being fixed in quick succession and the next date for the suit has been fixed for 18 August 2016 for the continuation of examination of the plaintiffs' witness. Thus, Respondents are pushing the Money Suit toward a speedy resolution in conflict with and in contravention of the Tribunals' Decision on Exclusivity, while delaying these arbitrations, in an effort to resolve the suit before the Tribunals finally resolve the Compensation Declaration.

356. The Claimant corrected this statement on 12 August 2016, by stating that Petrobangla actively opposed Niko's application for adjournment.

357. The Respondents objected in their letter of 19 August 2016, asserting that the continuation of the Money Suit did not interfere with the exclusive jurisdiction of these Tribunals.

358. The latest information made available to the Tribunals about these proceedings are references to the Money Suit contained in the written version of the *Alam* Judgment of November 2017. The judgment mentions information provided by counsel, stating that the case is "*now pending*".[105]

2.6.3 Criminal Proceedings in Bangladesh

359. The Respondents explain that, as soon as the BNP Government left office, the corruption during that period became the object of criminal investigations. BAPEX stated in its Memorial on Damages that the caretaker government, installed in Bangladesh on 12 January 2007, "*spearheaded a massive anti-graft campaign, resulting in the arrest of the*

[105] *Alam* Judgment, paragraph 30, p. 33.

former Prime Minister Khaleda Zia and others involved in the Niko corruption".

360. In Bangladesh these investigations were conducted by the ACC. The investigations in Bangladesh were joined and supported by those of the Canadian RCMP and the U.S. FBI.

361. Mr Khan testified that he and his company Octokhan were engaged in 2007 "*to provide key strategic services to the [ACC]*".[106] From then on he was actively involved in the investigations.

362. Ms LaPrevotte explained that in 2007 the interim caretaker Government in Bangladesh requested the assistance of the United States to investigate corruption in Bangladesh. The request for international cooperation was forwarded to the Department of Justice where it was assigned to Ms Linda Samuel, the then Deputy Chief of the Asset Forfeiture and Money Laundering Section. The investigative aspect of the request was assigned to Ms LaPrevotte at the FBI. In January 2008, Ms Samuel and Ms LaPrevotte travelled to Bangladesh to meet with their counterparts and began their investigation.[107]

363. The Canadian investigations were initiated in June 2005, alerted by the news concerning a possible violation of the Corruption of Public Officials Act by Niko in the context of the delivery of the vehicle to the State Minister.[108]

364. The three law enforcement agencies cooperated closely and produced the vast amount of evidence that is described in further detail below in Section 8.1. The investigations had different results in the three countries of the Investigators.

365. In Bangladesh proceedings were commenced in 2008 in connection with the JVA both against the Prime Minister Sheikh Hasina and others and against former Prime Minister Khaleda Zia and others.

366. The ACC Charge Sheet **against Prime Minister Sheikh Hasina** has not been produced. The description of the charges against former Prime

[106] Ferdous Ahmed Khan First Witness Statement, paragraph 3.
[107] Debra LaPrevotte Griffith First Witness Statement, paragraph 3.
[108] Agreed Statement of Facts, Exhibit R-215, paragraph 45.

Minister Khaleda Zia in the Charge Sheet of 5 May 2008, on the other hand, contains the following passage:

> *… using deceitful means, disregarding the opinions of technical experts of various levels from Petrobangla, BAPEX and Sylhet Gas Field Limited and without following any act, policy or procedures, the then Prime Minister (Sheikh Hasina) approved an illegal system called "Procedure for Developing Terminal [sic] and Abandoned Gas Fields" on 14-6-2001.*[109]

367. Later the charge against Sheikh Hasina stated that she "*approved the 'Procedure for Development of Marginal and Abandoned Gas Fields' in which Chattak, Feni and Kamta gas fields were identified as marginal and abandoned with instruction to finalise a Joint Venture Agreement (JVA) for extraction of gas by NIKO from those fields and place the JVA before the Government for approval*".[110]

368. Comparing the case against Sheikh Hasina with that against Begum Khaleda Zia, the High Court Division in an order of 5 November 2015 concluded that there was "*no such allegation that the process of approving the 'procedure' by her involved any unlawful financial or other transaction*".[111] The criminal proceedings against Sheikh Hasina were quashed.[112]

369. The charges **against former Prime Minister Begum Khaleda Zia** and others were set out in the ACC Charge Sheet of 5 May 2008 just quoted. This Charge Sheet concerned allegations of corruption in relation to the conclusion of the JVA and included Begum Khaleda Zia, the former Law Minister Barrister Moudud Ahmed, the former State Minister AKM Mosharraf Hossain and others.[113] The events described in this Charge

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[109] ACC Charge Sheet, 5 May 2008, Exhibit R-211, section 7, page 6.
[110] As reported in the order of the High Court Division of 5 November 2015 in Writ Petition No 4982 of 2008 by *Begum Khaleda Zia v. Anti-Corruption Commission and others* (Exhibit R-230), pages 6.
[111] As reported in the order of the High Court Division of 5 November 2015 in Writ Petition No 4982 of 2008 by *Begum Khaleda Zia v. Anti-Corruption Commission and others* (Exhibit R-230), pages 6, 40, 41; the Charge Sheet and the decisions in this case have not been produced.
[112] This appears from the order in Writ Petion No 4982 (*Begum Khaleda Zia v. ACC*, Exhibit R-230, pages 13 and 41.
[113] ACC Charge Sheet, 5 May 2008, Exhibit R-211. In this Charge Sheet only four persons (Khaleda Zia, Moudoud Ahmed, AKM Josharraf Hossain and Khandker Shahidul Islam) are included in the list of "*accused persons*"; towards the end of the text, a list of 11 persons is given, including Qasim Sharif. During proceedings on Jurisdiction a Charge Sheet also of 5 May 2008 but in a different format was produced as Exhibit RH-JSD 3; it contains the same list of 11 "*accused persons presented for trial*".

Sheet, relied on the "*evidence of payments made to obtain the JVA [...] discovered by the ACC investigation*".[114]

370. Proceedings against the Prime Minister Khaleda Zia, Mr Sharif and others were suspended in 2008. The suspension order has not been produced; but BAPEX produced the Order by which, seven years later, on 5 November 2015, the High Court Division of the Supreme Court discharged the suspension order and permitted the trial to go forward.[115] That Order distinguished the case of the petitioner Begum Khaleda Zia, charged with involvement in the approval of the JVA "*as an abettor in the alleged offence*", from that of the former Prime Minister Sheikh Hasina and her approval of the Marginal Fields Procedure for which there was no allegation that the process by her "*involves any unlawful financial of other transaction*". The court found that the difference was "*the alleged offence of giving and receiving bribe which is absent in the case of Sheikh Hasina*".[116]

371. No information was provided on any subsequent action taking place until on 12 February 2018, when the Respondents wrote to the Tribunals informing them, based on press reports, that "*a hearing to indict Ms Zia, Mr Rahman, Dr Siddiqui, former law minister Moudud Ahmed, former state minister for energy AKM Mosharrraf Hossain, Niko's former president Qasim Sharif, and others for their use of corruption in the award of gas exploration and exploitation rights to Niko has been set for 11 March 2018.*"

372. On 9 November 2018 the Respondents wrote to the Tribunals informing them that

> *the trials in Bangladesh of former Prime Minister Khaleda Zia and 10 others on charges of approving the procedure of concluding the JVA with Niko by corrupt and illegal means, among others, began yesterday, November 8, 2018. Former State Minister for Energy AKM Mosharraf Hossain, former Law Minister Moudud Ahmed, former Principal Secretary to Prime Minister Kamal Siddiqui, former President of Niko Qasim Sharif, Selim Bhuiyan, and Giasuddin al Mamoon are among the accused now standing trial.*

[114] B-MD, paragraphs 38 and 39.
[115] B-MD, paragraph 40, referring to the order of 5 November 2015 in *Zia v. Anti-Corruption Commission* Exhibit R-230.
[116] *Begum Khaleda Zia v. The Anti-Corruption Commission and Ors.*, 2016 36 BLD 27 (High Ct. Div.), Judgment, 18 June 2015, Exhibit R-387, paragraph 56.

373. No further information has been provided on the criminal proceedings in Bangladesh.

2.7 Proceedings in Canada and the United States

374. **In Canada**, the investigations led to the conviction of Niko on the basis of the Agreed Statement of Facts of 23 June 2011.[117] The only charges held against Niko were the delivery of the vehicle to the State Minister and the non-business-related expenses of his trip to Canada in 2005. Details have been described in the Decision on Jurisdiction and are summarised below in Section 10.1. The Agreed Statement of Facts records that "*the Crown is unable to prove that any influence was obtained as a result of providing the benefits to the Minister*".[118] The question whether the evidence gathered by the RCMP, as asserted by Mr Khan, supported the conclusion that other cases of corruption occurred, will be considered below in Section 8.1. The Tribunals note, however, that no other alleged acts of corruption were held against Niko in Canada.

375. With respect to the investigation in the **United States**, Ms LaPrevotte testified that the FBI investigated the corruption allegation because it determined "*a strong nexus to the U.S.*" since Niko's consultant and President of Niko Bangladesh was a U.S. citizen. Ms LaPrevotte participated actively in the Joint Investigation, dealing with the Niko case and with several others. She described the results of her investigation in her witness statements and at the Hearing.

376. Ms LaPrevotte expressed her conviction that "*the F.B.I. had a strong case to seize and forfeit the corruptly obtained assets of the U.S. citizen employed by Niko*",[119] i.e. Mr Sharif, the principal representative of Niko during the negotiations for the JVA. She also asserted that "*there was never any question of a lack of evidence that Niko engaged in bribery*".[120]

377. Nevertheless, the United States Department of Justice determined in August 2011 "*that it will discontinue its inquiry into potential violations of*

[117] Agreed Statement of Facts, 23 June 2019, Exhibit R-215.
[118] Agreed Statement of Facts, 23 June 2019, Exhibit R-215, paragraph 58.
[119] LaPrevotte First Witness Statement, paragraph 44.
[120] LaPrevotte First Witness Statement, paragraph 45.

the Foreign Corrupt Practices Act (FCPA) by Niko Resources Ltd. (Niko)". The Department explained:

> *While we have determined that prosecution is not necessary at this time in light of Niko's guilty plea in Canada, this letter should not be taken as an indication that we do not have concerns about Niko's compliance with FCPA.*[121]

378. The Department strongly encouraged Niko to adopt and implement policies and attached a "Corporate Compliance Program" to its letter. It also pointed out that "*the Department may decide to restart this inquiry at any time*". The Tribunals have not been informed of any other action taken in the United States against Mr Sharif of Niko in relation to the project in Bangladesh.

[121] Letter of the U.S. Department of Justice to Baker Botts of 11 August 2011, produced as Exhibit D to the Statement of Kristine Robidoux, Q.C. of 6 September 2011, Exhibit C-222; see also Decision on Jurisdiction, paragraph 390.

3 THE RELIEF REQUESTED

379. In its submission of 25 March 2016, **BAPEX** requested the following relief:

> *BAPEX requests that the Tribunal:*
>
> *a. Declare that Niko procured the Joint Venture Agreement between BAPEX and Niko Resources (Bangladesh) Ltd of 16 October 2003 through corruption;*
>
> *b. Declare that Claimant is not entitled to use the international arbitration system to pursue claims related to the JVA;*
>
> *c. Declare that the JVA is voidable, recognize BAPEX's invocation of its right to void the JVA, and treat the JVA as void;*
>
> *d. Dismiss all of Claimant's claims asserted in this arbitration;*
>
> *e. Declare that BAPEX is entitled to compensation for all of its losses arising from Niko's corrupt procurement of the JVA, including all losses resulting from the two blowouts that occurred at the Chattak Field;*
>
> *f. In the alternative, should the Tribunal determine that the JVA is not voidable or voided, declare that Niko must compensate BAPEX for the harms arising from Niko's breaches of the JVA, including all losses resulting from the two blowouts that occurred at the Chattak Field;*
>
> *g. Order Claimant to pay damages of $118 million for BAPEX's losses;*
>
> *h. Should the Tribunal make a determination of the Government's losses, order Claimant to pay damages of $896 million for the Government's gas losses and- 215 -between US$ 8,461,463 and $8,642,493 to cover the expenses of monitoring, surveying and abatement and to hold this proceeding open until such time as a complete survey and monitoring of the Tengratila area can be conducted and BAPEX can provide the fullest possible accounting of environmental and health related losses;*
>
> *i. Order prejudgment and post-award interest on all sums awarded;*

j. Order Claimant to pay all the expenses and costs associated with defending against these proceedings, including BAPEX's attorneys' and expert witnesses' fees and expenses, the fees and expenses of ICSID and the members of the Tribunal, and the charges for the use of hearing facilities;

k. Grant BAPEX any other remedy that the Tribunal considers appropriate.

380. In a separate letter of the same date **Petrobangla** made the following statements and requests:

[…] Petrobangla approves of and adopts BAPEX's recitation of the facts and legal consequences of Niko's use of corruption and bribes to obtain the JVA and the GPSA.

In light of those facts and legal consequences, Petrobangla requests that the Tribunal find that the GPSA was procured by corruption and is thus voidable. It further informs the Tribunal of it decision to rescind the GPSA.

As a result, Niko's claims based on the GPSA must be rejected. Niko cannot found claims before this international tribunal on its own bad acts. […]

Accordingly, Petrobangla requests 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. Petrobangla further requests that the Tribunal order Niko to bear all the costs of these proceedings and reimburse Petrobangla for all of its legal fees and expenses.

381. On 29 April 2016 the **Respondents modified** the relief they requested.

382. BAPEX modified its request in items (c) and (f), changing in particular the request for a declaration that the JVA is voidable and avoided to a declaration that the JVA is void and only in the alternative voidable. The following modifications were made in these two respects:

c.) Declare that the JVA is void or, in the alternative, declare that the JVA is voidable, recognize BAPEX's invocation of its right to void the JVA, and treat the JVA as void;

f.) In the alternative, should the Tribunal determine that the JVA is not void~~able~~ or voided and proceed to adjudicate Niko's claims,

declare that Niko must compensate BAPEX for the ~~harms arising from~~ amount it determines is owed by Niko for Niko's breaches of the JVA, including all losses resulting from the two blowouts that occurred at the Chattak Field.

383. In their cover letter of 29 April 2016, the Respondents developed their position and stated in their "Concluding Remarks":

> *For the foregoing reasons, Respondents submit that Niko is not entitled to any payment or credit for past performance. As a result of Niko's corruption, the Tribunal should reject all of Niko's claims and any attempt by Niko to have the Tribunal give it a benefit for its corrupt acts. In addition, in accordance with the above, Respondents would like to modify their requests to the Tribunal.*

384. The new request was expressed as follows:

> *Respondents first ask that the Tribunal recognize that the JVA and GPSA are void under Bangladeshi law and without legal effect. In the alternative, Respondents maintain their request to void the agreements.*

385. These requests were **modified again in paragraph 196 of the Respondents' Memorial on Corruption** of 23 November 2016 as follows:

> *a) Declare that Niko used corruption in the establishment and maintenance of the investment with respect to which it seeks to use the ICSID Convention arbitration system;*
>
> *b) Declare that, as a result of this use of corruption and other actions, Niko established its investment (i) in violation of the international law principle of good faith, (ii) in breach of the international public policy against corruption and (iii) in violation of Bangladeshi law;*
>
> *c) Declare that, as a result of a) and b) above, all of Niko's claims in these arbitrations must be dismissed;*
>
> *d) Declare that bribery was used to influence the Government's approval of the Joint Venture Agreement between BAPEX and Niko Resources (Bangladesh) Ltd of 16 October 2003 and the Gas Purchase and Sale Agreement between Petrobangla and the Joint Venture partners of 27 December 2006, that the Government's approval was not transparent, was mala fide, and was illegal under Bangladeshi law, and that, as a result, these agreements are without legal effect and void ab initio;*

e) Declare that as a result of d) above, all of Niko's claims based on the JVA and GPSA and their performance must be dismissed; and

f) Dismiss all of Niko's claims.

386. In their **Reply on Corruption** of 22 February 2017, the Respondents expressed their request for relief as follows:

> *Niko systematically used corruption in the establishment and maintenance of its investment in Bangladesh and in obtaining the Government's approval of the JVA and GPSA. As a result, all of Niko's claims must be dismissed.*
>
> *For all of the foregoing reasons, Respondents request the Tribunals find that they do not have jurisdiction. If the Tribunals exercise jurisdiction, Respondents affirm the request for relief in paragraph 196 of the Memorial.*

387. In the **First Post-Hearing Brief** of 20 July 2017 the Respondents expressed their "Conclusions and Submissions" in the following terms:

> *Respondents affirm and incorporate by reference their prior requests for relief in their Memorial and Reply on Corruption and request that the Tribunals:*
>
> - *Order Claimant to pay all costs and expenses of this arbitration and reimburse Respondents for all their legal and expert fees and costs, plus interest from the time of the Award until payment is made, in an amount and at a rate to be established at the appropriate time.*
>
> *In the alternative, if the Tribunals find that the Agreements are not void ab initio but voidable, Respondents request that they:*
>
> - *declare that the JVA and GPSA are void with retroactive effect and that the parties cannot maintain any claims in these arbitrations, or*
>
> - *dismiss all of Claimant's claims and award BAPEX damages as claimed in its Memorial on Damages, and to the extent the Tribunals find that either party might be entitled to payment under the Agreements, in restitution or otherwise, conduct further proceedings on the quantum of such payment.*

388. In their **Second Post-Hearing Brief** of 2 August 2017, the Respondents confirmed these earlier requests as follows:

Based on the foregoing, Respondents request that the Tribunals dismiss all of Claimant's claims and order Claimant to pay all costs, expenses, and fees of these proceedings. Respondents hereby affirm and incorporate by reference their prior requests for relief in the Memorial on Corruption, Reply on Corruption, and first Post-Hearing Brief on Corruption.

389. **The Claimant's request** for relief remained essentially unchanged throughout the proceedings on the Corruption Claim and, in its Second Post-Hearing Brief of 2 August 2017, took the form of the following request:

> *a) Dismiss the Respondents' Corruption Claim;*
>
> *b) Release their Decision on Liability in the Compensation Declaration forthwith;*
>
> *c) If necessary in light of that Decision on Liability, order the damages phase to resume in the Compensation Declaration;*
>
> *d) Fix a prompt schedule for costs statements in the Payment Claim in order to place the Tribunals in a position to render a final award in that case as soon as possible; and*
>
> *e) Order such other and further relief as the Tribunals may deem appropriate in the circumstances.*

4 THE FACTUAL BACKGROUND

390. The Corruption Claim is based on allegations of corruption in the course of the negotiations of the JVA and the GPSA and their conclusion. The history of these negotiations has been considered in previous decisions, in particular the Decision on Jurisdiction and the Decisions on the Payment Claim. The Tribunals present here an overview of the facts relating to these negotiations as they emerged from the extensive additional evidence produced at this stage of the proceedings. Certain aspects of these negotiations are discussed in further detail in subsequent sections, where they are particularly relevant.

4.1 The JVA and its negotiation history

391. The history of the negotiations leading to the JVA has been described in in particular in the Decision on Jurisdiction.[122] Since then the Respondents' argument has evolved substantially and large amounts of additional evidence have been produced. The Tribunals therefore have reconsidered this history in its entirety.

392. In 1997 Niko Canada made proposals for two projects in Bangladesh, one in response to an invitation to bid by Petrobangla, the other on its own initiative.

393. The first of these proposals was made in the context of the "Second Round of PSC [Production Sharing Contract] Bids" for oil and gas fields (the "**1997 PSC bids**"). In response to the invitation to bid for PSCs concerning at least 12 blocks, some 15 bids were received from a number of companies, including many of the major oil companies.[123] Niko Canada bid for Blocks 9 and 10. Although Niko Canada's bid was not accepted, the procedure is relevant for the case, in particular because, when discussing the qualification of Niko for the work under the JVA, the Respondents rely on Niko Canada's ranking in the evaluation of the PSC bids, which overall was the lowest with respect to both blocks.

[122] Decision on Jurisdiction, pp. 14-20.
[123] These numbers of blocks and of bidders appear from a table attached to the Arthur Andersen letter of 28 September 1997 (in Exhibit R-212).

394. Despite the frequent reference that is made to the 1997 PSC bids, there is very little evidence about the procedure. Indeed, the only documentary evidence from this bidding process produced in the Arbitrations is a letter from Arthur Andersen, London, dated 29 September 1997, together with the list of codes for the bidders and a document entitled "Attachment 3 - Preliminary Scorecard, Run Categorising Bids" containing evaluations for Blocks 9 and 10. In the letter, Arthur Andersen, which was apparently retained by Petrobangla as adviser in this bid round, describes some aspects of the evaluation that had taken place by the time of the letter. The letter concludes by looking forward "*to receiving instructions that the bid Negotiating Committee has been appointed in order that we may return to Dhaka to commence the formulation of the negotiating strategy for each block*".[124]

395. It is not clear when, if at all, Niko Canada was officially informed about the result of its bid. A fax message by the Canadian Department of Foreign Affairs and Foreign Trade to the Coordinator, South Asia Division, PSA, dated 11 May 1998,[125] reports that the decision on Blocks 9 and 10 had been deferred. The score of Niko in this evaluation, the criteria used, and the relevance for the conclusion of the JVA will be discussed in further detail below in Section 9.1 when the qualifications of Niko for the work in relation to marginal/abandoned fields will be examined.

396. The other proposal made by Niko in 1997 concerned the Sylhet field (the "**1997 Sylhet Proposal**"): Also in 1997 Niko Canada initiated another project in Bangladesh, distinct from the 1997 PSC bid round. On 12 April 1997 Niko Canada made a preliminary proposal to the Minister of Energy and Mining, which has not been produced in the Arbitrations but was referred to in subsequent correspondence.[126] From the Agreement between Niko Canada and Five Feathers, dated 15 August 1997,[127] one may conclude that this preliminary proposal concerned a joint venture with Sylhet Gas Field Ltd. "*for the development, production and marketing*

[124] Arthur Andersen Activity Report on 2nd Round PSC Bid Evaluation Phase, Vol. 3, 28 September 1997, Exhibit R-212.
[125] Fax from Department of Foreign Affairs and International Trade to PSA, 11 May 1998, Exhibit C-195.
[126] The letter of Niko Canada of 1 February 1999, Exhibit R-269, mentions the letter of that date with a preliminary proposal as the first contact of Niko with the Bangladesh authorities.
[127] Agreement between Niko Resources Ltd. and Five Feathers, 15 August 1997, Exhibit R-329.

of hydrocarbons from the Beanibazar and Fechuganj Gas Fields located in Sylhet, Bangladesh".

397. On 4 September 1997, Niko Resources (Bangladesh) Limited, the Claimant, was incorporated in Barbados.[128]

398. After some further correspondence,[129] Niko Resources Ltd was invited to make a presentation to the Ministry on 21 June 1998. This presentation was followed by a letter of 28 June 1998 in which the proposal of Niko Canada was further developed (the "**Niko's Proposal**").[130] The letter was captioned: "Marginal and Non-Producing Gas Fields Development and Production: Chattak, Fenchganj, Beanibazar and Kamta". Niko Canada explained the interest that Bangladesh should have in developing marginal and non-producing gas fields and Niko Canada's qualifications to do so, including its recent success in developing marginal fields in India. It proposed

> *… to form a joint venture with BAPEX and develop and produce the gas resources from the subject non-producing marginal fields at its sole risk and expense but under terms and conditions that internationally prevail in the development of marginal fields and are acceptable to Petrobangla. Niko is capable of operating at a substantially reduced cost in comparison to the larger foreign companies currently working in Bangladesh.*[131]

399. Niko Canada proposed the following sequence for the conclusion of the joint venture:

> *A. To our understanding since Niko is the first international company to promote the development of the marginal fields, the Ministry of Energy and Mineral Resources may execute an MOU with Niko Resources (Bangladesh) Ltd. A copy of the MOU is attached for your consideration.*

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[128] See Decision on Jurisdiction, paragraph 187.
[129] The letter of Niko Canada, dated 1 February 1999, Exhibit R-269, mentions two letters to the Minister and to the Secretary of the Ministry of Energy and Mining, dated 28 September 1997 and 27 May 1998; these letters have not been produced in the Arbitrations.
[130] Letter from Niko Canada to Ministry of Power, Energy and Mineral Resources, dated 28 June 1998, Exhibits C-123 and R-265.
[131] Letter from Niko Canada to Ministry of Power, Energy and Mineral Resources, dated 28 June 1998, Exhibit C-123.

B. Upon execution of the MOU, the terms and conditions of the contract are negotiated between Petrobangla and Niko and a draft contract is prepared.

C. Petrobangla then makes a public announcement of the project complete with the finalised terms and conditions…[132]

400. The June 1998 Proposal went on to describe in some detail a procedure, referred to as "Swiss Challenge", to the effect that any proposals received further to the announcement as well as the one previously negotiated with Niko would be evaluated. If Niko were not to receive the highest mark, it would be given an opportunity to match the highest ranked proposal. The Claimant described it as "*in essence providing a right of first refusal in favour of Niko*".[133] The procedure will be discussed in further detail below (see Section 9.5).

401. The June 1998 Proposal continued to explain that Niko Canada was pursuing the possibility of financing of the project by the Canadian International Development Agency (the "**CIDA"**). Attached to the letter were (i) the draft of a Memorandum of Understanding (MOU), (ii) a presentation by Niko Canada entitled "Niko Resources Ltd. Corporate Profile May 1998" providing information on the history and other projects of the company, in particular those in India and Nigeria, as well as financial information, and (iii) a one page presentation of Five Feathers, listing 25 "*international reputed companies*" which it represented.

402. **Petrobangla's 1998 Comments**:[134] Following the meeting and proposal, Petrobangla prepared, at the request of the MENR, comments on the proposal. These comments had as attachment the comments which BAPEX had prepared at the request of Petrobangla. The Respondents have produced Petrobangla's comments but not the enclosed comments from BAPEX. Petrobangla's comments are not dated, but they refer to the June 1998 Proposal as having been made "*recently*"; the Tribunal

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[132] Letter from Niko Canada to Ministry of Power, Energy and Mineral Resources, dated 28 June 1998, Exhibit C-123.
[133] C-CMC, paragraph 52.
[134] Comments on M/S Niko Resources Ltd. Canada's Offer on "Marginal and Non-Producing Gas Field Development and Production", Exhibit R-267; a different copy of the document is found as attachment to Exhibit C-98.

assumes therefore that they date from the second half of 1998, but prior to 13 November 1998.[135]

403. Petrobangla's 1998 Comments were first produced in the Arbitrations by the Respondents in their submission on Procedural Order No 13 of the 14 June 2016 (the "**R-PO13**"), in which the Respondents relied on the 1998 Comments and quoted from them to highlight the importance of the Swiss Challenge process.[136] In later submissions, the Respondents raised "*doubts about the provenance of this document*".[137] The Respondents note that the 1998 Comments, contrary to other internal Petrobangla and Government documents, are in English and "*include much of the same language*" as Niko's proposal. They also point out that Mr Sharif, Vice President of Niko Bangladesh, had obtained a copy of the document and had transmitted it to Niko.[138]

404. The Tribunals note that none of these doubts were expressed by the Respondents when they first produced the 1998 Comments and relied on them. The Respondents do not find it surprising that comments on a proposal made in English are made in the same language, and observe that the fact that Mr Sharif obtained a copy of the document does not speak against its authenticity. The Tribunals see no reason to doubt that the document reflects the considered joint opinion of BAPEX and Petrobangla.

405. Petrobangla's 1998 Comments provide a description of Niko's proposal and of the company profile, Niko's financial position and experience. The document contains observations on the desirability of developing "marginal fields" in general and the identified fields in particular, stating "*the sooner these fields can be brought into production the better*". It points out the advantages of Niko's proposal, explaining that "*Niko's straight and clear offer to take BAPEX into a joint venture (JV) is certainly attractive - especially when a lot of IOC's have shunned this possibility*". Petrobangla concludes:

> *There are no risks to Petrobangla even though marginal field development can become risky and unprofitable if the operator is not extra careful with costs. We have not much to lose, if anything, we*

[135] On this date Mr Sharif sent a copy of the Comments to Niko Canada, Exhibit C-98.
[136] R-RPO13, paragraph 7.
[137] R-PHB1 (CONFIDENTIAL), paragraph 31.
[138] R-RC, paragraphs 109, 110.

have rather much to gain if a proper MOU/contract is entered into safeguarding our basic interests.

406. The 1998 Comments then recommend "*that the Swiss Challenge process be adopted as proposed by Niko in their offer to ensure transparency in the award process*" and discuss the advantages of this process. Comments are made concerning the choice of the fields, and the following observation as to the profitability of the project:

> *Due to the low costs of this gas the financial benefit gained by Petrobangla for producing the marginal fields will be higher than gas produced by the existing PSC contractors from the first bid round.*

407. Following the 1998 Comments, the Board of Petrobangla seems to have approved the project and to have passed a resolution to privatise the marginal fields. In November 1998, Mr Sharif reported to Niko Canada that

> *… the file is now with Secretary, MOEMR, who will present it to the panel of 4 Secretaries called the High Level Committee of which he is the convener. Upon approval of the High level committee, we will be called to execute the MOU with the Govt. […] It appears that the MOU will be before Christmas but bear in mind that they are still in the planning stage to start the negotiation on the blocks in Dec. After the MOU the ball will be back in Petrobangla's court to negotiate with us and satisfy the requirements of the swiss challenge process before signing the contract. Since we already have Petrobangla board approval of our proposal the hardest part of the work is done. …*[139]

408. On 25 November 1998 CIDA informed Niko Canada that its request for a "*contribution under CIDA's Industrial Cooperation Programme*" had been granted in the amount not exceeding 101,650 Canadian Dollars for a "Viability Study – Revitalisation of gas fields – Bangladesh".[140] Niko Canada informed Petrobangla on 30 December 1998 of this approval, specifying that the funding was for "*the initiation of our work – the engineering studies for this project*". It also requested a quick response about the status of its proposal.[141]

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[139] Message from Mr Sharif to Niko Canada of 13 November 1998, Exhibit C-98.
[140] Attachment to Niko's letter to Petrobangla, dated 30 December 1998 Exhibit JD R E-1; the Niko letter is also produced as Exhibit R-268, but without the attachment.
[141] Letter from Niko Resources Ltd. to Petrobangla, 30 December 1998, Exhibit R-268.

409. At a high-level meeting on 26 January 1999 at the Ministry and attended also by Petrobangla and BAPEX, the Niko project was discussed and it was decided that a joint venture agreement between BAPEX and Niko should be finalised, followed by a MoU; "*Swiss Challenge Method might be abided by*". [142] The decision of the Government to proceed with the Niko project was formally communicated by the Ministry to Petrobangla in a **letter of 25 May 1999**, to which frequent reference has been made and which is discussed in further detail below in Section 9.2.

410. In the meantime, Niko Canada had written to BAPEX on 1 February 1999, referring to the past correspondence with the Ministry and Petrobangla. It had pointed out that "*the cornerstone of our proposal is the partnership we seek with BAPEX*" and listed the principal benefits to BAPEX of its proposal. It emphasised the importance of the "*high risk Chattak field where more than 80% of the gas reserves are expected in the unexplored and un-drilled high risk side of the fault*". Niko also explained the value of the CIDA financing and the risk of losing it, adding that it was "*keen to have your assistance as our proposed joint venture partner in getting a feedback from Petrobangla and/or the MOEMR regarding status of our application*." The letter concluded:

> *Our proposal for the subject project is based upon utilising the transparent process of Swiss Challenge as the award process to ensure a public solicitation and availing the best offer from qualified parties. We seek your assistance in initiating this process in an expeditious manner so that we don't loose the CIDA grant and also any subsequent CIDA support due top long delays.*

411. BAPEX responded on 6 May 1999, inviting Niko to send its "*authorized representative to draft the Joint Venture Agreement as early as possible*". [143]

412. It then turned out that BAPEX's invitation of 6 May 1999 did not lead to the conclusion of the envisaged Joint Venture. Mr Sampson, Executive Chairman of Niko Canada recalled in his letter of 26 February 2003 that events took a different course. In that letter he wrote:

> *… we have complied with all requirements on our part to execute the Bapex-Niko JVA. In May 1999, we were invited by Bapex, upon*

[142] Minutes of the Meeting of the Ministry of Power, Energy and Mineral Resources of 26 January 1999, 3 May 1999, Exhibit C-124.
[143] Letter from BAPEX to Niko Resources Ltd., 6 May 1999, Exhibit R-269.

> *approval of and instructions from the Government of Bangladesh, to finalise the Joint Venture Agreement, but instead after we arrived in Dhaka, we were asked to do a feasibility study at our cost. Niko relented …*[144]

413. Indeed, BAPEX and Niko did conclude a Joint Venture Agreement on 23 August 1999; but this agreement was not for the development of the fields but a "Framework of Understanding", providing for a Study of Chattak, Feni and Kamta fields jointly by BAPEX and Niko, but at the sole expense of Niko. The circumstances of this change in approach shall be discussed below in Section 9.3.

414. From 1999, Mr Qasim Sharif and his company Stratum were retained as consultants, acting as Niko Canada's principal representatives in Bangladesh. Mr Sharif and Stratum's roles are discussed in further detail below in Section 10.3.3.

415. The **Framework of Understanding,** also referred to as **FOU** or **the Study Agreement**,[145] was executed on **23 August 1999 by BAPEX and Niko**. Its full title is "*Framework of Understanding for the Study for Development and Production of Hydrocarbon from the Non-producing Marginal Gas Fields of Chattak, Feni and Kamta*".

416. The FOU states:

> *Niko Resources agrees to form a Joint Venture with BAPEX" for the purpose of study for the development and production of hydrocarbons from the non-producing marginal gas fields … utilizing all available existing technical data, reports and information, and employing the integration of multidisciplinary techniques such as regional and local geology, geophysics, biostratigraphy, geochemistry, petrophysics, reservoir and drilling engineering, economics and risk analysis.*[146]

417. The parties undertook to conduct what they described as a Technical Program, carried out under the joint responsibility of BAPEX and Niko;[147] this program is defined as a study

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[144] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 26 February 2003, Exhibit C-149.
[145] Framework of Understanding, Attached as Annex A to the JVA, Exhibit C-1.
[146] FOU, Exhibit C-1, Annex A, Whereas clause (c).
[147] FOU, Exhibit C-1, Annex A, Article 4.01.

> *… to provide for the estimation of recoverable reserves within the structures in the Study Area and to attempt to predict the production characteristics of proven and potential reservoirs in the Study Area.*[148]

418. An additional purpose of the FOU/Study Agreement is mentioned in Article 4.03:

> *Upon completion of the Technical Program, the Joint Study Team shall prepare a full development plan of the fields.*

419. The agreement provides that BAPEX shall make available its "*logs, drilling reports and other information required during the drilling in the Study Area*" (BAPEX Information)[149] and certain other assistance; the promised assistance includes obtaining permits, licenses, permissions etc. from various government agencies

> *… for undertaking the Technical Study and for the development and production of the fields are obtained in a timely manner.*[150]

420. The FOU/Study Agreement also provides that each party would supply one geologist and one geophysicist to perform work on the Technical Program; additional specialised professionals were to be supplied by Niko.[151] Article 5.01 provides:

> *The parties agree that NIKO, having the necessary expertise and financial capabilities to undertake the activities related to the development and production of the Gas Fields will be responsible including all cost of the Technical Program and for the execution of the work Program. Niko shall bear and pay the travel and living expenses for four (4) BAPEX officials (one Geologist, one Geophysicist, one Petroleum Engineer and one Process Facility Engineer) in Canada for a period 4 – 6 weeks each to perform work on the technical program.*

421. In Article 5.05, the parties agreed to endeavour to complete the Technical Program in six weeks and then added an exclusivity provision:

> *During the negotiations period, BAPEX agrees that it will not directly or indirectly:*

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[148] FOU, Exhibit C-1, Annex A, Article 1.02.
[149] FOU, Exhibit C-1, Annex A, Articles 2.01 and 1.0203.
[150] FOU, Exhibit C-1, Annex A, Article 5.01.
[151] FOU, Exhibit C-1, Annex A, Article 4.01.

a) *encourage, entertain, solicit or engage in negotiations or discussions with any party other than Niko with respect to this project or*

b) *enter into any agreement or takes [sic] any action that by its terms or effect could reasonable is [sic] expected to adversely affect the ability of Niko to implement the project.*

422. It must be noted, however, that the agreement does not define the "*negotiations period*".

423. As explained, the Study Agreement distinguishes between "BAPEX information" and "Program information". It contains a confidentiality clause concerning the former in Articles 1.03 and 3.01 to 3.04. Program Information is defined in Article 1.04 as "all information, except BAPEX information, relating to the Technical Program, that is developed or otherwise acquired by one or both Parties as a result of and during the Technical Program". With respect to this latter information, Article 7 contains *inter alia* the following provision:

> *Both Parties agree that Program Information shall be kept strictly confidential and shall not be sold, traded, published, or otherwise disclosed to anyone in any manner whatsoever, including by means of photocopy of reproduction without the other party's prior written consent for a period of three (3) years after the program is completed, except as provided in paragraph 7.02 and 7.03. If swiss challenge process is adopted, this is not applicable.*

424. This is the only reference in the agreement to the Swiss Challenge procedure.

425. Article 9, entitled "Joint Venture Agreement" provides the following:

> *The parties agreed that on successful completion of the Technical Program & on the basis of the acceptability of the result thereof the parties would execute a Joint Venture Agreement.*

426. Finally, elements procured under CIDA financing were to become the property of BAPEX.

427. Clause 12.05 provided that the effectiveness of the FOU was "*subject to the approval of the appropriate authority*".[152]

[152] FOU, Article 12.05.

428. The agreement has an "Exhibit A" to which Article 1.01 refers when defining the contract term "The Area". The Exhibit gives the "Coordinates of the Ring Fencing of Chattak, Feni and Kamta Structures", as well as the area in square kilometres and the depth of the structures.

429. Pursuant to the Framework of Understanding, BAPEX and Niko jointly evaluated the three identified fields.[153] Niko claims that it spent USD1.5 million on this work.[154] BAPEX and Niko prepared a report on this evaluation, the Study provided by the FOU, and described it as the **Marginal Fields Evaluation** (the "**MFE**") dated **February 2000**. An annex reported on the conclusion reached at a meeting of the technical staff of both BAPEX and Niko on 8 November 1999 "*to verify the interpretation of seismic and well data over the Chattak, Feni and Kamta fields and to establish common agreement for the recoverable reserves remaining these fields*". The Study and this annex, together with some of the Figures mentioned in the Study, form Annex B to the JVA.

430. The Study identified five contributors of various technical qualifications from each company, including on Niko's side Robert Ohlson, who as President of Niko Canada had signed the June 1998 Proposal; and, on BAPEX's side, Mir Moinul Huq, Senior General Manager. The report is signed by Syed Ahmed Haqqani, General Manager – BAPEX and Dr Emmanuel O. Egbogah, P. Eng., Vice President International Production – Niko.

431. The opening paragraph of the Study contains the following passage:

> *The technical staff of BAPEX and Niko Resources Ltd. both share a common view of these three fields. Both partners agree with the proposed recoverable reserves established in the three fields.*

432. The Study provides a description of the geological setting of the "*three fields Chattak, Feni and Kamta*", followed by more detailed descriptions concerning each of the fields. In the table showing the reserves, the three fields are identified: Feni, Kamta and Chattak, without subdivision. The same goes for the "Block Definition" which for each field identifies the

[153] Marginal Fields Evaluation, Annex B to the JVA; the complete report has been produced as Exhibit R-41.
[154] C-CMC, paragraph 82, with reference to Niko's letter to BAPEX of 8 July 2002, Exhibit C-140.

Coordinates the Area, and the Depth, treating the Chattak Gas Field as a single unit.

433. With respect to Chattak, the Study does, however, contain separate descriptions for the "Chattak West Field" and the "Chattak East Field". It speaks of the Chattak East exploration structure but provides that, in case of success there, the well will be tied into the Chattak West development plan.

434. The Study reported on a "technical program" held for four weeks in Calgary in which four delegates from BAPEX participated. It concluded:

> *During this technical program BAPEX-Niko jointly reviewed and concurred upon the following aspects of the study:*
>
> *1) Based upon the current data, the remaining, recoverable, and risked proven and probable gas reserves of the Chattak field has been estimated at 268 BCF, the Feni field has been estimated at 51 BCF, and Kamta field has been estimated at 5 BCF.*
>
> *2) It has been observed that there are significant gaps in the existing data and additional data for Chattak and Feni are essential to do effective reservoir characterisation of these fields. These data can be obtained after drilling the first well in each of these two fields.*
>
> *[…]*
>
> *Based upon the result of the study as indicated in the currently established reserves stated above, a joint venture contract may be executed between BAPEX and Niko as stipulated in the study upon approval of Petrobangla and the Ministry of Energy and Mineral Resources.*

435. While the study under the FOU was ongoing, Niko submitted to BAPEX on 7 November 1999 **the first draft for the JVA**.[155] Two **subsequent drafts** were presented in May and June 2000 but have not been

[155] Draft JVA, 7 November 1999, Exhibit R-336. The draft is not dated but the Respondents identified the date as 7 November 1999 in RM 40, Footnote 41; mentioned in the Minutes of the Petrobangla Board meeting of 22 October 2000; Exhibit R-271, p. 1, paragraph 2; The Minutes of the Niko Board of Directors meeting on 23 March 2000 state that the draft JVA was submitted to the Government in late November 1999; the draft "*was based on precedents used in the country*", Exhibit C-129 (CONFIDENTIAL).

produced.[156] The first of the subsequent drafts that has been produced in the Arbitrations is that of September 2000,[157] it was followed by the drafts of 3 July 2001,[158] December 2001[159] and 13 January 2003.[160]

436. BAPEX formed a committee for the negotiations with Niko (the BAPEX JVA Committee) which examined the November 1999 draft JVA and submitted its report on 27 March 2000.[161] **Negotiations for the JVA between BAPEX and Niko started in March 2000.**[162] The BAPEX JVA Committee issued a final report dated 23 May 2000 (the "**BAPEX May 2000 Report**").[163] Neither the Minutes of the Committee (if there were any) nor the March and May 2000 reports have been produced in the Arbitrations. There is, however, reference to the BAPEX May 2000 Report in a letter of Niko, which seems to indicate that in this report the Chattak Gas field was "*intact, that is including Chattak East, in the project*". Niko asserted that it agreed to all terms and conditions of the BAPEX May 2000 report "*and the draft JVA was prepared based upon this report*". According to Niko, it was only one of the "*numerous other changes to the JVA*" which BAPEX made "*since this report*", by which "*Bapex has taken out the Chattak East portion of the Chattak Gas Field from the project*"; and this was the only one of the subsequent changes to which Niko did not agree.[164]

437. The BAPEX Board addressed issues of the JVA at a number of occasions in 2000. The minutes of these meetings have not been produced; but the Minutes of the 287th Petrobangla Board meeting of 22 October 2000[165] reports on these meetings and records some of the conclusions and decisions reached at these meetings. This information shows that the

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[156] The Claimant stated that it was unable to locate these drafts (C-CMC, paragraph 93); the one of June 2000 is mentioned in the Minutes of the 25 June 2001 meeting as the basis of the then confirmed agreed points.
[157] Draft JVA, September 2000, Exhibit C-130.
[158] Draft JVA, 3 July 2001, Exhibit R-338.
[159] Draft JVA, December 2001, Exhibit R-339.
[160] Draft JVA, 13 January 2003, Exhibit R-306.
[161] Mentioned in the Minutes of the Petrobangla Board meeting of 22 October 2000, Exhibit R-271, p. 1, paragraph 2; see also C-CMC, paragraph 91; see also Niko Canada's letter of 26 February 2003, Exhibit C-149.
[162] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 26 February 2003, Exhibit C-149; for a discussion of this letter see below.
[163] C-MCM, paragraph 92 with references to letters from Niko to the Ministry and to BAPEX of 5 April and 28 June 2001, respectively, Exhibits C-133 and C-138.
[164] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 26 February 2003, Exhibit C-149.
[165] Decision from 287th Petrobanga Board of Directors Meeting, 22 October 2000, Exhibit R-271.

terms of the JVA were discussed at the BAPEX Board meetings on 8 June, 12 June and 21 August 2000.

438. The issues discussed concern various terms of the JVA, including Niko's obligation to provide the capital investment and operating costs and contributions by BAPEX with existing machinery and assistance, the Management Committee composition, tax questions and revenue sharing, the immediate payment by Niko of one Core BDT and its sponsoring of one "*BAPEX officer every year to study a Post-Graduation Degree in a Canadian University*". At one of the meetings it is specifically emphasised that "*we need to give particular attention to assess whether the JVA proposed by the company is favourable to our interest*".[166]

439. Several of the meetings consider the sale of the gas produced and the price for it. It is pointed out that the JVA terms "*are not consistent with the terms and conditions of PSC*" which may have an effect on the purchase of the gas.[167] At one of the meetings it is said that "*BAPEX will purchase per MCF gas at a 1.75 USD rate during the Agreement tenure of the Joint Venture and sell/market the gas as per the end users price approved by the government time-to-time*".[168]

440. The report on the 114th BAPEX Board meeting on 8 June 2000 contains the following passage concerning the area of the Joint Venture:

> *(f) Herein before, only Chatak, Feni and Kamta gas fields are demarked as Non-producing Marginal Fields, however, in the working paper, Chatak (East) has also been included in the proposal in addition to those 3 fields. It was remarked that Chatak East area should remain outside the JVA. Because Chatak (East) structure is a different exploration target.*[169]

441. In these reports on the BAPEX Board meetings no mention is made of competitive procedures or Swiss Challenge to be followed before the conclusion of the JVA.

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[166] Petrobangla Decision, 22 October 2000, Exhibit R-271, p. 3.
[167] 115th meeting of the BAPEX Board, 12 June 2000, quoted from Petrobangla Decision, 22 October 2000, Exhibit R-271, pp. 3 and 4.
[168] 118th meeting of the BAPEX Board, probably on 21 August 2000, quoted in Petrobangla Decision, 22 October 2000, Exhibit R-271.
[169] 118th meeting of the BAPEX Board, quoted from the Petrobangla Decision, 22 October 2000, Exhibit R-271, p. 2.

442. At the last of these meetings the BAPEX Board decided to submit its decisions concerning the JVA to the **Petrobangla Board**. That Board considered the matter **on 22 October 2000 at the 287th meeting**. The Minutes of that meeting[170] start with a report describing the history of the project and *inter alia* its economics:

> *1. Regard financing of the Joint Venture Agreement, BAPEX will provide with assistance/information to carry out the stated activities. Besides, the machineries/tools of BAPEX will be used for the development and exploration of gas from Chatak, Feni and Kamta Gas Fields and BAPEX will get Rental/Charge for that service. However, Niko will bear the expenses of purchasing or renting new machineries/tools, hiring foreign experts and anything purchased in cash (local/foreign), and BAPEX will have no Cash Involvement for such expenses.*

and

> *If the abandoned gas fields can enter into production with commercial viability, it will help the economic progress of the nation.*

443. In the section dealing with the "*discussion*", the Minutes contain the following passage:

> *19. The Board was informed that this entity has proposed to unilaterally develop the Joint Venture-fields, hence this is not possible to compare this entity with any other entities. The Board was further informed that in Paragraph 'C' of the latter [recte: "letter"?] of the Ministry date on 05/25/1999 in respect of development and producing gas the proposal prepared by Niko & BAPEX if it is required following the Swiss Challenging method by verifying and taking of steps for implementation has been mentioned. The Board was further informed that competitive terms have been adopted by calling for the international tender following this method. The Board had mentioned that following Swiss Challenge method is mandatory not optional.*

444. The Minutes then record the Board's decisions:

> *DECISIONS:*
>
> *27. After a threadbare discussion, the Board, as per policy direction of the Ministry, and in accordance with the recommendation of the 118th Meeting held on 08.21.2000 – in order to develop Chattak, Feni*

[170] Produced with an English translation by the Respondents as Exhibit R-271.

and Kamta Non-producing Marginal gas fields following Swiss Challenge method – approves sending the undertaken draft Joint Venture Agreement between Niko and BAPEX to the Ministry for its decision.

28. The PSC negotiation Committee of Petrobangla, meanwhile, will examine and observe the prepared Joint Venture Agreement.

29. In respect of transferring of the ownership and the assets and liabilities of Chattak, Feni and Kamta Gas Fields, Board has advised the Managing Director of BAPEX to take necessary actions by communicating with the Managing Directors of the concerned companies.

445. Further to this decision Petrobangla must have transmitted the draft JVA to the Ministry, since on 29 March 2001 the Ministry requested Petrobangla "*to take the necessary steps for finalising the JVA by following the Swiss challenge method …*".[171] The instructions were passed on by Petrobangla to BAPEX on 11 April 2001, transmitting the letter of 29 March 2001 "*for your kind acknowledgement and necessary steps to be taken …*"[172]

446. During the first half of 2001 the Ministry prepared a Procedure for Development of Marginal/Abandoned Gas Fields (the "**Marginal Fields Procedure**"). During the time when this procedure was being prepared, there was close interaction between the progress of the work on the Marginal Fields Procedure and the finalisation of the JVA.

447. Thus, **Niko's letter to the Ministry of 5 April 2001** referred to the "*policy for the development of marginal/abandoned gas fields*" which it understood the Government was finalising. While welcoming this initiative, Niko pointed out "*that Niko Resources had proposed to develop marginal and abandoned gas fields in Bangladesh in April 1997, through a joint venture*". It continued by summarising the development of the project, including the shift in approach in terms quoted above. The letter then continued:

Based upon the Study Agreement and the Study Report, Bapex appointed a Negotiation Committee to negotiate the JVA with Niko. These negotiations were completed in June 2000 and the Bapex

[171] Letter from the Ministry to Petrobangla, 29 March 2001, Exhibit JD SI-13.
[172] Letter from Petrobangla to BAPEX, 11 April 2001, Exhibit JD SI-14.

Negotiations Committee submitted its report on the negotiations to Bapex management. Niko was asked to conform to the requirements of Bapex which Niko acceded to and a finalised draft JVA has been under process in Bapex, Petrobangla and the Ministry of Energy ever since June 2000.

Although we have been advised that the Government approval process would be complete any day, unfortunately as of today we have not been advised of any signing date for our JVA even though we were invited back in May 1999 to negotiate and execute this JVA.

We request you once again to expedite the Government formalities so that we can execute the JVA and complete all related formalities without further delay. Since we have already completed the negotiations on the JVA based upon the Study Agreement, we request that the implementation of the Niko-Bapex JVA receive retrospective status and be kept outside the purview of any future policy.[173]

448. Upon receipt of Niko's letter, the Ministry wrote to Petrobangla on 16 April 2001: "*before going for Swiss Challenge, as per instructions you are being requested to formalize/finalize the JVA submitted by Petrobangla*".[174]

449. The Ministry then wrote on 20 May 2001 to Petrobangla:

Subject: - Policy on Development and Production of Hydrocarbon from the Marginal and Abandoned gas fields

A draft policy regarding the Development of Marginal and Abandoned gas fields is sent herewith. In light of this policy it is requested as directed to finalise and forward a Joint Venture Agreement on Chattak, Kamta and Feni between BAPEX and Niko Resources for the approval of ministry.[175]

450. Petrobangla forwarded the instructions to BAPEX on 27 May 2001.[176]

451. Between 20 May and 14 June 2001 the draft "*policy*" must have been revised, judging by the fact that the text attached to the Ministry's letter of 20 May 2001 differs in a number of important respects from that

[173] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 5 April 2001, Exhibit C-133.
[174] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 16 April 2001, Exhibit R-275.
[175] Letter from Bangladesh Ministry of Energy, Power and Mineral Resources to Petrobangla, 20 May 2001, Exhibit JD SI-16, also Exhibit JD C-7, p. 504, quoted at paragraph 35 of the Decision on Jurisdiction. A similar but shorter letter, also dated 20 May 2001, is produced by the Respondent as Exhibit 1, Appendix B to R-CMJ.1.
[176] Letter from Petrobangla to BAPEX, 27 May 2001, Exhibit R-9.

approved by the Minister on 14 June 2001 and attached to the JVA: the title is changed from "Policy on Development of Marginal/Abandoned Gas Fields" to "Procedures for Development …"

452. The Ministry followed up on 10 June 2001 by a letter to Petrobangla, with copy to BAPEX, "*Regarding finalisation of Joint Venture Agreement …*". Referring to the Marginal Fields Procedure, which had been approved "*by the special committee for supervision of the Bid evaluation formed by the chairmanship of Principal Secretary of Honourable Prime Minister now awaiting the final approval of the Honourable Prime Minister*", it gave directions in the following terms:

> *2. In this situation in light of the draft procedure for development of Chatak, Kamta and Feni marginal and abandoned gas fields for urgent finalisation of the Joint Venture Agreement between Bapex and Niko Resource:*
>
> *1) write a letter to Niko Resource mentioning specific date for coming to Bangladesh and*
>
> *2) After finalisation of the negotiation of Joint Venture Agreement between Bapex and Niko Resource, send the JVA to this ministry for approval of the government by 20/06/2001.*[177]

453. Petrobangla passed on these directions to BAPEX on the following day, stating:

> *… For urgent finalizing of the JVA between BAPEX and Niko Ltd in the light of the procedure mentioned in the draft procedure, it has been stated to (i) send invitation letter to Niko mentioning specific date and (2) upon completion of negotiation between BAPEX and Niko, the JVA to be sent to Ministry for approval of Government by 20.06.2001. You are requested to take urgent steps in this regard.*[178]

454. BAPEX then wrote to Niko, informing it of the Marginal Fields Procedure. It informed Niko of Petrobangla's letter of 11 June 2001 "*to conclude the JVA and forward the same to the Ministry for necessary approval.*" The letter continued as follows:

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[177] Memorandum from Ministry of Power, Energy and Mineral Resources to the Chairman of Petrobangla, 10 June 2001, Exhibit C-135; also Exhibit JD C-7, p. 510; a different translation is attached to the follow-up letter sent by BAPEX to Niko on 11 June 2001, as per Exhibit C-136.
[178] Letter from Petrobangla to BAPEX, 11 June 2001, Exhibit R- 10.

> *Pursuant to the mentioned draft policy of the Government, the proposed draft JVA needs to be reshaped/rearranged accommodating right clauses as and where needed. Accordingly, we invite one of your authorised representatives to a Joint meeting between BAPEX and Niko to be held on 12th June 2001 at 10.00 A.M. at BAPEX office, Dhaka, Bangladesh.*[179]

455. On the same day, 11 June 2001, Niko accepted the invitation and confirms "*that Mr Sharif is fully authorised to continue to represent Niko in all upcoming negotiations to finalise the JVA*".

456. The finalisation of the **Marginal Fields Procedure** proceeded in parallel. It was finalised at the Ministry and submitted by it to the Prime Minister with a Briefing Note by the Prime Minister's Secretary, dated 6 June 2001.[180] From a subsequent document it appears that the procedure was **approved by the Prime Minister on 14 June 2001**.[181] The Procedure has been attached to the JVA as Annex C, in the form of a "Final Draft Procedure"; there is no indication that this version would have been any different from that approved by the Prime Minister on 14 June 2001.

457. The Marginal Fields Procedure defines marginal gas fields and regulates the procedures for awarding contracts for the development of marginal/abandoned fields:

> *GOB/Petrobangla may invite proposals for private investment for the development of marginal/ gas fields. The offers received will be evaluated on declared criteria and the best offer will be selected for negotiation and finalisation of the contract.*

458. The Procedure goes on to provide further details about the contracting process, in provisions that differ from the May 2001 draft: in clause 4.3 a general clause concerning the negotiations for investment contracts is added, referring to the Model Production Sharing Contract 1997 as a guideline for negotiations, "*as far as practicable*".

459. The Procedure then deals with "*offers received prior to the adoption of these procedures*". The May draft contained two provisions:

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[179] Letter from BAPEX to Niko, 11 June 2001, Exhibit C-136.
[180] Procedure for Development of Marginal/Abandoned Gas Fields, Project Concept Approved by Prime Minister, 6 June 2001, Exhibit C-203, RfA II, Attachment I.
[181] Exhibit JD C-7, p. 513; referring to the Procedure as "*approved by the Ex-Prime Minister on 14-06-2001*". Adoption of the Procedure in June 2001 also is mentioned in a Niko letter of 8 July 2002, Exhibit C-140.

> *4.3 Unsolicited offers received prior to the adoption of this policy will be appraised by a technical committee appointed by Petrobangla. Such offers will be subject to Swiss Challenge before the contract is finalized.*
>
> *4.4 Offers received prior the adoption of these procedures will be appraised … (JVA) will be concluded between the selected investor and Petrobangla/Compan(ies) and forwarded to Government for approval.*[182]

460. In the final version, as attached to the JVA, paragraph 4.3 and the reference to Swiss Challenge is removed and paragraph 4.4 is completed to read as follows:

> *Offers received prior to the adoption of these procedures will be appraised by a technical committee appointed by Petrobangla. After appraisal a Joint Venture Agreement will be concluded between the selected investor and Petrobangla/Compan(ies) and forwarded to the Government.*[183]

461. Both the May 2001 draft and the final version contain a section on "Determination of Marginal Gas Fields" which are almost identical. The final Procedure, however, has an added "Explanatory Note" at its very end:

> *For the purposes of these procedures, Chattak, Kamta and Feni gas fields shall be deemed to have been declared marginal/abandoned gas fields, and the negotiations/discussions concluded so far with the approval by the Government in 1999, shall be deemed to have been in compliance with the above procedures.*[184]

462. There is no evidence that the meeting on 12 June 2001, to which BAPEX had invited Niko, actually took place. There is a reference to a letter from Niko to BAPEX requesting that in the Joint Study the term "Exploration" used in the context of the well to be drilled in the Chattak East area be replaced by "Appraisal"; the letter has not been produced but is mentioned in the Minutes of a meeting at the Ministry on 29 July 2002.[185]

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[182] Proceeding on Jurisdiction, Exhibit JD C-7, p. 506; underlined in the original.
[183] JVA Annex C, Exhibit C-1, paragraph 4.4.
[184] JVA Annex C, paragraph 10.
[185] Ministry of Power, Energy and Mineral Resources, Minutes of Meeting of July 29 2002, Exhibit R-303, paragraph 7.

463. The attempts at completing the JVA continued at a **meeting "*to finalise the Joint Venture Agreement between BAPEX Negotiation Committee and Niko ...*"** held on **25 June 2001**. The Minutes of this meeting record the conflicting positions of Niko and the BAPEX Committee concerning the question whether or not Chattak East should be included in the JVA. The Tribunals will consider below more closely the Parties' positions as recorded in these Minutes. Here the conclusion of the meeting must be mentioned: the BAPEX Committee insisted that Chattak East had to be excluded from the JVA while "*Niko is not prepared to change the area as defined in the STUDY AGREEMENT*". The Minutes' final paragraph reads:

> *BAPEX and Niko jointly agree that other than the issues under discussion herein all other issues, terms and conditions in the Negotiated Draft JVA June 2000 have been agreed to between BAPEX and Niko subject to final approval from BAPEX management.*[186]

464. The draft of the JVA of June 2000, as mentioned in the above quotation from the Minutes of the 25 June 2001 meeting, was also referred to on subsequent occasions but has not been produced. The Claimant explained that it searched for it but was unable to find it. The only draft of the JVA produced in the Arbitrations is that of September 2000.

465. The Tribunals note that there is no reference to Swiss Challenge or other competitive procedure in the Minutes of the 25 June 2001 meeting and in the correspondence relating to the finalisation of the JVA in the context of the Marginal Fields Procedure. This correspondence only related to the urgent finalisation of the JVA. The only issue that seemed to be outstanding at the end of June 2001 was the question of Chattak East.

466. Following the BAPEX/Niko meeting on 25 June another meeting took place on 27 June 2001 at the Ministry. At this meeting, the Energy Secretary is said to have instructed Niko to "*consider the Chattak East portion of the Chattak field separately from the Chattak West portion of the Chattak Gas field*". In the days immediately thereafter, these instructions seem to have resulted in significant progress; BAPEX considered the possibility of extending the JVA to Chattak East and Niko was prepared

[186] Minutes of Meeting to Finalize the JVA between BAPEX and Niko, 20 June 2001, Exhibit JD – SI 21, paragraph 4.

to accept for Chattak East fiscal terms different from those of Chattak West. This possible solution, which anticipates that which eventually was adopted in the JVA, does not seem to have been pursued further at that time.[187]

467. **In July 2001 the Awami League administration of Sheikh Hasina** left power. **The BNP-Jamaal e Islami Coalition Government** under Khaleda Zia took office in **October 2001**.[188]

468. The are no records in the Arbitrations about any negotiations for the JVA during the year that followed until **8 July 2002**. Following a **meeting at Petrobangla** on **7 July 2002**[189], Niko wrote to BAPEX, with copy to Petrobangla, concerning the "Definition of Chattak Gas Field and inclusion of Chattak East in the Bapex-Niko JVA".[190] In that letter, Niko sets out again its arguments in support of its claim that Chattak East must be included in the JVA area.

469. In correspondence that followed, Niko insisted on the inclusion of Chattak East, relying on the prior definition of the Chattak Field and declaring that without Chattak East the project would not be viable. In a meeting of representatives of the Ministry Petrobangla and BAPEX on 29 July 2002 it was decided that only Chattak West could be included in the JVA; BAPEX informed Niko of this decision on 8 August 2002, clarifying that "*there is no scope to include Chattak East in the proposed BAPEX-NIKO Joint Venture*".[191]

470. Niko wrote to the State Minister on 10 August 2002, presenting again its arguments, supported by a legal opinion by Md Azizul Haq, Advocate, Supreme Court, of the firm Moudud Ahmed and Associates. Niko also offered "*to treat Chattak East as an exploration area, as contended by Bapex*" with fiscal terms applied by the Government to "*exploration areas*".[192] The explanations were further developed in Niko's letter of 15

[187] For details see below Section 9.5.3.
[188] As explained e.g. in C-CMC, paragraphs 120 and 123; see also the Respondents' table of "Corruption Chronology".
[189] Niko's letter of 10 August 2002, Exhibit R-353, indicates that date; in its earlier letter of 8 July 2002, Exhibit C-140, reference is made to the "*meeting in Petrobangla today*".
[190] Letter from Niko to BAPEX, 8 July 2002, Exhibit C-140.
[191] Letter from BAPEX to Niko, 8 August 2002, Exhibit C-143.
[192] Letter from Niko to Ministry of Power, Energy, and Mineral Resources, 10 August 2002, Exhibit R-353.

September 2002, which again offered "*better fiscal terms based upon investment multiples for Chattak East*".[193]

471. In correspondence and meetings, other aspects of the JVA were considered, including the well head gas price, for which USD 1.75/MCF were considered. The issues were considered at a **meeting at the Ministry on 16 September 2002** attended by representatives of BAPEX and presumably also of Petrobangla.[194] At the meeting the requirement of using the Swiss Challenge procedure was also discussed and Petrobangla was requested to provide clarification about the question whether this procedure was applicable.

472. These issues were discussed with Niko at a meeting on 23 November 2002, followed by a letter from Niko dated 25 November 2002 in which Niko, *inter alia*, expressed concern about the well head price of USD 1.75/MCF. With respect to Chattak East, Niko wrote: "[w]e request that Chattak East be included in this project. However, NIKO will accept the final GOB decision in this regard."[195]

473. BAPEX then prepared a revised draft of the JVA "following the Government decision and the abovementioned proposal by Niko" and submitted it to the BAPEX Board on 30 December 2002. The Board decided to form a committee, convened by a General Manager of BAPEX and including two General Managers from Petrobangla, and gave directions for the procedure to be followed.[196]

474. The Committee submitted its report on 13 January 2003 and BAPEX commented on the report by making a correction in the draft JVA and recommended the acceptance of the modified draft JVA. It concluded:

> *This is to note that, the committee did not find any Article that goes against the interests of BAPEX/Petrobangla/the Government. In this circumstance, the draft JVA can be rearranged as per the recommendations of the committee.*[197]

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[193] Letter from Niko to Ministry of Power, Energy, and Mineral Resources, 15 September 2002, Exhibit C-144.
[194] The Minutes of the meeting were produced as Exhibit R-310, but without the list of attendants.
[195] Letter from BAPEX to Petrobangla, 30 January 2003, Exhibit R-309.
[196] Quoted from the letter of BAPEX to Petrobangla, 30 January 2003, Exhibit R-309, paragraph 2.1.
[197] Letter from BAPEX to Petrobangla, 30 January 2003, Exhibit R-309, paragraph 2.2(d).

475. During this period the Ministry pointed out to Petrobangla that at the meeting of 16 September 2002 it had requested that the proposed JVA be sent to it by 8 October 2002; it sent several reminders complaining that the proposed JVA had not been sent as requested. In a letter of 30 October 2002, the Ministry referred to the matters that had been raised and agreed at the 16 September 2002 meeting and those subsequently clarified. It requested Petrobangla "*to send the JVA pursuant to the direction to finalise the JVA upon consideration of the specific issues contained in the said minutes*".[198] The request seems to have remained without effect: on 5 January 2003, the Ministry wrote again to Petrobangla, referring to several reminders and concluded: "*Request is hereby made again to urgently send the said JVA*".[199]

476. This time BAPEX responded: on 30 January 2003 it provided a detailed account to Petrobangla.[200] That letter concluded by a request to the Ministry "*to take further steps for the consideration by and approval of the Ministry regarding decisions*" as per the BAPEX Board decision of 18 January 2003.

477. Sometime in February 2003, Mr Edward Sampson, Executive Chairman of Niko Canada, seems to have been received by the State Minister.[201] Following this visit, Mr Sampson wrote again **to the State Minister on 26 February 2003**.[202] He set out the history of the project up to the preparation of the JVA on the basis of the BAPEX May 2000 Report. His letter continued by pointing out that Niko had accepted in the draft JVA many changes requested by BAPEX so that agreement had been reached except for the Chattak issue. He requested the State Minister's "*intervention to keep the Chattak Field intact*" and stated that "*after waiting for five year*", Niko could not pursue this project any longer if it was not implemented without any further delay.

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[198] Letter from Ministry of Energy, Power and Mineral Resources to Petrobangla, 30 October 2002, Exhibit JD SI-28.
[199] Letter from Ministry of Energy, Power and Mineral Resources to Petrobangla, 5 January 2003, Exhibit JD SI- 29.
[200] Letter from BAPEX to Petrobangla, 30 January 2003, Exhibit R-309.
[201] In his letter of 26 February 2003 refers to the meeting in the State Minister's office "*on my recent trip to Dhaka*"; Letter from Niko to Ministry of Power, Energy and Mineral Resources, 26 February 2003, Exhibit C-149.
[202] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 26 February 2003, Exhibit C-149 and C-CM, paragraph 156.

478. Following this letter a "***joint meeting between the Energy Ministry, Petrobangla, Bapex and Niko***" was held on **2 March 2003**. At this occasion Niko was given an opportunity "*to present [its] views and concerns regarding this project […] This was the first time in almost two years we had the opportunity to present our case in a joint meeting*",[203] before "*senior representatives of BAPEX, Petrobangla and the Ministry*".[204]

479. In its follow-up **letter of 3 March 2003,**[205] **Niko** again set out its case, insisting that the Chattak Field, historically and geologically, had always been treated as a single field until it was for the first time excluded at the BAPEX Board meeting on 21 August 2000. It attached to the letter a legal opinion on the letter head of Moudud Ahmed and Associates, dated 27 February 2003 and signed by Md. Azizul Haq, Advocate, Supreme Court.[206]

480. Referring to a letter of the Ministry of 4 March 2003 (which has not been produced), **BAPEX**, wrote to Petrobangla a **letter of 5 March 2003**,[207] setting out the conflicting positions of the Parties and concluded by the recommendation to submit the difference to the Ministry of Law.

481. The opinion of the Law Ministry which then was obtained has not been produced. Its content was set out in a letter from the Energy Ministry to Petrobangla of 1 April 2003 with copy to BAPEX. [208] The opinion which is further discussed below in Sections 9.5.5 and 9.7, concluded that the Chattak area had been defined in Annex A of the FOU and that definition had to be respected. The letter of the Energy Ministry then continued by instructing Petrobangla to take the necessary action for finalising the signature of the JVA.

482. Following this communication by the Ministry, a "***BAPEX-Niko JVA Committee***" was set up to prepare separate fiscal terms for Chattak East,

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[203] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 3 March 2003, Exhibit C-152.
[204] C-CMC, paragraph 157, relying in Niko's letter to the Ministry, dated 3 March 2003, Exhibit C-152.
[205] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 3 March 2003, Exhibit C-152.
[206] Moudud Ahmed & Associates, Legal Opinion, 27 February 2003, Exhibits C-150.
[207] Letter from BAPEX to Petrobangla, 5 March 2003, Exhibit R-302.
[208] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 1 April 2003, Exhibit R-307; a similar but not identical translation is produced as Exhibit C-153 and Exhibit 7 in the Jurisdiction proceedings.

more favourable to BAPEX. To this effect the committee also prepared a comparative economic analysis of the gas fields to which the JVA was to apply and the terms of the PSC for Block 12 in the area of which the Chattak Field was included.[209]

483. The further events are reported in the **Minutes of the Petrobangla Management Committee meeting of 22 July 2003**.[210] The Minutes speak of a "*joint committee*" formed of "*officials from Petrobangla and BAPEX to executive [sic] a draft of the Joint Venture Agreement*", possibly the BAPEX-Niko JVA Committee discussed above. The committee to which the Minutes refer

> *…submitted its reports to the Petrobangla Chairman on 03 June, 2003. To reevaluate the report, Petrobangla formed a two members committee on 09 June, 2003.*
>
> *5. When the two members committee submitted the report to the concerned authority, Petrobangla instructed the committee to make needful amendment/correction to the JVA in light of the report and to take necessary actions to place it before the BAPEX board. Having made needful correction/amendment to the JVA in light of the instructions, the draft JVA was produced and approved at the 164th meeting of BAPEX Board held on 26 June, 2003. Draft JVA approved by BAPEX board was sent to the Ministry by Petrobangla on 03 July 2003.*

484. A "*legal vetting on the JVA accepted by BAPEX board and adopted by BAPEX and Niko Resources (BD) Ltd*" was performed by a "*Petrobangla panel of Lawyers*".[211] The Petrobangla Management Committee dealt with the determination of the gas price, pointing out the difference with price determination under the PSC and addressed certain tax and related issues as well as the registration of Niko in Barbados. It noted that there was "*no possibility of adverse effects and recommended the JVA for approval.*" It also pointed out:

> *There will be no benefit unless the Abandoned/Marginal Gas Fields are developed for production.*

[209] For details see below Section 9.5.6.
[210] 333rd Petrobangla Managing Committee Meeting, Agenda Extracts, 22 July 2003, Exhibit C-11; the document has also been produced as Exhibit JD SJ-32, with a different translation.
[211] 333rd Petrobangla Managing Committee Meeting, Agenda Extracts, 22 July 2003, Exhibit C-11; the document has also been produced as Exhibit JD SJ-32, with a different translation.

No JVA was signed till date in Bangladesh Gas sector.

485. The Minutes also contain the following summary of some critical issues concerning the JVA:

> *20. Referring to an investigation by the board, it was informed that no fund is required by BAPEX to run the said Joint Venture. Niko will bear all the investment needed. Earning from the produced gas will be distributed through Investment Multiple basis. The board stated that there will be no cost recovery in the said JVA as for the case of PSC.*

486. The discussion at the Petrobangla Management Committee, as reported in the Minutes, concluded as follows:

> *25. The board referred the draft JVA to the Ministry for Government approval.*
>
> *26. The board recommended the approval of Joint initiative between BAPEX and Niko for the development and exploration of Gas from Chattak and Feni Non-Producing Marginal/Abandoned gas fields. The board also advised the director (PSC) to send the matter to the concerned Ministry for need full Government approval.*

487. At this stage, the question of **Swiss Challenge** procedure seems to have arisen again. In **August 2003, the Law Ministry** seems to have prepared an **opinion** concerning the question whether this procedure had to be followed.[212] Considering the Government's decision of 25 May 1999 and the "*government approved FOU*", the opinion observes that according to the decision "*following Swiss Challenge Method or any other tender method was not mandatory, that was optional*". It also referred to the confidentiality clause in the FOU and opined that "*discussion or agreement with a third-party following Swiss Challenge method*" would create liability of the Government.

488. The Government approved the JVA. The Ministry notified this **approval to Petrobangla on 11 October 2003**;[213] the letter referred to the

[212] Attachment to the Ministry's letter of 11 October 2003, Exhibit R-280; the version of this letter produced as Exhibit JD SI-33 does not have this attachment.
[213] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 11 October 2003, Exhibit R-280.

Ministry's notification of 1 April 2003, Petrobangla's letter of 3 July 2003 and a summary presented to the Prime Minister on 18 March 2003. It requested "*to arrange final signature*" of the JVA. Details shall be discussed below in Section 9.8.

489. Two days later, on 13 October 2003, Petrobangla wrote to BAPEX[214] and BAPEX wrote to Niko, inviting it to sign the JVA in the following terms:

> *In accordance with the approval accorded by the Government of the Peoples Republic of Bangladesh to sign the "JOINT VENTURE AGREEMENT FOR THE DEVELOPMENT AND PRODUCTION OF PETROLEUM FROM THE MARGINAL/ABANDONED CHATTAK & FENI GAS FIELDS" between Bangladesh Petroleum Exploration & Production Company Ltd (BAPEX) and Niko Resources (Bangladesh) Ltd, you are requested to send your Authorized representative with due authorization to sign the said contract on 16th October, 2003 at 12.00 Noon to the Registered office of BAPEX, Dhaka, Bangladesh.*[215]

490. The **JVA was then executed on 16 October 2003**. BAPEX informed Petrobangla on 18 October 2003, reminding it of the required transfer of the Chattak and Feni Gas Fields from SGFL and BDFCL to BAPEX.[216]

491. On 4 November 2003, Niko Canada informed Petrobangla that Mr Qasim Sharif had been appointed with immediate effect President of Niko Bangladesh, representing that company "*in all matters under Scope of the Joint Venture between BAPEX and Niko for the development of the marginal/abandoned Chattak and Feni Gas Fields*".[217]

4.2 The GPSA and its negotiation history

492. The history of the GPSA negotiations has been described in some detail in the Decision on Jurisdiction.[218] These negotiations are summarised and in parts completed as relevant for the present Decision on the Corruption Claim.

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[214] The communication has not been produced but is mentioned in BAPEX letter of 18 October 2003, Exhibit JD SI-35.
[215] Letter from BAPEX to Niko, 13 October 2003, Exhibit JD SI-34.
[216] Letter BAPEX to Petrobangla, dated 18 October 2003, Exhibit JD-SI-35.
[217] Exhibit R-278.
[218] Decision on Jurisdiction, pages 24 to 33.

493. Niko commenced work on the development of the gas fields upon conclusion of the JVA, starting with the Feni field. The first well which it sought to develop in the Feni field was Feni-3. Niko tested water instead of gas in 17 of a total of 19 zones[219] It then appeared that during the second semester 2004 gas production could commence.

494. Niko wrote to Petrobangla on 19 May 2004, with copy to the Ministry, having as reference "Gas Purchase and Sales Agreement (GPSA) for the Feni Gas Field". The letter explained that a skid-mounted gas plant was to arrive on 1 June and that Feni-3 would be put on production in July 2004. The letter continued:

> *We, therefore, would like to initiate discussions with the Government of Bangladesh and Petrobangla to finalise the subject agreement so that Feni-3 can be on production as soon as the gas plant is commissioned.*
>
> *We understand that pursuant to Article 7 of the "Procedure for Development of Marginal/Abandoned Gas Fields" as approved by the Honorable Prime Minister, the gas price of the Investor shall be negotiated between the Government, Petrobangla, and the Investor. Moreover, Article 24.3 of the Bapex-Niko JV stipulates that the Buyer of the gas from the Feni Gas Field shall be Petrobangla or its designee.*
>
> *In view of the above, we request a meeting with the authorised representatives of the GOB, Petrobangla, and Bapex to initiate the process to execute the subject agreement so that Feni-3 well could be on production at the earliest.*[220]

495. On 6 June 2004, Petrobangla asked that Niko submit a proposed GPSA for the Feni Gas Field.[221] In a letter to Petrobangla of 14 June 2004, the Ministry instructed the urgent conclusion of a GPSA for the purchase of gas from the Feni field "*in order to meet the rising demand of gas in the country*".[222]

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[219] Explanations contained in Niko's letter to the Ministry of 7 August 2004 (year erroneously shown as 2002), Exhibit JD C-6, p. 475 and paragraph 3 at p. 476.
[220] Exhibit JD C-6, pp. 494-495.
[221] This letter is referenced in Niko's letter of 14 June 2004, Exhibit JD C-6, p. 492.
[222] Letter from Ministry of Power, Energy and Mineral Resources and Petrobangla, 14 June 2004, Exhibit R-282.

496. In response to Petrobangla's letter of 6 June Niko (Mr Sharif, President) wrote to Petrobangla's Director (PSC), attention Mr Raihanul Abedin, on **14 June 2004**, announcing that Feni-3 was completed, that work on Feni-4 was advancing and that the gas plant was expected to be in place and commissioned by early August 2004. Niko's letter was accompanied by **a draft GPSA**.[223]

497. Petrobangla (Mr Abedin, Director PSC) responded on 3 July 2004, announcing for 4 July 2004 a "*Negotiation Meeting on draft*" GPSA, and requested Niko's presence.

498. Shortly thereafter, further to a letter from the Ministry dated 15 July 2004,[224] a committee was formed "*to negotiate for finalisation of gas pricing of Ex. Feni gas field which is being developed by BAPEX-NIKO JVA*" (the "**Gas Pricing Committee**"). The committee was composed of

- Mr Ehsan-ul Fattah, Addl. Secretary, Petroleum & Mineral Resources Division at the Ministry, in the function of Convener
- Mr S.R. Osmani, Chairman of Petrobangla
- Mr Muktadir Ali, Director (Planning), Petrobangla
- Mr Qasim Sharif, President Niko
- Mr Peter Mercier, Vice President Niko, Bangladesh Operation
- Mr M. A. Based, Managing Director BAPEX.[225]

499. Mr Md. Raihanul Abedin, Director (PSC), was not included among the members of the Committee, but he was listed as an observer at the first of the two meetings of the Committee which took place under the chairmanship of the Convener on 24 July and 4 August 2004.[226] In addition, the first meeting also was attended also by an observer from the Ministry (Mrs Mahbubun Nahar, Senior Assistant Secretary) and from BAPEX (Mr Syed Ahmed Haqqani, General Manager) and Petrobangla.[227]

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[223] Exhibit JD C-6, p. 492. The draft GPSA is not attached to this Exhibit.
[224] This letter is referenced in the Minutes of the two subsequent meetings, Exhibit JD- 6, p. 482.
[225] Annexes A-1 and A-2 to the Minutes of the 24 July and 4 August 2004 meeting, Exhibit JD C-6, pp. 485 and 486.
[226] Minutes produced at Exhibit JD C-6.
[227] Annex A-1 to the Minutes, Exhbit JD C-6, p. 485.

500. The Minutes of these first two meetings record that, based on a commercial and risk analysis, **Niko requested a price of US$2.75/MCF**. The "*GOB participants*" stated that "*in 2003 [Niko] offered the gas price US$1.75 as the best offer*". At the end of the discussion "***the Chair offered*** *Niko to agree Feni Gas Price at* ***US$1.75/MCF****, since Niko signed the JVA considering this price*". Niko stated that it would respond later.[228]

501. Niko answered the proposal on 7 August 2004 by a letter to the Convener. It stated that pre-JVA discussion were superseded by the agreement itself and in Annex D of the JVA "*the 1.75/MCF price is used as an example of calculating the investment multiple*". Niko insisted that the gas price that it demanded was reasonable and justified and suggested consultations on the economics of the Feni development.

502. In particular Niko pointed out that, in the relevant region, Petrobangla was paying "*approximately USD 2.9/MCF*":

> *Chittagong area is the natural market for the Feni Gas. In this area Petrobangla is purchasing gas steadily from the Sangu Gas Field operated by an IOC at approximately USD 2.9/MCF for the past seven to eight years. Since the Feni Gas will supplement and compete with the Sangu gas, we find your offer of USD 1.75 grossly unfair. Niko is therefore unable to accept this unfair price.*

503. A third meeting was held on 19 August 2004 at which the parties developed their arguments for their respective price requests. The positions did not change, as summarised by Niko in its letter of 19 August 2004.[229]

504. **Gas delivery started on 2 November 2004**, without any agreement having been reached concerning the price and without a GPSA having been executed by the concerned parties. On the day before, Petrobangla (Mr Abedin) had written, however, to Niko (Mr Sharif), thanking Niko "*for the successful development of the Feni gas field*" and undertaking "*to buy gas from BAPEX-Niko Joint Venture's Feni marginal gas field*". The letter added that "*price of gas will be paid as per agreed and signed GPSA when finalised*".

[228] Exhibit JD C-6, pp. 482, 484.
[229] Exhibit JD C-6, p. 474; only the first page of this letter is produced in this exhibit.

505. At the end of 2004, Niko started drilling in the Chattak Field the Chattak-2 well. On **7 January 2005** a blowout occurred in this well (**the first blowout**). Niko sought to extinguish the blowout by engaging a specialist who drilled a relief well. The attempt failed and a second blowout ccurred on 24 June 2005 (**the second blowout**). The blow outs were eventually extinguished on 9 October 2005, when according to the Claimant the flow of gas was halted.[230] The circumstances of these blowouts and corresponding liability will be examined in the Tribunals' decision on liability.

506. Concerning the sale of the gas from the Feni field, Niko wrote to to the Chairman of Petrobangla on 14 February 2005, stating that the "*trial production period has ended. Our gas plants have been commissioned. We now find ourselves in an extremely difficult position with our management and board to justify and continue gas production from Feni without finalisation of the price of our share of the gas*". Niko required an immediate interim payment for the gas delivered from November 2004 to January 2005 at the rate of US$2.35/MCF and finalisation of the gas price within the next ten calendar days, failing which Niko said that it reserved the right to **suspend gas production** from the Feni field.[231]

507. Petrobangla responded the same day, announcing that it "*would make a lump sum interim payment against the gas supplied from November 2004 to January 2005*" without prejudice to the rate to be agreed. It added a request that Niko "*supply maximum possible quantity of gas immediately*".[232]

508. Niko then addressed itself to the Ministry on 9 March 2004. The letter to the Ministry has not been produced but is mentioned in a letter from Petrobangla of 10 March 2005. In that letter Petrobangla announced that it had "*arranged a **payment of US$2 million today** for the time being to you on a lump sum basis …*"[233] Niko confirmed its receipt as "*lump sum partial payment for Niko's share of gas production for November, December and January*".[234]

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[230] Claimant's Reply concerning the Compensation Declaration, paragraph 139, referring to Exhibit C-72, p. 3. The Respondents contest that the Chattak 2 well was completely sealed after the blow-out and assert that gas continued flowing (B-MD, paragraph 143 *et seq.*).
[231] Exhibit JD C-6, p. 471.
[232] Exhibit JD C-6, p. 472.
[233] Exhibit JD C-6, p. 470.
[234] Niko's letter to the Ministry of 19 March 2004, Exhibit JD C-6, p. 479.

509. In the letter of 10 March 2005, Petrobangla also relied on Article 16.1(c) of the JVA which identified as an event of default if "[a]*ny of the party indulges/commits any act which is contrary to the interests of Bangladesh*" and required Niko to withdraw the notice of suspension of gas production "*or else we would be constrained to take all necessary steps under the JVA to up hold the interests of the country*".[235]

510. A further meeting by the Gas Pricing Committee was held on 16 March 2005. No minutes of this meeting have been produced; but Niko summarised the parties' positions in a letter to the Ministry (to the attention of the State Minister, A.K.M. Mosharraf Hossain) of 19 March 2005:

> *Up to the date of the meeting, our understanding of the seller's and the buyer's positions was that Petrobangla is offering US$2.10 per mscf for gas production at Feni and Niko was requesting a price of US$ 2.35 per mscf for the gas.*[236]

511. According to Niko's summary of the meeting, Niko repeated its arguments in support of the requested price, referring to the costs for services and materials in the oil exploration and production industry which "*increased dramatically since the signing of the [JVA] over the past year*" and to the increase in energy prices world wide. It also stated that

> *The price Niko is proposing for supply of Feni gas production to the Bangladesh market is understood to be the lowest gas price of any PSC in Bangladesh.*[237]

512. At the meeting, "*as a gesture of good will and in an attempt to move the discussion to a conclusion, Niko proposed a final agreed price of US$2.30 per msfc…*".

513. Petrobangla was not in agreement with our proposed price and once again re-stated that the maximum price that Petrobangla could pay for the gas was US$2.10.

514. As no agreement was reached, Niko reverted to its previously requested price of US$2.35 per mscf.

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[235] Exhibit JD C-6, p. 470.
[236] Exhibit JD C-6, p. 479.
[237] Exhibit JD C-6, p. 479.

515. Given the failure to reach agreement, Niko requested at the meeting that the Committee re-convene; but no dates could be found in the immediate future. At the meeting the Chairman of Petrobangla "*suggested that if the Committee did not agree on a price that Niko/Bapex may have to directly approach the Government of Bangladesh for a final decision*". Niko therefore wrote to the Ministry on 19 March 2005, with copy to the members of the Committee, in the following terms:

> *It was expressed by the Chairman of Petrobangla that the final result of the Committee's deliberations may be that we will not reach a consensus on the price. He further opined that it is possible that the Committee will have to conclude its deliberations with a report to the Ministry that a price for the gas could not be agreed. Niko acknowledged that this could be a possible outcome of the Committee meetings, however it was requested by Niko that this conclusion be arrived at as soon as possible so that other avenues for concluding the price agreement could be pursued. Mr Osman [the Chairman of Petrobangla] suggested that if the Committee did not agree on a price that Niko/Bapex may have to directly approach the Government of Bangladesh for a final decision.*
>
> [Niko confirmed its request for a meeting of the Committee within 4 days, failing which it would reduce gas production at Feni.]
>
> *We are therefore writing to you to request your assistance in ensuring that the negotiations continue without delay so that a final agreement can be reached and gas production continue for the benefit of all.*[238]

516. The reactions of the State Minister and of the Committee have not been documented. From other evidence related to **the gifts to the State Minister** the Tribunals have been informed that the State Minister requested a Land Cruiser, purchased by Niko for the JVA, be delivered to him; that vehicle was indeed delivered on 23 May 2005. The Minister travelled to Canada and the United States in June 2005 at the expense of Niko. The Minister's receipt of this gift was publicised in the press in Bangladesh and the Minister resigned on 18 June 2005.

517. The Committee met again on 5 June 2005 and then prepared its report (the "**June 2005 Report**"); the report is undated but, according to Niko's

[238] Exhibit JD C-6, p. 480.

letter of 4 August 2005, was "*executed*" on 13 June 2005.[239] Niko added its "Comments and Explanations to the Feni Gas Pricing Committee Report", dated 13 June 2005.[240]

518. The Report presents again the positions of the parties and then concludes:

> *Committee's opinion:*
>
> *Members representing GOB opine that the Feni gas price might be of US$ 2.10/MCF pursuant to achieving comparability with PSC.*
>
> *Members representing Niko Resources (Bangladesh) Ltd. did not come to an agreement with such price. They opined that their price for Feni gas is US$ 2.35/MCF.*
>
> *Committee's recommendation:*
>
> *The Committee could not reach to a consensus in respect of pricing of gas to be produced from Feni field. The matter, therefore, remains unresolved.*
>
> *The members representing Government side recommend that the Niko's share of gas from Feni field under the terms of JVA may be purchased by Petrobangla at best at a price of US$2.10/MCF.*[241]

519. Niko followed up by a letter of 4 August 2005 to the Additional Secretary in the Ministry, referring to the June report and requesting another meeting "*with a view to reach a consensus on the subject matter*".[242]

520. The composition of the Gas Pricing Committee was altered on 23 August 2005, Mr Ali being replaced by Mr Rahman (Director, Planning, Petrobangla) and Mr Based being replaced by Mr Jamaluddin (Managing Director, BAPEX); Mr Fatha continued to function as Convener and Mr Osmani as Member.[243] The Committee held its **last meeting on 23 October 2005**. The report of the Committee, signed on 25 October 2005

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[239] Exhibit JD C-6, p. 455.
[240] Exhibit JD C-6, pp. 444-445; the Committee Report, following the signatures, shows a "*Note: Niko's Comments & Explanations is attached with this Report*".
[241] Exhibit JD C-6, p. 441.
[242] Exhibit JD C-6, p. 454.
[243] Reference to the amendment is made in the report of 25 October 2005 (see below) without indicating the nature of the amendment; possibly it concerned the composition; see also below.

(the "**October 2005 Report**"),[244] shows a change in the Committee's composition: the person appearing as the Director (Planning) of Petrobangla now is Mr Shahido Rahman and Mr M. Jamaluddin appears as the Managing Director of BAPEX. The Report repeats large parts of the June 2005 report but differs in one important aspect: when presenting the opinion of the "*members representing GOB*", the report removed the passage stating that "*the Feni gas price might be of US$ 2.10/MCF pursuant to achieving comparability with PSC*". That passage was replaced by the words:

> *… the Feni gas price might be of US$ 1.75/MCF in consideration of the issues stated above and at such price, Niko will achieve a positive cashflow from the Feni field as per projection attached hereto (Attachment 4).*

521. The Minutes make no reference to the prior offer of a price of US$2.10/MCF, as it had been recorded in the June 2005 Report. They record the reasons given by the "*members representing the GOB*" in support of the price at US$1.75/MCF, which corresponded largely to those in the June 2005 Report; but the objective of "*achieving comparability with PSC*" was removed and there is no explanation for the return from US$ 2.10 to the original offer 1.75/MCF. Niko's position remained, as per the June 2005 Report, at US$2.35/MCF.

522. Consequently, the report presented the following conclusion:

> *Committee's recommendation:*
>
> *The Committee could not reach a consensus in respect of pricing of gas to produce from Feni field. The matter, therefore, remained unresolved.*
>
> *The members representing Government side recommend that the Niko's share of gas from Feni field under the terms of JVA may be purchased by Petrobangla at best at a price of US$1.75/MCF.*[245]

523. Niko met the Convener on 25 October and wrote to him on 26 October 2005, providing comments which it requested to "*be included as part of the Minutes*" of the 23 October 2005 meeting. It objected to the "*retrenchmet to the lower price of US$ 1.75*" and attributed this change to

[244] The copy of the report filed as Exhibit JD C-6, pp. 434-437, is not dated; but it is signed by the Chairman of Petrobangla, its Director (Planning) and the Managing Director of BAPEX, all dated 25 October 2005.
[245] Exhibit JD C-6, pp. 460, 463.

one of the new Members of the Committee who "*perhaps had not been fully briefed on the past history of the negotiations*". Niko added: "*if the Committee could not reach a consensus on the matter of gas pricing that the next stage should be to pursue an arbitrated settlement of the matter*". Niko announced that it "*will therefore suggest to the GOB this solution to move forward on the matter*".[246]

524. In a letter to the Ministry (addressed to the Energy Advisor, Mahmudur Rahman), also dated 25 October 2005, Niko referred to Article 18.3 of the JVA and proposed that the gas price determination "*be referred to a* ***sole expert to arbitrate*** *…*"[247] It explained that a "*sole expert arbitrator would be appropriate in this matter as the basis of the dispute is to establish gas pricing and not legal issues or disputes*".[248]

525. However, this proposal was not accepted. Petrobangla refused to submit the difference about the gas price to arbitration or an expert, as per Article 18.3 JVA and persisted in this position. On 5 March 2006, for instance, Petrobangla wrote:

> *Failure to reach any unanimous price decision, cannot be arbitrated/determined by any sole expert under the GPSA of any kind, since GOB is not going to be a party to that. The truth of the matter is price negotiation under the JVA is not to be done at the time of GPSA negotiation neither it could be agreed that the GPSA negotiation has been started at the time of Price Committee was made because that had been started independently.*[249]

526. As to the gas price itself, the position of Petrobangla, BAPEX and the Government remained unchanged, despite numerous attempts by Niko to reach a more favourable solution, permanently or as an interim solution: Niko eventually accepted the price of US$1.75/MCF, as Petrobangla had requested from the beginning of the negotiations.

527. For the remainder of these negotiations the Tribunals refer to the account given in their Decision on Jurisdiction and simply mention the following points of some relevance for the present state of the proceedings:

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[246] Exhibit JD C-6, pp. 432, 433.
[247] Exhibit JD C-6, pp. 452, 453, emphasis added.
[248] Exhibit JD C-6, p. 448-449.
[249] Exhibit JD C-6, p. 319-320.

528. Petrobangla made two **payments on account** of US$2 million each,[250] but no other payment for the gas delivered. For any further payments on account, Petrobangla informed Niko: "*you have to wait till such time the gas price is finalised*".[251] Petrobangla also relied on the order of the High Court Division of the Supreme Court in the **BELA proceedings**, restraining *inter alia* Petrobangla from any payment to Niko.[252] Niko requested the Ministry[253] and Petrobangla[254] for "*full support*" in the efforts for having the orders stayed. This was to no avail.

529. As no agreement had been reached by 24 November 2005 on the gas price and the GSPA, Niko advised Petrobangla in writing, as it had done on a previous occasion, that as of 28 November 2005 it would **suspend gas production from the Feni Field** pending "*mutual resolution*" of the gas price, the agreement and execution of a GPSA and "*settlement of arrears for gas sold to date from the Feni Field.*"[255] Petrobangla responded the same day, requesting Niko to withdraw the notice and not to suspend deliveries. Petrobangla's letter concluded: "*If you are still determined to do so that will be seriously prejudicial to our national interest and we shall be constrained to act accordingly.*"[256] In the following correspondence, Petrobangla and BAPEX continued to object to any reduction or suspension of gas production and instead requested that Niko increase production.[257]

530. No suspension of gas production seems to have taken place by 16 January 2006, when Niko announced that "*due to problems with one of the glycol dehydrators*", production had to be reduced.[258] On 26 February 2006, Niko again announced to Petrobangla, with copy to the Prime Minister, the Ministry and others, that as from 27 February 2006 it

[250] The first payment, made in February 2005, has been mentioned above; a second payment was made before November 2005, as stated by Petrobangla in it letter of 24 November 2005 (Exhibit JD C-6, p.425) and confirmed by Niko on 26 November 2005 (Exhibit JD C-6, p. 424).
[251] Letter of 24 November 2005, Exhibit JD C-6, p. 426.
[252] Petrobangla letter of 28 November 2005, Exhibit JD C-6, p. 420; see also above Section 2.6.1.
[253] E.g. in a letter of 29 November 2005, Exhibit JD C-6, p. 409.
[254] E.g. in a letter of 30 November 2005, Exhibit JD C-6, p. 405.
[255] Exhibit JD C-6, p. 429.
[256] Exhibit JD C-6, p. 428.
[257] E.g. letter of 14 February 2006, Exhibit JD C-6, p. 334.
[258] Exhibit JD C-6, p. 367.

planned to shut down all gas production from the Feni field "*until further notice*".[259]

531. This time, the production does indeed seem to have been reduced or shut down. Indeed, on 28 February 2006, Petrobangla requested Niko "*to immediately restore gas production to an increased quantity from the field and deliver the same pending negotiations of GPSA*".[260] In a letter to Petrobangla of 2 March 2006, Niko clarified that the "*suspension of gas production is most definitely related to the finalisation of a GSPA*".[261]

532. This gave rise to further discussions with the Government's Energy Advisor, Petrobangla and BAPEX. Apparently encouraged at a meeting with Petrobangla on 7 March 2006, Niko repeated on 8 March 2006 its proposal of referring the gas price difference to an "*Internationally Reputed Arbitrator/Sole Expert*" and requested that a meeting of the Gas Pricing Committee be convened urgently.[262] In the expectation of this meeting, Niko decided to resume gas production. In the letter of 8 March 2006, it wrote:

> *… we value the relationship we have with the Government of Bangladesh and considering the national interest Niko Management after having detail discussion with the Hon'ble Advisor for the Energy & Mineral Resources Division decided to turn on the Gas Production from Feni Gas Field as a gesture of our goodwill. We are here to do business and we would like to move on with things and we feel that convening this meeting would be the first step toward the right direction to reach any early solution to this critical issue of gas price.*

533. There is no indication that a new meeting of the Gas Pricing Committee was held and that the renewed suggestion of the price determination by a Sole Expert was followed-up.

534. While the difference about the gas price remained unresolved, Niko and Petrobangla continued to negotiate **the terms of a GPSA**. These negotiations were conducted separately from the meetings of the Gas Pricing Committee and sometimes referred to as meetings of the GPSA Negotiation Committee.[263]

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[259] Exhibit JD C-6, p. 333.
[260] Exhibit JD C-6, p. 332.
[261] Exhibit JD C-6, p. 323.
[262] Exhibit R-285.
[263] See e.g. Petrobangla letter of 6 April 2006, Exhibit JD C-6, p. 251.

535. Petrobangla had formally announced on 29 November 2005 that the "*purchase price of gas of the Feni Gas Field is fixed at US$1.75/MCF*". Although, at the request of Petrobangla on 6 June 2004, Niko had sent a first draft of the GPSA already on 14 June 2004,[264] Petrobangla invited Niko in the letter of 29 November 2005 "*to negotiate the terms of the GPSA*".[265]

536. Following this renewed invitation by Petrobangla, Niko requested that an **interim GPSA** be concluded forthwith, submitted the draft of such an interim GPSA and eventually accepted under such an interim agreement payment at US$1.75/MCF.[266] After some correspondence concerning its terms, Niko sent on 22 January 2006, already initialled, what it considered to be a "*final version*" reflecting requests for changes.[267] After it had suspended gas production, it announced on 6 March 2006 that "*gas production at Feni Field cannot be resumed until an IGPSA has been signed*".[268] However, no such interim agreement was concluded.

537. Several versions of the **draft GPSA as the final agreement** were considered. Mr Adolf mentioned a first draft that Niko had submitted in 2004, with which he was not familiar.[269] A new draft seems to have been used in 2005; a version of this draft was sent on 14 March 2006,[270] which again gave rise to discussions with BAPEX.[271]

538. According to testimony from Mr Adolf during the jurisdiction phase, Niko then invited Petrobangla as follows: "*why do you not provide us what is your standard GPSA and we will work forward from there*".[272] Petrobangla did indeed present a draft GPSA on 29 March 2006, which Niko returned with suggested modifications on 2 April 2006.[273]

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[264] See above and Exhibits JD C-6, pp. 492 and 492.
[265] Exhibit JD C-6, p. 419; also produced as Exhibit R-287.
[266] Letter to Petrobangla of 5 December 2005, Exhibit JD C-6, p. 383.
[267] Communicated by Niko's letter of 22 January 2006, Exhibit JD C-6, pp. 343-351.
[268] Exhibit JD C-6, p. 313.
[269] Hearing on Jurisdiction, Tr. Day 2, pp.189, 190.
[270] Exhibit JD C-6, p. 290.
[271] E.g. letter BAPEX, 15 March 2006, Exhibit JD C-6, p. 286-297.
[272] Hearing on Jurisdiction, Tr. Day 2, p. 190.
[273] Exhibit JD C-6, p. 252-269.

539. After further negotiations, **a final text was agreed in a meeting on 6 April 2006**, a text for initialling was sent by Petrobanla to Niko and BAPEX on 19 April and Niko accepted US$1.75/MCF as the gas price, proposing arbitration for the determination of the "*Chattak blowout compensation*".[274]

540. The draft then was **initialled on 31 July 2006**, as confirmed in a document signed by Mr Jahangir Kabir, Senior General Manager of Petrobangla, Mr Jamludding, Managing Director of BAPEX and Mr Biran Adolph, Vice President, Country Manager, Niko.

541. The Government approved the GPSA. On 20 December 2006 the Senior Assistant Secretary at the Ministry (Mr Nurun Akter) wrote to the Chairman of Petrobangla:

> *You are informed on the above subject and reference that the draft Purchase and Sale Agreement (GPSA) for the produced gas from the Feni Gas Field as per agreement of Bapex with NAICO [sic] sent through abovementioned memo under reference has been approved by the government.*
>
> *2. Under the circumstances the undersigned is directed to request you to take necessary action in the due pursuance of the existing rules and regulations on the above mentioned subject.*[275]

542. On the following day, 21 December 2006, Petrobangla (Md. Maqbul-E-Elahi, Director (PSC)) wrote to Niko and BAPEX, informing them that the **Government of Bangladesh had "*approved the initialled (31.07.2006) Gas Purchase and Sale Agreement of Marginal Gas Field Feni*"**.[276]

543. **The GPSA was executed on 27 December 2006**. It fixed a price of US$1.75 per thousand cubic feet of gas for the period of the agreement.

544. **In conclusion** on the history of the GPSA negotiations, the Tribunals note that it required over 2 ½ years from the time when Niko first requested negotiations for an agreement on the gas price until execution of the GPSA. Agreement was reached only when Niko had accepted the gas price which the members of the Gas Pricing Committee "*representing*

[274] Letter of 24 April 2006, Exhibit R-286.
[275] Exhibit JD C-6, p. 228.
[276] Exhibit JD C-6, p. 289.

the GOB" had requested from the outset, based on calculations made during the JVA negotiations. These representatives insisted on this price, even though in 2005 they considered that "*achieving comparability with PSC*" justified a price of US$2.10, a position that was later abandoned by them.

545. This long period of negotiations may be attributed *inter alia* to differences in the positions concerning the price to be paid for the gas. Insisting on a price reflecting prices from other suppliers and cost developments, "*the members representing the Government side*" in the Gas Pricing Committee referred to a price mentioned in the context of the JVA, a position which ultimately prevailed. Other difficulties were highlighted by Niko when, following a meeting with the Advisor at the Ministry on 12 February 2006, Niko recorded "*confirmation of the delay in getting final approval from the Prime Minister's Office to allow us with our work*" and "*considerable confusion amongst the Petrobangla representatives as to how to proceed with the finalisation of the Agreement due to the fact that conflicting instructions were received from your Division*".[277]

546. In view of the Respondents' allegations in the Corruption Claim, the Tribunals have sought to identify the **principal protagonists in the GPSA negotiations**. The members of the Gas Pricing Committee have been identified above.

547. As to the GPSA negotiations, it appears that, on the side of Petrobangla, they were conducted by "*Engr. Md Rahanul Abedin*", Director (PSC); he signed the letters addressed to Niko and Niko addressed to his attention its letters to Petrobangla. The Respondents explained that Mr Abedin occupied the position of Director (PSC) from January 2003 to June 2006.[278]

548. On the side of Niko, the initial correspondence is signed by Mr Qasim Sharif, President, who also is identified as Niko representative at the initial meetings of the Gas Pricing Committee.[279] Mr Brian Adolf commenced his activity as Country Manager for Niko in January 2005.[280]

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[277] Niko's letter to the Advisor, dates 13 February 2006, Exhibit R-283, also produced as JD C-6, pp. 339-340.
[278] R-MC, paragraph 133.
[279] Exhibit JD C-6, pp. 485 and 486.
[280] Hearing on Jurisdiction, Tr. Day 2, p. 190.

As from March 2005 Niko's letters are signed by him, identified as Vice-President and Country Manager.

5 THE RESPONDENTS' NEW OBJECTIONS TO THE TRIBUNALS' JURISDICTION

549. When the Claimant brought the two Arbitrations, the Respondents (which originally included the Government of Bangladesh) raised several objections to the Tribunals' jurisdiction, one of which was based on acts of corruption committed by the Claimant. In their Decision on Jurisdiction of 19 August 2013, the Tribunals dismissed the objections which the Government, Petrobangla and BAPEX had raised against the Tribunals' jurisdiction and held that they had jurisdiction to decide the claims brought by the Claimant against these two Respondents.

550. In the context of their Corruption Claim, the Respondents first confirmed the Tribunals' jurisdiction. In the Memorial on Damages, BAPEX wrote:

> *Only the arbitration clause survives. This Tribunal should exercise jurisdiction to resolve the allegations of corruption and injury to BAPEX resulting from Niko's procurement of the JVA and its operations that resulted from that corrupt procurement.*[281]

551. This position was changed when the Respondents in their Reply on Corruption "*request*[ed] *the Tribunals find that they do not have jurisdiction*".[282]

552. For the Claimant the new objections are inadmissible and late; and they are baseless. The Claimant quotes from the Methanex award:

> *There is little point in any arbitration tribunal making jurisdictional decisions intended and understood to be final and binding on the parties if, much later, a disappointed party can re-argue its jurisdictional case and turn the arbitration into the equivalent of Sisyphus's torment or the film "Groundhog Day".*[283]

553. When examining the objection to jurisdiction now made by the Respondents, the Tribunals noted that it is not presented as the continuation of Sisyphus' torment but as new and different objection.

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[281] B-MD, paragraph 75.
[282] Respondents' equest for relief, as expressed in their Reply on Corruption of 22 February 2017 and confirmed in the Second Post-Hearing Brief of 2 August 2017.
[283] *Methanex Corp. v. United States of America*, UNCITRAL (NAFTA), Final Award on Jurisdiction and Merits, RLA-209, Part II, Chapter E, para. 35 (3 August 2005), quoted in C-CMC, paragraph 378.

5.1 The nature of the Respondents' new objections

554. In their original objection to jurisdiction based on acts of corruption, as it was presented on 29 August 2011 and considered in the Decision on Jurisdiction, the Respondents made it clear that they did

> *… not intend to argue that the [Agreements were] void or voidable by reason of corruption or otherwise.*[284]

555. In the Tribunals' understanding, the Respondents' denial of jurisdiction then was made despite binding Agreements and binding arbitration clauses. Rather the Respondents argued that, due to its alleged bad faith when making the investment, the Claimant could not resort to the international arbitration system and specifically not to ICSID arbitration. According to this line of argument, "*Petrobangla and BAPEX could invoke the arbitration clauses but Niko could not*".[285]

556. When they made the above declaration concerning their intended argument about the fate of the Agreements, the Respondents qualified it by stating:

> *[The Respondents] would, of course, revisit this position if further disclosure made it appropriate to do so.*[286]

557. This position was not changed by the Respondents until they brought the Corruption Claim in BAPEX's Memorial on Corruption of 25 March 2016. The Respondents' case, as presented now, is different from the previous case insofar as the Respondents now also challenge the validity of the Agreements. They do so on the basis of a much broader corruption allegation and relying on large amounts of additional evidence.

558. In view of these circumstances, the Respondents argue that their new challenge of the Tribunals' jurisdiction is not one for reconsideration; instead the "*new evidence presented to the Tribunals raises new jurisdictional barriers that the Tribunals must consider*". They argue:

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[284] Respondents' letter to the Tribunals of 29 August 2011, quoted in the Decision on Jurisdiction, paragraph 377.
[285] Decision on Jurisdiction, paragraph 465.
[286] Respondents' letter to the Tribunals of 29 August 2011, quoted in the Decision on Jurisdiction, paragraph 377.

> *Respondents do not seek reconsideration of the Tribunals' Decision on Jurisdiction. The new evidence presented to the Tribunals raises new jurisdictional barriers that the Tribunals must consider. Under these circumstances, the ICSID Convention and Arbitration Rules mandate that the Tribunals consider Respondents' jurisdictional objections on the basis of previously unavailable evidence.* [287]

559. During the course of the proceedings on the Corruption Claim, the Respondents position concerning jurisdiction evolved.

560. In a first phase, the Respondents expressly accepted the Tribunals' jurisdiction. In its Memorial on Damages of 25 March 2016, BAPEX stated:

> *Only the arbitration clause survives. This Tribunal should exercise jurisdiction to resolve the allegations of corruption and injury to BAPEX resulting from Niko's procurement of the JVA and its operations that resulted from that corrupt procurement.*[288]

561. As part of the relief it sought from the Tribunals, BAPEX requested a declaration that the JVA was voidable and voided by BAPEX; it also sought compensation for its losses suffered from the corrupt procurement of the JVA, including those resulting from the blowouts.

562. In a separate letter also dated 25 March 2016, Petrobangla declared that it "*approves and adopts BAPEX's recitation of the facts and legal consequences of Niko's use of corruption and bribes to obtain the JVA and the GPSA*". It stated that "*Niko's claims based on the GPSA must be rejected*" and requested that the Tribunals "*vacate*" their prior decision on the Payment Claim.

563. In their Memorial on Corruption of 23 November 2016, the Respondents invoked Article 102 of the Constitution and argued that the Agreements were "*void ab initio and without legal effect*".[289] It their request for relief, the Respondents sought a number of declarations, including the declaration that the Government's approval of the Agreements "*was*

[287] R-PHB1 (CONFIDENTIAL), paragraph 219.
[288] B-MD, paragraph 75 with a reference to section 18 of the Bangladesh Arbitration Act (2001).
[289] R-MC, paragraph 183.

without legal effect and void ab initio". They did not request formally a decision on jurisdiction but seemed to leave the matter to the Tribunals:

> *Given the overwhelming evidence of corruption in Niko's procurement of the JVA and GPSA presented with this Memorial that was not before the Tribunal at the time of the Decision on Jurisdiction, the Tribunals may wish to exercise their authority under Article 41(2) of the Rules to make a determination regarding their jurisdiction over Niko's claims in light of the evidence now before them.*[290]

564. The Respondents' formal request that "*the Tribunals find that they do not have jurisdiction*" eventually was made in their Reply on Jurisdiction of 22 February 2017. The various declarations which the Respondents had requested in the Memorial on Corruption were "*affirmed*" only "*if the Tribunals exercise jurisdiction*".

565. In their Post-Hearing Briefs the Respondents confirmed the earlier requests for relief. They clarified the position by stating:

> *… the facts regarding corruption's influence on the procurement of the Agreements are of such weight that efficiency demands that the Tribunals deny Niko's claims as a matter of jurisdiction to give effect to the international public policy against corruption.*[291]

566. The jurisdictional objections which the Respondents present as the "*new jurisdictional barriers*" take two forms: on the one hand, the Respondents assert that the "*Claimant cannot use the ICSID arbitration system to protect an investment created in violation of the international law principle of good faith, international public policy, or Bangladeshi law*".[292] On the other hand, the Respondents argue that the arbitration agreement is void *ab initio* as part of an agreements which also never came into existence.[293]

567. The Tribunals have examined these lines of argument and the newly produced evidence, assuming for the purpose of this examination that they could not have been presented during the proceedings on jurisdiction and that they therefore are admissible.

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[290] R-MC, paragraph 159, footnotes omitted.
[291] R-PHB1 (CONFIDENTIAL), paragraph 249.
[292] R-PHB1 (CONFIDENTIAL), title before paragraph 242.
[293] See in particular R-RC, Section V.A.2, pp. 143 *et seq.* and R-PHB1 (CONFIDENTIAL), Section VII.B, pp. 114 *et seq.*

5.2 The availability of ICSID arbitration for the Claimant's claims

568. In the proceedings on jurisdiction, the Respondents requested that the Tribunals deny jurisdiction because ICSID arbitration was not available for claimants having engaged in corruption and thus had violated principles of good faith and international public policy. In their submissions they submitted that "*it would violate the principles of international public policy to afford the Claimant access to ICSID*";[294] and

> *… jurisdiction must be denied because the Claimant has violated the principles of good faith and international public policy.*
>
> *This Tribunal is empowered to protect the integrity of the ICSID dispute settlement mechanism by dismissing a claim which represents a violation of fundamental principles of law.*

and

> *… jurisdiction should be denied because the Claimant has violated the principles of good faith and international public policy, in a manner intimately linked to the alleged investment. The Tribunal is empowered to protect the integrity of the ICSID dispute settlement mechanism by dismissing a claim which represents a violation of fundamental principles of law. The Claimant does not bring this claim with clean hands. That is not affected by the question whether or not its bribery achieved its admitted purpose.*[295]

569. The Tribunals examined this line of argument at great length in the Decision on Jurisdiction. They noted that jurisdiction in the present cases is based not on the offer to arbitrate in a treaty but on two Agreements; and that the validity of the Agreements and of the arbitration clauses in them was not contested. The Tribunals stated:

> *… in the present case jurisdiction is not based on such a treaty but on two agreements. The arbitration clause in these agreements is not merely an offer subject to conditions which may or may not be accepted. Rather it contains a firm agreement binding both parties to submit their disputes to ICSID arbitration.*

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[294] Respondents' Second Counter-Memorial on Jurisdiction, 30 August 2011, paragraph 54, quoted in the Decision on Jurisdiction, paragraph 473.
[295] Respondents' Counter-Memorial on Jurisdiction, 16 May 2011, paragraphs 54, 55 and 57, quoted in the Decision on Jurisdiction, paragraphs 374 and 376.

> *The question whether the investment was made in good faith or not and, if not, what consequences would have to be drawn from it, are matters which must be resolved in the agreed manner. In a contractual dispute as the present one, alleged or established lack of good faith in the investment does not justify the denial of jurisdiction but must be considered as part of the merits of the dispute.*[296]

570. The Respondents' case during the proceedings on jurisdiction, relied on the Claimant's corrupt conduct that manifested itself in the the two instances of corruption, sanctioned by the Canadian authorities. The Respondents' case now relies also on the Claimant's corrupt conduct for which the Respondents have vastly expanded the evidence by which they seek to prove the Claimant's corruption. The difference in the Respondents' case is one of quantity and, in the Respondents' view, persuasiveness of the corruption allegation and the supposed extent of the corrupt activity.

571. The argument itself, however, has remained the same as that which the Tribunals have considered in their Decision on Jurisdiction. Then as now, the Respondents argue: "*international law denies access to the ICSID arbitration system to investors who made their alleged investment in bad faith, or in violation of international public policy or local law*".[297] In effect the Respondents seek a reconsideration of the Tribunals' findings in the Decision on Jurisdiction. Without making a determination that reconsideration of the Decision on Jurisdiction is admissible, the Tribunals have examined the developments of the Respondents' argument and the support for it now presented. The Tribunals concluded that these additional developments do not justify alteration of their conclusion that, in cases based on contractual arbitration clauses, allegations of bad faith and violations of international or domestic law must be considered on the merits of the case.

572. When the Tribunals reached this conclusion in their Decision on Jurisdiction, the legality of the two Agreements and the validity of the arbitration clauses contained in them were not in issue. It was therefore a predicate of the Decision that (i) the arbitration clause itself was not procured by corruption and (ii) the agreement was not illegal. The Tribunals now have examined whether these assumptions still apply.

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[296] Decision on Jurisdiction, paragraphs 470 and 471.
[297] R-PHB1 (CONFIDENTIAL), title of Section VII.C.1, p. 117.

573. Concerning the first of these assumptions – **the arbitration clause was not procured by corruption** - the Tribunals found in their Decision on Jurisdiction that the arbitration clauses in the Agreements were proposed by Petrobangla.[298] This has not been denied since then. Indeed, the Claimant has presented further argument and evidence to support the conclusion that the arbitration clauses were proposed by the Respondents and were not affected by the alleged corruption:

> *From the beginning of the discussions concerning the JVA, the Parties were in agreement that any dispute was to be referred to ICSID arbitration.*
>
> *[…]*
>
> *The record thus establishes that the Parties at all relevant points were agreed that any disputes under the JVA and the GPSA should be submitted to ICSID arbitration. Indeed, the record shows that it was the Respondent that proposed to consent to ICSID arbitration, based on their own models of the relevant agreements. The record further contains not the slightest suggestion that the consent to ICSID arbitration was affected by corruption.*[299]

574. At the end of the proceedings on the Corruption Claim, the Claimant noted among the matters "*never disputed*":

> *The arbitration clauses in question were proposed by the Respondents and accepted by Niko without debate. The Respondents do not suggest that the arbitration agreements were in any respect procured by corruption.*[300]

575. The Tribunals confirm: the Respondents did not argue in the proceedings on Jurisdiction that the arbitration clauses were procured by corruption. They now argue that the additional evidence on which they rely proves the "*link of causation between the established acts of corruption and the conclusion of the agreements*";[301] this is an issue which the Tribunals will have to examine when they consider the merits of the Corruption Claim. The Respondents do not, however, seek to demonstrate that the arbitration clauses in these agreements were procured by corruption.

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[298] Decision on Jurisdiction, paragraphs 46 and 47.
[299] C-RC, paragraphs 275 and 277, argument and evidence presented in support of the affirmation in the first paragraph has been ommitted.
[300] C-PHB2 (CONFIDENTIAL), paragraph 166.
[301] R-RC, paragraph 265, quoting the Decision on Jurisdiction.

576. In any event, the evidence before the Tribunals, then and now, does not contain any indication of corruption in the proposal and acceptance of the arbitration clauses. The Tribunals conclude that **the corruption allegations, even in the expanded form in which they are now raised by the Respondents, do not affect the arbitration clauses**; the issue of the severability of these clauses from the Agreements in which they are contained will be considered separately below.

577. Concerning the second assumption – **the object and content of the Agreements is not illegal** - the Tribunals had considered separately cases where the contract has corruption as it object, rather than having been procured by corruption. The Tribunals referred to the controversy about the question whether, in the case of such contracts, arbitrators should deny jurisdiction, as was done most prominently in 1963 by Judge Lagergren when he faced an admitted case of corruption in Argentina, or whether the arbitrators should deny claims under contracts for corruption on the merits of the dispute. The Decision on Jurisdiction leaves the question open, because the Tribunals concluded:

> *In the present case, the agreements on which the claims are based have as their object the development of marginal/abandoned gas fields and the sale of gas from such fields. It has not been argued that there is anything illegal about the object and the content of these contracts. The Tribunal[s have] not been made aware of any such illegality. The reasons which lead to the unenforceability of contracts for corruption do not apply to the agreements considered in the present case.*[302]

578. The Respondents now refer to the Tribunals' "*understanding that the contract was not unlawful, and had not been avoided*" and add: *"[t]hat understanding is no longer accurate*".[303] The Respondents also state that the "*the object [of the Agreements] is unlawful*".[304] They state that the "*objects of the Agreements are not simply the exploitation of gas fields and gas sale, rather, the implementation of an unlawful Government grant of rights to Niko*".

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[302] Decision on Jurisdiction, paragraph 438.
[303] R-MC, paragraph 149, FN 200.
[304] R-PHB1 (CONFIDENTIAL), paragraph 263.

579. The Claimant responded: "*That is a novel theory, and a creative one. However, nothing in the language of the JVA or GPSA suggests a grant of governmental authority to Niko. Rather, the grant of rights was from the Government and Petrobangla to BAPEX*".[305]

580. The Tribunals agree. The object of the Agreements is for BAPEX and Niko to develop the gas fields under the JVA and for Niko to sell the Gas to Petrobangla under the GPSA. These are lawful objects. The question whether Niko was granted governmental authority and whether such authority was lawfully granted is a question concerning the merits. Contrary to the claim which was brought before Judge Lagergren, the Tribunals in the present case do not have to decide a claim which, directly or indirectly, seeks payment of the proceeds of corruption. Here Niko requests payment for gas it has delivered and a declaration about liability for the blowouts. The Tribunals still do not consider these claims or the agreements under which they are made as illegal or "*unlawful*"; they still do not "*see why hearing and resolving these claims under the given circumstances would affect the integrity of the ICSID system*".[306]

581. The Decision on Jurisdiction stated explicitly that "*whether the investment was made in good faith or not and, if not, what consequences would have to be drawn from it […] must be considered as part of the merits of the dispute*".[307] The Tribunals see no grounds for reconsidering this conclusion. The Tribunals continue to be, as they were when issuing their Decision on Jurisdiction:

> *… mindful of the importance of the ICSID dispute settlement mechanism and its integrity. In the Tribunal's view, such integrity is promoted, and not violated, by the adjudication of disputes submitted to the Centre under a valid consent to arbitrate. Faced with a binding arbitration agreement and subject to the specific requirements under the ICSID Convention, considered elsewhere in this decision, the Tribunal must address the substance of the dispute. In so doing, the integrity of the system is protected by the resolution of the contentions*

[305] C-PHB2 (CONFIDENTIAL), paragraph 144.
[306] Decision on Jurisdiction, paragraph 47; this is the passage to which the Respondents refer when in R-MC, paragraph 149, Footnote 200, refer when stating that the Tribunals' "*understanding is no longer correct*".
[307] Decision on Jurisdiction, paragraph 471, as quoted at R-MC, paragraph 158, emphasis added by the Respondents.

made (including allegations of violation of public policy) rather than by avoiding them.[308]

582. The Tribunals are intent on addressing in this phase of the Arbitrations precisely this question: are the Respondents correct in seeking the denial of the merits of Niko's claims on grounds of corruption? Before doing so, the Tribunals will consider the objection that they have no jurisdiction to consider the Respondents' new argument on the footing that the Agreements were void *ab initio*.

5.3 Jurisdiction to decide whether the Agreements are void *ab initio*

583. The Respondents now argue that because the Agreements are void the arbitration clauses were void *ab initio*, in effect as though they never existed. In the Respondents' opinion, the "*arbitration clauses are void ab initio because the underlying Agreements are void ab initio*".[309]

584. This conclusion is based (i) on the premise that the scope of the arbitration clauses cannot extend to the question whether the Agreements existed,[310] and (ii) on the law of Bangladesh which in the Respondents' view governs the arbitration clauses and does not apply the principle of severablility in cases where the underlying agreement is void *ab initio*.

585. The arbitration clauses in the two Agreements in all relevant parts are identical. The JVA regulates arbitration in Article 18; an identical text is provided in Article 13 of the GPSA:

> *ARTICLE – 18 DISPUTES AND ARBITRATION*
>
> *18.1 The Parties shall make their best efforts to settle amicably through consultation any dispute arising in connection with the performance or interpretation of any provision of this Agreement.*
>
> *18.2 If any dispute mentioned in Article 18.1 has not been settled through such consultation within ninety (90) days after the dispute arises, either Party may, by notice to the other Party, propose that the*

[308] Decision on Jurisdiction, paragraph 474.
[309] R-RC, title before paragraph 274.
[310] R-RC, paragraph 275 *et seq.*

dispute be referred either for determination by a sole expert or to arbitration in accordance with the provisions of this Article.

[Sole expert or Sole Arbitrator]

18.5 If the Parties faile to refer such dispute to a sole expert under Article 18.3 or to a Sole Arbitrator under Article 18.4, within sixty (6) days from giving of notice under Article 18.2, such dispute shall be referred to the International Center for Settlement of Investment Disputes ("ICSID") and the Parties hereby consent to arbitration under the Treaty establishing ICSID. If for any reason, ICSID fails or refuses to take jurisdiction over such dispute, the dispute shall be finally settled by International Chamber of Commerce.

[various issues concerning the arbitral procedure and related matters]

18.12 The right to arbitrate disputes under this agreement shall survive the termination of this agreement.

586. The Respondents accept that the arbitration clauses are severable from the underlying agreements and survive their "*termination*"; but in the Respondents' opinion, severability does not apply if the Agreements are void *ab initio*:

> *The arbitration clauses agreed to by the Parties are clear: they are separable from the underlying Agreements, but only where those Agreements have come to end by "termination." The underlying Agreements have not come to end by "termination" because they never existed, and Claimant's case must therefore be dismissed for that reason alone.*[311]

587. The Claimant denies that the arbitration clauses provide such a restriction of their severability.[312]

588. The Tribunals note that the disputes to which ICSID arbitration according to Article 18.5 applies are identified in Article 18.1 as "*any dispute arising in connection with the performance or interpretation of any provision of this Agreement*". In the present case, Niko seeks a determination of its liability under the JVA; this is an issue arising in connection with the performance and the interpretation of the JVA. The Tribunals' jurisdiction does not disappear just because the Respondents

[311] R-RC, paragraph 282, emphasis in the original.
[312] C-RC, paragraphs 278 *et seq*.

now argue the JVA is void *ab initio*. The same must be said about the GPSA where Niko sought and was awarded payment.

589. Article 18.12 clarifies one aspect of severability, application of the arbitration clause after termination of the Agreement. It does not say that the Parties intended to limit severability to that aspect.

590. The argument now raised by the Respondents would mean that a party, merely by alleging the Agreements were void *ab initio*, could prevent arbitration on disputes which otherwise the Parties agreed to submit to ICSID arbitration. The Tribunals do not believe that this is a tenable interpretation of the Parties' intention.

591. The Respondents also seek support for their argument in international law and the law of Bangladesh. They assert that they "*are not challenging the well-established principle of severability*" but argue that "*under both Bangladeshi and international law, the principle of severability does not apply in one particular circumstance: where the underlying agreement is void ab initio and therefore never existed as a matter of law*".[313]

592. The Parties disagree whether the validity of an ICSID arbitration clause is governed by Article 25 (1) of the Convention or by the law chosen to govern the contract, in the present case that of Bangladesh; and they differ about the content of one and the other of these laws.

593. The Tribunals take as starting point that the "*well-established principle of severability*" is accepted by both Parties. When the Respondents argue that this principle does not apply in circumstances where the underlying agreement is void *ab initio*, they refer to cases and statements where it is established that the underlying agreement never existed. This is not the situation here.

594. The issue here concerns the effect of a certain theory which the Respondents have chosen. When they introduced the Corruption Claim, they affirmed the validity of the arbitration clause. It was only when they decided, without any substantial change of the alleged factual pattern, that their defence should be considered by reference to a different provision of the law of Bangladesh that their defence changed: they

[313] R-PHB1 (CONFIDENTIAL), paragraph 231.

sought no longer recognition by the Tribunals that they had avoided the Agreements but introduced the new defence of asserting that the Agreements were void *ab initio*.

595. The Tribunals have not seen any authority or argument from the Respondents that would support the exclusion of the "*well-established principle of severability*" simply on the basis of a respondent changing the characterization of the factual pattern presented and relying on a different legal theory. If such an exception were admitted, the principle would be deprived of its essence and would be at the mercy of a party's changing lines of defence.

596. In any event, this line in the Respondents' objection can be decided only by an examination by the Tribunals' of the validity of the Agreements. Since it is an essential element of the Respondents' position that, according to the legal principles which they invoke, the arbitration clauses are not severable from the underlying agreements, the Tribunals must make a decision that affects both the agreements and the arbitration clause in them. If the Tribunals agree with the Respondents, they will have to decide that the Agreements are void *ab initio* – a decision on the merits. If they do not and accept jurisdiction, this does not exclude that, on the merits, the Tribunals find that the Agreements are void or even void *ab initio*.

597. The Tribunals conclude that they **must examine the argument and evidence** presented by the Respondents to support their defence **according to which the Agreements are void *ab initio*. They have the jurisdiction to do so**.

6 THE REQUEST FOR AVOIDANCE[314] OF THE AGREEMENTS – THE LEGAL GROUNDS INVOKED

598. In these Arbitrations, Niko claims under the two Agreements. The Respondents deny these claims and, in their Corruption Claim, assert that, as a result of corruption, both Agreements are void. The Tribunals now examine the legal grounds invoked by the Respondents to justify this assertion.

6.1 The Parties' positions – an overview

599. The relief sought by **the Respondents** in their Corruption Claim changed over time. In their requests of 25 March 2016, they sought a declaration that the Agreements were "*voidable*" and declared that they exercised their right to "*void*" or "*rescind*" the Agreements.

600. In their submissions of 29 April 2016, the Respondents relied on Article 102 of the Bangladesh Constitution and concluded that the Agreements were void. The original request was preserved as an alternative: the Respondents relied on Section 19 of the Contract Act and chose to exercise their right to rescind the Agreements, adding that "*Niko can only make a claim for the limited relief of restitution under sections 64 and 65 of the Bangladeshi Contract Act*".

601. As from their Memorial on Corruption onward the Respondents sought dismissal of Niko's claims on the grounds that the Agreements are "*without legal effect and void ab initio*", based on Article 102 of the Constitution. The Respondents asserted that avoidance of the Agreements is the result of

- the use of bribery "*to influence the Government's approval*" of the JVA and the GPSA and
- of the Government's approval

[314] The Tribunals use the term "*avoidance*" to cover both a finding that a voidable contract has become void and that a contract was void *ab initio*.

- not being transparent,
- being *mala fide* and
- being illegal under Bangladeshi law.[315]

602. In the final form of their requests, the Respondents also argue that international law prevents the Claimant from seeking relief in ICSID arbitration and that "*Niko's claims must be dismissed on the merits because the Agreements are void under Bangladeshi law*".[316] They deny that the Contract Act is applicable; if it were applicable, the relevant provision would not be Section 19 but Section 23.

603. **The Claimant** argues that the claim for avoidance must be considered under Section 19 of the Contract Act; Article 102 of the Constitution and Section 23 of the Contract Act, according to the Claimant, are not applicable in the circumstances of the present case.

604. **The Tribunals** will consider in the present section the relevance and applicability of the legal bases invoked by the Respondents. They will commence by examining the question whether Article 102 of the Constitution is applicable to the Respondents' Corruption Claim and the legal principles governing this application. They will then consider the two cases in which the conclusion of the Agreements was the subject by judgments in which the High Court Division of the Supreme Court applied Article 102, the *BELA* Judgment of May 2010 and the *Alam* Judgment of 24 August 2017.

6.2 Avoidance by reference to Article 102 of the Constitution

605. The principal legal basis for the Respondents' claim that the Agreements are void is Article 102 of the Bangladesh Constitution. The relevant part of this article reads as follows:

> *The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law-*
>
> *a) on application of any person aggrieved, make an order-*

[315] Relief requested in R-MC, paragraph 196, and confirmed in all subsequent submissions (see above Section 3).
[316] R-PHB1 (CONFIDENTIAL), title VII, E, before paragraph 254.

(i) …

(ii) *declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect; […]* [317]

6.2.1 Is the Supreme Court's jurisprudence with respect to Article 102 Writ Petitions applicable in the present Arbitrations?

606. **The Parties** agree that (i) Article 102 provides aggrieved persons with the possibility to apply by Writ Petition to the Supreme Court but that these Tribunals are not called upon to decide a Writ Petition under Article 102 of the Constitution, (ii) that Article 102 proceedings are available only if "*no other equally efficacious remedy is provided*" and (iii) that no evidence is taken in such proceedings apart from the presentation of affidavits; judgments pursuant to this provision are based on uncontested facts.

607. The differences between the Parties here concern (i) the question whether the validity of the Agreements must be determined by reference to the jurisprudence of the Supreme Court on Article 102, to the exclusion of the Contract Act and (ii) the substantive content of this jurisprudence.

608. **The Respondents** argue that "*improper action*" in the Government approval process requires a finding that the agreements are void *ab initio*:

> *Since the process of obtaining Government approval was tainted by corruption, fraud or other improper action, the approval is illegal and the contract that resulted from it is void ab initio and without legal effect.*[318]

609. Due to the legal nature of the Governmental acts that are at issue here, the Respondents argue that their case must be considered not under the Contracts Act but under Article 102 of the Constitution:

> *… the Supreme Court specifically distinguishes situations where, like here, the Government or Government entity acts pursuant to statutory*

[317] Constitution of the People's Republic of Bangladesh, Article 102(2)(a)(ii), 1972, CLA-77, quoted at R-MC, paragraph 177, Footnote 259 and, more completely, C-CMC, paragraph 353.
[318] R-MC, paragraph 183.

power or in its capacity as a sovereign from situations where the Government functions as an ordinary buyer in the marketplace. In the latter case, the Contract Act would apply; in the former, it does not.[319]

610. They argue that

> *Bangladesh Supreme Court jurisprudence provides that where, like here, a government entity acts pursuant to statutory power or in furtherance of a sovereign right, these matters of public law are determinative.*[320]

611. This leads the Respondents to introduce the concept of a "*public contract*", subject to rules different from those of the Contract Act:

> *The Contract Act does not fully govern the validity of a public contract tainted by corruption.*[321]

and as already quoted above

> *Bangladesh Supreme Court jurisprudence provides that where, like here, a government entity acts pursuant to statutory power or in furtherance of a sovereign right, these matters of public law are determinative.*[322]

and

> *However, because BAPEX and Petrobangla are public entities and Niko bribed Government officials, the agreements do not fall within the category of voidable agreements under Section 19. Sections 15-19 of the Contract Act govern situations in which the "free consent of the parties" was compromised. Niko's bribes did more than compromise Respondents' free consent: they illegally procured the approval of the Government and the grant of rights to public goods.*[323]

612. In response to the Claimant's argument based on the limitations in the scope of the Writ Petition jurisdiction under Article 102, the Respondents state:

> *Respondents are not asking the Tribunals to assume writ jurisdiction over them. While Niko is correct that Article 102(2) itself does not "reflect an enactment of new substantive law," the case law created*

[319] R-RC, paragraph 336, with references to Bangladeshi case law.
[320] R-PHB1 (CONFIDENTIAL), paragraph 257.
[321] R-PHB1 (CONFIDENTIAL), paragraph 256.
[322] R-PHB1(CONFIDENTIAL), paragraph 257.
[323] R-PHB1 (CONFIDENTIAL), paragraph 261.

through its operation does create substantive law in Bangladesh which the Tribunals must apply here. Bangladesh is a common law jurisdiction and Bangladeshi Supreme Court pronouncements, including those made in its exercises of Article 102 power, establish binding legal norms, creating precedent to which all other courts and tribunals applying Bangladeshi law are bound through the principle of stare decisis. Indeed, international Tribunals have applied common law, including writ jurisprudence, in other arbitral cases.[324]

613. Based on these considerations, the Respondents argue that

> *Article 102 jurisprudence constitutes Bangladeshi law governing the validity of Agreements and must be applied by a tribunal asserting exclusive jurisdiction over the validity of agreements under Articles 13.1 of the JVA and 15.1 GPSA.*[325]

614. **The Claimant** denies that the jurisprudence from cases decided in proceedings on Article 102 Writ Petitions apply to a dispute between parties to a contract. It insists *inter alia* on the limited competence of the court under Article 102 which provides "*for a summary form of public interest litigation of an act of a Bangladesh State organ*" to which the State of Bangladesh was a necessary party.[326] The Claimant argues that because the right to exploit gas resources had been granted to BAPEX prior to the conclusion of the JVA, that agreement does not amount to the exercise of public functions; nor can this be said of the GPSA. The Claimant also emphasises the limitations in the jurisdiction of the Supreme Court: (i) relief under Article 102 being available only when there are no "*other equally efficacious remedies provided by the law*", (ii) "*a Writ court cannot and should not decide any disputed question of fact which requires evidence to be taken for settlement*" and (iii) petitions under Article 102 must be presented in a timely manner.[327]

615. The Claimant concluded that the Respondents attempted "*to create a new cause of action, non-existent in Bangladesh law, applying principles supposedly developed in jurisprudence under Article 102 to a claim that could never be heard under that constitutional provision*".[328]

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[324] R-RC, paragraph 330.
[325] R-PHB1 (CONFIDENTIAL), paragraph 256.
[326] C-CMC, paragraphs 347, 349.
[327] C-CMC, paragraphs 352 -363.
[328] C-RC, paragraph 284 *et seq.*, paragraph 292.

616. **The Tribunals** have taken note that the law of Bangladesh, through Article 102, provides a remedy in cases where a Governmental act or proceeding has been decided or carried out "*without lawful authority*" and that such act can be declared as "*of no legal effect*". The article does not provide substantive rules determining when such acts or proceedings lack "*lawful authority*". When applying Article 102, the jurisprudence of the Supreme Court has given relevant examples and provided guidance in determining cases of lacking lawful authority.

617. The Respondents do not request the Tribunals to grant a Writ Petition but invite the Tribunals to apply this jurisprudence of the Supreme Court when determining acts and proceedings lacking lawful authority. By reference to this jurisprudence the Respondents request the Tribunals to declare the relevant governmental acts as being "*without legal effect*".

618. In the present case, it is undisputed that both Agreements required governmental approval and did indeed receive such approval.[329] When examining the validity of this approval by reference to the law of Bangladesh, the Tribunals must consider the grounds on which under that law such approval may be considered as "*of no legal effect*". The jurisprudence of the Supreme Court under Article 102 provides examples and directives for such finding and the Tribunals must consider this jurisprudence when examining the validity of the approvals and related matters. The question whether the Agreements themselves must or may be considered Governmental acts is not decisive for determining the relevance of the Article 102 jurisprudence in these cases.

619. **The Tribunals** therefore agree with the Respondents that, when considering the validity of governmental approval of the Agreements, they must consider the precedents developed by the Supreme Court in the application of Article 102 of the Constitution. The Respondents expressed this position in the following terms in response to a question from the Tribunals at the Hearing:[330]

> *Tribunals must look first at the exercise of governmental authority because if authorization to enter into a contract is granted improperly,*

[329] JVA, Preamble, item 14, Exhibit C-1, and Decision on Jurisdiction, paragraph 82.
[330] Hearing on Corruption, Tr. Day 1 (CONFIDENTIAL), p. 202, ll. 14-24.

the contract is without legal effect and void ab initio, and the Contract Act does not apply.[331]

620. This conclusion is aligned with another consideration put forward by the Respondents. As mentioned above, the Respondents highlighted the responsibility of the Tribunals resulting from their exclusive jurisdiction.[332]

> *If the Tribunals cannot apply the jurisprudence of the Supreme Court, then the exclusive jurisdiction of the Tribunals cannot affect the jurisdiction of the Supreme Court to hear the writ petitions pending before it. Otherwise, the orders and decisions of the Tribunals would nullify a fundamental area of Bangladesh law governing the validity of improperly procured rights to public resources.*[333]

621. The Tribunals conclude that, when applying the law of Bangladesh in determining the validity of the Agreements and of the Government acts and proceedings relating to the Agreements, they have regard to the principles developed by the Supreme Court in applying Article 102.

6.2.2 The relevant cases

622. In their discussion of the Article 102 jurisprudence the Parties have referred to a number of cases of which two are of particular importance. Both of these cases were brought before the Appellate Division of the Supreme Court.

623. The first concerned the licensing of a TV channel. The case as it appeared before the High Court Division and before the Appellate Division of the Supreme Court is referred to under partly different names.

624. The High Court Division decided the case by Judgment of 27 March 2002 under the case name *Chowdhury Mohmood Hossain v. Bangladesh and others.*[334] The appeal against this Judgment was decided by the Appellate

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[331] R-PHB1 (CONFIDENTIAL), paragraph 257.
[332] R-PHB1 (CONFIDENTIAL), paragraph 256, quoted above; see also R-RC, paragraph 333.
[333] R-RC, paragraph 333; the Respondents point out in a footnote to this passage that they "*maintain their position that the Supreme Court of Bangladesh retains its jurisdiction to hear writ petitions under Article 102 with respect to the JVA and the GPSA …*" R-RC, paragraph 333, Footnote 574.
[334] *Chowdhury Mohmood Hossain v. Bangladesh & ors.*, (2002) 22 BLD 459 (High Ct. Div.), 27 May 2002, RLA-159.

Division of the Supreme Court on 1 July 2002, denominated as *Ekushey Television Ltd. & ano. v. Dr Chowdhuy Mahmood Hasan & ors*; and *Citicorp International Linanee corp and anr v. Dr Chowdhury Mahmood Hasan & ors*; and *Dr Chowdhuy Mahmood Hasan & ors v. Government of Bangladesh & ors.*[335]

625. The Tribunals will refer to the case as **the Television case** or by short versions of the official denominations.

626. The licensing agreement was concluded by the Ministry of Information and A.S. Mahmud, acting for Ekushey Television Limited (or ETV) to which the license subsequently was assigned. The High Court Division noted a number of irregularities in the process by which ETV was selected. This included changes in the evaluation report by the technical committee which first had rejected ETV and in a revised version ranked it in top position; the Court found the "*manner in which the report was prepared and submitted was mala fide*". It also examined procedural aspects of the signing of the license agreement and the references to the Ministries involved. It concluded that the signing of the licensing agreement "*may be considered irregular to some extent but it cannot be considered as invalid or void*".

627. This distinction between minor irregularities and acts performed mala fide is reflected in the final conclusions of the Judgment:

> *…we finally hold that changing of the evaluation report is mala fide and the manner in which it is done is not at all transparent and acceptance of offer of ETV on the basis of this changed report and all subsequent action taken on the basis of that report including signing of the licensing agreement are also mala fide…*
>
> *We have found that signing of the licensing agreement itself or its subsequent transfer to ETV Ltd. was not unlawful but we have found the process followed for selecting the ETV as most responsive was not transparent and ultimately the acceptance of the proposal of ETV was mala fide and all subsequent acts including granting of license were also mala fide […]*

[335] *Ekushey Television Ltd. v. Chowdhury Mahmood Hasan*, (2002) 54 DLR (AD) 130, RLA-30 (bis).

> *It is declared that the act of acceptance of the proposal of ETV as most responsive and granting of license to ETV by respondent No. 1 was done without any lawful authority and is of no legal effect.*[336]

628. On appeal, the Appellate Division made a number of pronouncements which are relevant for the issues before these Tribunals.

629. The Appellate Division addressed the relationship between the law of contract and Article 102. The respondents in that case had argued that "*once a contract is concluded, it can be challenged only if there is a breach of terms and conditions and then again, not under Article 102 of the Constitution*". The Court responded:

> *This line of argument is not acceptable to us, as the writ petition before the High Court Division was not regarding breach of terms and conditions of a contract. In this particular case the High Court Division looked into the procedure adopted in giving license to ETV and on doing so, it has exercised its jurisdiction under Article 102 which on the facts of the case, in our view, is quite justifiable.*[337]

630. The Court also responded to an argument concerning the timing of the application. One of the appellants had pointed out that

> *… on the basis of license issued by the Government the respondent No. 8 has been operating for more than two years and rights of bona fide third parties were subsisting including those of the petitioners as foreign investors, in addition to those of international lenders, the large number of employees and the growing audience of respondent No 8 and the judgment in effect destroys those rights.*[338]

631. The Appellate Division responded to this argument:

> *The rule in respect of the court's power to inquire into delayed and old claim is not a rule of law, but a practice and depends much on proper exercise of discretion. Each case must depend on its fact such as how the breach of fundamental right occurred, the nature of the injury and lastly how the delay is caused. The test in such case is not physical*

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[336] *Hossain v. Bangladesh*, RLA-159, paragraphs 42-43; the last two paragraphs were quoted at R-MC, paragraph 179 and referenced at R-PHB1 (CONFIDENTIAL), paragraph 21, Footnote 28.
[337] *Ekishey Television v. Hasan*, RLA-30(bis), paragraph 75.
[338] *Ekishey Television v. Hasan*, RLA-30(bis), paragraph 31.

running of time but whether a parallel right has accrued and whether the lapse of time can be attributed to latches and negligence.

But above all, while the circumstance justifying the conduct exists, the illegality which is manifest, cannot be sustained on the sole ground of latches. […] Therefore, the petitioners claim that there was no delay in approaching the court. The High Court Division has accepted the explanation and we do not find any reason not to accept it.[339]

632. The second case concerned the Government approval of the construction of container terminals in the Chittagong Port (the "***Container Terminals* case**"). The High Court decided by a Judgment of 26 November 2002, denominated *Engineer Mahmudul-ul Islam and others v. Government of the Peoples Republic of Bangladesh and others*.[340] The Appellate Division confirmed the judgment on 17 May 2003 in *SSA Bangladesh Limited v. Engineer Mahmud Ul-Islam and others*.[341]

633. The High Court Division considered the approval given by the Government to the project of the container terminals under Article 102. No contract had yet been concluded with the prospective investor. The Respondents describe the case as "*involving irregular government approval*". The Court declared the approval "*to be illegal, without lawful authority and of no legal effect and accordingly all actions taken on the basis of the impugned approval are declared to be illegal, without authority and of no legal effect*".[342]

634. The Respondents rely on this decision, concluding that "*the court declared that 'any misuse of power by <u>any</u> executive benefitting a private party in dealing with <u>any</u> State property' is 'without lawful authority and of no legal effect'*".[343]

635. The Respondents also emphasise the Court's statement that the declared illegality of the approval and its effects extended to "*all actions taken on the basis of the impugned approval*".[344]

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[339] *Ekishey Television v. Hasan*, RLA-30(bis), paragraphs 73-74; explanations justifying in the circumstances of that case the time taken by the petitioner have been omitted.
[340] *Engineer Mahmudul-ul Islam & ors. v. Government of the People's Republic of Bangladesh & ors.*, (2003) 23 BLD 80 (High Ct. Div.), RLA-160.
[341] *SSA Bangladesh Ltd. v. Eng. Mahmu Ul-Islam & ors.*, (2004) 24 BLD (AD) 92 (App. Div.), RLA-161.
[342] *Ul-Islam v. Bangladesh*, RLA-160, paragraph 39.
[343] *Ul-Islam v. Bangladesh*, RLA-160, paragraphs 25, 25-36, quoted at R-PHB1 (CONFIDENTIAL), paragraph 21, where the emphasis was added.
[344] *Ul-Islam v. Bangladesh*, RLA-160, paragraph 39, referred to at R-RC, paragraph 347, and R-MC, paragraph 178

636. On appeal the judgment was confirmed. Among the findings of the Appellate Division particular mention should be made of the following passage:

> *In the instant case though a contract has not yet been entered into as yet but the process that has been adopted in the matter of approval of the project being not fair, reasonable or according to the established principles of Law or practice or procedure, we are of the view that the impugned action is mala fide, arbitrary, unfair, unreasonable and does not have the sanction of any Law or norms.*[345]

6.2.3 The principles of the Article 102 jurisprudence relevant for the present decision

637. When examining the Article 102 jurisprudence of the Supreme Court and its relevance for the Tribunals' decision, a distinction must be made between (i) procedural conditions that must be observed by the Supreme Court when applying Article 102 and (ii) the substantive principles emerging from that jurisprudence with respect to determining acts and proceedings that are "*without legal authority*" and thus must be declared as "*without legal effect*".

638. Concerning **procedural conditions** for the exercise of Article 102 reviews, the Claimant has argued that Article 102 Writ Petitions are "*a summary form of public interest litigation*" not available to disputes between the parties to a contract and in the absence of the Government as a party to the proceedings. These may be restrictions implied in the type of action considered by Article 102, even though the Court itself considers its jurisdiction broadly. In the *Container Terminals* case, the High Court Division, relying on the decision in the Television case, declared that it "*does not suffer from any lack of jurisdiction under Article 102 of the Constitution to hear a person*"; and that it was a "*question of exercise of discretion*" for the High Court Division whether it will treat a person as "*aggrieved*", depending on "*the facts and circumstances of each case*".[346]

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[345] *SSA Bangladesh Limited v. Ul-Islam*,RLA-161, paragraph 61.
[346] Exhibit RLA-160, paragraph 30.

639. In any event, the Tribunals have explained that, in the present case, they are considering the jurisprudence of the Supreme Court in a case in which they have exclusive subject matter jurisdiction. They will therefore consider this jurisprudence as part of Bangladeshi law, irrespective of the question whether, under the procedural rules of that law, the Supreme Court may exercise Article 102 jurisdiction in contractual cases.

640. Another restriction on the Supreme Court's Article 102 jurisdiction is expressly spelled out in the provision itself: the Supreme Court may intervene only if it is "*satisfied that no other equally efficacious remedy is provided by law*". The Tribunals see in this restriction, too, a provision that concerns the allocation of jurisdiction between different authorities within Bangladesh. In the present case, however, there is no need nor justification for such allocation. The Tribunals have exclusive jurisdiction for determining the validity of the Agreements, including any issues concerning the validity of their governmental approval.

641. It follows that there is no other "*equally efficacious remedy*" which would prevent the Tribunals from examining the objections raised by the Respondents against the validity of the approvals of the Agreements by the Government.

642. Finally, the Tribunals have considered the procedural restrictions concerning the evidence that may be considered by the Supreme Court in proceedings according to Article 102. In Article 102 proceedings the Supreme Court must make its findings on the basis of uncontested evidence. The Supreme Court (Appellate Division) has been very clear in this respect

> *However extraordinary its powers, a writ Court cannot and should not decide any disputed question of fact which requires evidence to be taken for settlement. The principle is well-settled and we have no hesitation therefore in observing that all the findings. orders and observations made by the High Court Division on the question of title and possession of the disputed lands are wholly untenable and uncalled for and the dispute can only be decided one way or the other by a competent Civil Court upon taking evidence.*[347]

[347] *Shamsunnhar Salam & ors v. Mohammad Wahidur Rahman & ors.*, (1999) 51 DLR (AD) 232 (App. Div.), 3 December 1997, CLA-128, paragraph 15.

643. No such restriction is imposed on the Tribunals in the present ICSID proceedings. When examining the Respondents' Corruption Claim in the light of principles developed by the Supreme Court in Article 102 cases, the Tribunals will therefore consider all evidence before them and, where such evidence is contested, will make the necessary determinations.

644. As to **the substantive principles** emerging from the Supreme Court's jurisprudence on Article 102, the Tribunals have reached the following conclusions from their examination of the cases and the Parties' argument.

645. The examination under Article 102 concerns "*any act done or proceeding taken*", provided the act or proceedings are done or taken "*by a person performing functions in connection with affairs of the Republic*". The examination concerns the regularity of governmental action and the standards which this action must meet.

646. The Respondents assert that the Article 102 review applies not only to government actions but also "*actions of State entities*". This is not what Article 102 says. The acts that may have to be considered are those of a person "*exercising governmental functions*". In the present case, the acts in issue are the Government's approval to the JVA and the GPSA and possibly Governmental acts that preceded this approval and allowed the negotiations to reach the state where approval could be given.

647. When applying Article 102, the Supreme Court considers not only the approval itself but also the process leading to it. Indeed, Article 102 refers to "*any act done or proceeding taken*". Serious irregularities in the process justify a declaration that the act or procedure is of no legal effect.

648. Article 102 concerns "*acts done*" and "*proceedings taken*" and requires an examination whether they were done or taken "*without lawful authority*". It is the irregularity of the act or proceeding that is the basis for the Court's declaration. In other words, irregularities which have no effect on the act or proceeding do not enter into consideration. Indeed, the judgments on which the Parties rely all consider situations where the irregularity in the process affected the Governmental approval.

649. With the exception of the *Alam* Judgment, which will be considered below, the Parties have not presented any case where the Supreme Court

decided that an approval obtained by corruption had to be considered as given "*without lawful authority*". The Respondents argue that "*corruptly-obtained Government authorisation*" is an "*unlawful exercise of Government power*" which renders the grant of rights and the resulting contracts "*unlawful and without legal effect*".[348] The Claimant has not contested that governmental approval obtained by corruption would be an act "*without lawful authority*". The Tribunals see no reason why Article 102 should not apply to Government approvals obtained by corruption.

650. The Respondents go a step further and conclude from the cases considered that

> *The Article 102 case law implements the public policy against corruption in Bangladesh. As the Supreme Court stated, the public interest is protected by nullifying corruptly procured rights, even in a situation where a project is being implemented and would materially benefit the people of Bangladesh.*[349]

651. The Tribunals have examined the references on which the Respondents rely. They did not find support for this affirmation. From these references and other statements of the Supreme Court, it appears to the Tribunals that the Court has not considered the question whether it must deprive of legal effect governmental acts which gave rise to a project that materially benefits the people of Bangladesh.

652. Governmental action, i.e. the approval and the process leading to it, is distinct from the contract to which it relates. The Court made this clear in the *Television* case as quoted above. The Court made it also clear, however, that the consequences of a finding of "*no legal effect*" concerns not only the approval and the process leading to it but also "*all actions taken on the basis of the impugned approval [which] are declared to be illegal, without lawful authority and of no effect*".[350] As a result, contracts that may otherwise be lawful and valid, if their approval by the Government is without lawful authority, they are without legal effect just as the approval itself.

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[348] R-PHB1 (CONFIDENTIAL), paragraph 259.
[349] R-PHB1 (CONFIDENTIAL), paragraph 25; referring also to Tr. Day 1 (CONFIDENTIAL), p. 223, argument by Ghani.
[350] *Ul-Islam v. Bangladesh*, RLA-160, paragraph 39.

653. The regularity of governmental action is presumed; the burden is on the party asserting the contrary. The Supreme Court has stated this principle in no uncertain terms:

> *It is to be presumed that all actons taken by the government officials are in accordance with law and the public interest and if any action of the government official is challenged, the challenger is required to prove such allegations.*[351]

654. Finally, the Tribunals conclude in particular from the judgments in the *Television* case that the time within which the relief under Article 102 must be requested is not fixed. Different criteria must be considered, including the question whether the illegality is manifest. In the *Television* case the High Court verified that there "*was no delay in approaching the court*". The Appellate Division has supported this approach.

655. The Tribunals now will consider whether and how these principles derived from the Supreme Court's jurisprudence were applied in the two cases before the High Court Division relating to the JVA and the GPSA, viz. the judgments in the *BELA* case and in the *Alam* case.

6.3 The *BELA* Judgment and its relevance

656. Prior to the *Alam* proceedings another petitioner, the Bangladesh Environmental Lawyers Association (*BELA*) had brought, on 12 September 2005, a Writ Petition under Article 102 of the Constitution before the High Court Division of the Supreme Court; it was recorded as petition 6911 of 2005. The petition was decided by a Judgment delivered orally on 16 and 17 November 2009, and in writing on 2 and 3 May 2010.

657. The *BELA* petitioner sought *inter alia* declarations that the JVA was made without lawful authority and was of no legal effect and that was "*procured through flawed processes and resorting to fraudulent means and forged documents by Niko*". In addition, the petitioners sought a number of other declarations concerning the blowouts and the damage caused by them.

658. The ten respondents in these proceedings included the Government of Bangladesh, represented by the Secretary, Energy Division, Ministry of

[351] *Ul-Islam v. Bangladesh*, RLA-160, paragraph 18.

Power, Energy and Mineral Resources, Petrobangla, BAPEX and the two Niko companies.

659. The proceedings concerning this petition have been described above in Section 2.6.1. In the present context it is sufficient to mention the following points:

660. The High Court Division received a number of affidavits, including documents, but did not consider any other evidence. On this basis it concluded:

> *From the above, we do find that the JVA was not obtained by flawed process by resorting to fraudulent means.*[352]

661. With respect to the blowouts it decided that the amount of the damage had to be determined by "*the Court below after taking proper evidence or by mutual agreement amongst the parties involved*".[353]

662. In the *Alam* Judgment the High Court Division distinguished the *BELA* case, holding that the causes of action in the two proceedings were different, pointing out that in the *BELA* Judgment "*did not look into the issue of corruption and BELA did not produce any evidence of corruption […] without any evidence of corruption, it was not possible to reach the conclusion that the JVA was executed in bad faith, through misuse of power, or in an improper manner rendering the JVA illegal and without any legal effect*".[354]

663. The Tribunals note that, indeed, the allegations of "*flawed processes*" and "*fraudulent means*" in the *BELA* case did not include the corruption charges which the petitioner in the *Alam* case made. In the *BELA* Judgment no findings were made with respect to corruption.

664. The absence of any corruption findings or even allegations in the *BELA* proceedings deserves to be noted; as the Tribunals pointed out already in the Decision on Jurisdiction, the *BELA* Judgment was issued on 2 and

[352] *BELA* Judgment, CLA-143, p. 40.
[353] *BELA* Judgment, CLA-143, p. 42.
[354] *Alam* Judgment, paragraph 21; the paragraph presents argument by the lawyer of the petitioner, but the Court does not contradict the argument and seems to accept it.

3 May 2010, two years after the ACC Charge Sheet.[355] By the time the *BELA* Judgment was issued, the Zia Government had been replaced following what the Respondents refer to as "*violent political unrest and the declaration of a state of emergency*" and the arrival *in January 2007* of a new government which "*spearheaded a massive anti-graft campaign*".[356] Nevertheless, neither the Government nor the Respondents in the *BELA* Proceedings raised any of the charges they raise in the present proceedings.

665. Finally, the Tribunals point out that the *BELA* Judgment was issued on 2 and 3 May 2010, at a time when only RfA I had been received with the Centre on 12 April 2010; RfA II was received by the Centre only on 23 May 2010. In other words, no ICSID Tribunal had been established; the *BELA* Judgment did not intrude on the exclusive jurisdiction of these Tribunals.

6.4 The *Alam* Judgment and its relevance for the Tribunals' decision

666. The High Court Division of the Supreme Court delivered a second judgment in a Writ Petition No 5673/2016 under Article 102 in relation to the JVA and the GPSA. The proceedings had been brought by Professor Alam on 9 May 2016, shortly after the Respondents had re-introduced in these Arbitrations the corruption issue in the modified version of the Corruption Claim. The High Court Division issued its Judgment on 24 August 2017, declaring, *inter alia*, that the JVA and the GPSA were "*without lawful authority and of no legal effect and thus void ab initio*".

667. The Respondents produced this judgment in the Arbitrations on 21 November 2017. The Parties commented on the procedure, the issue of jurisdiction, and the tenor of the judgment, as well as its relevance for the present proceedings. The Tribunals have described the case above in Section 2.5. The discussion here concerns the admissibility and relevance of this judgment and the legal principles applied for the present cases.

[355] Decision on Jurisdiction, paragraph 403; the Judgment had been announced orally in November 2009, one and a half years after the date of the Charge Sheet.
[356] B-MD, paragraph 37.

6.4.1 The admissibility of the production of the *Alam* Judgment in the Arbitrations

668. The Judgment of the High Court Division was submitted after the Post-Hearing Submissions had been filed, which marked the closure of the proceedings concerning the Corruption Claim. The Tribunals must first consider whether the Judgment may be admitted in these proceedings.

669. On the basis of the explanations provided by the Parties, the Tribunals noted that the Judgment was issued in proceedings which had been brought to the Tribunals' attention previously and which were considered in the Tribunals' Decision on Exclusivity of 19 July 2016. The Judgment directly relates to an important matter before the Tribunals, in particular Article 102 of the Constitution as basis for the Respondents' relief sought by the Corruption Claim.

670. The Tribunals therefore consider the *Alam* Judgment of such importance that they deem it proper to allow it on the record, even though the evidentiary record had been closed. Consequently, the Parties had to be given an opportunity to comment upon the Judgment. They have done so in their submissions of 11 and 21 December 2017. The Tribunals are satisfied that, for the purpose of the present decision, no further submissions on the Judgment and its relevance for this decision are required.

671. The Claimant also raised objections to the conduct of the Respondents in the proceedings before the High Court Division. It argued that the Respondents failed to comply with the Tribunals' Decision on Exclusivity.[357]

672. The Respondents deny that this was the case. They point out that they "*filed an application on 14 August 2016 informing the Court of the Decision on Exclusivity and asking the Court to vacate the stay prohibiting payment to Niko and conform its decisions to the decisions of the Tribunals*".[358] The Respondents state that "*there never were 'explicit directions' to do more*" than that.[359]

[357] In particular in the letter of 11 December 2017.
[358] Respondents' letter of 21 December 2017, p. 3 with further details.
[359] Respondents' letter of 21 December 2017, p. 2.

673. The Claimant stated that it stands ready to tender evidence from the proceedings before the High Court Division but has refrained from doing so since the evidentiary record was closed.

674. The Tribunals have noted that, when the Claimant raised before these Tribunals its complaint about the Respondents' alleged failure, the Claimant did not request any specific sanction. It appears to the Tribunals that the Decision on the Corruption Claim can be made without deciding the question **whether the Respondents failed to defend the Tribunals' exclusive jurisdiction** as actively before the High Court Division as the Tribunals' decision required. **The Tribunals therefore do not make any finding at this stage, but reserve to revisit the issue**. In particular the Tribunals advise the Parties that the Tribunals may adopt a different course if the issue arises again in the appeal proceedings announced by the Claimant or in other proceedings before judicial or other authorities in Bangladesh.

6.4.2 The *Alam* Judgment and the Tribunals' exclusive jurisdiction

675. In their Decision on Exclusivity of 19 July 2016, the Tribunals confirmed that they have "*sole and exclusive subject matter jurisdiction with respect to […] the validity of the JVA and the GPSA, including all questions relating to the avoidance of these agreements on grounds of corruption*".

676. The Respondents explain that the Decision on Exclusivity was brought to the attention of the High Court Division. Indeed, the Judgment records that Mr Rokanuddin Mahmud, appearing on behalf of Respondent No 4, brought the decision on exclusivity to the attention of the court[360] . The High Court Division nevertheless addressed the request for avoidance of the JVA and the GPSA on grounds of corruption and rendered a decision on the merits, declaring the Agreements void *ab initio*.

677. When seeking to justify its decision on the merits in conflict with the Decision on Exclusivity, the High Court Division identified three parts of the decision it had to make: (i) and (ii) concerned the question whether the JVA and the GPSA, respectively, should be declared void *ab initio* and (iii) whether Niko's assets should be attached and seized.

[360] See paragraph 28, p. 28 of the document entitled "Reformatted clean copy of Judgment in Write Petition" filed by the Respondents on 29 November 2017

678. It stated that

> *… ICSID does not have the power to carry out judicial review of Bangladesh Government action as exercised by us under Article 102 of the Bangladesh Constitution. […] The judicial review powers of the Bangladesh Court also cannot be exercised by an ICSID tribunal since ICSID tribunals have no powers to seize the proceeds of crime being enjoyed by [Niko] in Bangladesh. ICSID tribunals may only issue a pecuniary award but cannot punish corruption or declare invalid unlawful exercise of executive powers. The proper forum for the determination of issues such as unlawful exercise of executive authority tainted by bribery and corruption of Bangladesh Government officials is the Bangladesh Supreme Court applying Bangladesh law under Article 102 of the Bangladesh Constitution. ICSID tribunals may benefit from our finding and there does not need to be any conflict since we are not infringing on the jurisdiction of the ICSID tribunals.*[361]

679. This reasoning fails to distinguish between the different roles and responsibilities of these Tribunals and the Supreme Court or other bodies which may be concerned with issues over which the Tribunals have sole and exclusive jurisdiction. The Tribunals do not assume the role of the High Court Division and do not decide Writ Petitions under Article 102 of the Constitution. In the Decision on Exclusivity the Tribunals made it clear that the exclusivity of their substance matter jurisdiction

> *… does not affect the personal jurisdiction of the courts in Bangladesh in other respects. These courts may well receive and determine claims by persons over which the Tribunals do not have jurisdiction and adjudicate such claims. In making their decision involving other parties, the courts of Bangladesh, however, are bound to conform to and implement the decisions rendered by these Tribunals that are within the competence of these Tribunals. This means, for instance, that it is for these Tribunals, and the Tribunals alone, to decide whether the JVA and the GPSA were procured by corruption, [….] When seized by a claim of a party not subject to the jurisdiction of the Tribunals, a court in Bangladesh may entertain that claim but it must conform in its decision to those of the Tribunals.*[362]

[361] *Alam* Judgment, paragraph 48, pp. 45 and 46.
[362] Decision on Exclusivity, paragraph 12.

680. The Tribunals have discussed these principles and their justification in the Decision on Exclusivity and they see no justification for reconsidering this decision. For clarification, they add the following.

681. When making their decision on the validity of the Agreements, the Tribunals consider the law of Bangladesh, including any relevant jurisprudence of the Supreme Court under Article 102, as has been explained above in Section 6.2.1. Indeed, the Respondents have expressly invited the Tribunals to consider their Corruption Claim and the effect of corruption under that Article.

682. As the Tribunals have explained in the Decision on Exclusivity, the exclusivity of their substance matter jurisdiction implies that the State of Bangladesh, including its courts, is bound by the decisions of these Tribunals. When the Supreme Court or any other court or authority in Bangladesh is faced with the question of the validity of the Agreements, it may not deviate from these Tribunals' decision, whether the parties concerned are those in the present Arbitrations or other parties.

683. Insofar as the *Alam* Judgment makes substantive findings that differ from those by these Tribunals, in the present decision or elsewhere, such findings are in violation of the Tribunals' exclusive subject matter jurisdiction and of the ICSID Convention. This applies also to any subsequent action, based on such findings.

684. This conclusion does not prevent the Tribunals, when they apply the law of Bangladesh, to consider the *Alam* Judgment as part of the jurisprudence of the courts of Bangladesh. The Respondents have insisted on the relevance of the principles applied by the High Court Division in that Judgment and invited the Tribunals to "*give particular consideration to the Supreme Court's judgment in determining how the laws of Bangladesh would be applied*".[363]

685. When considering the *Alam* Judgment in its relation to the jurisprudence concerning Article 102, the Tribunals must, however, not overlook the factual assumptions made by the High Court Division when it reached

[363] Respondents' letter of 21 November 2017, p. 4.

its findings in law and the fact that the Judgment is subject to appeal proceedings before the Appellate Division.[364]

6.4.3 The asserted *res judicata* effect of the *BELA* Judgment

686. When commenting on the *Alam* Judgment, the Claimant referred to the *BELA* Judgment and holding there of the High Court Division of the Supreme Court that "*the JVA was not obtained by flawed process by resorting to fraudulent means*". The Claimant contrasted this holding with the *Alam* Judgement and stated:

> *Despite this, the Court in the present writ petition justified ignoring this prior proceeding by asserting that it arose from a different cause of action and there is no uniformity of parties". That finding is plainly erroneous: the BELA Proceedings were conducted under Article 102 of the Constitution, examined precisely the same exercise(s) of executive authority with respect to the JVA, included each of the Government of Bangladesh, BAPEX and Petrobangla as parties, and were both brought by Writ Petitioners acting in exactly the same representative/public interest capacity.*[365]

687. The Tribunals need not examine whether the *BELA* Judgment has *res judicata* effect on High Court Division in the *Alam* case and whether in the latter case the Court was precluded from examining the validity of the Agreements again, this time under the aspect of corruption. The question whether the Agreements are void or voidable is a matter which the present Tribunals have to decide as determined in the Decision on Exclusivity. In this determination the Tribunals take account of principles of Bangladeshi law, in particular with respect to the application of Article 102 of the Constitution. In the application of this law to the facts of this case, however, they are bound neither by the *Alam* nor the *BELA* Judgments.

688. The *BELA* Judgment nevertheless has some relevance insofar as, in that case, the High Court examined the process by which the JVA was agreed and approved by the Government. While the Tribunals are not bound by the High Court's conclusion, they noted with interest the Court's examination of the action of the Government from the perspective of Article 102 and the results of this examination.

[364] Claimant's letter of 11 December 2017, p. 16.
[365] Claimant's letter of 11 December 2017, p. 14.

689. The *BELA* Judgment is of interest in the present case also, for another reason mentioned above: there is no indication that, in the *BELA* proceedings the Respondents and the Government made any reference to the corruption charges, although by the time the Judgment was announced orally on 16 and 17 November 2009, the Joint Investigation of Niko's alleged corruption had well advanced and the ACC had issued on 5 May 2008 its Charge Sheet, which contained the essence of the corruption allegations which the Petitioner in the *Alam* case invoked and on which the High Court relied in its Judgment.

6.4.4 The factual assumptions in the *Alam* Judgment

690. The Writ Petition proceedings under Article 102, as stated by the Claimant, "*are purely summary procedures based on affidavit evidence alone; for this reason, courts may not make determination based on disputed issues of fact which would require weighing of evidence*".[366] The Court confirmed this rule in the *Alam* Judgment. It asserted that it did not need to rely on disputed facts since its conclusions were supported by admissions of Niko; and it listed the admissions on which it relied for its decision:

> *[Niko (Bangladesh)] also submits that the allegations in the writ petition are disputed questions of facts. We are of the view that we do not need to rely on any disputed question of fact in this situation since, in addition to admitting to making payments of bribes to the then State Minister for Energy AKM Mosharaf Hossain for obtaining and retaining business interests in Bangladesh for its subsidiaries, [Niko (Bangladesh)] brazenly admits to making payments of over US$ 4 million to Mr. Qasim Sharif and US$ 500,000 to Mr. Salim Bhuiyan for their services in making "payments to Government officials" and for "arranging meetings with Government officials".*[367]

and

> *Regarding the submission of [Niko (Bangladesh)] that some of the evidence cannot be relied upon because [Niko (Bangladesh)] has not been allowed to cross-examine Mr. Giasudding al Mamoon, Mr. Salim*

[366] Claimant's letter of 11 December 2017, p. 6.
[367] *Alam* Judgment, paragraph 49.

Bhuiyan, or Corporal Duggan, who all made statements adverse to [Niko (Bangladesh)], we are of the view that it is not necessary for us to rely on these statements since there are other undisputed facts and evidence …[368]

691. **The Respondents** summarised the manner in which the Court established the facts on which it relied:

> *While the Court had evidence of disputed facts, it stated that it did not need to decide the issues of fact Niko disputes. The facts Niko admits suffice.*[369]

692. **The Claimant** objected and asserted that, despite having

> *…no jurisdiction to determine disputed issues of fact […], the Court proceeded to make the applicable findings on the spurious basis that the decision was based only on "undisputed facts". However, this assertion does not withstand scrutiny.*[370]

693. **The Tribunals** have examined the *Alam* Judgment and noted that it is replete with statements of fact that differ from the "*admissions*" by Niko.

694. A particularly striking example of the Court's reliance on facts that are far from being admitted or undisputed is the following statement:

> *The admitted payments made to agents and Government officials in Bangladesh were clearly built into the prices of the contracts entered into by [Niko Canada] through its subsidiaries. The eventual prices to be paid by Bangladeshi consumers for the gas to be supplied by [Niko Canada] were thus artificially inflated by these corrupt payments, to take into account the fees paid to Niko's on the ground agents and Bangladeshi government officials.*[371]

695. In view of the evidence available, uncontested or not, this is a remarkable and surprising finding. There is no evidence before these Tribunals to show that the price agreed in the GPSA was "*inflated*" by corrupt payments or at all. It has not even been alleged that the price at which the gas was sold was inflated. The High Court Division does not mention any evidence to support its assumption of inflated prices.

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368 *Alam* Judgement, paragraph 50.
369 Respondents' letter of 21 December 2017, p. 5.
370 Claimant's letter of 11 December 2017, p. 6.
371 *Alam* Judgment, paragraph 65, in fine.

696. The evidence shows the contrary: It is undisputed that the price agreed in the GPSA was lower than other prices which, at the same time, Petrobangla agreed to pay other suppliers. Indeed, in the *BELA* Judgment the same High Court noted that under the GPSA Petrobangla paid US$1.75 per MCF while under identified other contracts Petrobangla agreed to US$2.75 or even US$2.90.[372]

697. The Respondents themselves have explained that the gas price was negotiated by Petrobangla, the sole purchaser, in full knowledge of prices by other suppliers:

> *There are multiple suppliers and a single buyer, Petrobangla. Petrobangla negotiates a price with each supplier based on field-specific economic considerations and its relationship with that particular company. The best indication of what "a reasonable person in [Petrobangla's] position would have paid for" the Feni gas is the price negotiated between Petrobangla and the Feni joint venture partners. Where parties have agreed in an arm's-length transaction on a price, that is the best measure of the market price for the good, particularly where, as here, none of the conditions of the sale would change between the negotiated price and the hypothetical price.*[373]

698. During the negotiations for the GPSA, Niko repeatedly requested a price higher than that offered by Petrobangla. It did not succeed. Eventually, it had to accept the price on which Petrobangla insisted.

699. The price which Niko eventually had to accept for the Feni gas was negotiated in the Gas Pricing Committee.[374] There is no indication or even allegation that this committee, or the representatives from the Respondents and the Ministry represented in it, built into the price on which they insisted an allowance for Niko's "*corrupt payments*".

700. The assumption in the *Alam* Judgment of "*artificially inflated*" prices by which Niko sought to recover its corrupt payments appears to the Tribunals as a confirmation of what the Claimant described as a "*results-driven, partial approach*".

701. A similar observation can be made about another factual assumption, which is frequently repeated in the *Alam* Judgment and forms one of the

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[372] *BELA* Judgment, CLA-143, p. 37.
[373] Respondents' letter of 29 April 2016, p. 12.
[374] For details see above, Section 4.2 and the Decision on Jurisdiction Section 3.3.

foundations of the finding of corruption: the Court relies on the existence of a "*corrupt scheme*", or "*sophisticated corruption scheme*", characterising Niko's activity in Bangladesh.[375] The existence and components of this "*scheme*" is described by the Court in a variety of versions. One of these versions reads as follows:

> *The scheme of corruption set up by [Niko] during 2003-2006 was for the payment of hidden consultancy fees amounting to millions of dollars received in Swiss bank accounts of companies incorporated in offshore jurisdictions, for the layering of those clandestine payments though [recte: through?] different companies in offshore places such as Barbados and Cayman Islands, and for eventual payments of illegal gratifications to politically influential people for their ability to "obtain and arrange" meetings with Bangladeshi Government officials, as was admittedly done by Mr. Salim Bhuiyan, or to "assist in the execution" of the JVA by making payments to Bangladesh Government officials to "expedite and secure" the performance of official duties of Government officers, as was admittedly done by Mr. Qasim Sharif. Under the laws of Bangladesh this set up of [Niko] cannot be treated as anything other than a scheme for bribery and corruption. This scheme has been unearthed by the international law enforcing authorities in Canada, United States, and Bangladesh acting in close co-operation for the purposes of fighting the global menace of corruption.*[376]

702. In another passage, the Court describes the conclusions which it draws from Niko's admissions, asserting that this conclusion is reached without having to rely on "*disputed questions of fact*":

> *Despite the many layers used to hide the payments and the channeling of these payments through numerous offshore bank accounts, the law enforcing agencies in Bangladesh, Canada, and the United States must be commended for their united and effective work in tracing the trail of the corrupt payments from Niko Canada (respondent 5) through Barbados bank of respondent No. 4 [Niko (Bangladesh)], then through Swiss bank account of Niko's agent and President Mr. Qasim Sharif to Mr. Sali Bhuyian, and finally to the eventual recipients in Bangladesh.*[377]

703. And another passage quoted above announcing "*other undisputed facts and evidence*" continues as follows:

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[375] *Alam* Judgment, paragraph 83.
[376] *Alam* Judgment, paragraph 47.
[377] *Alam* Judgment, paragraph 49.

> *… such as bank records, contracts for payments to Government officials, and the own admissions of respondent No 4 that establish the entire chain of corrupt payments. Furthermore, we have noted the admissions of respondents No. 4 and No. 5 regarding the payments made in 2005 to State Minister AKM Mosharraf Hossain in order to get the GPSA as well as in 2003 to Mr. Salim Bhuyian for arranging meetings for procurement of the JVA. The undisputed facts and the undisputed documentary evidence is adequate for us to reach the inevitable conclusion that the JVA and GPSA were procured by corruption, through the set up of a corrupt scheme during the period 2003 to 2006, thus rendering the JVA and GPSA without law authority and of no legal effect, i.e. void ab initio.*[378]

704. The question whether, as the Respondents assert, Niko had built a "*scheme of corruption*" is hotly disputed in the Arbitrations. In preparation and during the Hearing, in their subsequent deliberations and in drafting this decision, the Tribunals have spent great efforts and much time in examining the relevant allegations and supporting evidence. They will discuss the matter in detail below. One thing, however, can be said firmly and immediately: the existence of a "*scheme of corruption*" is neither admitted by the Claimant nor can it be accepted as an "*undisputed fact*".

705. In a similar line, the Court refers to a passage in the Agreed Statement of Facts, according to which Niko Canada provided "*improper benefits to [the State Minister] in order to further the business objectives of Niko Canada and its subsidiaries*".[379] In the Canadian proceedings the Canadian Court had fixed the sanction in a Sentencing Agreement, considering that "*the company has never been convicted of a similar offence nor has it been sanctioned by regulatory body for a similar offence*"; and it had already taken steps "*to reduce the likelihood of it committing a subsequent related offence*".[380] The Canadian Court had noted that the "*Crown is unable to prove that any influence was obtained as a result of providing the benefits to the Minister*".[381] Nevertheless, the High Court Division relies on the first of these statements and concludes:

> *The preponderance of evidence of corruption leads us to conclude that the assets of [Niko Canada] and its subsidiaries in Bangladesh,*

[378] *Alam* Judgment, paragraph 50.
[379] Agreed Statement of Facts, Exhibit R-215, paragraph 2. When referring to this passage, the Court uses the word "*bribes*" for "*improper benefits*"; the passage is taken from paragraph 2 of the Statement which sets out the allegation.
[380] Agreed Statement of Facts, Exhibit R-215, paragraphs 63 and 62.
[381] Agreed Statement of Facts, Exhibit R-215, paragraph 58.

> *obtained through the corrupt scheme in place from 2003 to 2006, are to be treated as tainted by corruption and proceeds of crime. As such all the assets of the subsidiaries of [Niko Canada], including the assets and rights under the JVA, assets and rights under the GPSA and assets and shareholding interests in Block 9 PSC are attached and seized. These assets of [Niko] are being seized as proceeds of crime as well as to provide compensation to the victims of the 2005 blowouts.*[382]

706. When justifying its conclusions, the Court refers to

> *… the evidence of the trail of the corrupt payments uncovered by several international law enforcing agencies working together, and the contracts entered into by Niko which manifestly aim to facilitate corruption of Bangladesh public officials.*[383]

and

> *The consultancy contracts are clear evidence that a corrupt scheme was set up by which regular payments were being made by [Niko Canada] to Bangladesh officials and politically influential people for the business benefits of its subsidiaries in Bangladesh.*[384]

707. The Tribunals note that, based on inconclusive or contested evidence, the Court not only declares a Governmental act for void *ab initio*, as the Court has powers to do according to Article 102, but goes further and declares all assets of Niko in Bangladesh as "*proceeds of crime*".

708. The Court goes yet a step further and makes a determination concerning the liability for and the damage caused by the blowouts, issues that are pending before the present Tribunals and also before a court in Bangladesh in the Money Suit. In the *Alam* Judgment, the Court asserts:

> *The eventual blowouts and the destruction of two gas fields have caused damages of over US$ 1 billion. Unfortunately, respondents No. 4 and No. 5 are yet to pay for their crimes committed about 14 years ago.*[385]

709. The High Court Division extends its findings about corruption and the "*corrupt scheme*" to the award of a 60% share in the Block 9 PSC gas contract to a Niko company, with respect to which no specific corruption

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382 *Alam* Judgment, paragraph 85.
383 *Alam* Judgment, paragraph 79.
384 *Alam* Judgment, paragraph 79.
385 *Alam* Judgment, paragraph 70.

allegations had been made. The Court did not examine the process by which this share was awarded the Niko company. It merely noted that in the Arthur Andersen report of 1997 Niko Canada had been ranked least qualified. It added that Niko Canada "*ended up with obtaining*" these rights and concluded that "*the preponderance of evidence of corruption leads us to the conclusion that but for the corrupt scheme in place [Niko Canada] could not have obtained its exploration rights in Bangladesh*".[386]

710. The High Court Division sees its function as imposing a penalty on the Niko companies, preventing the Niko companies from using the assets of which it ordered the seizure "*to fund further bribery and corruption*". The Court finds a "*culture of corruption within the companies*"; and it asserts that the Niko companies "*orchestrate crimes and then disperse and conceal the proceeds of their illicit activities the world over*".[387]

711. In view of these and other inflammatory statements in the Judgment without citation of evidence, the Tribunals conclude that the High Court Division, in contradiction with the confirmed principle concerning evidence in Article 102 writ petitions, relied on factual assumptions far beyond uncontested facts admitted by Niko.

712. The Claimant pointed out that the High Court Division "*ventured far beyond its competence*" by making determinations concerning criminal offences.[388] The Tribunals indeed noted that the Court, as just pointed out, applied "*a penalty*"; and it determined "*proceeds of crime*" and ordered their seizure with the objective "*to strip [Niko] of any benefits obtained through corruption*".[389] The High Court Division thus ordered the confiscation of Niko's assets in Bangladesh.[390] It decided that these assets must be

> *… seized, confiscated, and returned back to the state of Bangladesh, the ultimate victim of the corruption. The aims of the confiscation are to recover the proceeds of crime, return the assets to the State, deny*

[386] *Alam* Judgment, paragraph 78, p. 76.
[387] *Alam* Judgment, paragraphs 82 and 83.
[388] Claimant's letter of 11 December 2017, p. 12.
[389] *Alam* Judgment, paragraph 86.
[390] *Alam* Judgment, pp. 69 *et seq*.

criminals the use of ill gotten assets and deter and disrupt further criminality.[391]

The people and the state would be able to obtaining [sic] at least some financial benefit or compensation from the scourge of the crime of corruption committed by [Niko]. Hardship and suffering has been inflicted by [Niko] on the citizens such as the victims of the 2005 blowouts. The return of the assets to the State would also help to reimburse the State for the human and financial resources expended in fighting and pursuing the corrupt activities of [Niko].[392]

713. When studying the Parties' submissions and the jurisprudence concerning Article 102, the Tribunals have found no indication that, in addition to determining that a Governmental act was done or proceedings were taken "*without lawful authority*", the Court had powers under Article 102 as those which the High Court Division exercised in the *Alam* Judgment.

714. It appears therefore to the Tribunals that, both with respect to the factual findings and the relief granted, the *Alam* Judgement goes beyond the scope of the powers under Article 102, as it had been understood by the Supreme Court in previous cases. These circumstances may affect the relevance of the Court's findings for the issues before the Tribunals.

6.4.5 The legal findings of the *Alam* Judgment and their relevance for the Tribunals' decision

715. When discussing the relevance of the *Alam* Judgment, **the Respondents** refer to the contract provisions according to which the "*validity, interpretation and implementation*"[393] of the Agreements shall be governed by the laws of Bangladesh. They rely on Article 111 of the Bangladesh Constitution providing:

The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it.

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391 *Alam* Judgment, paragraph 80 (in the certified copy produced to the Tribunals, the last part of the sentence is partly obscured and reconstituted by hand).
392 *Alam* Judgment, paragraph 82.
393 Article 13.1 and 15.1 of the JVA and the GPSA, respectively.

716. According to the Respondents, the High Court Division reached in the *Alam* Judgment "*a number of holdings of law that are part of the content of the laws of Bangladesh and directly relevant to the decision of the Tribunals on the Corruption Claim*".[394] They assert that "*judgments of the Supreme Court of Bangladesh create binding precedent establishing and explaining Bangladeshi law*".[395]

717. **The Claimant** asserts that the "*Respondents fostered proceedings in local court that purported to address the same topics submitted for decision in these Tribunals*" and did so in violation of the Tribunals' Decision on Exclusivity and Article 26 of the ICSID Convention. It considers the Judgment as "*fundamentally illegitimate*" and describes the Judgment as

> *… issued by a court with no authority to resolve disputes of fact or to hear more than summary evidence. The judgment's disingenuous assertions that disputed facts were undisputed and its leaps of logic confirm its results-driven, partial approach. The Respondents assert that the Writ Petition Judgment is persuasive authority. Review of the document leads to the conclusion that it is neither persuasive nor an authority legitimately considered in this forum.*[396]

718. **The Tribunals** recognise the authority of the Supreme Court in the interpretation of the laws of Bangladesh and accept, as asserted by the Respondents, that the judgments of this Court are "*directly relevant to the decision of the Tribunals on the Corruption Claim*".[397] As shown above in Section 6.2, the Tribunals have carefully analysed the relevant jurisprudence of this court.

719. When considering the *Alam* Judgment the Tribunals must, however, take account of the specific circumstances of this judgment as just reviewed: the Judgment was rendered in violation of the Tribunals' exclusive jurisdiction; it is founded on a very distorted representation of "*undisputed*" facts, relying on highly disputed allegations and even assumptions that have not even been alleged and that, as shown above are wrong; it assumes powers which seem to go beyond the scope of Article 102 and beyond what the Supreme Court decided in other cases; it uses disturbing and inflammatory language to characterise factual

[394] Respondents' letter of 21 November 2017, p. 2.
[395] Respondents' letter of 21 December 2017, p. 1.
[396] Claimant's letter of 11 December 2017, pp. 1 - 2
[397] Respondents' letter of 21 November 2017, p. 2.

assertions which are plainly contradicted by the record; and it is subject to appeal.

720. The Tribunals noted that the *Alam* Judgment seems to differ from earlier jurisprudence of the Supreme Court on at least three points:

721. First, in the *Alam* Judgment the High Court Division concluded that Article 102 applies to Governmental decisions "*tainted by*" corruption. The Court states:

> *If the exercise of Executive powers is tainted by extraneous factors such as personal benefits or gratifications, or procured through fraud and corruption, then such actions are ultra vires and liable to be declared to be done without lawful authority and of no legal effect, i.e. void ab initio. Any contract arising from the ultra vires exercise of Government power is liable to be declared void ab initio.*[398]

722. The Parties have not relied on any prior decision of the Supreme Court in which corruption led to a declaration of avoidance in Article 102 proceedings; and the Tribunals have not seen any such decision. Prior decisions of the Supreme Court, in particular the "*mala fide*" preparation of the report in the *Television* case and deficiencies in the approval process of the *Container Terminals* case indicate the type of irregularities that are taken by the Court to fall within the scope of acts taken "*without legal authorities*". The Tribunals have concluded above in Section 6.2.3 that the extension of Article 102 case law to corruption is justified and in line with the jurisprudence of the Supreme Court.

723. Second, when examining the question whether the exercise of Governmental powers was "*tainted by corruption*", the Court did not consider merely the decision itself, but referred to a whole series of steps prior to the final approval of the JVA, including the result of prior tender proceedings for a contract different from the JVA, the decision on the scope of the JVA, including Chattak East and the decision not to apply competitive procedures in the form of Swiss Challenge. The Court also relied, as discussed above, on a scheme of layered consultancy contracts.

724. While the factual assumptions on which this reasoning is based are seriously flawed and in a number of respects seem to exceed the limits

[398] *Alam* Judgment, paragraph 43.

on the Supreme Court in Article 102 proceedings, what is of relevance here is the legal principle of extending the examination beyond the sole act of approval.

725. The Tribunals have noted that in prior decisions, in particular in the *Television* and the *Container Terminals* cases, the Supreme Court considered not just the final decision, granting the license or authorising the contract; the Court also considered the process leading to this decision. For instance, it considered the "*process followed for selecting the ETV as most responsive*"[399] and the "*process that has been adopted in the matter of approval of the project*".[400]

726. The Tribunals conclude that the examination by the High Court Division of steps prior to the Governmental approval of the JVA and the GSPA is in line with the jurisprudence of the Supreme Court. When determining whether acts or proceedings have been done or taken with lawful authority, the examination need not be limited to the act itself; in the opinion of the Tribunals the examination may be extended to the preceding steps leading to the act.

727. The third point of legal principles which the Tribunals note concerns **causation**. The High Court Division states

> *There is no need to show, as [Niko] argues that the bribes paid to State Minister AKM Mosharaf Hossain actually influenced his decision to act in favour of Niko.*[401]

728. This assertion by the Court is based on the definition of bribery in section 161 of the Bangladesh Penal Code. The Court finds that, under that provision, actual influence is not necessary.

729. The Claimant objects:

> *… a Court acting under Article 102 of the Constitution has no jurisdiction to make determinations regarding offences allegedly committed by a private party under the Bangladesh Penal Code.*[402]

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399 *Hossain v. Bangladesh* (Exhibit RLA-159), paragraph 42
400 *SSA Bangladesh Limited v. Ul-Islam,* RLA-161, paragraph 61.
401 *Alam* Judgment, paragraph 61.
402 Claimant's letter of 11 December 2017, p. 15.

730. Indeed, decisions taken under Article 102 of the Constitution are not by way of application of the Penal Code. The purpose of Article 102 is not the punishment of a bribe giver but the regularity of the Governmental act (see Section 6.2 above). What must be considered, therefore, is that act and the process leading to it. If these are not influenced by corruption, there is no basis for declaring, according to Article 102, that the act is done "*without lawful authority*".

731. Elsewhere in the Judgment, the High Court Division uses language which is in contradiction with the statement quoted above and which does indeed confirm that a link of causation must exist. For instance:

> *If the exercise of Executive powers is tainted by extraneous factors such as personal benefits or gratifications, or procured through fraud and corruption, then such actions are ultra vires and liable to be declared to be done without lawful authority and of no legal effect, i.e. void ab initio.*[403]

732. The point was made in equally clear terms when the Court defined the function of the process:

> *The point for adjudication in the instant writ petition is whether during the period 2003 to 2006 the respondent No. 4 and No. 5 had set up a corrupt scheme for obtaining benefits from the Government of Bangladesh and was able to procure the Joint Venture Agreement (JVA) and the Sale Agreement for the Sale of Gas from Feni Gas Field (GPSA) through corrupt and fraudulent means.*[404]

733. This is indeed the understanding of Article 102 that the Tribunals had found when examining the jurisprudence of the Supreme Court. The Governmental act considered is "*procured through corrupt and fraudulent means*"; the act is "*tainted*" or otherwise affected by the extraneous factors, as those given as examples.

734. This clearly requires causation. In the absence of any influence of such extraneous factors, there is no basis for declaring the act as "*without lawful authority*" according to the procedure under Article 102.

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[403] *Alam* Judgment, paragraph 43.
[404] *Alam* Judgment, paragraph 42.

6.5 The remedies under the Contract Act

735. Both Parties also rely on the **Contract Act**;[405] they differ however with respect to the identification of the relevant sections.

6.5.1 The positions of the Parties

736. When they initiated the present Corruption Claim in BAPEX's Memorial on Damages, **BAPEX** argued that Niko should be prevented from "*accessing the international arbitration system*" and that "*public policy requires that rights obtained by bribery be unenforceable*".[406] It continued by stating:

> *In addition to the international condemnation of corruption, Bangladeshi law, like English law, provides that agreements obtained by bribery are voidable.*[407]

BAPEX added:

> *On the facts of this case, the JVA is voidable according to the Bangladeshi Contract Act because BAPEX's consent was procured by "coercion", "fraud" and "misrepresentation". Any of these alone is sufficient to render the contract voidable. Courts in Bangladesh can declare a contract void in circumstances like these.*[408]

737. The text refers to Sections 15, 17 and 18 of the Contract Act, respectively, for the definition of each of the three quoted terms and to Section 19 for the conclusion that in the circumstances a contract is voidable. BAPEX then concluded:

> *BAPEX therefore exercises its right to hold the JVA void and requests that the Tribunal treat the JVA as voided as a result of Niko's bribery and dismiss all of Niko's claims […] Voiding the agreements results in there being no substantive provision to support Niko's claims.*[409]

738. On the same date, 25 March 2016, **Petrobangla** wrote to the Tribunals referring to BAPEX Memorial on Damages and informed the Tribunals that

[405] The Contract Act has been produced as Exhibit CLA-4.
[406] B-MD, paragraphs 62, 63.
[407] B-MD, paragraph 68.
[408] B-MD, paragraph 69.
[409] B-MD, paragraph 71.

Petrobangla approves of and adopts BAPEX's recitation of the facts and legal consequences of Niko's use of corruption and bribes to obtain the JVA and the PSA.

In light of those facts and legal consequences, Petrobangla requests that the Tribunal find that the GPSA was procured by corruption and is thus voidable. It further informs the Tribunal of it decision to rescind the GPSA.

739. In this original version of the Respondents' claim there is no reference to Article 102 of the Constitution.

740. In subsequent submissions, **the Respondents** seek a declaration that the agreements were void *ab initio* based on Article 102 of the Constitution, as discussed above. Alternatively, they rely on the Contract Act, but no longer on Sections 15 to 19 of the Contract Act but on Section 23, which defines the circumstances in which an agreement is void.

741. **The Claimant** takes the position that the Contract Act is the correct reference for determining whether an agreement is void or voidable. In the Contract Act the relevant provision is Section 19 together with Section 15, providing that a contract is voidable if it was caused by "*coercion*", a term that, in the understanding of both Parties, includes corruption. It denies the applicability of Section 23, since neither the "*consideration*" nor the "*object*" of either Agreement is unlawful.

6.5.2 The relevant provisions

742. The Contract Act deals in Sections 15 to 19 with agreements "*without free consent*". **Section 19 of the Contract Act** reads as follows:

When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

743. Coercion, fraud and misrepresentation are defined in Sections 15, 17 and 18, respectively. The Parties agree that the relevant definition is that of coercion, defined in **Section 15** which provides:

"Coercion" is the committing, or threatening to commit, any act forbidden by the Penal Code or the unlawful detaining or threatening

to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

744. **Section 23 of the Contract Act**,[410] on which the Respondents rely in their later submissions, has the following wording:

> *The consideration or object of an agreement is lawful, unless- it is forbidden by law; or*
>
> *is of such a nature that, if permitted, it would defeat the provisions of any law; or*
>
> *is fraudulent; or*
>
> *involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.*
>
> *In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.*

745. The provisions of the **Penal Code**[411] on which the Parties rely[412] are **Sections 161**:

> *Whoever, being or expecting to be a **public servant, accepts or obtains**, or agrees to accept, or attempts to obtain from any person, for himself or for any other person any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or for bearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Government or Legislature, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.*

and **Section 165 A**

> ***Whoever abets** any offence punishable under section 161 or section 165 shall, whether the offence abetted is or is not committed in consequence of the abetment, be punished with the punishment provided for the offence.*

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410 The Contract Act, 1872, CLA-4.
411 The Penal Code (Act No. XLV of 1860), RLA-184. (emphasis added).
412 For the Respondents, see R-MC, paragraph 148; for the Claimant, see C-CMC, paragraph 285 and C-RC, paragraph 252.

6.5.3 Applicability of Section 23 Contract Act

746. In the Decision on Jurisdiction the Tribunals already considered the legality of the two Agreements. They concluded:

> *In the present case, the agreements on which the claims are based have as their object the development of marginal/abandoned gas fields and the sale of gas from such fields. It has not been argued that there is anything illegal about the object and the content of these contracts. The Tribunal has not been made aware of any such illegality. The reasons which lead to the unenforceability of contracts for corruption do not apply to the agreements considered in the present case.*[413]

747. **The Respondents** recognise that the "*objects of the JVA and GPSA (the exploitation of gas fields and the sale of gas) are, on the face of the agreements, lawful.*"[414] They argue, however, that

> *the agreements are void under Section 23 because, due to an external factor (Niko's procurement of the authorization of the Ministry and the Prime Minister's office by illegal influence and bribery), they: 1) amount to fraud perpetrated on the people of Bangladesh, 2) defeat the provisions of the Penal Code prohibiting influence on and bribery of public officials, among others, 3) injure the property of the people of Bangladesh by unlawfully transferring the economic benefits of their property to Niko, and 4) are opposed to Bangladeshi and international public policy because they give effect to decisions of public officials influenced by corruption.*[415]

748. The Respondents argue that the "*JVA and GPSA validate and implement the illegal acts of Niko and the officials they bribed*".[416] They seek to bring this situation in the ambit of Section 23 by asserting that a contract lawful on its face "*will be void under Section 23 if the contract or its enforcement is contrary to public policy*".[417] In support of this assertion,

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[413] Decision on Jurisdiction, paragraph 438.
[414] R-RC, paragraph 354.
[415] R-RC, paragraph 354.
[416] R-RC, paragraph 355.
[417] R-RC, paragraph 352.

the Respondents refer to one of the examples given at Section 12 in the published text of the Contract Act:

> *A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment by A, on his principal.*[418]

749. In the view of the Respondents, the example shows that an agreement with an object and consideration entirely legal (the lease of the land and the payment of money) is nevertheless void "*due to an external factor (the agent's fraud on the land owner)*".[419] The example was discussed at the Hearing, as a result of which it became clear that the Respondents' argument confuses two agreements: the valid lease agreement and the agreement between A and B which had the object to defraud the landed proprietor.[420]

750. In their First Post-Hearing Brief, the Respondents nevertheless continue to argue that Niko's conduct must be considered not under Section 19 of the Contract Act but under Section 23. They argue:

> *Niko's bribes did more than compromise Respondents' free consent: they illegally procured the approval of the Government and the grant of rights to public goods […] this contravenes Bangladesh public policy and the case law of the Supreme Court […] As the Supreme Court of Bangladesh has declared, citing English law, 'a public body [can]not act incompatibly with the exercise of its powers or the discharge of its duties'.*[421]

751. Relying on the terms of Section 23 the Respondents argue that the Agreements

> *… defeat a number of Bangladeshi laws, including the provisions against bribery in the Penal Code, the Constitution, and the case law dealing with grant of government largess, and the objects of the Agreements are not simply the exploitation of gas fields and gas sale,*

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[418] R-RC, paragraph 353, quoting example (g) to Section 23 of the Contract Act.
[419] R-RC, 353; the Respondents describe as "*external factor*" at paragraph 354 and Footnote 610, a number of situations which they also invoke in the context of Article 102 of the Constitution and which have been considered above.
[420] Tr. Day 2 (CONFIDENTIAL), pp. 36 to 41 and C- PHB2, paragraph 142.
[421] R-PHB1 (CONFIDENTIAL), paragraph 261.

rather, the implementation of an unlawful Government grant of rights to Niko. Accordingly, the object is unlawful and opposed to public policy.[422]

752. **The Claimant** objected to the earlier justifications for the Respondents' theory concerning Section 23. To the revised version of this theory presented in Respondents' First Post-Hearing Brief, the Claimant responds by describing it as a "*novel theory, and a creative one*", and continued by asserting:

> *… nothing in the language of the JVA or GPSA suggests a grant of governmental authority to Niko. Rather, the grant of rights was from the Government and Petrobangla to BAPEX. Furthermore, Bangladeshi law generally follows English law. As explained before, English law treats a contract obtained by corruption as voidable, while a contract whose object is illegal would be void.*[423]

753. **The Tribunals** have noted that the Contract Act makes a clear distinction between the object and consideration of a contract and the situations in which the "*free consent*" of the agreement is affected. The examples given in the Contract Act for cases of Section 23 clearly show that for cases covered by Section 23 the determining factor is the "*object or consideration*", i.e. the purpose of the performance of the agreement. Section 19 is concerned with the manner in which the agreement came about. This distinction corresponds to that between contracts of corruption and contracts obtained by corruption, as the Tribunals have explained in the Decision on Jurisdiction.

754. The Tribunals have pointed out previously that there is nothing in the JVA and the GPSA which is illegal.[424] If the approval of the agreements by the Government were caused by corruption, such a finding would relate to the manner in which the Agreements were formed and not to their terms. Indeed, the Respondents question how the Agreements came about: with respect to the JVA the Respondents say that it should have been awarded following the Swiss Challenge procedure; and Chattak East should have been treated as an exploration target and treated according to the PSC procedure. Had these procedures been used, and no corruption occurred, there would be no issue with the performance of the Agreements.

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[422] R-PHB1 (CONFIDENTIAL), paragraph 263.
[423] C-PHB2 (CONFIDENTIAL), paragraphs 144 and 145.
[424] See e.g. Decision on Jurisdiction, paragraph 438.

755. The Tribunals therefore see no basis for applying Section 23 of the Contract Act when determining the legal consequences of the alleged corruption. They find confirmation in this conclusion by the Respondents' own argument: when the Respondents first raised the corruption issue, they did not argue that the Agreements were void. Even after they had changed counsel and initiated the Corruption Claim in its present form, the Respondents still argued that the Agreements were voidable and declared avoidance. It was only in subsequent submissions that they introduced the new theory, based on Article 102 of the Constitution and, alternatively, Section 23 of the Contract Act.

756. For the reasons stated, the Tribunals are unable to follow the Respondents in their change of the legal basis for their claim with respect to the Contract Act. The Tribunals conclude that **allegations of corruption in the procurement of the JVA and the GPSA must be considered under Sections 19 and 15 of the Contract Act and not under Section 23**.

6.5.4 Lobbyists and the "*exercise of personal influence*" (Section 163 of the Penal Code)

757. Section 19 of the Contract Act applies in cases where the consent to an agreement is caused by "*coercion, fraud or misrepresentation*". The Parties agree that this includes consent caused by corruption.

758. The definition of "*coercion*" in Section 15 Contract Act includes "*any act forbidden by the Penal Code*". **The Respondents** include in such forbidden acts not only Section 161 (accepting bribes) and 165 A (abetting) of the Bangladesh Penal Code, but also Section 163.[425] This Section concerns specifically the "*exercise of personal influence*" and has the marginal note: "*Taking gratification for exercise of personal influence with public servant*". It reads as follows:

> *Whoever accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public*

[425] R-PHB2 (CONFIDENTIAL), paragraph 149.

servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Government or Legislature, or with any public servant, as such, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.[426]

759. When arguing that Section 163 of the Penal Code applies to lobbying practices by consultants the Respondents refer to statements made by the Claimant in its Rejoinder:

> *… Niko has now admitted that it engaged Mr. Bhuiyan to exercise personal influence over State Minister AKM Mosharraf Hossain to gain his favor and obtain the JVA. To avoid the consequences of admitting to criminal conduct in violation of Section 163 of the Penal Code in establishing its investment, Niko argues that "Respondents' suggestion that the engagement of local consultants was illegal is flatly contradicted by the widely prevailing practice" of using "local consultants to perform logistical and lobbying services." The prevalence of criminal conduct does not make it lawful. Engaging "consultants" to commit acts that violate the Penal Code is a crime. Respondents have established, and Niko has not rebutted, that in Bangladesh, as elsewhere, "consultants" are often used to commit criminal acts of corruption. One of the consultants used by Niko, Mr. Mamoon, was convicted of "corruption being backed by political influence" for assisting Mr. Rahman "obtain […] dirty money in the name of [a] 'consultation fee'" paid to Mr. Mamoon.*[427]

760. The Respondents also referred to Section 163 in the context of their challenge to the Tribunals' jurisdiction on grounds that the Agreements were obtained in violation of Bangladeshi law.[428] The Tribunals have dismissed this challenge; they nevertheless take account of these arguments in the present context to the extent they also apply to the discussion about the validity of the Agreements.

761. **The Claimant** denies that Section 163 of the Penal Code is applicable here. In particular it denies that its consultants exercised "*personal influence*" as it is punished by Section 163. It argues that

> *Lobbyists do not "induc[e]" by personal influence but simply "advocate, or seek to use legitimate forms of persuasion to advance the business interests of their clients". They may be able to facilitate*

[426] Quoted from The Penal Code (Act No. XLV of 1860), Sec. 163, Exhibit RLA-184.
[427] R-PHB2 (CONFIDENTIAL), paragraph 119, quoting from C-RC, paragraphs 116 and 113.
[428] In particular R-RC, paragraphs 298, 304 *et seq.*, 307 and 145.

> *access to decision-makers in order to enable reasonable commercial discourse and dialogue, but do not 'exercise personal influence' over them. Rather they act in a professional capacity to represent and defend their client's interest, just as lawyers do.*[429]

762. By this reference to the activity of lawyers, the Claimant seeks to establish a link to the illustration which follows the text of Section 163:

> *Illustration*
>
> *An advocate who receives a fee for arguing a case before a Judge; a person who receives pay for arranging and correcting a memorial addressed to Government, setting forth the services and claims of the memorialist; a paid agent for a condemned criminal, who lays before the Government statements tending to show that the condemnation was unjust, - are not within this section, inasmuch as they do not exercise or profess to exercise personal influence.*[430]

763. The Claimant points out that the term "*personal influence*" is not defined in the Penal Code and there are no cases in which it was applied. The Claimant finds assistance in the Contract Act which uses the term "*undue influence*".[431] According to Section 14 of that act, consent is not free when it is caused by "*undue influence*". This term is defined in Sections 16 of the Contract Act which provides:

> *A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.*[432]

764. Both Section 163 of the Penal Code and Sections 14 and 16 of the Contract Act relate to interventions that affect the formation of the will and resulting decisions; insofar they are comparable. The term "*influence*" is, however, qualified by different expressions, the two provisions relate to different circumstances and, in particular, they seek to protect different values. The provision in the Contract Act protects a person against being bound by a commitment in the absence of free consent. Section 163 of the Penal Code seeks to protect the formation of decision by public servants in the interest of public administration. The Tribunals therefore find the reference to the term "*undue influence*" in the

[429] C-RC, paragraph 262.
[430] The Penal Code, 1860, RLA-184, Section 163.
[431] C-CR, paragraph 262, Footnote 410.
[432] Contract Act of 1872, CLA-4, Section 16(1).

Contract Act of limited value in their search of the correct understanding of the term "*personal influence*" in Section 163.

765. The Parties have not provided any cases decided by courts in Bangladesh applying Section 163 of the Penal Code. The Claimant has stated that there is no reported case on Section 163.[433] The Respondents refer to a case; but that case relates to the Money Laundering Protirodh Ain 2002[434] and not to Section 163. The latter provision is mentioned only in passing as part of the argument of one of the appellants, distinguishing it from the Ain 2002.[435] Otherwise, the Respondents have not provided any case in which Section 163 has been applied, nor have they provided scholarly writing on the meaning of the term considered.

766. **The Tribunals** have found some assistance in the examples provided in the Illustration to Section 163, published with the code and quoted above. The three examples given in the illustration all concern situations in which persons are paid for their efforts to influence a decision: the advocate is paid for seeking to influence the judge; the memorial writer is paid to influence the Government and the agent is paid for an effort to influence the Government to decide that the condemned criminal is innocent. The illustration makes it clear that payment for seeking to influence in such circumstances is legal and is not subject to the punishment under Section 163.

767. The illustration to Section 163 of the Penal Code gives examples for the influence which is <u>not</u> an exercise of "*personal influence*". It does not provide guidance for understanding when and under what circumstances the exercise of influence becomes "*personal*" and punishable. The Respondents nevertheless assert

> *… under Bangladeshi law, it is illegal even to pay someone, such as an on-the-ground consultant, to exercise personal influence on a public official, whether a bribe is paid or not.*[436]

768. When making this assertion, the Respondents do not explain how the exercise of influence by an advocate arguing a case before a judge

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[433] C-RC, paragraph 260.
[434] *Durnity Daman Commission v. Md. Tarique Rahman & The State and Md. Gias Uddin Al-Mamun v. The State and Another*, Criminal Appeal No. 7225 and Criminal Appeal No. 7469, Judgment, 21 July 2016, ("*DDC v. Rahman & State and Al-Mamun v. State & Another*, Judgment"), Exhibit R-326, p.2.
[435] *DDC v. Rahman & State and Al-Mamun v. State & Another*, Judgment, Exhibit R-326, p. 15.
[436] R-RC, paragraph 71.

(admissible, according to the Illustration) should differ from the influence of a lobbyist presenting to a public servant the advantages of desired Governmental action.

769. In the absence of any other explanation, it appears to the Tribunals that the difference must lie in the qualification "*personal*". Section 163 applies to the case where a person accepts a gratification for inducing a public person to do or forbear an official act "*by the exercise of personal influence*" as opposed to the presentation of facts and analyses which are proper elements of the public person's decision-making in the public interest. The critical element, thus, is not the intention to influence the public person as such but the use of *personal* connections (characteristically deployed under a cloak of secrecy) in order to affect an official act. In other words, Section 163 does not punish any case in which a person is engaged to exercise influence on a public servant; the act becomes criminal when it is the objective of the engagement to achieve the result through "*personal influence*".

770. The Respondents' argument based on Section 163 thus is of no assistance in the absence of any demonstration showing that the influence exercised by lobbyists must be characterised as "*personal influence*" and that the lobbyists are engaged to achieve the objective through such personal influence.

771. The term "*personal*" generally is understood as relating to a particular person, a specific individual. "*Personal influence*" may thus be understood as referring to a relationship between the public servant and the individual who seeks to exercise influence. Exercising personal influence thus would mean seeking to influence the act of the public servant, not by argument before the judge or presenting claims to the Government in a memorial, but by relying on the personal relationship between that individual and the public servant.

772. This understanding finds support in the Illustration to Section 164 of the Penal Code. This provision concerns abetment of the offence of Section 163 by a public servant. In the example given, the wife of a public servant is given a present in order to solicit from her husband a favour for a third person. It is obviously the personal relationship of the wife with the public servant which is the critical element in the example.

773. In the light of these considerations, the Tribunals conclude that it is the reliance on a personal relationship of the person engaged to provide the service with the public servant which is critical for the application of Section 163. It is, thus, not any engagement of a lobbyist that falls under the sanction of Section 163. The sanction applies only if the lobbyist is engaged to induce the public servant, not by the strength of his or her argument (as e.g. the advocate before the judge) but – to repeat -- by relying on the personal relationship with the public servant.

774. This understanding of Section 163 reconciles this provision of the Bangladeshi Penal Code with general international practice. As the Claimant explained, lobbyists "*act in a professional capacity to represent and defend their client's interests, just as lawyers do*".[437] It would be most surprising if the legislator in Bangladesh had intended a general "*prohibition in Bangladeshi law against consultancy agreements with private citizens to influence Government officials*", as alleged by the Respondents.[438]

775. Indeed, when Mr Chowdhury was asked about Mr Sharif coming to the Ministry to "*brief [him] further*" on the matter concerning the proposal considered by BAPEX and Petrobangla, he said: "*There was nothing wrong. I found nothing wrong.*"[439] In other words, the most senior public servant in the Ministry at the time found nothing wrong with Mr Sharif briefing him on the Niko Proposal. As long as Mr Sharif did not use "*personal influence*" to promote the Niko project, there was indeed "*nothing wrong*" and no conflict with Section 163 of the Penal Code, as the Tribunals understand this provision.

776. The Tribunals conclude that Section 163 Penal Code does not prohibit the engagement of lobbyists in general. The sanction applies only if the lobbyist is engaged to promote the principal's interests by relying on a personal relationship with the public servant.

[437] C-RC, paragraph 262.
[438] R-RC, paragraph 306.
[439] Tr. Day 3 (CONFIDENTIAL), pp. 68, 70.

6.5.5 Causation in the application of Section 19 of the Contract Act

777. **The Respondents** do not discuss causation in the specific context of Section 19 of the Contract Act. Indeed, they reproach the Claimant for its "*myopic application of the Contract Act, as opposed to Article 102 or international law*" and, in the context of the Contract Act, they refer to Section 23.[440]

778. The Respondents do, however, discuss causation in the broader context of their Corruption Claim. In particular, they object to the Claimant's argument that "*proximate causation*" is required:

> *… there is no requirement to prove proximate causation as part of a corruption claim. Niko insists that corruption must be shown to be the "immediate" cause of the signing of the Agreements.*
>
> *While Respondents do not agree that proving causation is necessary, even if it is, it is certainly not causation of the kind Claimant advocates. At most what is required is a "link between the advantage bestowed and the improper advantage obtained," not immediate causation. In noting the importance of a link, the Sistem tribunal highlighted the absence of any suggestion of a "plausible explanation […] as to how the" alleged bribe "could be linked to any improper advantage," and therefore denied the corruption claim.*[441]

779. **The Claimant** insists that causation must be proven.[442] It asserts:

> *… the causal link between the alleged bribe and the signing of the contracts is central to a finding of corruption. If no advantage is obtained the causal link is absent.*[443]

780. The Claimant continues by referring to the *Spentex* award, where the arbitral tribunal insisted on the causal link, looking at international instruments, specifically to the 1997 OECD Anti-Bribery Convention and the 2003 UN Convention against Corruption. It concludes

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[440] R-PHB2 (CONFIDENTIAL), paragraph 100.
[441] R-PHB1 (CONFIDENTIAL), paragraph 95, footnotes omitted; the case referred to in the quotation is *Sistem v. Kyrgyz Republic,* ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009, RLA-309, paragraph 43.
[442] C-CMC, paragraph 283 *et seq*.
[443] C-PHB2 (CONFIDENTIAL), paragraph 154.

In other words, the alleged bribe must be shown to have been made with specific regard to the official acting (or refraining from acting) to procure business advantage.[444]

781. **The Tribunals** do not exclude that, under the laws of Bangladesh and other countries, criminal sanctions for corruption may be applied in all cases in which a bribe is paid to a public official, whether this bribe produces the desired effect or not. The Tribunals, as pointed out repeatedly, are not a criminal court. Here they consider the application of Section 19 of the Contract Act, which, in its clear wording requires causation:

> *When consent to an agreement is **caused by coercion** [including "any act forbidden by the Penal Code"], fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.*

782. The Respondents have asserted that causation need not be "*proximate*"; but they have not argued that causation was required at all. They also failed to show the basis for the distinction concerning "*proximate cause*" in Bangladeshi law and how it would be applied in the context of Section 19 to corruption affecting the consent.

783. The Tribunals conclude that, when seeking to avoid the Agreements under the Contract Act, the Respondents must show that the Agreements were caused by corruption. The question whether there is a requirement to show that the bribe also procured an undue benefit to the bribe giver is an issue to be considered separately.

[444] C-PHB2 (CONFIDENTIAL), paragraph 155.

7 THE EVIDENCE – QUESTIONS OF PRINCIPLE

7.1 The burden of proof and how it can be shifted

784. The Respondents seek relief by reason of Niko's alleged corruption. They bear the burden of proof for the allegation and do not contest this. The Parties differ with respect to the facts that have to be proven, a question that has been considered in the preceding section. The issue here concerns the question which party must prove the alleged facts.

785. **The Respondents** argue that they have established all facts necessary for their claim and thus have met their burden of proof. In any event, they argue that they have provided *prima facie* evidence sufficient to shift the burden of proof to the Claimant. The Respondents assert:

> *… Respondents have discharged their burden of proof, under any standard, to show the elements of each of its [sic] claims. Niko put on no evidence to rebut the relevant facts, and its counsel, when asked directly at the hearing, could not deny its use of consultants to channel money to officials. […] Niko can only prevail if it presents more persuasive rebuttal evidence. It has not.*
>
> *Further, on matters for which any doubt might remain, Niko's burden results from the rule that, when a party bearing the legal burden of proof "adduces evidence that prima facie supports its allegation, the [evidentiary] burden of proof may be shifted to the other [p]arty." Niko has not provided an adequate rebuttal of Respondents' evidence that prima facie shows Niko engaged in corrupt activities to establish its investment and secure the JVA and GPSA. Niko's "f[ailure] […] to throw sufficient doubt on the […] factual premises […]" upon which Respondents corruption claim is based is fatal to its defense.*[445]

[445] R-PHB2 (CONFIDENTIAL), paragraphs 101 and 102; the references indicated for the quotation are *International Thunderbird v. Mexico*, UNCITRAL (NAFTA), Award, 26 January 2006, CLA-134, paragraph 95; and *Rompetrol v. Romania*, ICSID Case No ARB/10/3, 4 October 2013, RLA-157, paragraph 246. The Respondents' argument concerning the burden of proof and the shift of it is also developed in earlier submissions, e.g. R-RC paragraph 62 *et seq.*; R-PHB1 (CONFIDENTIAL), paragraph 78 *et seq.*

786. **The Claimant** denies that the Respondents have proven the corruption allegations and that there is any basis for shifting the burden of proof to Niko to 'disprove' the corruption allegations.[446] The Claimant

> *… denies having made any payment to any government official and the record shows no payment (or promise of payment) from Niko (or anyone associated with Niko) to any government official.*[447]

787. Concerning the shift of the burden of proof, the Claimant does not deny the principle but asserts that "*there is no automatic shifting of the burden of proof*"[448] and objects to the Respondents' assertion that "*certain classic 'red flags' of corruption can suffice to shift the burden onto the party denying its existence*".[449] The Claimant accepts that "*the presence of red flags indicates that a transaction merits particular scrutiny*".[450] It adds that "*red flags, by themselves, are not evidence of corruption*" and quotes from the *Kim v. Uzbekistan* Decision on Jurisdiction:

> *Respondent has not established that red flags can of themselves substantiate the most basic requirements of the crime of bribe giving [to government officials] as set forth in Article 211 [of the Uzbek Criminal Code].*[451]

788. In support of its position concerning the shifting of the burden of proof, the Claimant refers to explanations in two cases. In *Feldman v. Mexico*, the ICSID Tribunal stated:

> *[V]arious international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to*

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446 C-PHB1 (CONFIDENTIAL), paragraphs 189, 191.
447 C-PHB1 (CONFIDENTIAL), paragraph 189.
448 C-CMC, paragraph 31.
449 R-MC, paragraph 165.
450 C-PHB1 (CONFIDENTIAL), paragraph 192, quoting from *Vladislav Kim v. Republic of Uzbekistan*, ICSID Case No ARB/10/3 (Caron/Fortier/Landau),Decision Jurisdiction, 8 March 2017, CLA-208, paragraph 606.
451 *Vladislav Kim v. Republic of Uzbekistan,* paragraph 589.

the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[452]

789. The Claimant also quotes from *Thunderbird v. Mexico*:

> *The Tribunal shall apply the well-established principle that the party alleging a violation of international law giving rise to international responsibility has the burden of proving its assertion. If said Party adduces evidence that prima facie supports its allegation, the burden of proof may be shifted to the other Party, if the circumstances so justify.*[453]

790. With respect to the principle, the Parties do not seem to disagree. Indeed, the Respondents summarise the Claimant's position as follows:

> *1. "the party alleging corruption must prove it;"*
>
> *2. "a distinction exists between the legal burden of proof (which never shifts) and the evidential burden of proof (which can shift from one party to another, depending upon the state of the evidence);" and*
>
> *3. if the party bearing the legal burden of proof "adduces evidence that prima facie supports its allegation, the [evidentiary] burden of proof may be shifted to the other Party."*[454]

791. The Respondents conclude by stating their agreement with these principles.[455] They disagree, however, on the evidentiary value of the red flags presented by the Respondents. They present a list of red flags and add:

> *The jurisprudence plainly indicates that such "red flags" are not to be taken lightly, and tribunals have frequently ruled against claimants after they failed to produce evidence sufficient to rebut a presumption of illegality that arises from them.*[456]

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[452] C-CMC, paragraph 30, Footnote 32, quoting *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1 (Kerameus/Covarrubias Bravo/Gantz), Award, 16 December 2002, RLA-219, paragraph 177, with references to Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, 23 May 1997, at 14 (emphasis in the original).
[453] C-CMC, paragraph 30, Footnote 32, quoting *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL (NAFTA), Award, 26 January 2006, CLA-134, paragraph 95.
[454] R-RC, paragraph 86 (internal citations omitted).
[455] R-RC, paragraphs 83 and 84.
[456] R-RC, paragraph 94.

792. The Claimant disagrees with the asserted frequency about the decisions on which the Respondents rely. It quotes a learned study:

> *ICSID tribunals … have affirmed that the burden of proof may shift in a variety of contexts, although no ICSID tribunal has yet done so in the context of alleged corruption.*[457]

793. Concerning the issue of "*red flags*", the Respondents list among red flags for corruption situations in which the *"commission or fee seems disproportionate in relation to the services to be rendered*".[458] They refer to the *Metal-Tech* award, where the tribunal noted that the consultants had been paid about US$4 million and enquired "*What service was the payment intended to remunerate? When was this service rendered?*" [459] That tribunal did so in order to give the claimant "*an opportunity to substantiate the reality and legitimacy of the services for which payments were made*".[460]

794. The Respondents deny that in the present case, as in *Metal-Tech*, the Claimant was able to provide the required substantiation. They assert that "*certain classic 'red flags' of corruption can suffice to shift the burden onto the party denying its existence*".[461] They refer in particular to the *Spentex v. Uzbekistan* award, referring to it as "*the most recent award addressing the issue of red flags [in which] an ICSID tribunal found that the red flag of large payments to consultants was alone sufficient proof of corruption*".[462]

795. The Claimant objects and argues that "*there is no automatic shifting of the burden of proof*",[463] pointing out that the *Spentex* award has not been

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[457] C-PHB2 (CONFIDENTIAL), paragraph 118, quoting C.B. Lamm, B.K. Greenwald and K.M. Young, *From World Duty Free to Metal-Tech: A Review of International Investment Treaty Arbitration Cases Involving Allegations of Corruption*, 29(2) ICSID Review, 14 April 2014, CLA-200, paragraphs 328, 335.
[458] R-MC, paragraph 165.
[459] *Metal-Tech Ltd. v. The Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 (Kaufmann-Kohler, President, Townsend, von Wobeser), RLA-157, paragraph 92(a).
[460] *Metal-Tech v. Uzbekistan*, paragraph 246.
[461] R-MC, paragraph 165.
[462] R-PHB1 (CONFIDENTIAL), paragraph 80, referring to a report on the decision by the ICSID Tribunal in *Spentex Netherlands BV v. Republic of Uzbekistan*, ICSID Case No. ARB/13/26, Award, 27 December 2016 (August Reinisch, president, Stanimir Alexandrov and Brigitte Stern) by V.Djanic, *In Newly Unearthed Uzbekistan Ruling, Exorbitant Fees Promised to Consultants on Eve of Tender Process Are Viewed by Tribunal as Evidence of Corruption, Leading to Dismissal of All Claims under Dutch BIT*, IA Reporter,22 June 2017, Exhibit RLA-422.
[463] C-CMC, paragraph 31.

published and its content is available only in a news report. The Claimant qualifies the Respondents' quotation by reference to a passage indicating that the *Spentex* tribunal adopted a "*nuanced approach capable of taking into account all of the relevant circumstances in relation to the allegations of corruption*" and distinguishing the facts of the *Spentex* case from those of the present case.[464]

796. **The Tribunals** conclude that the difference between the Parties concerning the burden of proof and the question whether it has been shifted in the present case is not an issue of principle which can be decided in the abstract. The Respondents assert that they have proven corruption; but if the Tribunals are not persuaded by the evidence produced, the Respondents rely on a number of circumstances (or red flags) which in their opinion justify a presumption of corruption which the Claimant must rebut in order to prevail.

797. The Tribunals must therefore examine whether (i) the circumstances on which the Respondents rely as red flags are established and, if so, (ii) what evidentiary conclusions should be drawn from them, taken individually and collectively. In this process, the Tribunals will also have to consider circumstances which point in the opposite direction.

798. This examination and its conclusions will be presented below in Section 8.

7.2 The standard of proof

799. **The Claimant** argues that the nature of corruption allegations requires that a heightened standard be applied. The Respondents argue the ordinary standard must apply and that this is the "*preponderance of evidence*".[465]

800. As part of the questions addressed to the Parties, the Tribunals had asked:

> 15. *Standard of proof in case of corruption allegations: when determining the standard of proof for allegations that agreements*

[464] C-PHB2 (CONFIDENTIAL), paragraph 106 *et seq.*
[465] See R-RC, paragraphs 74 *et seq.*

were procured by corruption, what allowance must be made for (a) possible efforts of concealing the corruption activity and resulting difficulties to prove corruption and causation and (b) the gravity of any finding of corruption for the persons concerned?[466]

801. The Claimant discussed a number of decisions and legal writings and concluded:

> *…because corruption is a serious allegation which can attract drastic legal consequences, these Tribunals must have a high degree of confidence in the evidence put before them and its probative weight.*[467]

802. **The Respondents** discussed these decisions and legal writings and asserted that the "*normal standard of proof*" is that of the "*preponderance of the evidence*". They concluded that there is no established rule requiring a higher standard and "*the consequences of a finding of corruption are no greater than the consequences of many other findings in international arbitration*".[468] They added:

> *Respondents do not suggest they "need not" prove their case; they maintain that the standard of proof is the preponderance of the evidence. Yet, they do insist that the clandestine nature of corruption and strong international public policy against it must animate the Tribunals' approach to fact-finding in this case and militate against requiring a higher standard of proof.*[469]

803. Having examined the Parties' argument and the many learned publications and arbitral decisions on which they rely, **the Tribunals** find it difficult to identify an invariable rule on the standard of proof:

804. The Tribunals have pointed out repeatedly that they are not a criminal court; their findings on corruption thus do not necessarily require application of the exacting standards of proof that justify criminal sanction. The civil sanctions which they may apply are nevertheless also serious and likely to have far reaching effects for all concerned. They are also aware of the difficulties of proving corruption in a case as the present one:

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[466] See above, Section 2.4.15, Question 15.
[467] C-PHB1 (CONFIDENTIAL), paragraph 208.
[468] R-PHB2 (CONFIDENTIAL), paragraph 90 and R-,MC, paragraph 164.
[469] R-PHB2 (CONFIDENTIAL), paragraph 94.

- where there is neither direct evidence of a corrupt payment nor an uncontested admission;
- which has been the object of a vast investigation by authorities in Bangladesh, Canada and the U.S. leading to allegations of corruption,
- where the allegations are based on a number of indicia creating a situation in which the prevalence of concordant circumstantial evidence may possibly become, as the Tribunals stated at the Hearing, "*so dense that we say we must assume that, despite the denial, we accept corruption to have occurred*";[470]
- where the the evidence gathered in the joint international investigation has led only to a limited criminal sanctions against Niko and its representatives, a sanction which the Tribunals have already considered in their Decision on Jurisdiction.

805. In this complex situation of facts and allegations, the Tribunals do not find much assistance in terms such as "*preponderance of evidence*" and "*heightened standard of proof*".

806. In the end the question is whether the Tribunals are persuaded that the JVA and GPSA were procured by corruption or not. The Tribunals share the conclusion reached by Aloysius Llamzon in his comprehensive monograph devoted to the legal doctrine and cases concerning corruption in international investment arbitration, to which the Parties have frequently referred:

> *… the less formalistic sensibility of Rompetrol and Metal-Tech towards the evidentiary rules to be applied to corruption issues is helpful. Because corruption is a serious charge with serious consequences attached, the degree of confidence a tribunal should have in the evidence of that corruption must be high. However, this does not mean that the standard of proof itself should necessarily be higher, or that circumstantial evidence, inferences, or presumptions and indicators of possible corruption (such as 'red flags') cannot come to the aid of the fact-finder. Tribunals are given the freedom and*

[470] Corruption Claim Hearing, Tr. Day 2 (CONFIDENTIAL), p. 27, ll. 23-24.

burden of choice, which they should not abdicate by rote reference to an abstract 'heightened' standard of proof.[471]

[471] Aloysius P. Llamzon, *Corruption in International Investment Arbitration*, 2014, CLA-239, paragraph 9.26.

8 THE EVIDENCE AVAILABLE IN THE ARBITRATIONS

807. One of the particular features of the Corruption Claim proceedings is the broad scope and large volume of the evidence presented and said to be relevant to the alleged corruption.

808. 803. When the Respondents initiated their Corruption Claim on 25 March 2016, the Tribunals decided to examine this claim with priority and to take an active role in the gathering of the evidence. Despite initiating this Claim, the Respondents pointed out that:

> *ICSID tribunals are not well suited to this type of investigation. They have no police force to conduct an investigation, no power to compel testimony or document production from nonparties to the arbitration, and limited ability to force a party suspected of corruption to fully cooperate in the inquiry.*[472]

809. However, as the proceedings advanced, it became apparent that the case of Niko had been investigated in Bangladesh, Canada and the United States by law enforcement agencies in those countries and in cooperation under mutual legal assistance arrangements among them. The results of these investigations were produced as evidence in the present Arbitrations. Two of the lead investigators produced witness statements and testified at the Hearing. The Tribunals thus were provided precisely with the type of evidence and information which, in the words of the Respondents, ICSID tribunals usually do not have.

810. When considering the corruption evidence before them, the Tribunals therefore will commence by describing (i) the Joint Investigation, (ii) the accounts given of it in the Arbitrations prior to the Corruption Claim and during the proceedings on that Claim; and then (iii) the collection of evidence from other sources during the proceedings on the Corruption Claim Finally, they will (iv) examine whether there are any gaps in the evidence available and (v) consider inferences and conclusions on the available evidence.

[472] Respondents' letter of 8 August 2016, p. 3.

8.1 The Joint Investigation through Mutual Legal Assistance (Canada, Bangladesh and U.S.)

811. It appears from the evidence in these Arbitrations that Bangladesh to some extent took an active role in the investigation of corruption in the country first through the National Coordination Committee against Grievous Offences (NCCAGO), then through the Anti-Corruption Commission of Bangladesh (ACC), and finally also by the mechanism of international cooperation. These efforts included investigation of Niko. In this case the cooperation was initiated by Canada and conducted through the use of mutual legal assistance under the United Nations Convention Against Corruption (UNAC), as explained by the High Court Division to which the Government of Bangladesh had provided evidence.

812. In these proceedings, the Government, represented by the Secretary, Energy Division, Ministry of Energy, Power and Mineral Resources,

> *… produced substantial evidence of corruption gathered by Bangladesh through Mutual Legal Assistance (MLAs) requests between the Royal Canadian Mounted Police (RCMP) in Canada, the Federal Bureau of Investigation (FBI) in the United States, and the Anti-Corruption Commission (ACC) in Bangladesh. The investigation of the corruption of [Niko and Niko Canada] was initiated by the Canadian Law enforcing authorities in 2005. The initial RCMP investigation began in June 2005 after an official from Canada's Department of Foreign Affairs and International Trade (DFAIT) alerted RCMP to the possible violation of the Canadian Corruption of Foreign Public Officials Act by [Niko and Niko Canada]. The RCMP started investigation and had sent a letter of request to Bangladesh for investigation and legal assistance. That investigation was joined by the United States Department of Justice through the FBI, since one of the prime actors in the corruption scheme, Mr. Qasim Sharif, was a U.S. citizen and transferred a large part of proceeds of crime to the United States. The ACC has charged several individuals in criminal cases under the laws of Bangladesh for offences committed in Bangladesh.*[473]

813. As explained by the Court, the investigation began in June 2005 as a direct consequence of the gift that Niko had made to the State Minister and the news in the Bangladeshi press. On 15 June a Bangladeshi newspaper, *The Daily Star,* published an article entitled "*Niko gifts minister luxurious car*". On 18 June another newspaper wrote that the

[473] *Alam* Judgement, paragraph 23.

Minister had been summoned to the Prime Minister's office in Dhaka where he tendered his resignation. On 20 June the Canadian Department of Foreign Affairs and International Trade alerted the RCMP to these news stories.[474] Mr Khan explained in his second witness statement:

> *The RCMP became involved because the Canadian High Commissioner in Bangladesh at the time, Barbara Richardson, was concerned about Niko's activities, and sent a request to begin an investigation. As a part of the investigation, Canada made a request for mutual legal assistance to Bangladesh in 2006. My firm Octokhan was formally engaged by the caretaker government in 2007 to provide key strategic services to the Anti-Corruption Commission of Bangladesh ("ACC"), initially through the National Coordination Committee against Grievous Offences ("NCCAGO") and then directly to the ACC, the Office of the Attorney General for Bangladesh and other agencies.*[475]

814. The Respondents highlighted the importance of **the Canadian investigations led by Corporal Duggan**.

> *According to Corporal Duggan, the Niko investigation involved assistance of the United States Federal Bureau of Investigation, City of London Police, the World Bank, and the United States Department of Justice, eight completed Mutual Legal Requests, 16 Production Orders, and 20 people interviewed in six different countries.*[476]

815. The Respondents produced a report in the form of a PowerPoint presentation, in which Corporal Duggan accounted for the RCMP anti-corruption activity.[477] The presentation was entitled "Royal Canadian Mounted Police, Foreign Bribery Investigation by Corporal Kevin Duggan" and included a section on the Niko investigation under the heading "Project Koin: Niko Resources Ltd". The document shows the broad scope of the investigation, recording assistance to the RCMP from Bangladesh, Japan, Switzerland, Barbados, United States and the United Kingdom; specific mention is made of

- *FBI,*
- *City of London Police,*

[474] Agreed Statement of Facts, Exhibit R-215, paragraph 45.
[475] Khan Second Witness Statement, paragraph 4.
[476] R-PO13, paragraph 43.
[477] RCMP Foreign Bribery Investigations, Presentation, undated, Exhibit R-290.

- *World Bank,*
- *USDOJ,*
- *ACC Bangladesh,*
- *AFT and*
- *a number of Canadian bodies.*

The document also mentions:

- *Mutual Legal [Assistance] Requests completed,*
- *16 Production Orders,*
- *20 people interviewed in 6 different countries.*[478]

816. The authorities of the United States became involved in 2007 and, as she explained in her first witness statement, **Ms Debra LaPrevotte Griffith**, Supervisory Special Agent at the FBI, played an important role in the investigation. She had "*instituted the agency's Kleptocracy Program*" at the FBI. She described as a particular achievement that she had "*seized more than $1 billion in corrupt proceeds*" and that she was "*recognized as the F.B.I.'s expert in international money laundering and asset recovery*".[479] She described the initiation of the investigation as follows:

> *In 2007, the interim caretaker government in Bangladesh requested the assistance of the Unites States to investigate corruption in Bangladesh. The request for international cooperation was forwarded to the Department of Justice ("DOJ"), where it was assigned to Linda Samuel, the Deputy Chief of the Asset Forfeiture and Money Laundering Section. The investigative aspect of the request was assigned to me at the F.B.I. In January 2008, Linda Samuel and I travelled to Bangladesh to meet with our foreign counterparts and begin our investigations.*[480]

817. Following her report on that first visit, "*the F.B.I. agreed and we opened an umbrella case to address Bangladesh corruption*". During the following

[478] Procedural Order 14, paragraph 3.2, citing RCMP Foreign Bribery Investigations, PowerPoint Presentation, undated, Exhibit R-290.
[479] LaPrevotte First Witness Statement, paragraph 1.
[480] LaPrevotte First Witness Statement, paragraph 3.

years until 2011, she travelled four or five times to Bangladesh and "*worked closely with the National Coordination Committee against Grievous Offences ("NCCAGO") and then the Anti-Corruption Commission ("ACC") on the corruption cases we investigated*".[481]

818. In the course of this investigation, the F.B.I was "*informed of numerous corruption investigations opened in Bangladesh*" and addressed first the "*cases with a strong nexus to the U.S.*"

> *Niko was one such case, because Niko used a U.S. citizen as one of its so-called consultants in Bangladesh and eventually made him President of its subsidiary in Bangladesh.*[482]

819. As part of the FBI investigation in Bangladesh, Ms LaPrevotte described in some detail the case concerning the Siemens contract for a nationwide cell phone network in Bangladesh which was awarded to it at a value of US$40 million. In that case, "*Siemens pled guilty in the U.S. to paying bribes and kickbacks*" to secure the contract. The *modus operandi* which Ms LaPrevotte observed in the Siemens case, as in other cases, consisted in hiring "*on the ground*" consultants.[483]

820. With respect to her investigation of Niko, Ms LaPrevotte explained:

> *I continued to work closely with Bangladesh investigators until December 2015. I obtained records from the U.S., Bangladesh, Singapore, Switzerland and Canada. The F.B.I. investigated Niko Resources in cooperation with the Bangladeshi ACC and the Royal Canadian Mounted Police ("RCMP").*[484]

821. She also explained that the FBI investigations against Niko began in "*early 2008*",[485] at a time when she was already aware of the investigation in Canada. Her testimony continued by reporting on the FBI investigations and the conclusions she had reached, as discussed further below.

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[481] LaPrevotte First Witness Statement, paragraph 5.
[482] LaPrevotte First Witness Statement, paragraph 6.
[483] LaPrevotte First Witness Statement, paragraph 8 *et seq.* 14; see also below Section 8.2.
[484] LaPrevotte First Witness Statement, paragraph 18.
[485] LaPrevotte First Witness Statement, paragraph 30.

822. **Mr Ferdous Ahmed Khan** described the investigations in Bangladesh and explained that the "*Bangladeshi investigative teams were multi-disciplinary groups made up of higher-level officials from different departments [...] working in concert with the Governments of Canada and the United States*".[486] He played a key role in this investigation. Since 2007 he and his company Octokhan had been

> *... formally engaged to provide key strategic services to the Anti-Corruption Commission of Bangladesh, initially through the National Coordination Committee against Grievous Offences ('NCCAGO') and then directly to the Anti-Corruption Commission, the Office of the Attorney General for Bangladesh and other agencies. [He] was appointed Special Assistant to Prime Minister Sheikh Hasina on corruption matters in 2009 and [his] appointment was renewed in 2014.*[487]

823. Concerning the internal allocation of responsibilities in Bangladesh, Mr Khan testified that the Attorney General was formally responsible for engagement in the international mutual cooperation:

> *The Office of the Attorney General for Bangladesh sent mutual legal assistance requests to Canada and the US and the RCMP and the United States DOJ came to Bangladesh to investigate Niko offences, gather evidence of corruption and money laundering, and take witness statements. The Attorney General sent formal letters to his Canadian and US counterpart Central Authorities to share evidence among the three governments and cooperate in the investigation of Niko.*[488]

824. Concerning the gathering of the evidence by the "*joint Canadian-US-Bangladeshi investigation*", Mr Khan highlighted the close cooperation between the authorities of the three countries. As a result, documents used in Bangladesh bore the stamp of the RCMP even though they had originated in Bangladesh. Mr Khan explained:

> *The vast majority of that evidence was gathered in Bangladesh in joint efforts between Canadian and Bangladeshi officials. This evidence was then given to the RCMP through the mutual legal assistance process to be processed, indexed and scanned to create a*

[486] Khan Second Witness Statement, paragraph 9.
[487] Khan First Witness Statement, paragraph 3.
[488] Khan First Witness Statement, paragraph 34.

> *common source for the use of both countries and U.S. law enforcement agencies. It was returned to Bangladesh through the mutual legal assistance process and the RCMP stamp simply indicates that it has been shared with the RCMP, not that it was originally provided by Canada.*[489]

825. The written evidence and the testimony at the Hearing demonstrated the close cooperation between the agencies in the three countries. There is no indication that any relevant evidence supporting allegations of corruption by Niko was withheld by one of them. To the contrary, Mr Khan has testified that the RCMP was very supportive of making his evidence available in the present Arbitrations by testifying at the Hearing:

> *I also discussed my participation in this arbitration and my intention to provide the evidence to the Tribunals with my counterparts at the RCMP and the Canadian Department of Justice. They had no objections. To the contrary, they are very supportive of my efforts to bring the details of Niko's corrupt activities in Bangladesh to the attention of an international tribunal considering the matter.*[490]

826. The Tribunals had quoted in some of the Procedural Orders the statement by Mr Khan in his second witness statement about *"[t]he vast majority of that evidence"* (see paragraph 824). In their letter of 23 August 2017 the Respondents assert that this statement was taken out of context. They wrote:

> *Mr. Khan's statement was simply that most of the evidence provided to Bangladesh by Canada pursuant to the Mutual Legal Assistance request had been generated in Bangladesh. The witness's words in no way meant that there was not <u>other highly significant evidence in Canada to which Respondents and Bangladesh have never had access</u>, as Respondents have consistently argued.*

827. At the Hearing Mr Khan was clear about the extent of the cooperation and free exchange between the agencies:

> *The task forces then gathered those evidence and the foreign law enforcement agencies gathered those evidence. They were exchanged between the countries and between us, that means Bangladesh*

[489] Khan Second Witness Statement, paragraph 10.
[490] Khan Second Witness Statement, paragraph 11.

shared with Canada, Bangladesh shared with US. US and Canada exchanged with each other as well and we gave clearance for that.[491]

828. There is no indication in that statement, nor elsewhere in Mr Khan's testimony, that the Canadian investigators withheld evidence, especially interrogations of persons such as Mr Bhuiyan and Mr Sharif. Mr Khan was clear in explaining in his witness statement that the evidence gathered was understood as a joint effort; it was "*processed, indexed and scanned to create a common source for the use of both countries and the U.S. law enforcement agencies*".[492]

829. The Tribunals conclude that **Bangladesh had the full evidence that was gathered in the course of the Joint Investigation**, to the extent it was relevant to the Niko corruption allegation. In view of this close cooperation between the three law enforcement agencies, **the Tribunals have no reason to believe that the RCMP or the FBI withheld any evidence relevant for Niko's alleged corruption.** Consequently, it is now clear to the Tribunals that **any interventions of the Tribunals in Canada and the United States are not likely to produce evidence beyond that which is available in Bangladesh and accessible to the Respondents.**

830. Mr Khan asserted that the evidence gathered by Investigators demonstrated acts of corruption beyond the gift of the vehicle and the travel expenses. He stated that the Investigators were convinced that Niko procured the Agreements by corruption and that the RCMP officers were "*very disappointed when the Canadian prosecutors decided to accept a plea bargain for the bribe to State Minister Hossain involving an expensive car and payment for travel and leave the significant evidence of other corruption on the table*".[493] The Tribunals noted, however, that Corporal Duggan in the PowerPoint presentation of the Canadian corruption investigations indicates no other case of corruption and mentions, with respect to the outcome of the Niko case, only

The Bribe

- *Toyota Landcruiser valued at $ 194,000*

[491] Tr. Day 2 (CONFIDENTIAL), p. 113, ll. 3-9.
[492] Khan Second Witness Statement II, paragraph 10.
[493] Khan First Witness Statement, paragraph 45.

- *Trip to New York/Chicago*

Penalty

- *Fine $8.2 Million + 15% Victim Surcharge = $9.5 Million 3 years' probation with extensive monitoring conditions.*[494]

831. As recorded above in Section 2.7, the investigation against Niko in the United States was discontinued and the Department of Justice determined that "*prosecution is not necessary at this time in light of Niko's guilty plea in Canada*".

832. The Tribunals have nevertheless examined the evidence from the Joint Investigation, as it was presented in the Arbitrations, in order to determine whether it supported by other acts of corruption the Respondents' allegations that the Agreements were procured by corruption; and they have extended their own investigation beyond the evidence from the Joint Investigation.

8.2 The evidence from the Joint Investigation in the Arbitrations prior to the Corruption Claim

833. The Respondents referred to the corruption investigations first in the context of their objection to the Tribunals' jurisdiction in their Counter-Memorial of 16 May 2011. In that submission, the Respondents explained that the ACC had filed charges at "*Tejgaon Police Station Case No. 20 of 2007 against government officials under the provisions of the Prevention of Corruption Act 1947 and the Penal Code 1860, and there continues to be a pending charge against one former Prime Minister*". Answering a question from the Tribunals, the Respondents invited the Tribunals to order the Claimant to disclose any relevant documents.

834. The Claimant responded that it had received requests for information from the ACC and had been informed that the ACC was investigating whether public officials of the Government of Bangladesh accepted bribes in respect to investments in Bangladesh. The investigations also concerned Mr Qasim Sharif who was "*at one time an officer of Claimant*". The Claimant added that according to its information "*most, if not all, of the charges were stayed. The Claimant understands that no further*

[494] RCMP Foreign Bribery Investigations, Presentation, undated, Exhibit R-290.

proceedings have yet been taken on any charges that were not stayed, if in fact any charges remain outstanding." The Claimant declared that it "*was not told that it was a target of the investigation*".[495]

835. In response to a question from the Tribunals on 29 August 2011, the Respondents referred to the Canadian conviction based on the two gifts to the State Minister.[496]

836. The Tribunals tried to obtain further information about this investigation and discussed the matter at the Hearing on Jurisdiction on 13 and 14 October 2011. Mr Adolf and Mr Imam Hossain, witnesses presented by the Claimant and the Respondents, respectively, stated that they were aware of the ACC investigation. Mr Adolf stated that the ACC had approached Niko, requesting access to its files, and that it was provided such access. He added that he did not think that "*there is any further action taking place*". Mr Hossain stated that his knowledge was "*the same as Mr Adolf*", but added that "*one investigation is going on by the ACC and they have seized some files from Petrobangla*".[497]

837. Towards the end of the Hearing on Jurisdiction, the Claimant produced some documents emanating from the ACC, in particular the "Charge Sheet" dated 7 May 2008 and a document of 5 May 2008 reporting on discussions relating to the negotiations of the JVA and alleged illegalities committed in this context relating to the Charge Sheet.[498] The Decision on Jurisdiction recorded:

> *The Respondents' counsel stated that they had been unaware of the charge sheets prior to their delivery by the Claimant's counsel towards the end of the hearing; they could not provide any information about the status of these investigations.*

838. The Tribunals noted that, apart from the comments just described, "*no further evidence was provided about the investigation by the ACC*".[499]

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[495] Quoted as per Decision on Jurisdiction, paragraphs 394 – 397.
[496] See Decision on Jurisdiction, paragraphs 374 – 377.
[497] Decision on Jurisdiction, paragraph 398 with references.
[498] Decision on Jurisdiction, paragraph 399; in the present phase of the Arbitrations, a Charge Sheet against five persons related to the JVA negotiations, dated 5 May 2008, is produced as Exhibit R-211.
[499] Decision on Jurisdiction, 400 and 401.

839. As the account in the preceding section shows, by the time of the Hearing on Jurisdiction on 13 and 14 October 2011,

- the RCMP investigations had commenced in 2005;
- Canada had made a request to Bangladesh in 2006 for mutual legal assistance;
- the NCCAGO/ACC investigation had commenced in 2007 and possibly earlier;
- Mr Khan and his company had been engaged for assistance to the ACC and in 2009 he was appointed Special Assistant to Prime Minister Sheikh Hasina on corruption matters;
- the Office of the Bangladesh Attorney General had sent mutual assistance requests to Canada and the U.S. and officials from these countries had come to Bangladesh to investigate, *inter alia*, the case of Niko;
- further to the request to the United States in 2007, Ms LaPrevotte had travelled in January 2008 to Bangladesh to begin her investigative work there;
- prior to May 2008, documents relating to the negotiations of the JVA, the GPSA and the blowouts had been seized in the offices of Petrobangla in the course of the ACC investigation;[500] they are mentioned in the Charge Sheet of 5 May 2008.

840. During the proceedings on jurisdiction, the Government of Bangladesh was still a party to the Arbitrations and, as such, responsible for the submissions made and represented at the Hearing. The Tribunals find it difficult to believe that the Attorney General, who was responsible for the requests for legal assistance to Canada and the United States, would not have been aware of the Joint Investigation and its results.

841. At the April 2017 Hearing, Mr Khan was questioned by the Respondents' counsel:

> *… Mr Khan, can you please explain to the Tribunal how and when you acquired the evidence you presented in this arbitration?*

[500] These seizures are mentioned in the Charge Sheet of 5 May 2008, Exhibit R-211.

MR KHAN: The evidence was collected after I was engaged from 2007 to around 2011. The package of evidence that came from Canada was collected by me from Ottawa in September 2011.

The US evidence was in process. We have not received anything formally from US on Niko case. We have received other evidence on other cases but not Niko case. Canadian evidence, once it was received in September after due process, I handed it over to Anti-Corruption Commission, through the Attorney General's office in December 2011.

MS TSUTIEVA: Thank you, Mr Khan. When did you share it with Respondents' counsel?

MR KHAN: The Respondents' then counsel was Tawfique Nawaz and Tawfique Nawaz I believe was handed over the evidence package by me in the first half of March 2012, sir.

MS TSUTIEVA: Thank you, Mr Khan. Who authorised you to give him, to give Mr Nawaz this evidence?

MR KHAN: It was the Attorney General for Bangladesh Mr Mahbubey Alam authorised it.

MS TSUTIEVA: Why did you give it directly to Mr Tawfique Nawaz?

MR KHAN: It is in evidence and I was instructed by the Attorney General to give it directly to Tawfique Nawaz.

MS TSUTIEVA: Mr Khan, do you know what he did with this evidence?

MR KHAN: No, I do not, sir.

MS TSUTIEVA: Mr Khan, why did you not disclose this in your statement submitted in this arbitration?

MR KHAN: I did not see the importance of mentioning that in my witness statement.

MS TSUTIEVA: When did you share this evidence with Respondents' current counsel, Foley Hoag?

MR KHAN: I was contacted by Foley Hoag around June last year, 2016, and after that, the due process, then I handed it over to Foley Hoag in September 2016.

MS TSUTIEVA: Mr Khan, can you tell us who authorised you to do so at this time?

> *MR KHAN: The Principal Secretary in the Prime Minister's Office telephoned me asking me to assist Foley Hoag and then I asked him to set up due process. Then subsequently Foley Hoag entered into an arrangement with my firm Octokhan in their London office to receive this evidence properly and then I handed it over to Foley Hoag.*[501]

842. In this exchange Mr Khan testifies that **the evidence was collected from 2007 to around 2011**. The information about the date when he collected the evidence from Canada must be seen in conjunction with his testimony, elsewhere in his evidence, about the manner in which the testimony was collected and delivered to Canada. In his second witness Statement he explained that

> *the vast majority of that evidence was gathered in Bangladesh in joint efforts between Canadian and Bangladeshi officials. This evidence was then given to the RCMP through the mutual legal assistance process to be processed, indexed and scanned to create a common source for the use of both countries and U.S. law enforcement agencies. It was returned to Bangladesh through the mutual legal assistance process and the RCMP stamp simply indicates that it has been shared with the RCMP, not that it was originally provided by Canada.*[502]

843. The Tribunals conclude that the evidence which Mr Khan collected in September 2011 from Ottawa had been gathered, in its vast majority, in Bangladesh and had been delivered to Canada for processing "*to create a common source for the use of both countries and U.S. law enforcement agencies*", as described by him. In other words, by the time of the Hearing on Jurisdiction on 13 to 14 October 2011, a great preponderance of the evidence had been gathered in Bangladesh, was available to the Attorney General, and could have been produced by the Government in its defence against jurisdiction in the present case

844. Mr Khan testified that during the first half of March 2012, he delivered this evidence to the Respondents' counsel in the present proceedings. These Arbitrations continued; the Tribunals decided the objections to their jurisdiction and then the Payment Claim, ordered Petrobangla to pay for the gas delivered by the BAPEX/Niko Joint Venture, and advanced in the proceedings on the Compensation Declaration. No claim to avoid the Agreements on grounds of corruption was raised.

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[501] Tr. Day 2 (CONFIDENTIAL), pp. 118 to 120.
[502] Khan Second Witness Statement, paragraph 10.

845. The Respondents explain that their failure to act on the evidence made available to their prior counsel was due to the failure of that counsel who was "*fired for inadequate representation*".[503] They do not explain how their counsel's supposed inadequacy for so long escaped their attention.

846. Mr Khan testified that the Attorney General instructed him to deliver the evidence gathered in the Joint Investigation, after it had been processed in Canada, to counsel of the Respondents, who -- at that time and until the Government was released from these Arbitrations by the Decision on Jurisdiction – was also the Government's counsel. There is no explanation why in the Arbitrations the Government did not make available this evidence as it had been collected, before it delivered it to Canada, or indeed thereafter.

847. Instead, the Respondents during the jurisdiction phase, which included the Government of Bangladesh, made the following statement:

> *The Respondents do not intend to argue that the contract is void or voidable, by reason of corruption or otherwise. They would, of course, revisit this position if further disclosure made it appropriate to do so.*[504]

848. In other words, by August 2011, the Government, Petrobangla and BAPEX did not consider that the evidence then available justified the conclusion that the Agreements were void or voidable on grounds of corruption.

8.3 The Respondents' use of the Joint Investigation in the proceedings on the Corruption Claim

849. When it introduced the Corruption Claim in its Memorial on Damages of 25 March 2016, BAPEX asserted that it relied on "*new evidence of corruption recently obtained by BAPEX [which] fundamentally change the nature of these proceedings*".[505] Petrobangla approved the presentation of BAPEX in a separate letter of the same date.

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[503] R-PHB2 (CONFIDENTIAL), paragraph 1; also paragraphs 211 *et seq.*
[504] Respondents' letter of 29 August 2011, quoted from the Decision on Jurisdiction, paragraph 377.
[505] B-MD, paragraph 1.

850. The evidence which BAPEX presented to justify the newly introduced Corruption Claim does not appear to have been the same as that collected in the Joint Investigation which Mr Khan, on instructions of the Attorney General, had delivered to the Respondents' counsel in March 2012. BAPEX did not even mention the Joint Investigation. It explained that the "*evidence of payments made to obtain the JVA was discovered by the ACC investigation*" and asserted that a judgment "*late last year*" lifted a stay on the criminal proceedings against ex-Prime Minister Khaleda Zia. The judgment in question had been rendered by the High Court Division of the Supreme Court in proceedings under Article 102 of the Constitution, initiated in 2008, and had been rendered orally on 18 June 2015 and in writing on 5 November 2015.[506]

851. With the start of the trial, according to the explanations in the BAPEX Memorial, the ACC provided the Respondents "*with some of the evidence it recently submitted to the Bangladesh court*".[507] In that Memorial, BAPEX relied essentially on the "*new information from Corporal Duggan's affidavit, as corroborated by the ACC charge sheet and the recent Order of the Supreme Court*".[508] Without mentioning the legal assistance between Canada and Bangladesh, BAPEX asserted that it "*would be even more difficult and costly for the Canadian Government to gather evidence in Bangladesh …*"[509]

852. As to the investigations in Bangladesh, BAPEX insisted on the independence of the ACC which had made it impossible to access information from its inquiries. BAPEX went so far as to write:

> *The Government has no control over the activities of the ACC and, for obvious reasons, the ACC has no obligation to share information with the Government, much less a company like BAPEX or Petrobangla.*[510]

853. On the strength of this curious affirmation, BAPEX continued to describe the difficulty it had encountered in seeking evidence and information with respect to the alleged corruption:

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[506] *Begum Khaleda Zia v. Anit-Corruption Commission and ors.*, Writ Petition No. 4982 of 2008 (High Ct. Div.), Order Lifting Stay of Proceedings, 5 November 2015, Exhibit R-230; see also above Section 2.6.3.
[507] B-MD, paragraph 41.
[508] B-MD, paragraph 55.
[509] B-MD, paragraph 54.
[510] B-MD, paragraph 41.

> *Other than the court orders available, BAPEX/Petrobangla have had no information on the content of the ACC investigation or what evidence was being gathered. BAPEX and Petrobangla have requested documentation from the ACC on the Niko corruption case, and now that the trial has restarted, the ACC has provided them with some of the evidence that it recently submitted to the Bangladesh court. Only this week has BAPEX received the information from the ACC to be able to share it with the Tribunal. The full record, however, is still not public and is not yet available to BAPEX.*[511]

854. Elsewhere in the Memorial on Damages BAPEX wrote:

> *BAPEX did not have access to the information from the ACC investigation and did not have Corporal Duggan's affidavit. It had to wait for the investigation and criminal proceedings underway in Bangladesh to progress to a stage where the evidence would become available. When that proceeding started back up last year, BAPEX sought to gather the evidence needed for this Tribunal to determine that the agreements were procured by corruption and are therefore voidable.*[512]

855. In their response to the Tribunals' enquiry about information and evidence concerning the negotiation and conclusion of the two Agreements (Procedural Order No 13), the Respondents repeated that they "*do not have access to all the information uncovered in investigations of Niko by the Anti-Corruption Commission ("ACC"), the Royal Canadian Mounted Police ("RCMP"), and others*".[513]

856. During the weeks that followed the introduction of their Corruption Claim, the Respondents requested evidence from the Claimant and sought to engage the Tribunals in interventions with the Canadian authorities and in the court proceedings in Bangladesh in order to obtain, through Mr Khan, evidence collected by the ACC.[514] As explained above, on 8 August 2016 the Respondents made an application to the Tribunals requesting them to "*issue a declaration that could be presented to the court*" which was dealing with the *Alam* Writ Petition. They asserted that this intervention by the Tribunals was necessary, "*[b]ecause this evidence*

[511] B-MD, paragraph 41.
[512] B-MD, paragraph 59.
[513] R-RPO13, paragraph 3.
[514] Details have been described above in Section 2.4.4.

is part of the ACC investigation, without authorization from the ACC or a Bangladeshi court order, such evidence is not available to Respondents or these Tribunals."[515]

857. In its Memorial on Damages, BAPEX asserted that the Respondents "*have requested documentation from the ACC on the Niko corruption case*"[516] but did not provide any details on these requests. Since the Attorney General, already in 2011, had given instruction to deliver the evidence from the Joint Investigation to the Respondents, it is difficult to understand why the delivery of that evidence should be refused subsequently.

858. The Respondents made repeated requests by which they sought to engage the Tribunals in interventions before the Canadian authorities. They did so before and also after they had presented, essentially through the witness statements of Mr Ferdous Ahmed Khan and Ms Debra LaPrevotte Griffith, detailed explanations about the joint Canadian/ Bangladeshi/ U.S. investigation. These explanations made it clear that the evidence gathered in this Joint Investigation was shared between the participating organisations.

859. The sharing was systematic to the point that, as explained by Mr Khan, it "*was processed, indexed and scanned to create a common source for the use of both countries [Bangladesh and Canada] and U.S. law enforcement agencies*". The Tribunals, therefore, find it difficult to understand the insistence with which the Respondents have sought to engage the Tribunals in interventions in Canada to obtain evidence that had been shared with the authorities in Bangladesh.

860. Mr Khan's testimony at the Hearing, as quoted above, also seems to indicate that, prior to the initiative of their new counsel in June 2016, the Respondents made no effort to obtain the evidence from the Joint Investigation available in Bangladesh. As Mr Khan explained, the newly instructed counsel contacted him in June 2016. It was only then, on instructions of the Principal Secretary in the Prime Minister's Office, that Mr Khan delivered the evidence to the Respondents' counsel in September 2016.

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[515] Respondents' letter of 8 August 2016, p. 2, accompanied by a copy of the Application of 24 July 2016, Exhibit R-299.
[516] B-MD, paragraph 41.

861. In these circumstances, the Tribunals must conclude that the Respondents and the Government which controls them previously had no serious interest or intention in these Tribunals' examining the case of the alleged corruption by Niko.

862. The Tribunals also note that, once the evidence from the Joint Investigation had been delivered to them by Mr Khan, the Respondents continued their procedural applications seeking to engage the Tribunals in searches and interventions with little if any prospect of additional relevant evidence.

863. In an application of 26 January 2017, amplified on 3 February 2017, the Respondents requested, once again, an intervention in Canada, this time by an application to the Alberta Court of Queen's Bench, with an engagement of reciprocity by ICSID, for the appearance of Corporal Duggan and the production of videos and transcripts of interviews presumably made by investigating officers of persons not available for questioning by opposing counsel and the Tribunals. The application was discussed extensively at the Status Conference on 30 January 2017 (see Sections 2.4.9 and 2.4.10).

864. The Respondents also followed a different approach in a new attempt to obtain evidence concerning the Joint Investigation by a request on 14 March 2017, seeking (under the heading "Documents from the criminal investigations", production of

> *]r]ecords in any format held by or available to Claimant or its former counsel pertaining to the ACC, Canadian, or U.S. investigations of Niko's activities in Bangladesh.*

865. Both applications were denied in Procedural Order No 18.[517]

866. The Respondents' attempts continued even after the April 2017 Hearing and the closure of the evidence on the Corruption Claim. As explained above in Section 2.4.17, the Respondents made another attempt on 23 August 2017 to seek the Tribunals' intervention with the Canadian authorities to hear Corporal Duggan. In their letter of that date, the Respondents brought "*to the Tribunals' attention a letter from the RCMP regarding evidence from the Canadian investigation*". The Respondents

[517] See above Section 2.4.11.

produced a letter by which the Deputy Commissioner, Federal Policing, RCMP, responded on 21 April 2017 to a request of the Attorney General of Bangladesh, dated 26 March 2017. The Attorney General's request seems to have concerned permission for Corporal Duggan to appear for cross-examination at the Tribunals' hearing in Paris of 24 to 29 April 2017. The Respondents did not produce the request of the Attorney General; but the RCMP concluded from it that the Tribunals "*indicated that [they do] not wish to hear from the RCMP, either through documentary evidence or through live witnesses*". The RCMP concluded that, in these circumstances, "*the RCMP will be unable to voluntarily participate in the matters before the Tribunal[s]*". The RCMP added that "*if further involvement is required by either the Claimant (Niko) or Respondents (Bapex and Petrobangla), the RCMP would need a request from the Tribunals, which it would then consider before determining how to proceed*".

867. In their letter of 23 August 2017 the Respondents asserted

> *…there can be no doubt that the RCMP and its officers hold significant evidence that is relevant and material to the question of Niko's corrupt procurement of the JVA and the GPSA […] Their testimony and evidence is not available to the Respondents through any other means. Accordingly, to the extent the Tribunals consider giving any credence to Claimant's arguments regarding the sufficiency of the evidence, Respondents would request that they accept the RCMP's offer and request the testimony of the agents and the additional evidence in its possession.*
>
> *Respondents have presented more than sufficient evidence to prove that Niko established its investment and procured the JVA and GPSA in bad faith, illegally, and by corruption. It should thus be unnecessary for the Tribunals to reopen the evidentiary proceedings on corruption. Nevertheless, in light of Claimant's assertion of privilege and its continued arguments challenging the sufficiency of the evidence, Respondents feel compelled to bring this option for gathering additional evidence to the Tribunals' attention.*

868. In the absence of a specific request for action, the Tribunals informed the Parties on 11 September 2017 that they would address the matter in due course as necessary. The Tribunals have accepted to hear the testimony of Ms LaPrevotte and Mr Khan, two of the investigators. They did not refuse to hear Corporal Duggan, contrary to what the RCMP was made to believe. The Respondents failed to bring the correspondence about

Corporal Duggan's testimony to the attention of the Tribunals at the Hearing or at any time before the closing of the evidentiary record; the Tribunals did not see a justification for re-opening of the evidence.

869. As to the documentary evidence held by the RCMP to which the Respondents made reference in their 23 August 2017 letter, the Tribunals have pointed above to the very close cooperation between three agencies investigating corruption the Niko case. The Respondents have not shown any evidence nor even argued that the RCMP refused a request from the Bangladeshi authorities to share evidence gathered in the Niko investigation. The RCMP letter of 14 April 2017 does not indicate the contrary.

8.4 Collection of evidence in the course of the proceedings

870. When the Tribunals decided to address the Respondents' Corruption Claim with priority, they considered possible approaches for examining the corruption charges as effectively as possible with the means at the disposal of an ICSID arbitral tribunal (see Section 2.4). As a first step, they sought to gather information and documents related to the negotiation and conclusion of the Agreements. They issued Procedural Order No 13, inviting the Parties

- to provide a detailed account of the negotiations, and
- to identify persons who could testify about the negotiation and conclusion of the two Agreements and possible corruption influence in this process (the Tribunals informed the Parties of their intention to hear as witnesses "*persons who were involved in the negotiations and conclusion of the JVA and the GPSA, including those involved in the Government approval of these Agreements*").

871. The Parties did indeed provide, on 14 June 2016 and on other occasions, accounts of the negotiation and conclusion of the Agreements referring also to the detailed account the Tribunals had given in the Decision on Jurisdiction. Further information and evidence was provided with subsequent submissions, both with respect to witnesses and documentary evidence.

8.4.1 Potential Witness Testimony

872. The Parties also provided lists of persons engaged in the negotiations.

873. **The Claimant** explained, in its letter of 14 June 2016, that **Mr Robert Ohlson**, the former President and CEO of Niko Canada, who had both day-to-day control and overall responsibility for negotiations relating to the JVA, died in 2004. *"[P]rior to the JVA being signed Niko acted in Bangladesh purely through a local agent, Mr* ***Qasim Sharif*** *who subsequently served as President of Niko until 2005*". The Claimant explained that it had no association with him "*for many years, and Niko has no recent contact with him*". It mentioned also **Mr William Hornaday**, **Mr Brian Adolf** and **Mr Amit Goyal** who had "*significant involvement*" in the negotiations and/or execution of the GPSA. The Claimant indicated names of persons involved in the GPSA negotiations.

874. **The Respondents** provided in Annex B to their Responses to Procedural Order No 13 of 14 June 2016 a list of persons involved, on the side of Petrobangla and BAPEX, in the negotiations of the GPSA.

875. In view of the information and documentation provided by the Parties in response to Procedural Order No 13, the Tribunals sought further clarifications by Procedural Order No 14, in particular with respect to the functions of potential witnesses and their role in the negotiations as well as information on the manner in which they could be contacted. In response, the Parties updated the information on 8 August 2016.

876. The Claimant, in its letter of 8 August 2016, provided further information about the three employees previously identified and confirmed that they were available for testifying before the Tribunals. It also referred to three persons who had provided **sworn affidavits in the *BELA* Proceedings** on behalf of BAPEX, Petrobangla and the Government, viz. **Muhammad Imaduddin**, Managing Director of BAPEX, MD. **Nurul Islam**, Deputy Secretary, Energy Ministry and **Mohammad Hossain**, Secretary of Petrobangla. The Claimant explained that they had provided an account of the negotiations of the JVA, attesting that "*the JVA was valid and that none of the Government, Petrobangla or BAPEX was involved in any fraud or misconduct in entering into the JVA*". The Claimant suggested that they "*may have information that could also assist the Tribunals*".

877. The Respondents provided, also on 8 August 2016, an updated version of Annex B, containing additional details about the persons listed, their role in the negotiations, and their current position and address (**the Respondents' Updated List**). In the accompanying letter, however, the Respondents added this:

> *Respondents would like to inform the Tribunals that they have doubts about the availability of the persons named. BAPEX and Petrobangla have reached out to some of the persons named to obtain the updated contact information, and many of them have made it clear that they are unwilling or unable to appear before the Tribunals to testify.*[518]

878. The Respondents commented on the Claimant's statements about persons involved on its side. They mentioned **Edward Sampson**, describing him as "*the Executive Chairman of Niko's parent company who worked closely with Mr Ohlson when it was entering Bangladesh*". They added that Mr Sampson had retired from his role as Chairman, CEO and President of Niko Canada at the end of 2013 but remained one of the largest individual shareholders. As to Mr Sharif, the Respondents stated that

> *Mr Sharif has a large online presence and his contact information in the United States is available. If Niko is unable to provide it in today's submission, Respondents can provide contact information for Mr Sharif. If Niko is unable to produce him as a witness, Respondents request that the Tribunals make a request under the laws of the United States (28 USC 1782) for the district court where Mr. Sharif resides to order him to give his testimony in these proceedings.*[519]

879. The Tribunals addressed these issues concerning witness testimony in the August and September 2016 Procedural Consultations and in Procedural Order No 15, in which the Tribunals instructed the Claimant to provide Witness Statements from Mr Hornaday, Mr Adolph and Mr Goyal and to ensure their presence at the April 2017 Hearing. With respect to Mr Sampson and Mr Sharif, the Tribunals:

> *order the Claimant to seek to obtain a Witness Statement from Mr Sampson as well as his agreement to attend the Evidentiary Hearing as a witness; if the Claimant is unable to do so, it shall describe the*

[518] Respondents' letter of 8 August 2016, p. 5.
[519] Respondents' letter of 8 August 2016, p. 6.

steps it has taken to obtain the Witness Statement and Mr Sampson's appearance at the hearing;

note the Claimant's statement that it has no control over Mr Sharif, has no contact with him and did not know his whereabouts. At the September 2016 Procedural Consultation, the Claimant confirmed that Niko had no contact with Mr Sharif for many years. The Respondents state that they were able to locate Mr Sharif in Houston, Texas. The Respondents are invited to obtain a Witness Statement from Mr Sharif and ensure his appearance at the Evidentiary Hearing. The Tribunals note the Respondents' explanations concerning the possible objections by reason of Mr Sharif's earlier role as agent and officer of companies of the Niko Group. They instruct the Claimant to deliver to the Respondents no later than 14 October 2016 a declaration in the name of all companies of the Niko Group by which Mr Sharif had been engaged as agent or officer, releasing him of all obligations which would prevent him to provide the above described Witness Statement and to appear at the Evidentiary Hearing. If the Respondents nevertheless are unable to obtain from him a Witness Statement and to procure his presence at the Evidentiary Hearing, they shall describe the steps they have taken in this respect.[520]

880. The Tribunals also decided that the three **affidavits in the *BELA* Proceedi**ngs should be part of the record and invited both Parties to contact the affiants with the objective of ensuring their appearance at the April 2017 Hearing. Concerning the persons on the list of persons presented as Annex B, the Tribunals noted that at the August and September Procedural Consultations the Respondents surprisingly declared that they were unable to identify the persons whom they had contacted and which of them were unwilling or unable to testify. The Respondents were invited to identify "*the persons on their list whom they have contacted and indicate those who are prepared to testify before the Tribunals and to appear at the April 2017 Hearing, indicating subject matter and time period which the testimony is expected to cover*". The Tribunals reserved the decision as to who of these persons they required to present a witness statement and to appear at the April 2017 Hearing.

881. On **27 October 2016**, the Respondents provided the requested information on the potential witnesses on their side:

Counsel for Respondents has been able to speak with a number of the individuals from the list of persons who had some involvement in

[520] Procedural Order No 15, paragraph 53 (i)-(ii).

the negotiations of the JVA and the GPSA provided to the Tribunals on 8 August 2016. We note that list did not contain complete information on the current employment status of all the persons listed. Respondents confirm that all Petrobangla or BAPEX employees on the list have retired or resigned from service except for Mr. A K M Anwarul Islam, who is still in service at BAPEX.

We have spoken to the following individuals and can provide the following information about their knowledge of relevant events:

***Major (Rtd.) M. Muqtadir Ali** – Major Ali was Managing Director of BAPEX for six months in 1998-1999 and again from April 2000 to August 2001. He could be available to testify, but he was not involved during some of the key period of negotiation of the JVA. [The Updated List also stated that "he was involved in all the correspondence made with regards to the JVA during his term as MD, Bapex and was involved in the JVA negotiations"].*

***Mr. Maqbul-E-Elahi** – Mr. Elahi was Managing Director of BAPEX from August 2001 through July 2003. He is available to testify and knows about the negotiation of the JVA during the two years before it was approved.*

***Mr. A K M Anwarul Islam** – Mr. Islam was involved in negotiation of the JVA as a financial analyst. He could be available to testify, but has indicated that he only has knowledge of the negotiations regarding the investment multiple and has no knowledge of other aspects of the negotiations.*

***Mr. Rahman Murshed** – Mr. Murshed was at Petrobangla when the GPSA was negotiated. He states that he does not recollect any details of the negotiations.*

***Mr. Ataul Haque** – Mr. Haque was at Petrobangla when the GPSA was negotiated, until August 2006. He states that he took notes for the meeting minutes, but he does not recall any details and was not part of the decision-making process.*

***Mr. M. Nazrul Islam** – Mr. Islam was Director of Finance at Petrobangla for six months in 2006 before he retired. He attended the meeting during which the GPSA was approved, but was not involved in negotiating the GPSA and did not review the GPSA outside of that meeting.*

Based on the information gathered in these conversations, we will provide a witness statement from Mr. Maqbul-E-Elahi. We do not believe that any of the others have sufficient recollection or knowledge

of negotiations of the JVA and GPSA to merit calling them to testify before the Tribunals. As our understanding of events grows through review of the documents and these interviews, we think it would be best to focus on a shorter list of key people, as many people on the original list had only peripheral roles. We have therefore identified a short list of persons that appear to be key people, noted in the attached chart with information about efforts to contact them.[521]

882. The chart attached to the letter, entitled "**Key Persons involved** in the Negotiations of the JVA & GPSA" provided information about six persons. One of them was **Mr Maqbul-E-Elahi**, mentioned above. Another, Engr. M.A. Based, MD BAPEX from 8 November 2003 to 9 June 2005, was deceased. For two others availability was marked as "*unknown – ongoing efforts to contact*": **Engr. Atiqur Raman** (interim), MD BAPEX from 9 July 2003 to 8 November 2003, and **Mr Mohammad Mosharraf Hossain Bhuiyan**, Chairman, Petrobangla from 14 December 2005 to 9 January 2007. The remaining two persons seemed of particular importance for the Tribunals' examination:

- **Mr Jahingir Kabir** held key positions in Petrobangla throughout the Targeted Period and at the time when both Agreements were concluded. He was identified as "*GM (PCD)*" in Petrobangla from 27 January 1999 until 25 February 2004 and thereafter Sr. GM (PCD) from 26 February 2004 to 12 November 2006. The Respondents also indicated that he was Convener of the JVA Review Committee.

- **Mr Raihanul Abedin** held key positions in Petrobangla during critical periods. He was identified as Senior General Manager (Planning) in Petrobangla from 1 March to 31 July 2001, the period during which the Procedure, including the provision specific to Niko's JVA, was adopted; and as Director (PSC) from 28 January 2003 to 30 June 2006, the period during which the JVA was finalised until shortly before the conclusion of the GPSA; during the time between these two assignments in Petrobangla, Mr Abedin held the position of Managing Director at RPGCL, apparently another subsidiary of Petrobangla. The Respondents described his involvement in the negotiations of the two agreements as *"[i]nvolved in finalisation of the JVA and GPSA and communicated with legal advisor of Petrobangla, BPAEX and Niko*

[521] Respondents' letter of 27 October 2016, pp. 1-2.

during his tenure as Director (PSC)". The allegation of bribes paid to him in the context of the GPSA negotiations is discussed below in Section 11.8.2.

883. The Respondents informed the Tribunals that both of these important potential witnesses were not available and explained: *"[u]nwilling; refused to attend video conference and to be a witness*".[522]

884. There were a number of persons identified in the Respondents' Updated List of 8 August 2016 about whom the Respondents did not provide further information, even though, judging from that List, they appeared as potentially important sources of information; these included:

- **Ms Mahbubun NAHAR** Senior Assistant Secretary Ministry, who, according to the Updated List, "issued a letter dated 11.10.2003 instructing Petrobangla to sign final JVA in accordance with the summary proposal approved by the Hon'ble Prime Minister (R-280)" and the letter dated 14 June 2004 "instructing Petrobangla to take necessary measure on emergency basis to sing GPSA with Niko for purchasing gas produced from Feni gas filed within 20.6.2004 and after doing so inform the EMRD accordingly" (R.282); the Updated List indicated that she had "retired as Additional Secretary";

- **Mr Kamal SIDDIQI**, Principal Secretary, Prime Minister's office; according to the Updated List he was "accused in the Niko Graft Case in connection with the approval of the JVA; played role in getting Prime Minister's approval for finalising JVA by suppressing information"; the List indicated his address and specified that he was "retired from service";

- **Mr C.M. Yusouf HOSSAIN**, Senior Assistant Secretary Ministry, presently Joint Secretary & Director (Finance) Petrobangla; the Updated List states that he was "accused by ACC in the Niko Graft Case in connection with the approval of JVA; responsible for referring the matter of Swiss Challenge system to the Law Minister and suppressing information";

- **Mr Shafiur Rahman**, Company Secretary BAPEX, signed the FOU; the Updated List adds "later General Manager, Petrobangla. Retired from service";

[522] Respondents' letter of 27 October 2016, p. 3.

- **Mr Rahman MURSHED**, identified as Member of the Bangladesh Energy Regulatory Commission, "involved in finalising the GPSA" (Updated List of Persons).

885. The Tribunals also noted that some persons who were engaged in critical activities relevant for the negotiations of the Agreements were not mentioned in any of the Lists, in particular

- **Mr Mizanur RAHMAN**, Senior Assistant Secretary, Ministry, who signed letters of 25 May 1999 (the Government's acceptance to proceed with the Niko Project, R-270), and 12 August 1999 (directing that a Study be conducted and giving approval to complete the FOU, Exhibit JD C-7, p. 502), 19 and 29 March 2001 (R-337 and R-274, instructing completion of the JVA).

- **Mr Shafiqur RAHMAN**, Senior Assistant Secretary, Ministry in 2003 (see Exhibit C-153); signed the letter of 1 April 2003, which reported on the Opinion of the Law Ministry (C-153 and R-307);

886. Concerning the persons who had provided affidavits in the *BELA* Proceedings, the Respondents produced with their Memorial on Corruption of 27 November 2016, witness statements of two of them (**Md Imaduddin and Mr Nurul Islam**) in which they declared that the affidavits had been prepared without their knowledge and had not been signed by them; Md Imaduddin and Mr Islam stated that they had no knowledge of the matters contained in their affidavit and that the content did not represent their personal knowledge.[523] The Respondents explained that "*efforts to contact **Mr Hossain**, the other affiant in the BELA Proceedings, and other Petrobangla officials are ongoing*".[524]

887. The Claimant explained that on 17 November 2016 it had written to all three of the affiants, but received no response to its letters.[525]

888. As explained above in Section 2, the Respondents also produced a witness statement by Mr Elahi.

[523] Imaduddin Witness Statement, paragraph 6 ans Islam Witness Statement, paragraph 7.
[524] R-MC, paragraph 18.
[525] C-CMC, paragraph 22.

889. Generally with respect to the availability of witnesses the Respondents explained:

> *We note that issues related to Niko's corruption and the officials affected by it are very delicate in Bangladesh. Those accused of corruption are powerful and are reputed to use threats, intimidation, and violence. It is not easy for anyone in Bangladesh to make these accusations and retired officials are understandably reluctant to get involved in this matter, with the significant risks doing so could entail for them and their families.*[526]

890. With their Memorial on Corruption of 23 November 2016, the Respondents also produced witness statements of **Mr Ferdous Ahmed Khan and Ms Debra LaPrevotte Griffith** describing the Joint Investigation. The Respondent declared that both persons were available for examination at the April 2017 Hearing, scheduled for 24 to 28 April 2017 (with 29 April in reserve). In its letter of 11 January 2017, the Claimant raised the question *"[w]hether it will be useful for 'witnesses' with no personal knowledge of the facts they address, such as Mr. F. Khan and Ms. LaPrevotte Griffith, to testify at the April 2017 Hearing and for Niko to prepare to cross-examine such 'witnesses'"*. The Respondents replied on 17 January 2017, insisting that these persons be heard, arguing that they are "*entitled to marshal the evidence and make arguments without a referee making calls mid-play*".

891. On the occasion of the Status Conference on 30 January 2017, the Claimant clarified that it did not seek the exclusion of the evidence in question; rather the Claimant argued that no or very little weight should be given to it. According to the Claimant, advance clarification of this aspect could be of assistance to the Claimant when deciding whether to call Mr Khan and Ms LaPrevotte Griffith to testify at the April 2017 Hearing, or otherwise assist in the preparation of its forthcoming submission. The Respondents announced during the Status Conference their intention of calling Mr Khan and Ms LaPrevotte Griffith to appear for testimony at the April 2017 Hearing.

892. In Procedural Order No 18 of 23 March 2017 the Tribunals took the following position:

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[526] R-MC, paragraph 18.

Concerning the witness statements of these two persons, the Tribunals noted that their testimony concerns aspects of the joint investigations of the Niko corruption allegations. The statements include assessment of the evidence gathered about corruption in Bangladesh in general and against Niko specifically. The testimony of these two persons is similar to that of Corporal Duggan, except that, according to the Respondents, no legal assistance intervention by the Tribunals with the Court in Alberta is required.

The Tribunals are aware of the Claimant's objections concerning the hearsay nature of much of the two witness statements. The Tribunals note that they are not bound by strict rules on the admissibility of evidence. The Tribunals will take the Claimant's observations into consideration when it comes to the assessment of the testimony.

The Tribunals admit the appearance of Mr Khan and Ms LaPrevotte Griffith as witnesses. Following the procedure previously adopted for other witnesses, witness statements are accepted as direct testimony if the witnesses appear for examination when called upon to testify.[527]

893. Concerning **Mr Sharif**, the Claimant wrote to him on 14 October 2016, further to the instructions of the Tribunals in Procedural Order No 15, confirming that Niko

is not asserting (and will not in the future assert) that you are subject to any ongoing duty of confidentiality arising either by virtue of your prior employment relationship with [Niko], or by virtue of consulting and/or management services you performed on behalf of Stratum Developments Ltd for [Niko], which would prevent you from providing a witness statement and/or testifying as a witness in connection with the ICSID Arbitration Proceedings.[528]

894. The Respondents, referring to the Tribunals instructions in Procedural Order No 15, explained that

counsel for Respondents contacted him and met with him. Mr Sharif is charged with corruption-related crimes in two separate cases in Bangladesh and said that he is not willing to provide a witness statement or appear at the Hearing unless granted immunity by the Government of Bangladesh.[529]

[527] Procedural Order No 18, paragraphs 99 to 101.
[528] Letter communicated by the Claimant to the Respondents' Counsel by its letter of 17 October 2016.
[529] R-MC, paragraph 17.

895. The Claimant responded to the Tribunals' instruction concerning Mr Ed Sampson, explaining that its counsel "*reached out to [him] to inquire of his willingness to participate as a witness. Mr Sampson expressed his unwillingness to participate as a witness and emphasised the staleness of these matters and his retirement status*".[530]

896. As stated in Section 2.4.13, Mr Adolph, Mr Hornaday and Mr Goyal, on the Claimant's side and Mr Chowdhury, Mr Elahi, Ms LaPrevotte and Mr Khan, on the Respondents' side, appeared at the April 2017 Hearing and testified.

8.4.2 Documentary Evidence

897. Concerning the search for **documentary evidence**, the Parties assured the Tribunals that they were making efforts of retrieval but described difficulties they were facing for a variety of reasons, largely resulting from the time that had elapsed since the relevant events.

898. In their first response to Procedural Order No 13, the Parties indicated that their search for documents was still ongoing. In that response and on other occasions, the Parties again referred to the **difficulties they had in retrieving relevant evidence**.

899. **The Claimant** explained

> *Niko has confronted several challenges in its efforts fully to satisfy the Tribunals' invitation. First, the documents in issue concern a period a decade or more ago. Niko's arbitration counsel has not previously had occasion to collect or review documents potentially relevant to the Tribunals' inquiry. Documents on the subject of the Tribunals' inquiry were collected under the direction of other counsel for Niko years ago. It has taken some time to make arrangements for the undersigned counsel to obtain access to these documents. Second, the key individuals involved in the JVA negotiations are either dead or have had no contact with Niko for many years.*[531]

[530] C-CMC, paragraph 22.
[531] Claimant's letter of 14 June 2016, p. 5

900. The Claimant also highlighted another change affecting its ability to provide information and evidence:

> *Much has changed since 2003. The lapse of time has implications not only on Niko's ability to marshal evidence concerning the facts but also on the affected stakeholders.*
>
> *No director or officer of Niko Canada today was in such a role in 2003, with the sole exception of Mr. William Hornaday. Mr. Hornaday was an officer of Niko Canada in 2003 but had limited involvement in Bangladesh until after the JVA was executed.Mr. Robert Ohlson, the President and Managing Director and owner of more than 10% of Niko Canada's shares in 2003, died in 2004.*[532]

901. The Claimant added that "*Niko is a very different company today than it was in 2003*", emphasising the substantial drop in the price of its shares and the different stance of the principal stakeholders, now "*the company's creditors*".[533]

902. **The Respondents**, when describing their efforts to respond to the Tribunals' request for information and documents, wrote:

> *The ACC seized the original correspondence and note sheet folders from both BAPEX and Petrobangla related to Niko, as well as other documents. BAPEX and Petrobangla kept a copy of most, but not all, of the seized correspondence. BAPEX no longer has any note sheets. In addition, BAPEX moved into new offices after the relevant time period.*[534]

903. Shortly after having filed the Corruption Claim, on 19 April 2016 the Respondents addressed to the Claimant **requests for the production of documents,** and on 18 April 2016 the first request concerning the "*affidavit*" of Corporal Duggan. The request for documents concerned

> *… the following specific categories of documents:*
>
> *1. Communications dated between 2001-2003 regarding negotiation and signing of the JVA, and dated from 2004-2006 regarding negotiation and finalization of the GPSA, between Niko Resources Ltd, its affiliates, its officers or its agents and the following recipients:*

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[532] C-CMC, paragraphs 17 and 18 (internal citations omitted).
[533] C-CMC, paragraph 19.
[534] Respondents' letter of 8 August 2016, p. 1.

a. Mr. Qasim Sharif

b. Barrister Moudud Ahmed

c. Mr. AKM Mosharraf Hossain

d. Mr. Khandker Shahidul Islam

e. Mr. Selim Bhuiyan

2. Communication in 2001-2006 addressed to or from Niko Resources Ltd, its affiliates, its officers or its agents regarding communications with former Prime Minister Khaleda Zia or her son (Tareq Rahman) with respect to Niko's efforts in Bangladesh;

Communications in 2001-2006 addressed to or from Niko Resources Ltd, its affiliates, its officers or its agents regarding contact with or payment to Selim Bhuiyan, Giasuddin Al Mamun, and/ or Mr. AKM Mosharraf Hossain; and

Financial records (including, but not limited to wire transfer receipts, cancelled checks, and bank records) showing transfers and/or payments of funds between 2001 and 2006 from or on behalf of Niko Resources Ltd, its affiliates, its officers or its agents to any entity or person in Bangladesh (including affiliates, employees and agents of Niko Resource Ltd) or to any of the persons named in items 1-3 above.

904. Claimant had responded on 21 and 29 April 2016, denying the request, and the Respondents transmitted the exchange to the Tribunals on 10 May 2016.

905. By Procedural Order No 13, the Tribunals invited

- the Claimant to respond to the Respondents' request concerning the affidavit of Corporal Duggan, an issue that has been dealt with in Procedural Order No15, as described above in Section 2.4.5,
- the Respondents to provide a list of documents, including company records and reports about the negotiations,
- the Claimant to provide a list of compliant documents in response to the Respondents' request for documents, which included correspondence within the Niko group and with others during the period 2001 to 2006, as well as financial records.

906. The Respondents submitted a detailed reply to the Tribunals' request (**R-RPO13**), accompanied by a large number of documents. The Tribunals noted, however, that, with very few exceptions, these documents did not include any company records of BAPEX and Petrobangla. By Procedural Order No 14, they invited the Respondents to inform them "*about the respondent companies' record-keeping practices and provide lists of the relevant documents*". The Respondents provided this information, produced some of the records, and explained reasons for missing documents, as quoted above.

907. Concerning the Respondents' request for document production, **the Claimant** objected by letter of 14 June 2016 that the requests were "*overbroad and unfocused*" and requested that the "*parameters for the compilation of a document list*" be narrowed. In Procedural Order No 14 the Tribunals recognised that the documents requested by the Respondents were "*relevant places to seek evidence*"; but they accepted that the request was "*overbroad*".

908. In a letter of 8 August 2016, the Claimant wrote:

> *Niko has identified and retrieved files from its archives relating to the negotiation of the JVA. In addition, via counsel, it has also retrieved records collected by its external advisors in connection with the RCMP investigation and related proceedings. While the review of those records is still on-going, Niko considers that it is now in a position to respond reasonably promptly to a suitably focused documentary evidence request as submitted below.*[535]

909. In that letter, the Claimant also provided explanations concerning the system of its payments to Bangladesh and outlined what it considered appropriate limitations to the Scope of the Examination. It questioned the extension of the Targeted Period to the conclusion of the GPSA, stating that "*addressing the 2001-2003 period will permit the present phase of the proceedings to be conducted in the focused and expeditious manner suggested by Procedural Order No. 13*". The letter continued by stating:

[535] Claimant's letter of 8 August 2016, p. 1.

Niko proposes that the production encompass records in its possession relating to payments (if any) made to or communications with (if any), the individuals identified above[536] during the Targeted Period, with the exception of Qasim Sharif.

With regard to Qasim Sharif, it must be borne in mind that he was the principal of Stratum, Niko's agent in Bangladesh until execution of the JVA, and served thereafter as Niko's President (until late 2005). As such, in Niko's respectful submission, it is neither reasonable nor proportionate to require production of all correspondence with Mr. Sharif during the Targeted Period. Instead, Niko respectfully suggests the enquiry in relation to Mr. Sharif be limited to the following parameters:

- *Payments to Mr. Sharif or to Stratum during the Targeted Period; and*
- *Communications with Mr. Sharif or Stratum regarding payments to or from the individuals identified at b. to g. above.*

It is respectfully submitted that any enquiry beyond this would, taking account of the Respondents' request as well as the allegations particularized in BAPEX's Memorial on Damages, amount to nothing more than a fishing expedition.[537]

910. During the Procedural Consultation that followed on 10 August 2016, the Claimant

> *…explained that hard copy files had been assembled by it. In addition, records had been collected by the Claimant's previous counsel, including financial records. These were now available and, to the extent to which they concerned the Niko case, could be produced. The Claimant also stated that it is prepared to present minutes of board meetings and other internal documents to the extent to which they concern the negotiations of the JVA and the GPSA.[538]*

911. Concerning **Financial Records**, the Claimant provided in its letter of 8 August 2016 explanations concerning its "Bangladesh Payment Systems" and the limitations, as set out in the passages quoted above.

912. During the September 2016 Procedural Consultation, the Claimant explained that it had been incorporated in 1997 and that its branch in

[536] The identified individuals were those listed in the Respondents' request of 19 April 2016.
[537] Claimant's letter of 8 August 2016, pp. 3-4
[538] Summary Minutes of the Procedural Consultation of 10 August 2016, paragraph 24.

Bangladesh was established in the latter half of 2003. Prior to incorporation, payments to Bangladesh were made to Stratum, and Stratum reported on the use of the funds so received. The Claimant declared that it was prepared to produce the corresponding records as part of the document production, subject to limitations concerning the scope of the examination.

913. The Respondents objected to limiting the production of financial records to those concerning Stratum, arguing that corruption payments may have been made through other channels. They indicated that they were prepared to **appoint a financial expert** and would agree to Niko appointing one as well. They further believed it would be useful for the Tribunals to appoint one or several experts to examine the relevant financial information. In their letter of 8 August 2016, the Respondents wrote:

> *The study of financial information to track payments that might have been used for corruption must be done by specialized financial experts, "including financial investigators and experts in financial analysis, [and] forensic accountants […]." Thus, Respondents reserve their right to have a financial expert review all financial information presented by Niko.*
>
> *[…]*
>
> *We therefore request that Niko be ordered to make its financial records available to an independent financial expert for review. Respondents are prepared to appoint an expert for this purpose and would, of course, agree to have Niko appoint an expert as well. Respondents also believe it would be useful for the Tribunals to appoint its own expert or experts.*[539]

914. The Claimant objected to this request.

915. **The Tribunals** considered the conflicting views of the Parties and gave the following directions in **Procedural Order No 15**:

> *The Tribunals consider that the production of the records concerning payments to Stratum are a useful start for the investigation; but they accept the Respondents' view that it cannot be excluded that corruption payments took other routes, in particular through companies of the Niko Group other than the Claimant. The Tribunals*

[539] Respondents' letter of 8 August 2016, pp. 4-5.

have examined how this justified consideration can be taken into account in the most effective and least disruptive manner.

During the September 2016 Procedural Consultation the Claimant stated that it was prepared to produce complete records of all payments to Bangladesh made by any of the companies of the Niko Group. The Tribunals accept this production as a possibly sufficient measure in the production of financial records; but they reserve the right to consider the adequacy of this approach, once the production has been made and the Respondents have had an opportunity of commenting thereon. In particular, the Tribunals reserve the right to order a statement of the auditor of the Niko Group, as it had been announced in the draft of the present Procedural Order prior to the September 2016 Procedural Consultation.

When envisaging the order for Niko to produce the said audited statement, the Tribunals had considered that the Niko Group produces consolidated accounts for the fiscal years ending on 31 March. The Tribunals concluded that any payment from a company of the Niko Group to third parties in Bangladesh must be reflected in these consolidated accounts. According to the accounts posted on the Niko website, these consolidated accounts are audited by KPMG. The Tribunals invite the Claimant to make the necessary preparatory arrangements with the auditor of the Niko Group so that, if the Tribunals decide that an audit report is required, the auditor may produce on short notice a statement identifying any payments during the fiscal years ending 31 March 2001 to 31 March 2004 which the Niko Group made to beneficiaries in Bangladesh, possibly including Stratum, identifying each beneficiary and the amounts received. In view of these directions, the Tribunals see no need, at this stage, to make further directions concerning the financial records of the Niko Group.[540]

916. The Tribunals also instructed that Mr Goyal's Witness Statement "*shall include a description of the payments made to Bangladesh during the Targeted Period*".[541]

917. In response to this order, **the Claimant uploaded the document production of Niko** on the Secure Transfer Site of the Respondents' counsel and informed them thereof on 14 October 2016. The Claimant explained that the production was in compliance with the commitment

[540] Procedural Order No 15, paragraphs 47 – 49.
[541] Procedural Order No 15, paragraph 7(i).

recorded by the Tribunals, as quoted above. With respect to payments in Bangladesh, the Claimant added:

> *… given that Niko had commenced petroleum operations in late 2003 and 2004 there are a significant number of transactions as reflected in the relevant bank statements. Considering the issues, we have applied a materiality threshold of approximately $5'000 (converted Taka amounts in the statements) for the production of supporting documentation: that is, Niko has produced the available back up documentation for each individual transaction that was in excess of that threshold. If you have any concerns in this regard we are prepared to discuss the application of reasonable materiality limits to the production.*[542]

918. Further to instructions of the Tribunals in Procedural Order No 18, the Respondents, in a letter of 31 March 2017, acknowledged receipt of the following financial documents:

> *73 "financials" documents dated 2001-2004, consisting of many one-page bank statements and wire transfer requests, as well as limited financial statements and vendor invoices.*[543]

919. The Respondents declared this production to be "*insufficient to provide a basis for assessing whether Niko's financial records contain evidence of corruption*"; they did not use the documents produced by Niko in the preparation of their Memorial on Corruption of 23 November 2016.[544] In a separate letter of the same date, the Respondents developed their objections and produced the opinion of Duff & Phelps, "*a global financial firm with expertise in complex valuation, disputes, compliance, and regulatory consulting, among other topics*". In this opinion, the firm stated:

> *The documents provided by Niko were unorganized, incomplete, and do not meet the level of documentation needed to conduct a proper corruption examination.…* [545]

920. In the correspondence leading up to the Status Conference on 30 January 2017, the Respondents made an application concerning the

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[542] Letter to the Respondents' counsel of 14 October 2016.
[543] Table attached to the Respondents' letter of 31 March 2017, response to item 4.
[544] R-MC, paragraph 21.
[545] Duff & Phelps Memo, 22 November 2016, pp.2-3.

appointment of a financial expert by the Tribunals. In their letter of 26 January 2017 they wrote:

> *Specifically, Respondents maintain that the Tribunals should reconsider, as envisaged in Procedural Order No. 15, […] ordering Claimant to open its financial records for the entire relevant period (2001-2006) to review by an independent financial expert.*[546]

921. The Claimant observed that the Respondents had produced extensive financial records of third parties but not tendered any report from a forensic expert. The Claimant added that it did not see any justification why it should commission such a forensic expert concerning its own records. Concerning the Respondents' complaint about the insufficiency of the records on Niko's payments which it produced, the Claimant asserted that the Respondents did not argue that channels of payment other than those indicated by the Claimant were used; rather they questioned the Claimant's explanations concerning the use of the funds transferred to Bangladesh.

922. The Respondents confirmed that, other than the note by Duff & Phelps, their experts had not produced any opinion on the documents disclosed by the Claimant. They maintained their position that the Claimant had not provided the information that would be necessary for experts to conduct an analysis of possible corruption emanating from Niko's accounts. [547]

923. On the same occasion, the Respondents made **an application on 14 March 2017**, requesting that the Tribunals order the production of the following groups of documents:

(i) "*Documents from the criminal investigation*", specifically records "*pertaining to the ACC, Canadian or U.S. investigations of Niko's activities in Bangladesh*";

(ii) various financial records;

(iii) documents the production of which had been requested and, in part ordered previously but were not produced or produced only incompletely by the Claimant;

[546] Respondents' letter of 26 January 2017, p. 2.
[547] Summary Minutes of the Status Conference, 30 January 2017, paragraph 10.3.

(iv) a new list of correspondence and other documents concerning a number of subjects, described as "*key to Niko's corrupt scheme in Bangladesh*".

924. This request and the Tribunals' decision in response in Procedural Order No 18 were referred to above in Section 2.4.11. The decisions can be summarised as follows:

925. With respect to the request concerning the criminal investigation and the **Joint Investigation**, the Tribunals held:

> *The Tribunals note that the vast majority of these records or copies therof are in Bangladesh. Important documents from this record have been produced by the Respondents in these arbitrations. The Respondents have not made any efforts to identify with any specificity documents which are relevant and material for the Tribunals' decisions and to which they do not have access.*
>
> *In these circumstances, the Tribunals see no justification for ordering the Claimant to produce the requested records.*[548]

926. Concerning **financial records**, the Tribunals considered the evidence from the witness statements of Mr Khan and Ms LaPrevotte Griffith, testifying that the Joint Investigation included extensive examination of the financial transactions of the Niko Group. They concluded in Procedural Order No 18:

> *On the basis of the evidence and considerations set out above, the Tribunals have concluded that the Respondents have shown access to the results of this investigation or, at least, have failed to demonstrate that they made diligent efforts to gain such access. They have indeed shown by some of the evidence produced with their submissions on the Corruption Issue that at least some of the evidence now requested from the Claimant was in their possession.*
>
> *In these circumstances, the Tribunals see no justification to order the Claimant to produce documents of a type that had been made available already by the Niko Group and others during the course of the joint investigation and of which at least the "vast majority" is in the possession of the Bangladesh authorities and available to the Respondents.*[549]

[548] Procedural Order No 18, paragraphs 114-115.
[549] Procedural Order No 18, paragraphs 110 - 111.

927. With respect to the Respondents' request concerning allegedly **incomplete compliance with requests and orders for document production**, the Tribunals organised in Procedural Order No 18 an exchange to determine with specificity the allegedly incomplete productions. In the course of this exchange the Respondents presented a list on 31 March 2017 of documents which the Claimant had produced directly to the Respondents on 14 October 2016. The list identified the documents produced by the Claimant as follows:

- 10 documents related to Niko's retainer with Moudud Ahmed, payments and legal opinions from his law firm between 2000 and 2003;
- 11 NRBL Board Minutes from 2000 to 2003;
- 11 NRL Board Minutes from 2001 to 2004;
- 73 "*financials*" documents dated2001-2004, consisting of many one-page bank statements and wire transfer requests, as well as limited financial statements and vendor invoices
- 5 IDEAS reports dated 2002 to 2004;
- 13 "*agreement*" documents dated between 1998 and 2005; and
- 14 "*correspondence*" documents dated between 1998 and 2008.

928. The Respondents described the 73 financial documents in this list in the following terms:

> *The 73 documents include 22 wire transfers between Niko entities and between Niko and Stratum or Qasim Sharif. They also include just four expense reports, one which mentions $1,090 spent on gifts to Petrobangla and Ministry officials on a trip to Texas, but without attaching receipts or further information. The 73 documents include one email from Qasim Sharif (regarding the $2.93 million to be paid in October 2003) and one journal voucher. It is unclear how these particular 73 documents were selected, but they are clearly not all the responsive financial documents, as indicated by Duff & Phelps. "The documents provided by Niko to date, including Niko's financial statements, bank statements, wire transfer requests and limited vendor invoices could not be used on their own to trace 'all payments to Bangladesh made by any of the companies of the Niko Group.'" Memo from Duff & Phelps to Foley Hoag (22 Nov. 2016), p. 2. For example, "[e]very bank statement should be accompanied by copies*

> *of cancelled checks, at the very least. We would also expect to see copies of all invoices used to generate checks and wire transfer requests, of which there were hundreds listed in the statements provided."* [550]

929. The Claimant replied on 7 April 2017. Referring to the undertakings set out in its letter of 8 August 2016, the Claimant asserted that it had fully complied with the agreement and had

> *… disclosed all documents it was able to identify as falling within the above description that are in its possession or control. This included, but was not limited to: complete bank records for the Targeted Period; the pertinent data from IDEAs accounting software respecting the Targeted Period, as well as underlying transactional support (such as invoices, vouchers and cheques where available) for any payments over US$5,000 dollars. With respect to the US$5,000 threshold, as Niko pointed out in its letter of 9 December 2016...*[551]

930. The matter was discussed at the Pre-Hearing Conference on 10 April 2017 and the conclusion recorded in the Summary Minutes. The Tribunals then addressed the issue in Procedural Order No 19 of 15 April 2017:

> *The Tribunals have taken note that the Respondents, having considered the Claimant's letter of 7 April 2017, confirm their view that the Claimant's document production was incomplete but see no need for further submissions on the topic. The Tribunals reserve their position concerning the question whether the production was complete and, if they consider it incomplete, reserve the conclusions that may be drawn from it.*[552]

931. Concerning the new list of correspondence and other documents requested by the Respondents on 14 March 2017, reproduced above in Section 2.4.11, the Tribunals noted that the requests had a "*very broad scope*"; some failed to identify documents with specificity but instead described *subjects* of enquiry, yet others were of doubtful relevance – or seemed to be available in Bangladesh. Having considered the Parties' submissions and the evidence produced about the joint investigation, the Tribunals concluded that the subject areas identified by the

[550] Table attached to the Respondents' letter of 31 March 2017, Footnote x.
[551] Claimant's letter of 7 April 2017, pp. 4-5.
[552] Procedural Order No 19, paragraph 20.

Respondents' list of the new production request must also have been considered by the Joint Investigation. They saw

> *… no justification to initiate now, one year after the Corruption Issue had been raised by the Respondents, such measures which, at best, would be duplicative of the joint investigation performed by organisations of incomparably greater means of investigation.*[553]

8.5 Are there gaps in the evidence available?

932. As explained above, the Tribunals sought from early on in the proceedings to identify persons who could testify about the negotiations and conclusion of the two Agreements and possible corruption influence in the process. In the course of the efforts in this direction, key persons were indeed identified, both on the side of Niko and on the side of the Respondents and the Government.

933. As it turned out, most of these key persons were not available to testify. As a substitute for testimony before the Tribunals, the Respondents presented records of interrogations of some of these persons, in some cases together with a video recording of the interrogation. They also presented two of the principal investigators, Ms LaPrevotte and Mr Khan and two documents from the third, Corporal Duggan, providing information about what they, or members of their team had heard from some of the key persons.

934. The Tribunals mention here the following records:

(i) Concerning Mr Qasim Sharif:

- Interrogation by Corporal Duggan and Corporal Schoepp on 16 December 2010 (Exhibit R-333);
- Redacted copy of an interrogation by the FBI on 15 May 2008 of an unidentified person, presumably Mr Sharif and his wife (Exhibit R-327).

(ii) Concerning Mr Gias Uddin Al-Mamoon:

[553] Procedural Order No 18, paragraph 121.

- Interrogation by Corporal Duggan and Corporal Schoepp on 1 and 2 November 2008 (Exhibits R-316 and R-352), also audio recording.

(iii) Concerning Mr Selim Bhuiyan:

- Form of Recording confessions of statement under section 164 of the Code of Criminal Procedure before Metropolitan Magistrate, dated 15 January 2008 (Exhibit R-324);
- "*Information Revealed Regarding Corruption in the Energy Sector (Niko/Chevron) – in Selim Bhuiyan interview*", undated (Exhibit R-317);
- "*Withdrawal of confessionary under section 164 given against my will on 15.01.2008*" dated 8 June 2008, (Exhibit C-120 and C-215).
- Prayer for withdrawal of Special Case No. 16 of 2008, dated 19 April 2009, (Exhibit C-217)

(iv) Concerning Mr Syed Rezwamul Kabir:

- "*Interview*" by Corporal Duggan, Sergean Kriwokon and Flight Lieutenant Khan of the ACC, video and transcript, 23 October 2008 (Exhibit R-368).

(v) Concerning Md Shafikul Islam:

- "*Witness deposition as per Section 164 of the Cr.P.C.*", dated 12 March 2008 (Exhibit R-302).

935. The testimony thus recorded has not been tested in adversarial proceedings before the present Tribunals nor, as far as these Tribunals are aware, before any court. The testimony is the result of interrogations, in most of the cases, by persons whose task it is to discover corruption and, as in relating to the work of Ms LaPrevotte, is also the basis for asset recovery. In order to provide reliable evidence, the persons must appear as witnesses in adversarial proceedings and representatives of the person or entity against which the testimony is intended to be used must have an opportunity to question them.

936. Video recordings of such interrogations, transcripts of such recordings, and testimony by the interrogating officers may provide interesting information. This is why the Tribunals have admitted the testimony of Mr

Khan and Ms LaPrevotte; they would not have objected if the Respondents, directly or through the Bangladesh Attorney General, would have brought Corporal Duggan to testify before them. The Tribunals also considered the transcripts of such interviews as the Respondents produced. Such recordings, transcripts and testimony by the interrogating officer are no substitute, however, for testimony in adversarial proceedings which respect the principles of due process. Bearing in mind these limitations in their probative value, the Tribunals have nevertheless considered these records.

937. The Respondents asserted that there are records of other relevant interrogations in the possession of the Canadian authorities to which they have no access. In their application of 10 February 2017 they sought to obtain through the Tribunals' intervention from the Alberta Court of Queen's Bench the following order:

> *1) The RCMP will provide the Tribunals with the following documents and video recordings obtained or created during the course of the investigation of Niko and that are still in its possession:*
>
> *a. Video of interview of Mr. Qasim Sharif on December 16, 2010 and video and transcript of interview of Mr. Qasim Sharif on May 20, 2008;*
>
> *b. Video and transcript of interview of Mr. Selim Bhuiyan;*
>
> *c. Videos and/or transcripts of interviews of former Chief Financial Officers mentioned at paragraph 25 of the Duggan affidavit;*
>
> *d. Video and/or transcript of March 12, 2009 interview of former accounting employee mentioned at paragraph 93 of the Duggan affidavit;*
>
> *e. Video and/or transcript of December 11, 2009 interview of former employee mentioned at paragraph 115 of the Duggan affidavit; and*
>
> *f. Transcripts or videos of other interviews conducted in the Niko investigation and other evidence of corruption in obtaining the JVA and GPSA referenced by Corporal Duggan in his affidavit.*

2) *Corporal Duggan will be examined under oath before the ICSID Tribunals and counsel for BAPEX and Petrobangla and then cross examined by counsel for Niko in relation to his investigation of Niko that led to its conviction on June 24, 2011.*[554]

938. The Respondents repeated a similar request in their letter of 23 August 2017. They asserted that the material under item 1 in the quoted passage "*is not available in Bangladesh and not available to Respondents from any source*".

939. Considering the testimony of Mr Khan about the extent of the cooperation between the three agencies, the Tribunals concluded that Bangladesh had the full evidence that was gathered in the course of the Joint Investigation (see above Section 8.1). The Tribunals therefore have serious difficulties to believe that the material from the persons included in the Respondents' request above was unavailable to the Respondents. Concerning the evidence which the Respondents sought in Canada, it is difficult to believe that it was not shared by the RCMP with the ACC. It is simply not credible, for instance, that the RCMP provided the ACC with the transcript of Mr Sharif's interrogation of 16 December 2010 (which the Respondents obtained and produced in the Arbitrations as Exhibit R-333, see above); but would refuse to deliver to the ACC the transcript of the same Mr Sharif of 20 May 2008. Similarly, the Respondents had access to some of the video recordings and, as listed above, produced them in the Arbitrations; they provide no explanations why the RCMP should refuse to deliver such recordings of other interrogations.

940. In any event, assuming there would have been evidence in Canada not included in the "*common source*", the Respondents have not shown any attempt to obtain such evidence. They informed the Tribunals in August 2017, long after the Hearing, that, before the Hearing, the Bangladesh Attorney General had written to the RCMP on 26 March 2017. They have not produced this letter but it appears from the response to it that the Attorney General did not seek any evidence but rather authorisation for Corporal Duggan to appear before these Tribunals at the Hearing in Paris. The terms of the Attorney General's letter caused the RCMP to assume that the Tribunals did "*not wish to hear from the RCMP*". There is nowhere

[554] Respondents' Letter of 10 February 2017

any indication that the Attorney General or the Respondents sought any relevant evidence which had not yet been shared with Bangladesh.

941. Moreover, there is no indication that the RCMP would have refused a request for such relevant documents; quite to the contrary, judging from the testimony of Mr Khan, the RCMP was quite supportive:

> *I also discussed my participation in this arbitration and my intention to provide the evidence to the Tribunals with my counterparts at the RCMP and the Canadian Department of Justice. They had no objections. To the contrary, they are very supportive of my efforts to bring the details of Niko's corrupt activities in Bangladesh to the attention of an international tribunal considering the matter.*[555]

942. The Respondents also assert that "*the Respondents did not have, and were not entitled to, the information from the ACC's criminal investigation*".[556] In support of this assertion, the Respondents wrote: "*The ACC is an independent investigative arm of the Government and does not share information that it intends to use in pursuing criminal charges in Bangladesh*".[557] Although "*Petrobangla and BAPEX were aware that there was evidence in the ACC proceedings that would demonstrate Niko's corruption, it did not have access to that information due to its confidential nature*".[558]

943. This, too, is not plausible. As explained by Mr Khan, the mutual legal aid cooperation was initiated by the Attorney General;[559] the Canadian evidence was "*handed [...] over to the Anti-Corruption Agency, through the Attorney-General's office*";[560] the decisions on the international sharing of the evidence collected was taken by the Attorney General;[561] and it was the Attorney General who authorised Mr Khan to make the ACC evidence available for the Arbitrations.[562] The Government was party to these Arbitrations. Had the Government wished to rely on the evidence gathered by the Joint Investigation, this evidence could have been available in these proceedings. If it was not, this must have been because

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[555] Khan Second Witness statement, paragraph 11.
[556] R-PHB1 (CONFIDENTIAL), paragraph 211.
[557] R-PHB1 (CONFIDENTIAL), Footnote 395.
[558] R-RC, Footnote 358.
[559] Khan First Witness Statement, paragraph 34.
[560] Tr. Day 2 (CONFIDENTIAL), p. 118, ll. 15-17.
[561] Tr. Day 2 (CONFIDENTIAL), p. 180, ll. 24-25.
[562] Tr. Day 2 (CONFIDENTIAL), p. 119, ll. 2-8.

the Respondents withheld it or did not make adequate efforts to obtain it.

944. **The Tribunals, therefore, do not accept that any evidence collected in the Niko investigations, in Bangladesh, Canada or the U.S., was unavailable to the Respondents**.

945. This being said, the Tribunals noted some surprising **gaps in the evidence produced in these Arbitrations**. As shown above and as will be seen from the discussion of the facts below, these gaps concerned documents that appear of critical importance for understanding the circumstances under which the Agreements were concluded.

946. The gaps in the evidence also relate to persons directly concerned by the allegations of corruption, but whose testimony has not been provided in any form. This concerns in particular:

- **Mr Tawfiq Elahi Chowdhury**: The Respondents assert that Mr Sharif, through his uncle in Australia, paid bribes to Mr T.E. Chowdhury.[563] The Respondents rely on Ms LaPrevotte's interrogation of both Mr Sharif and Mr Chowdhur'y brother; but they did not produce Mr Chowdhury himself, even though he is, according the Claimant's repeated and uncontested assertion, currently the most senior official in the Energy Ministry; nor did the Respondents produce a written statement from Mr T.E. Chowdhury.
- The Respondents accuse Barrister **Moudud Ahmed, Law Minister in 2003**, of irregularities when his Ministry issued the legal opinions, decisive for the adoption of the JVA. Mr Ahmed is included as one of the accused in the ACC Charge Sheet and must have been interrogated in Bangladesh; the Respondents did not produce any trace of a statement by him.
- The Respondents accuse Mr **AKM Mosharraf Hossain**, the State Minister, to have taken bribes from Mr Bhuiyan for the approval of the JVA; they produce the record of Mr Bhuiyan's Confession, but no statement from Mr Hossain, even though Mr Hossain is one of the accused on the ACC Charge Sheet.

[563] See below Section 11.2.

- The Respondents accuse **Begum Khaleda Zia** of having taken bribes through Mr Mamoon for the approval of the JVA; the Respondents have produced transcripts of interrogations of Mr Mamoon, but no record of any statements on the subject from Begum Khaleda Zia.

- The Respondents accuse Mr Sharif to have bribed Mr **Raihanul Abedin** and thereby procured the GPSA; they describe him as "an important figure in the JVA and the GPSA approval process".[564] The Respondents produce transcripts of the persons alleging to have delivered the money to Mr Abedin; they informed the Tribuals that Mr Abedin is unwilling to appear as witness; but they produce no record of his interrogation, which one would expect to have taken place if he had taken bribes that are said to have caused the corrupt procurement of the GPSA.

947. Some of the unavailable evidence may have been included in the evidence collected by the Joint Investigation; the information provided to the Tribunals does not allow a determination in this respect. The Tribunals have, however, examined what conclusions have to be drawn from these gaps in the evidence.

8.6 Inferences and Conclusion on the available evidence

948. The Claimant and the Respondents alike expressed surprise, and each complained about the absence of certain evidence to which, in their opinion, their opponent must have had access. They invited the Tribunals to draw conclusions from this absence.

949. When the issue of document production was addressed once again, the Tribunals, in Procedural Order No 18 of 23 March 2017, instructed compliance with previous production orders and gave other related directions. The Tribunals added:

> *The Tribunals may draw adverse inferences if it appears to them that the documents so produced by the Claimant are incomplete and without convincing explanations for missing documents.*[565]

[564] R-MC, paragraph 133.
[565] Procedural Order No 18, paragraphs 122 and 123.

950. At the end of the exchange that followed Procedural Order No 19, and the exchange described above in Section 8.4.2, **the Respondents** made **a request for the Tribunals to draw adverse inferences** from what they considered the Claimant's incomplete compliance with the Tribunals document production orders. In their letter of 17 April 2017, the Respondents insisted that the Claimant's responses to the document production requests were inadequate and requested "*that the Tribunals draw all appropriate adverse inferences against Claimant*". They described three specific cases justifying such inferences.

951. The first of these inferences was said to follow from the assumption that "*there was regular email correspondence with Qasim Sharif and that Claimant retained it and can search it for relevant documents to produce*". The Respondents referred to the importance of Mr Sharif's role as Niko's primary agent in negotiating the JVA and the GPSA until the end of 2005 and

> *the fact that the evidence clearly indicates that he executed the corrupt transactions with Mr. Mamoon, Mr. Bhuiyan, and the State Minister and paid the bribes on Niko's behalf. It is not credible for Claimant to insist that it has no other relevant communications. If such communications were exculpatory, Claimant would have put them in the record. Since it has refused to produce them, Respondents request that the Tribunals infer that the communications with Qasim Sharif demonstrate that Niko corruptly obtained the JVA and the GPSA.*

952. The second request for adverse inferences focussed on the payments made by Niko to Mr Sharif. The Respondents asserted that:

> *inferences can be drawn from Niko's failure to provide accounting for the millions it paid to procure the JVA. Accordingly, Respondents request that the Tribunals infer from Niko's failure to present these records that, as demonstrated by Respondents' evidence, Mr. Sharif used these funds to pay bribes to acquire the JVA and GPSA.*

953. The third inference concerned the relations with Mr Bhuiyan with respect to whom the Claimant had produced a letter in assistance for a visa application. The Respondents argued:

> *It is not believable that Mr. Bhuiyan had a $1 million agreement to coordinate Niko's meetings with the Government and there were no other communications either with or about Selim Bhuiyan.*

Respondents, therefore, ask the Tribunals to infer from Claimant's failure to produce further documents that the agreement with Selim Bhuiyan was to pay bribes to the State Minister of Energy and the Prime Minister's office.

954. **The Claimant** responded on 18 April 2017. It complained about an alleged failure of the Respondents to comply with an instruction in Procedural Order No 19 and produce the documents they had received from the FBI; that issue was resolved at the Hearing when the Respondents delivered to the Claimant on Day 1 a set of documents of which the Claimant produced one in the record, Document C-237.

955. Concerning the inferences which the Respondents had requested the Tribunals to draw, the Claimant referred to Arbitration Rule 34 (2) and 34 (3). The relevant parts of these provisions read as follows:

> *(2) The Tribunal may, if it deems it necessary at any stage of the proceeding:*
>
> *(a) call upon the parties to produce documents, witnesses and experts […]*
>
> *(3) The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.*

956. Relying on this provision, the Claimant argued:

> *"formal note" can be taken, and an adverse inference drawn, only if the Tribunal first calls upon a Party to produce evidence and the Party fails to cooperate with the Tribunal in producing that evidence.*
>
> *For the reasons set out in Niko's letter of 7 April 2017 on this topic, Niko has fully complied with all orders of the Tribunals for the production of evidence. The failure to cooperate with the Tribunals required by Rule 34(3) has in no respect been established as to Niko.*
>
> *[…]*
>
> *For the avoidance of doubt, Niko denies the assertions made by the Respondents concerning the documents in its possession and those which have been produced. Even putting aside the procedural bar noted above to the adverse inferences the Respondents seek, the*

inferences asserted in no way follow from the record here. This will be a matter for argument at the hearing.

957. At the Hearing, the Claimant confirmed its assertion that it had produced all relevant documents available to it:

> *Niko searched for all of that and I am confident in terms of what was available that anything that touched on those matters has been made, that was within Niko's records, has been produced.*[566]

958. **The Tribunals** have considered that inferences as requested require that (i) a party was called upon to produce documents; that (ii) it failed to do so and (iii) the Tribunals take note of such failure and the reasons given for it.

959. In the present case, the Tribunals repeatedly have called upon both Parties to produce relevant documents, as summarised in Sections 2.4 and above in this section. The documents actually produced by both Parties are incomplete in various respects. When discussing the many factual issues that arise in the context of the Corruption Claim, this will become quite clear. It can be said here that it is indeed surprising that there are no or only very few records of communications in the circumstances on which the Respondents' three requests are based – just as it is surprising that the Respondents failed to produce a number of documents relevant to the case, e.g. the legal opinions of the Law Ministry which, as will be seen below, are of critical importance to the outcome of the case or records about interrogations of the persons accused of having taken bribes.

960. The Claimant provided explanations for the apparent gaps in the documents produced, including the passage of time since the events to which such documents, if they existed, would relate. The Claimant declared that, with one exception, no other responsive documents are available. When contesting these declarations, the Respondents rely on assumptions and not on concrete evidence. The Tribunals are unable to accept on the basis of these assumptions that the Claimant's declaration is incorrect; and all the less so because on the Respondents' side there are quite a number of instances where documents that must have existed were not produced with the explanation that they could not be found.

[566] Tr. Day 1, p. 335 (Tarnowsky).

961. The exception just mentioned is the case of the Deloitte Audit, where the Claimant did not deny the existence and availability of some documents; but relied on privilege. The Tribunals held in Procedural Order No 22 that this reliance was justified. The Claimant's refusal to produce the Deloitte Audit therefore cannot be held against it.

962. Assuming that the Tribunals had reached the conclusion that requested documents were available to the Claimant but not produced, the Tribunals would have had to consider the evidence that is available to determine whether the conclusion which, according to the Respondents, should be drawn from the absence of the document are justified. The Tribunals set out below their extensive analysis of the facts. In this analysis, the Tribunals consider the evidence available, including the gaps in this evidence. At this stage, however, it must be said that the sweeping conclusions which the Respondents invited the Tribunals to draw from the unavailable evidence are not justified.

963. In conclusion, the Tribunals point out again that any gaps in the evidence that remained at the end of the proceedings are attributable primarily to the Respondents who insisted through repeated procedural initiatives on involving the Tribunals in the search for evidence which must be available in Bangladesh. The Tribunals have not drawn from these disruptive initiatives inferences adverse to the Respondents. They will decide the Corruption Claim on the basis of the evidence that was brought before them.

9 THE GOVERNMENTAL ACTS ALLEGEDLY PROCURED BY CORRUPTION

964. *A central part of the Respondents' case is the allegation that it was on* instruction of the State Minister that BAPEX entered into the JVA on terms requested by Niko and that these instructions were the result of Niko's bribes to the State Minister. The Tribunals therefore invited the Respondents' clarification by the following question in Annex A to Procedural Order No 20 of 17 May 2017:

> *The Tribunals understand the Respondents' position to be that BAPEX concluded the JVA because it was instructed to do so by the Minister and that these instructions were procured by corruption. Do the Respondents rely on any other governmental acts which were required for the conclusion of the JVA and which were allegedly procured by corruption?*

965. In their First Post-Hearing Submission, the Respondents stated that they also relied on such other governmental acts. They replied to the Tribunals' question as follows:

> *The answer is yes, there are other governmental acts procured by corruption for both Agreements. Most notably, Niko needed the approval of the Prime Minister's Office, which it procured by corruption. Corrupt approval from the State Minister or Prime Minister Khaleda Zia are each individually sufficient to establish Respondents' claims that the Agreements are void ab initio and that Niko procured its investment in bad faith and in violation of domestic law and international public policy. Nevertheless, the other corrupt acts are additional evidence of Niko's bad faith and corrupt procurement of the Agreements. Niko, by paying to influence Government decision-making, moved "from not being in the race [ ] to get a PSC, to getting the JVA without competitive bidding" and then obtained the GPSA after causing two blowouts and bribing the State Minister.*[567]

[567] R-PHB1 (CONFIDENTIAL), paragraph 3 (internal citations omitted).

966. In a footnote, the Respondents added that the "*broad term 'corruption' covers much more than direct payment to the highest government official*".[568]

967. Given this position, the Tribunals' inquiry will also be a broad one. The Tribunals will first examine the Governmental acts described by the Respondents as facilitating the conclusion of the JVA and the GPSA and the regularity of the process leading to it, including the question whether the Government's "*approval was not transparent, was mala fide and was illegal under Bangladeshi law*".[569] They will then have to identify the various forms which Niko's alleged corruption took in obtaining these Governmental acts and, finally examine specific payments which the Respondents declare to be suspect.

968. In their First Post-Hearing Submission the Respondents identify a number of relevant Government acts and the related corrupt acts. The Government acts so identified were:

- Approval of Niko's proposal to be considered as a candidate to develop marginal fields,
- The Framework of Understanding (FOU),
- The Marginal Fields Procedure,
- The State Minister's grant of access to Niko, efforts and instructions to Petrobangla to finalise the JVA covering Chattak East and to avoid Swiss Challenge and approval of the JVA,
- The Prime Minister's approval of JVA,
- Finalisation and execution of GPSA.[570]

969. The Parties disagree as to the characterisation of these acts, their relevance for the eventual conclusion of the Agreements, and the advantages obtained by Niko through them. The Tribunals will now examine these issues in respect to each of these acts.

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[568] R-PHB1 (CONFIDENTIAL), FN 1, citing A. Llamzon, *Corruption in International Investment Arbitration*, 2014, RLA-196(bis), paragraph 1.09.
[569] As requested by item (d) of the Respondents' request for relief in their Memorial on Corruption.
[570] Table in R-PHB1 (CONFIDENTIAL), paragraph 4.

9.1 Niko's Marginal Fields Project and its qualification for having its proposal considered

970. A central part of the Respondents' case is that, when seeking to procure the JVA and the GPSA, Niko "*did not have the technical and financial capacity to obtain these rights through legitimate procedures*".[571] The Respondents argue that Niko used corrupt means to achieve its acceptance by the Government, Petrobangla and BAPEX as a competent partner for the development of marginal/abandoned fields: "*the only way Niko could enter into the oil and gas market in Bangladesh*" was "*the promise and payment of bribes*".[572]

971. The lack of qualification and even disqualification is frequently asserted by the Respondents and its witnesses and by authorities in Bangladesh. Thus, the Respondents state that Niko Canada was "*financially and technically unqualified*",[573] "*deemed unqualified*";[574] or even "*disqualified*".[575] Ms LaPrevotte was even more categorical:

> *… when I went to Bangladesh and I was informed and started my investigation the first thing I learned is that Arthur Andersen had deemed Niko unqualified to explore gas in Bangladesh.*[576]

972. The basis on which the lack of qualification is asserted is the evaluation of the bids of Niko Canada for lots 9 and 10 in the 2nd bid round for PSC in Bangladesh.[577] Thus the Respondents state:

> *It is notable that Niko was not qualified to obtain rights through the normal PSC procedure in Bangladesh, but through its deal with Five Feathers and Qasim Sharif, opened up a market for itself to do "marginal field" development.*[578]

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[571] B-MD, paragraph 1.
[572] B-MD, paragraph 1.
[573] R-MC, paragraph 4.
[574] R-PHB1 (CONFIDENTIAL), paragraph 28.
[575] Md. Maqbul-E-Elahi Witness Statement, paragraph 3.
[576] Tr. Day 3 (CONFIDENTIAL), p. 169, ll. 11-15.
[577] Occasionally, reference is also made to the blowouts in 2005; whether the blowouts are indeed a sign of Niko's lack of qualification remains to be seen. In any event, they cannot have been a consideration during the negotiations for the JVA. Indeed, in its June 1998 letter, Niko points out that it "*has never had a blow out in any of the wells it has operated in India or elsewhere.*" Letter from Niko to Ministry of Power, Energy and Mineral Resources, 28 June 1998, Exhibit C-123, p. 2.
[578] R-RC, paragraph 108.

973. Elsewhere the Respondents state:

> *This movement from not even being in the running in May 1998 to having the Government agree to deem fields "marginal" and pursue the company's proposed project confirms that there was more at play than simply Niko's qualification to develop marginal fields.*[579]

974. **The Claimant** contests the relevance of the PSC bid evaluation process and its results. It points out that this was "*a fundamentally different process*" relating to twelve large new oil and gas blocks which is "*clearly not a reasonable comparator for Niko's novel proposal*" for the development of existing marginal fields, which Petrobangla had itself explicitly recognised as "*a specialty that requires certain unique companies and their unique ability to control cost*".[580] The Claimant also contests the relevance of the scoring process applied in the evaluation of the PSC bid[581] and concluded:

> *… it is entirely misleading for the Respondents to use the PSC bid evaluation results to cast aspersions on Niko's qualifications, particularly to undertake a marginal field development project.*[582]

975. **The Tribunals** have examined the available evidence concerning **Niko's ranking in the PSC evaluation** in order to determine its relevance for the assessment of Niko's qualification for the development and operation of marginal and abandoned fields.

976. The evaluation of the PSC bids was addressed in an exchange at the Hearing between the Claimant's counsel and Mr Elahi, who was the only witness who could testify to this issue. He did not participate in this particular bid evaluation, but had experience with similar, but less complicated, evaluations.[583] In his witness statement he explained that

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[579] R-PHB1 (CONFIDENTIAL), paragraph 30; for the description of "*not even being in the running in May 1998*", the Respondents rely on the message from the Canadian Department of Foreign Affairs and International Trade of 11 May 1998, Exhibit C-195.
[580] C-CMC, paragraph 73, relying on Petrobangla's comments on Niko's proposal, Exhibit R-267, paragraph D.7.
[581] C-CMC, paragraph 74.
[582] C-CMC, paragraph 77.
[583] He explained at the Hearing that in 2008 he was involved in another PSC bid process and that then: "*We made it more simpler, during 2008 I did it and evaluation criteria was very simple*" (Tr. Day 4 (CONFIDENTIAL), pp. 94 to 95).

he was Managing Director of BAPEX from 5 August 2001 to 9 July 2003. He then stated:

> *I learned that Niko had participated in the bid round in late 1990s for the exploration and development of Block 9, an exploration target, but Niko was disqualified from the bid process because it was found to be unqualified for such a project, especially compared with other international companies bidding for the same fields.*[584]

977. At the Hearing he was questioned about the PSC evaluation,[585] as documented in the Arthur Andersen letter of 29 September 1997.[586]

978. Concerning the criteria for the evaluation, the letter mentions a document entitled "Evaluation Criteria for the Assessment of Bids" (ECAB) that had been sent to the bidders in May 1997. Arthur Andersen explain that this had not been appreciated by them in their initial assessment and led them to revise their earlier "*thinking and the contents of the original suggested Scorecard*". Arthur Andersen continued to explain that, in addition to the ECAB and items relevant for the evaluation defined in the Letter of Invitation (the "**LOI**"), its experts were provided at their return to Bangladesh in September 1997 by the Chairman of Bangladesh with "*a revised Scorecard weighing which had been developed by the 'Bid Evaluation Committee'*". The review of these three documents produced a "Description of Suggested Methodology for Ranking Bids" and a "Scorecard weighing grid" which were attached to the letter. These have not been produced in the Arbitrations.

979. The basic criteria for Arthur Andersen's evaluation of Niko's bid can nevertheless be understood from an attachment to their letter: this attachment shows the score cards for Blocks 9 and 10 which provide the ranking of the bidders by reference to a number of criteria and their weighting, the highest weights being given to "*Work Commitment*" (45%), "*Financial & Technical*" (15 %), "*Cost recovery*" (15%) and Petrobangla share (15%). In Block 9 the highest bidder (Tullow Oil Plc) scored of 80.5 points, while Niko Canada was ranked lowest with 42.9 points. For Block 10, the highest ranked bidder (Shell/Cairn) was rated 91.4 points, while Nico Canada again ranked lowest with 45.9 points.

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[584] Elahi Witness Statement, paragraph 3.
[585] Tr. Day 4 (CONFIDENTIAL), pp. 70 *et seq.*
[586] Arthur Andersen Activity Report on 2nd Round PSC Bid Evaluation Phase, Vol. 3, 28 September 1997, Exhibit R-212.

980. In order to determine the relevance and significance of these criteria and rankings, one should look at the manner in which each of the criteria is assessed.

981. The criterion "*Work Programme*", which presumably corresponds to "*Work Commitment*",[587] weighted at 45%, was valued by reference to the number of wells and their depth (as proposed by the bidder) and the seismic tests. The Tribunals understand that this criterion measures the investment which each of the bidders was prepared to make in the development of the field. They do not see that it includes any assessment of the technical qualification of the bidder.

982. "*Financial and technical capability"* are grouped together and jointly weighted at 15%. Financial capability is assessed by reference to cashflow and debt service. Technical capability is assessed simply by the number of countries, presumably those in which the company is active. While these criteria may be of some interest in the comparative evaluation of the bidders, they say little if anything about the qualification for the development of marginal and abandoned fields. The same must be said about the other criteria: cost recovery and Petrobangla share.

983. The Tribunals conclude that the ranking of Niko in the PSC has little if any relevance with respect to its qualification for the different project it proposed to the Government of Bangladesh and the Respondents.

984. As to **the relevance of the PSC evaluation for the development of marginal and abandoned fields**, the Respondents have expressed various views. On some occasions, they stated that there was scant difference between the two types of activities;[588] elsewhere, they said that developing marginal and abandoned fields could be more complicated than exploring and developing an unexplored area.[589]

[587] The values from the Table "Work Programme" are entered in the Score Card in the column "Work Commitment".
[588] R-PHB1, paragraph 28.
[589] See e.g. Khairuzzaman Chowdhury Witness Statement, paragraph 7.

985. The Claimant emphasised the difference between the two types of projects.[590] In its June 1998 Proposal, Niko explained that they concern different stages in the exploitation of gas fields:

> *… an oil or gas field is considered marginal when producing the field in the conventional manner becomes uneconomical and impractical from the existing operator's view point.*

986. It continued by stating that the criteria for considering a field marginal varied according to the circumstances and the priorities of the existing operator:

> *In the USA the major oil companies routinely sell out producing fields to small independents when they become marginal and uneconomical for the majors to operate.*
>
> *Internationally the prevailing conditions such as availability of cost effective services, logistic problems and associated costs, political risks, local expertise, project implementation time frame, market conditions and market proximity among other issues determine to great extent if the field is marginal or prospective.*[591]

987. Fields that have become marginal and uneconomic for the large producers moreover require different technologies in their development and operation.[592]

988. Niko's project for marginal fields development also differed from the PSC bids in the manner in which it was presented. In the case of the PSC bids, Petrobangla prepared the project, identified the fields to be offered for the bid round, and elaborated the bidding procedure and contract conditions. It did so with the assistance of an international specialist, Arthur Andersen, which as described above assisted Petrobangla in the elaboration of the methodology for ranking bids and evaluating them.

989. In the case of Niko's proposal, it was Niko Canada that had taken the initiative, identified potential fields, and presented the technology for exploiting abandoned gas fields which Bangladesh had neither the

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[590] See C-CMC, paragraph 75 *et seq.*

[591] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 28 June 1998, Exhibits C-123 and R-265.

[592] See in particular Note of the Ministry for the Prime Minister concerning the Marginal Fields Procedure, 6 June 2001, Exhibit C-203, questioning of Mr Moyes, Tr. Day 4 (CONFIDENTIAL), p. 79 *et seq.*, Chowdhury Witness Statement, paragraph 7 and his testimony at the Hearing, Tr. Day 3 (CONFIDENTIAL), p. 100.

intention nor the means of bringing back on stream. Niko thus proposed to develop at its own cost and risk resources which the Government of Bangladesh had considered uneconomical to develop but which, in view of the need for gas in Bangladesh, were important to develop. Mr Chowdhury testified that, to his knowledge, the contract proposed JVA with Niko was not "*a typical Government contract*" and there was "*no precedent for this contract*".[593]

990. Finally, the Tribunals have examined **how the Respondents themselves assessed Niko's proposal and its qualifications at the time**. When Niko proposed the project, the Respondents took a view of it and of Niko's qualification which is quite different from their statements in the Arbitrations. This is demonstrated for instance in Petrobangla's 1998 Comments, which it prepared after having received BAPEX's comments on the June 1998 Proposal. Petrobangla described the project as follows:

> *A.2. The Government of Bangladesh has several marginal gas fields that are presently non-producing such as Chatak, Kamta, Begumganj, and Feni. Among these Chatak, Kamta & Feni fields were produced for long periods and were shut-in due to excessive water production and pressure reduction depletion problems. These fields were not rehabilitated due to financial constraints and technical limitations faced by Petrobangla and due to the marginal nature of these fields and uneconomical investment. In addition the available limited financial and technical resources of Petrobangla were better utilised in the exploration, development and production of the more prospective fields such as Saldanadi, Bakhrabad and Kailashtilla.*
>
> *A.3. However, the requirement of gas in Bangladesh has continued to increase, and as the larger fields such as Bakhrabad mature, the need to rehabilitate the marginal fields should be considered seriously. These marginal fields still have some salvageable infrastructure and produc[ible] [ill.] quantum of gas, which will be lost if they are not rehabilitated with priority. In addition the cost for drilling and construction services will continue to increase with time making the rehabilitation of the marginal fields more and more cost prohibitive and risky.*[594]

[593] Tr. Day 3 (CONFIDENTIAL), p. 65, ll. 12-16, 21-23.
[594] 1998 Petrobangla Comments, Exhibit R-267; see also above, Section 4.1.

991. Petrobangla went further, pointing out the advantages of following the approach to the project proposed by Niko and the attendant benefits to Bangladesh, Petrobangla and BAPEX, including the following:

> *C.3. Niko's straight and clear offer to take BAPEX into a joint venture (JV) is certainly attractive - especially when a lot of IOC's have shunned this possibility. Such a JV would surely enhance BAPEX's reputation and expertise and would also give them an insight into international operations.*

992. In the Conclusion/Recommendations Petrobangla's 1998 Comments contain the following passage:

> *D.1 Niko's ideas are quite novel and a first offer for us ~ containing some attractive proposals like job creation - expertise growth, extra production, etc. It should therefore be given due consideration. There are no risks to Petrobangla even though marginal field development can become risky and unprofitable if the operator is not extra careful with costs. We have not much to lose, if anything. we have rather much to gain if a proper MOU/contract is entered into safeguarding our basic interests.*

993. The document then recommends "*that the Swiss Challenge process be adopted as proposed by Niko in their offer to ensure transparency in the award process*" and discusses the advantages of this process. Comments are made concerning the choice of the fields, and the following observation as to the profitability of the project:

> *Due to the low costs of this gas the financial benefit gained by Petrobangla for producing the marginal fields will be higher than gas produced by the existing PSC contractors from the first bid round.*

994. This assessment differs sharply from the arguments of the Respondents in the Arbitrations.

995. The Respondents have expressed the view that these comments by Petrobangla and BAPEX are "*suspect*" on a number of grounds[595] and have suggested that the Comments in the Minutes of the October 2000 of the Petrobangla Board "*are a more accurate depiction of Petrobangla's knowledge and view of Niko's proposal …*"[596]

[595] R-PHB1 (CONFIDENTIAL), paragraph 31; R-RC, paragraphs 109 and 110.
[596] R-PHB1 (CONFIDENTIAL), paragraph 32.

996. Petrobangla's 1998 Comments were first produced in the Arbitrations by the Respondents in their submission Responses to Procedural Odder No 13 of 14 June 2016. In this submission, the Respondents relied on the Comments and quoted from them to highlight the importance of the Swiss Challenge process.[597] In later submissions, the Respondents raised "*doubts about the provenance of this document*".[598] The Respondents note that the Comments, contrary to other internal Petrobangla and Government documents, are in English and "*include much of the same language*" as Niko's proposal. They also point out that Mr Sharif had obtained a copy of the document and had transmitted it to Niko.[599]

997. The Tribunals note that none of these doubts were expressed by the Respondents when they first produced the Comments and relied on them. They do not find it surprising that comments on a proposal made in English are made in the same language. The fact that Mr Sharif obtained a copy of the document does not speak against its authenticity. The Tribunals see no reason to doubt that the document reflects the considered joint opinion of BAPEX and Petrobangla.

998. The Tribunals add that the Comments were the result of a process of analysis, instructed by the Ministry and carried out first by BAPEX in a separate document and then by Petrobangla. To assume that these Comments were the result of corruption would imply that all contributors to it, whether on the side of BAPEX or Petrobangla, were corrupted. There is no indication and not even an allegation that this was actually the case.

999. Concerning the Respondents' reference to the Minutes of the October 2000 Petrobangla Board meeting, the Tribunals note that the passages quoted by the Respondents are taken from the discussion at the meeting.[600] The Board concluded that it was advisable to proceed with the Joint Venture Agreement, and sent the draft agreement to the Ministry for its decision.[601] The record shows that beginning in 1998, with the approval of Petrobangla and the Ministry, BAPEX negotiated the terms of the JVA and did not question the qualification of Niko for performing the work required under the JVA.

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[597] R-RPO13, paragraph 7.
[598] R-PHB1 (CONFIDENTIAL), paragraph 31.
[599] R-RC, paragraphs 109, 110.
[600] Decision of 287th Petrobangla Board of Directors Meeting, 22 October 2000, Exhibit R-271, p. 10.
[601] Decision of 287th Petrobangla Board of Directors Meeting, 22 October 2000, Exhibit R-271, p. 1.

1000. Against this background it is important to compare the testimony of the Respondents' witnesses in their written witness statements with the testimony at the Hearing.

1001. Mr Chowdhury's witness statement affirmed this with respect to what he had been told by BAPEX and Petrobangla in what seems to have been early 2002:[602]

> *… I was briefed by BAPEX and Petrobangla on Niko's proposal, and I became directly involved in the consideration of the project and the Ministry's decision on whether it should be approved. I was concerned when they told me that Niko had been excluded from the prior bid round for production sharing contracts to develop oil and gas fields based on its lack of technical capabilities. I understood that developing marginal and abandoned fields can be more complicated than exploring and developing an unexplored area. Niko was arguing it had been successful at one filed in India, but I did not think that was a sufficient basis to conclude that they should be granted rights in Bangladesh. I thought it was very important to carefully scrutinise Niko's proposal. […] There were two very important points […] First, the companies believed it was essential for Niko's proposal to be subject to a competitive bidding process. […] Such bidding was even more essential with regard to Niko because it had been eliminated in prior competitive bidding based on its lack of technical and financial capacity. We needed to make sure we had the most competent and financially sound company developing our resources.*[603]

1002. At the Hearing, the testimony changed: rather than causing concern, the explanations Mr Chowdhury received were reassuring:

> *When Petrobangla and BAPEX assured me that Niko has the competence to explore or conduct this exploration in marginal gas fields, I did not question their technical findings.*
>
> *… they told me that Niko was not found technically qualified in the production sharing contract offers, but they assured me that what*

[602] Mr Chowdhury does not give a precise indication with respect to time; but he explains that in February 2002 he was posted to the Ministry of Power, Energy and Mineral Resources as Acting Secretary of Energy and Mineral Resources Division and that almost as soon as he had been posted to this position, Mr Sharif came to visit him and that not long after that visit the above quoted statements were made to him (Chowdhury Witness Statement, paragraphs 2, 6 and 7).
[603] Chowdhury Witness Statement, paragraph 7.

technical qualification Niko has, that is sufficient for the exploration of the marginal gas fields and possibly that their Indian success was one of the primary basis that they considered them technically fit.[604]

1003. It should be recalled that in his witness statement, Mr Chowdhury had testified, as quoted above, that, in his understanding, "*developing marginal and abandoned fields can be more complicated than exploring and developing an unexplored area*".[605] At the Hearing Mr Chowdhury confirmed that this was different from the work done under production sharing contracts. Mr Chowdhury added that from discussions with BAPEX and Petrobangla he understood the following:

> *So to extract gas from those marginal fields may be difficult than exploring from the virgin fields. But later, they made me understand that smaller companies may be found more efficient to explore those and more commercially viable.*[606]

1004. The Tribunals conclude that **Niko's June 1998 Proposal was welcomed by the Respondents as an economically interesting contribution to the supply of gas in Bangladesh**. From the evidence produced, the Tribunals are of the view that the low ranking in the PSC bid does not justify any conclusions about Niko's qualification for the work under the proposed JVA and the Respondents had no serious concerns about this qualification**. The evidence does not support the Respondents' assertion** quoted above according to which "***the only way Niko could enter into the oil and gas market in Bangladesh*" was "*the promise and payment of bribes*".**

1005. The Respondents argue that corruption occurred by

> *- Sharfuddin Ahmed's efforts to earn US$1 million success fee, including spending $100,000 on 'incidentals' to get the FoU approved.*
>
> *- Mr. Sharif's payments to lower level officials at Ministry of Energy*
>
> *- Mr. Sharif's payments of US$54,000 to the brother of the then-Secretary of Energy.*[607]

[604] Tr. Day 3 (CONFIDENTIAL), p. 91, ll. 16-20 and 92, ll.4-11.
[605] Chowdhury Witness Statement, paragraph 7.
[606] Tr. Day 3 (CONFIDENTIAL), p. 100, ll. 14-18.
[607] R-PHB1 (CONFIDENTIAL), paragraph 4.

1006. These points shall be considered, with respect to Mr Ahmed, in the section dealing with the consultancy agreements (specifically Five Feathers) and with respect to the two other points in the section of Suspect Payments (see Sections 10.3.2, 11.2 and 11.3).

9.2 The Government's decision to proceed with the Niko project

1007. On 26 January 1999 a high-level meeting was held at the "*Ministry of Electricity, Fueling and Minerals*", chaired by the Secretary of the Department and attended, *inter alia*, by four Deputy Secretaries and a Senior Assistant Secretary, the Chairman and two Directors of Petrobangla, and the Managing Director and General Manager of BAPEX. Niko's proposal was presented and discussed. The representative of Petrobangla pointed out that it was "*not possible to develop [marginal and non-producing fields] by the conventional method*" and that *"[i]f the salvageable gas is not recovered soon it will not be possible collected/drawn by cost-effective method*". The Minutes record that, after "*details discussion*", the following decision was taken:

> *4) At the preliminary stage as per proposal of Niko Resource the gas fields of Chatak, Kamta and Feni considering as marginal gas filed [sic] development might be developed and produced the gas.*
>
> *5) Before signing the Memorandum of Understanding (MOU) between BAPEX & Niko the joint venture agreement shall have to be finalized. In this respect the Managing Director of BAPEX may discuss with Niko.*
>
> *6) In respect of development and producing gas from these gas fields the Swiss Challenge Method might be abided by.*[608]

1008. The Respondents generally refer to a letter of 25 May 1999 as the expression of the Government's decision to proceed with the Niko project.[609] There is, however, no explanation about the form in which this decision was taken or by whom. In particular, there is no explanation about the steps, if any, that were taken between the decision at the meeting chaired by the Ministry on 26 January 1999 and the letter of 25 May 1999.

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[608] Minutes of the Meeting of the Ministry of Power, Energy and Mineral Resources of 26 January 1999, 3 May 1999, Exhibit C-124.
[609] e.g. R-MC, paragraph 34.

1009. **In the letter of 25 May 1999** the Ministry informed Petrobangla of the Government's decision on the "Implementation of proposal of Niko Resources for Marginal Gas Fields Development and Production". The letter responds to a letter from Petrobangla of 31 December 1998 which has not been produced.

1010. The Ministry's letter reads as follows:

> *Regarding the subject matter above, it is being informed that the Government has taken the following decision after examining the proposal of NIKO Resources for Marginal Gas Field Development and Production:*
>
> *a) On the basis of the proposal of Niko Resources, the gas fields at Chatak, Kamta and Feni may be developed and produced under the concept of "Marginal Gas Field Development" under joint collaboration of Niko and BAPEX.*
>
> *b) Joint Venture Agreement between BAPEX and Niko will have to be finalised before signing of the Memorandum of Understanding (MOU) with Niko Resources.*
>
> *c) Thereafter, steps may be taken to implement the proposal prepared by Niko and BAPEX, after evaluation by using the Swiss Challenge method, if necessary.*
>
> *2. You are requested by order of the appropriate authority to take necessary action in order to implement that proposal.*[610]

1011. This letter was already produced during the Jurisdiction phase of these proceedings, but with a different translation:

> *On the above referenced matter it is notified that after examining the proposal of Niko Resources on Marginal Gas Field Development, Government has made the following decisions:*
>
> - *The gas fields Chattok [sic], Kamta and Feni may be developed in the 'Marginal Gas Field Development' system as per the proposal of Niko Resource.*
> - *A Joint Venture Agreement must be executed between Bapex and Niko before a Memorandum of Understanding (MOU) is*

[610] Letter from Ministry of Power, Energy, and mineral Resources to Petrobangla, 25 May 1999, Exhibit R-270.

signed with Niko. The Managing Director of Bapex can conduct discussions with Niko regarding this.

- *The 'Swiss Challenge' method may be adopted for developing the said gas fields.*

You are requested to take necessary next steps for implementation of the proposal.[611]

1012. Although Niko's June 1998 Proposal is not expressly mentioned, there is no doubt that it is this proposal to which both the BAPEX letter and the Government's decision refer. In any event, the Government's decision clearly specifies the essential elements of the proposal in the communication to Petrobangla. These elements include the development of the "*gas fields at Chatak, Kamta and Feni [...] under the concept of 'Marginal Gas Field Development'*", a joint venture between Niko and BAPEX and "*using the Swiss Challenge method, if necessary*".

1013. The letter does not specify when and how this decision by the Government was taken and whether any steps subsequent to the above-mentioned high-level meeting on 26 January 1999 had been taken. It is, however, possible that the Government's decision had been taken earlier, since in a letter of 6 May 1999 BAPEX communicated to Niko that a decision to form a joint venture between Niko and BAPEX had been made.

1014. In a letter to BAPEX of 1 February 1999, referring to the past correspondence with the Ministry and Petrobangla, Niko Canada had stated that it was "*keen to have your assistance as our proposed joint venture partner in getting a feedback from Petrobangla and/or the MOEMR regarding status of our application.*" BAPEX responded on 6 May 1999:

1. With reference to the above letter, this is to inform you that it has been decided in principle to formulate a Joint Venture Agreement between BAPEX and Niko Resources LTD for the development of Marginal & Non-producing Gas-Field that is Chattak, Kamta and Feni.

[611] Exhibit 11, Appendix B to R-CMJ.1, emphasis in the original, quoted from the Decision on Jurisdiction, paragraph 29.

2. In view of the above you are requested to send your authorised representative to draft the Joint Venture Agreement as early as possible.

3. Please note that this letter is issued WITHOUT ANY PREJUDICE and any obligation on the part of BAPEX.[612]

1015. The Tribunals conclude that, during the period between 26 January and 25 May 1999, possibly before 6 May 1999, **the Government decided to proceed with the Niko project**. According to the Respondents, the terms of this decision are expressed in the Ministry's letter to Petrobangla of 25 May 1999. There is no indication that the Government's decision as recorded in that letter was communicated to Niko in terms other than those of the letter of 6 May 1999.

9.3 The Framework of Understanding (FOU) or the Study Contract

1016. Following BAPEX invitation of 6 May 1999, the Executive Chairman of Niko Canada travelled to Dhaka. The meetings that then took place did not lead to the conclusion of a MOU or the JVA in the form envisaged by the Government's decision. Instead a different approach was adopted.

1017. This modified approach took the form of the Framework of Understanding (FOU) providing for a study performed jointly by Niko and BAPEX at the cost of Niko; this agreement is sometimes also referred to as the "Study Contract".

1018. The change in approach is documented in the FOU and in a letter of 12 August 1999 from the Ministry to Petrobangla with copy to BAPEX, approving the FOU.[613] The letter refers to a letter from Petrobangla of 30 June 1999, which has not been produced, and identifies as its subject "*Regarding the Approval of the Proposal of Niko Resources on Marginal Gas Field Development and Production*". The text of the letter reads as follows:

In light of the above subject and reference it is to inform that before signing the MOU regarding Marginal Gas Field Development between

[612] Letter from BAPEX to Niko Resources Ltd., 6 May 1999, Exhibit C-125.
[613] Exhibit JD C-7, p. 502; the letter is mentioned also in the 333rd Petrobangla Managing Committee Meeting of 22 July 2003, Exhibit JD C-9, pp. 563 and 566, also produced as Exhibit C-11.

BAPEX and Niko Resources, technical evaluation of the Non-Producing Marginal gas fields is required to complete the joint study.

02. In this respect approval is given as directed to complete the Framework of Understanding.

1019. The circumstances that brought about the change in approach are not documented by contemporaneous evidence; in particular, the Respondents have not produced any minutes of meetings of their respective boards or committees nor any correspondence between them explaining the reasons for the change.

1020. There is, however, subsequent correspondence that sheds some light on the change:

- In their opinion of 1 November 2000, [redacted] state that on 30 June 1999 "*Petrobangla proposed a joint study to be undertaken by BAPEX and NIKO in the relevant gas fields for technical evaluation which was approved by MEMR*".[614]
- In a letter of 5 April 2001 to the Secretary at the Ministry, Mr Ohlson on behalf of Niko explained:

  During these preliminary discussions between Bapex and Niko it appeared that the modality and the basis of how the JVA would be structured was not very clear to every one. Therefore Bapex proposed that instead of formulating a JVA agreement, a joint technical study should first be concluded to form the basis for a JVA.[615]

- On 26 February 2003, Mr Sampson on behalf of Niko wrote to the State Minister:

  In May, 1999, we were invited by Bapex, upon approval of and [sic] instructions from the Government of Bangladesh, to finalize the Joint Venture Agreement, but instead after we arrived in Dhaka, we were asked to do a feasibility study at our cost. Niko relented …[616]

1021. These explanations have not been contradicted by the Respondents and no evidence to the contrary has been presented. The Tribunals conclude that **the change in approach was introduced at the request of the Respondents and to their advantage**.

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[614] [redacted], Legal Opinion, 1 November 2000, Exhibit C-131 (CONFIDENTIAL), p. 2.
[615] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 5 April 2001, Exhibit C-133.
[616] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 26 February 2003, Exhibit C-149.

1022. The FOU is the first agreement executed between Niko and one of the Respondents. It reflects an approach that differs from that originally proposed by Niko. No information has been provided about the reasons and objectives which led the Respondents to this change in approach. Nor is there any information available about the question whether and to what extent the Government and the Respondents, by requiring the execution of the Study Contract, had changed their mind about the approach to the implementation of the Niko Proposal. In other words, prior statements of the Government and the Respondents as well as Niko's proposal itself must be considered with caution. They are relevant for determining the Parties' obligations only to the extent that they are relevant to this first agreement and the approach which the Parties adopted in it.

1023. The content of the FOU has been described above in Section 4.1. The critical terms, relevant for the present decision, are the rights and obligations the FOU created for the further implementation of the Project and the procedure to be followed once the Study had been completed.

1024. The general objective of the FOU is, as indicated in its title, "*the Development & Production of Hydrocarbons from the Non-Producing Marginal Gas Fields of Chattak, Feni and Kamta*"; the feature addressed specifically in the agreement is the Study for this development and production.

1025. The FOU defines the "*Area*" to which the agreement applies by reference to Exhibit A to the FOU which sets out the "*Coordinates of the Ring Fencing of Chattak, Feni and Kamta Structures*", showing coordinates, area (in square kilometres) and depth (in meters). The Parties disagree as to whether the development and production was intended to apply to the fields so defined by the coordinates or whether, within these fields, only that part was intended which would qualify as "*non-producing marginal gas field*". The issue will be considered below in Section 9.5.

1026. The FOU also provides that "*on successful completion of the Technical Program & on the basis of the acceptability of the result thereof the parties would execute a Joint Venture Agreement*". The Parties disagree whether this clause gave Niko a right to the conclusion of a joint venture for the development and production of the fields provided only that the results

of the technical programme were acceptable, or whether in any event the Swiss Challenge method had to be applied before a Joint Venture Agreement between BAPEX and Niko could be concluded. The Respondents rely primarily on Article 7.01 which qualifies the confidentiality obligations by adding "*if swiss challenge process is adopted, this is not applicable*"; Claimant argues that the provision does not prescribe a Swiss Challenge process but simply determines the effect of the confidentiality obligations in case the process is applied.

1027. The FOU contains the clear provision that, upon agreement on the terms of the JVA, the Parties shall "*execute*" the JVA. In other words, if agreement on these terms is reached, the JVA will be executed. The question whether the FOU defines the Chattak Field as including Chattak East, and confirms an agreement to resort to the Swiss Challenge method prior to signature, will be discussed below in Sections 9.5 and 9.6.

1028. The Respondents also argue that the FOU still required Government approval.[617] They rely on Article 12.5, which states: *"[t]he effectiveness of the contract will be subject to the approval of the appropriate authority*". The Claimant relies on the reference to the "*approval accorded by the government in 1999*", as contained in the Marginal Fields Procedure; they assert that this expression clearly refers to the FOU.[618] The Respondents reply that "*Niko has not shown that the Government ever issued a specific approval of the FOU*".[619]

1029. The Claimant points out that "*the totality of the record [...] demonstrates that no agreement of any substance gets executed by BAPEX without the prior approval of Petrobangla and the Government*".[620] The Tribunals would indeed find it most surprising that the FOU was concluded, followed by the Marginal Fields Procedure and mentioned in subsequent meetings[621] and correspondence without there having been the "*approval of the appropriate authority*", as required by its Clause 15.05.

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[617] R-RC, paragraphs 113 *et seq*.
[618] C-CMC, paragraph 100.
[619] R-RC, paragraph 114.
[620] C-RC, paragraph 54, Footnote 50.
[621] E.g. the Minutes of Meeting of the Ministry of Power, Energy and Mineral Resources, 16 September 2002, Exhibit R-310, p. 56.

1030. Indeed, the letter which the Ministry addressed to Petrobangla on 12 August 1999 expressly states: *"[i]n this respect approval is given as directed to complete the Framework of Understanding."*[622] In the meetings where the FOU was referred to it was not contested that approval had been given. For instance, the Minutes of the 333rd Petrobangla Management Committee Meeting held on 22 July 2003 expressly confirmed that, by the letter of 12 August, the Ministry had approved the execution of the FOU:

> *In response to the proposal the ministry approved the execution of the Framework of Understanding (FOU) between BAPEX and Niko vide letter No. Resou: 22/97/290 of 12 August 1999. As per the approval, a Framework of Understanding (FOU) was signed between BAPEX and Niko for evaluation of Chattak, Feni and Kamta gas fields.*[623]

1031. Based on the evidence before it, the Tribunals conclude that the FOU was duly concluded without any formal defect.

1032. The Respondents argue, however, that the FOU was also procured by corruption. In support of this allegation, they list the same acts as those in relation to Niko's qualifications for the proposed project; the Tribunals will address these allegations below.

9.4 The Marginal Fields Procedure

1033. The Procedure for the Development of Marginal/Abandoned Gas Fields (the "**Marginal Fields Procedure**" or simply the "**Procedure**") was adopted in June 2001. A copy is attached to the JVA as Annex C. The Procedure appears to be the first regulation in Bangladesh of the development of this type of gas fields.

1034. In its Clause 4.4, the Procedure deals expressly with the processing of "*offers received prior to the adoption of these procedures*". For these cases it requires "*appraisal by a technical committee appointed by Petrobangla*", and "*after appraisal*" the conclusion of a joint venture agreement with a Petrobangla company, "*forwarded to the Government for approval*".

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[622] Exhibit JD C-7 (Proceedings on Jurisdiction), p. 502.
[623] Extracts from the Agenda of 333rd Petrobangla's Managing Committee Meeting, 22 July 2003, Exhibit C-11, paragraph 1.

1035. Clause 10 of the Procedure, entitled "Explanatory Note", concerns specifically the Chattak, Kamta and Feni gas fields. It states that these fields "*shall be deemed to have been declared marginal/abandoned gas fields*". The clause brings the "*negotiations/discussions conducted so far with the approval accorded by the government in 1999*" in line with the newly adopted Procedure and declares that these negotiations and discussions "*shall be deemed to have been in compliance with the above procedure*".

1036. The Respondents argue: "*[t]o proceed with the JVA, the Government needed a system for identifying marginal/abandoned fields.*" They quote Mr Elahi's testimony: "*[o]nce you declare some field as marginal or abandoned you can invite the foreign companies or any private company to develop it […]".*[624] They disagree that the reference in clause 10 extends to Chattak East, arguing that the Procedure "*does not define which structures were to be included in the JVA – it did not include Chattak East*".[625] Elsewhere the Respondents argue that the Procedure "*excluded Chattak East from its purview*", [626] relying on what, according to clause 1.2 of the Procedure, "*may be termed marginal/abandoned*".

1037. In the Claimant's view, the Procedure established that the Chattak, Kamta, and Feni fields were properly characterised as marginal/abandoned, and that this concerned the entire field, including both Chattak West and Chattak East.[627] The Claimant also sees in the Procedure confirmation that the Swiss Challenge procedure was not applicable: "*any lingering notion that Swiss Challenge was necessary prior to approving the JVA was put to rest by the passing of the Marginal Field Procedure in 2001.*"[628]

1038. The Procedure was adopted by the Awami League Government of Sheikh Hasina and there is no allegation of any irregularity in its adoption. The Respondents, nevertheless, include the Procedure among the Government acts procured by corruption. They associate the corruption allegation for the Procedure with the two acts which have just been discussed; it shall therefore be dealt with below in the same context.

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[624] R-PHB1 (CONFIDENTIAL), paragraph 175, quoting from Tr. Day 4 (CONFIDENTIAL), p. 60, ll. 6-16.
[625] R-PHB1 (CONFIDENTIAL), paragraph 175.
[626] R-PHB1 (CONFIDENTIAL), paragraph 280.
[627] C-PHB1 (CONFIDENTIAL), paragraph 160.
[628] C-PHB1 (CONFIDENTIAL), paragraph 139 with further references.

9.5 The Chattak Field and the inclusion of Chattak East

1039. The principal "*roadblock*" in the negotiations of the JVA were the definition of the contract area with respect to the Chattak Field (the "**Chattak issue**") and the question whether Swiss Challenge was required. The former of these two issues appears to have been by far the more contentious one.

1040. With respect to the Chattak issue, the differences between the Parties during the negotiations and in the Arbitrations concerned two matters: (i) whether the Chattak Field must be considered a single entity, and as such characterised as "*marginal/abandoned*"; or as two blocks, of which Chattak West was marginal/abandoned and Chattak East was a virgin field considered as an "*exploration target*"; and (ii) whether it had been validly agreed in the FOU and confirmed in the Marginal Fields Procedure that the JVA would cover the entire Chattak Field.

1041. From the evidence in the record, the Tribunals conclude that the dispute was close to being resolved by early July 2001; it was then finally resolved in March 2003, when BAPEX proposed to submit the issue to the Law Ministry and that Ministry opined that the Chattak Field had to be understood according to the coordinates in Exhibit A to the FOU. As a result of this opinion, BAPEX was instructed to conclude the JVA for a contract area including Chattak West and Chattak East. The Respondents assert that in order to break the "*impasse*" in the JVA negotiations due to the Chattak issue the Claimant used corruption[629] and that "*Niko was only able to get [Chattak East] included [in the JVA] by making its deals to pay Mr Mamoon, State Minister Mosharraf Hossain, and Mr Bhuiyan*".[630]

9.5.1 The identification of the Chattak Gas Field until the completion of MFE

1042. In the initial correspondence reference is made to the Chattak Gas Field, without a distinction between West and East. Niko's proposal of June 1998 refers to the "*Marginal and Non-Producing Gas Fields Development*

[629] R-PHB2 (CONFIDENTIAL), paragraph 176.
[630] R-PHB2 (CONFIDENTIAL), paragraph 178.

and Production: Chattak"; and the Ministry's letter of 25 May 1999, expressing the Government's decision to proceed with Niko's project, refers simply to the "*gas fields at Chattak, Kamta and Feni …*".

1043. The historic situation of the field was notably described in the Marginal Fields Evaluation, dated February 2000, that is to say the study produced further to the FOU, where it is pointed out that the Chattak field was discovered in 1959 and produced until 1985 when Petrobangla shut it down due to "*increased water production*". Some further details are provided in Niko's letter of 3 March 2003,[631] which points out that the Chattak Gas Field is situated within the area of the PSC for Block 12 but does not form part of it and is defined as an excluded area.[632] This is uncontested.

1044. It is also uncontested that the Eastern part of the Chattak field is separated from the Western part by a fault and that it had not been explored. The Eastern part, nevertheless, was not considered as a separate gas field. Niko made this quite clear to BAPEX in its letter of 1 February 1999 when it referred to

> *… the high risk Chattak field where more than 80% of the gas reserves are expected in the unexplored and un-drilled high risk side of fault.*[633]

1045. BAPEX responded on 6 May 1999, expressly referred to this letter and expressed no reservation concerning the "*unexplored and un-drilled*" side of the field:

> *With reference to your [1 February 1999] letter, this is to inform you that it has been decided in principle to formulate a Joint Venture Agreement between BAPEX and NIKO RESOURECES LTD for the development of Marginal & Non producing Gas Field that is Chatak, Kamta and Feni.*[634]

631 Letter from Niko to Ministry of Power, Energy and Mineral Resources, 3 March 2003, Exhibit C-152.
632 See also Tr. Day 1, pp. 275-283.
633 Letter from Niko to Bapex, 1 February 1999, Exhibit R-269.
634 Letter from BAPEX to Niko, 6 May 1999, Exhibit C-125.

1046. The Ministry, too, made no distinction between East and West Chattak. For instance, in its letter of 25 May 1999 to Petrobangla and BAPEX, as quoted above, it wrote:

> *On the basis of the proposal of Niko Resources, the gas fields at Chatak, Kamta, and Feni may be developed and produced under the concept of "Marginal Gas Field Development" under joint collaboration of Niko and BAPEX.*[635]

1047. The JVA negotiations that followed this letter and the role of the Chattak issue in them have been summarised above in Section 4.1. The following details are added for a better understanding how the "*impasse*" arose and how it was overcome.

1048. On 23 August 1999, the FOU was concluded between BAPEX and Niko. The FOU refers to Chattak without distinguishing between East and West. It defines the "*Area*" by reference to a map (which has not been produced) and a table showing the coordinates of the three fields. This table forms "Exhibit A" to the FOU and is attached to the JVA, as produced in the Arbitrations. It is entitled "*Coordinates of the ring fencing of Chattak, Feni and Kamta Structures*". The coordinates for the "*Chattak Gas Field*" include the entire Chattak Field without distinction between East and West.

1049. The study which BAPEX and Niko agreed to perform as provided for in the FOU, described as the Marginal Fields Evaluation,[636] was completed in February 2000. The Study provides a description of the geological setting of the "*three fields Chattak, Feni and Kamta*", followed by more detailed descriptions concerning each of the fields. In the table showing the reserves, the three fields are identified: Feni, Kamta and Chattak, without subdivision. The Introduction provides a table showing the "*Block Definition*" which for each field identifies the Coordinates of the Area, and the Depth.

1050. With reference to Block 12, the table presents the "*Gas Field Structure*" of the Chattak Gas Field showing exactly the same coordinates as those in the FOU.

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[635] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 25 May 1999, Exhibit R-270.

[636] Attached as Annex B to the JVA, as executed, Exhibit R-1.

1051. In subsequent chapters the Study treats separately the Chattak West Field and the Chattak East Field but considers joint development of both fields. In particular it states that the

> *Chattak East exploration structure will be drilled and tied in to the Chattak West plant facilities following successful development of the Chattak West Field.*

1052. These explanations conclude*:*

> *Given success at the Chattak East exploration target the well will be tied into the Chattak West development plan.*

1053. In the conclusions on the technical program the Study identifies the "*remaining, recoverable and risked proven and probable gas reserves*" for the three fields. For Chattak a single value is given with 268 BCF, a value much above that of Feni (51 BCF) and Kamta (5 BCF). The "*established reserves*" thus recorded for Chattak and Feni were to serve as the basis for the joint venture between BAPEX and Niko:

> *Based upon the result of the study as indicated in the currently established reserves stated above, a joint venture contract may be executed between BAPEX and Niko as stipulated in the study upon approval of Petrobangla and the Ministry of Energy and Mineral Resources.*

1054. The Tribunals conclude that, according to the Study, the JVA was intended to relate to the "*currently established reserves*" also of Chattak, i.e. the 268 BCF for the entire field.

9.5.2 The Chattak Field in the negotiations until the end of the Awami League Government

1055. The first draft JVA (7 November 1999)[637] deals with the Contract Area in Article 3 and Annex A. Article 3 reads as follows:

> *The Contract Area, as of the Effective Date of this Contract, comprises the Chattak, Feni and Kamta Gas Fields jointly and the areas immediately surrounding these fields in the event the reservoirs should extend beyond the currently accepted boundaries.*

[637] Draft JVA, 7 November 1999, Exhibit R-336; the Respondents describe this draft as "*the earliest draft*"; R-PHB1 (CONFIDENTIAL), paragraph 175.

1056. Annex A confirms that the "*[c]ontract Area consists of Chattak, Feni and Kamta gas fields jointly*". It provides for the identification of the surface area and for a "*Map CF Bangladesh Well Fields*"; but no values have been entered in this Annex.

1057. The Respondents argue that this draft did not include Chattak East.[638] The Claimant disagrees and points to a number of features in this draft that support its position, including the use of the term "*Chattak field*" without the qualification of "*West*".[639]

1058. Following the receipt of Niko's JVA proposal of 7 November 1999, BAPEX formed a committee to examine the proposal. The BAPEX committee produced a report on 27 March 2000 which was presented to the BAPEX Board on 28 March 2000 and a second report on 23 May 2000. These reports have not been produced in the Arbitrations; but it appears from subsequent correspondence that in these reports the Chattak Gas field was "*intact, that is including Chattak East, in the project*". This correspondence indicates that it was only afterwards that "*Bapex has taken out the Chattak East portion of the Chattak Gas Field from the project*".[640]

1059. The Claimant refers to two drafts of the JVA submitted during this period, one in May or June 2000, the other in September 2000. While it was unable to find the former draft, the September 2000 draft has been produced by the Claimant.[641] According to the Claimant, that draft "*clearly incorporates the same coordinates for the Chattak field as used in the FOU, hence reflecting the inclusion of both the east and west portions of the Chattak field*".[642]

1060. The Tribunals noted that in Article 1.17 of the September 2000 draft "*Contract Area*" is defined as "*the areas specified in Article 3.1 hereof and delineated on the map with coordinates set out in Annex 'A'*"; Article 3.1 of the draft refers to the Chattak field without distinction in a manner similar to the wording of the November 1999 draft; but the version of the draft produced by the Claimant does not include an Annex A.

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[638] R-PHB1 (CONFIDENTIAL), 179, identifying the draft produced as Exhibit R-336.
[639] C-PHB2 (CONFIDENTIAL), 26 and 27.
[640] See above in Section 4.1 and letter from Niko to Ministry of Power, Energy and Mineral Resources, 26 February 2003, Exhibit C-149.
[641] Draft JVA, September 2000, Exhibit C-130.
[642] C-CMC, paragraph 93.

1061. The reference to the FOU coordinates in the draft JVA is not as clear as the Claimant asserts. Since, as described above, the Chattak Field had been defined by the coordinates in Annex A of the FOU, one would expect that coordinates of a reduced area would indicate clearly that what is meant is not the Chattak Field but only Chattak West.

1062. The Minutes of the 114th BAPEX Board meeting of 8 June 2000 support this assumption. They refer to an earlier "*working paper*" which included Chattak East in the scope of the JVA:

> *… only Chatak, Feni and Kamta gas fields are demarked as Nonproducing Marginal Field, however, in the working paper, Chattak (East) has also been included in the proposal in addition to those 3 gas fields. It was remarked that Chatak East area should remain outside the JVA. Because, Chatak (East) structure is a different exploration target.*[643]

1063. The position was confirmed at the 118th BAPEX Board meeting of 21 August 2000, when the Board considered the Joint Venture negotiations and determined:

> *The purpose of this Joint Venture is to transform previously Abandoned Chatak, Feni and Kamta Non-Producing Marginal Gas Fields to commercially viable gas producing fields. West Block of Chatak Gas Field, Feni Gas Field and Kamta Gas Field have been demarked in order to operate the joint venture activities, and since Chatak East Block is considered a different exploration Lead, it is not included in the Chatak Gas Field in the proposed activities.*[644]

1064. The evidence thus suggests that it was **only after the joint Niko/BAPEX study had been issued in February 2000**, that BAPEX and Petrobangla changed their position and **decided that Chattak East should not be included in the JVA**.

1065. The conclusion is confirmed by Mr Chowdhury who wrote in his witness statement: "*BAPEX and Petrobangla had decided after the joint study in February of 2000 that Chattak East was not part of the abandoned Chattak West field to include in the JVA*".[645]

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[643] Decision from 287th Petrobangla Board of Directors Meeting of 22 October 2000, Exhibit R-271, p. 2
[644] Decision from 287th Petrobangla Board of Directors Meeting of 22 October 2000, Exhibit R-271, p. 8.
[645] Chowdhury Witness Statement, paragraph 9.

1066. The Respondents assert that

> *In October of 2000, the Petrobangla Board issued a Decision agreeing with BAPEX, noting that Chattak East was a different exploration target and would therefore not be included as part of the "Chattak Field" identified as a marginal gas field.*[646]

1067. In support of this assertion the Respondents rely on an extract from the Petrobangla Board of Directors meeting of 22 October 2000. This extract reproduces the decisions of the BAPEX Board of 8 June and 21 August 2000, containing the quoted passages concerning the limitation of the contract area to West Chattak; but the decision of the Petrobangla Board itself does not make the distinction between West and East Chattak. In the decision of the Petrobangla Board there is merely reference to the development of the "*Chattak, Feni and Kamta Non-producing Marginal gas fields*".[647]

1068. The Petrobangla Board decided to send the draft JVA "*to the Ministry for its decision*"; it also decided that "*PSC negotiation Committee of Petrobangla, meanwhile, will examine and observe the prepared Joint Venture Agreement*".

1069. The Petrobangla PSC Negotiation Committee produced its Observations on 26 November 2000.[648] From these Observations it appears that it had before it the September 2000 draft.[649] With respect to Chattak, the Observations refer to the BAPEX Board decisions and state that the:

> *BAPEX Board categorically excluded Chattak East from the purview of the JVA, but the same has not been reflected in the JVA. Rather, the JVA remains vague in defining the Contract Area.*
>
> *The area of each field should be defined specifically in sq. km with coordinates and a location map both in the text and annexure.*[650]

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[646] R-MC, paragraph 41.
[647] Decision from 287th Petrobangla Board of Directors Meeting, 22 October 2000, Exhibit R-271, p. 11, paragraph 27.
[648] Comments and Observations on the Draft JVA, Exhibit R-393. The document is not dated, but the Respondents indicate in the list of exhibits the date of 26 November 2000.
[649] Draft JVA, September 2000, Exhibit C-130.
[650] Comments and Observations on the Draft JVA, Exhibit R-393, paragraphs 2 and 3.

1070. The Claimant asserts that it was only at the meeting of 25 June 2001 that Niko appeared to have "*the first official indication that BAPEX intended to try to exclude Chattak East from the JVA*".[651] The above quoted passages all are from documents internal to the Bangladeshi side of the project; there does not seem to have been an official communication of the position concerning Chattak East. The Respondents rightly point out,[652] however, that on 1 November 2000, the law firm Lee, Khan & Associates prepared an opinion for Niko on the proposed JVA in which it addressed the issue of the JVA "*land area*" and argued that the JVA should include "*the whole of Chattak*".[653] This suggests that the Claimant may already have been informed about the change in BAPEX' position before the meeting of 25 June 2001. Indeed, in its letter of 3 March 2003, Niko explained that it was after the 118th BAPEX Board meeting on 21 August 2000 that it became aware "*that the definition of Chattak Gas Field had been changed to include only Chattak West*".[654]

1071. **The Marginal Fields Procedure**, as approved by the then Prime Minister Sheikh Hasina on 14 June 2001 and attached to the executed JVA, identifies marginal gas fields and mandates Petrobangla to declare certain gas fields as "*marginal/abandoned*". It provides for the processing of such fields and other aspects of their exploitation. At the end, the procedure contains an Explanatory Note with the following text:

> *For the purposes of these proceedings, Chattak, Kamta and Feni gas fields shall be deemed to have been declared marginal/abandoned gas fields, and the negotiations/discussions conducted so far with the approval accorded by the government in 1999, shall be deemed to have been in compliance with the above procedures.*

1072. Despite this confirmation of approval, the differences between BAPEX and Niko about the contract area continued. At a **meeting of BAPEX and Niko on 25 June 2001**, the Parties' positions with respect to the contract area remained unresolved. The Minutes of this meeting **record the positions of the parties** with respect to the difference that had arisen as a result of the change in the position by BAPEX, which then also was adopted by Petrobangla and the Ministry. These Minutes present the Parties' reasoning in a form that was repeated with some variations

[651] C-CMC, paragraph107.
[652] R-RC, paragraph 117.
[653] Lee, Khan & Associates, Legal Opinion, 1 November 2000, Exhibit C-131 (CONFIDENTIAL).
[654] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 3 March 2003, Exhibit C-152, p. 2.

during the following period until March 2003. The Tribunals therefore reproduce large extracts of these Minutes here:

> *1. Niko's clear and firm understanding is that Chattak Gas Field means the whole of the Chattak Gas Field within the ring fenced area as recorded and declared by Petrobangla in various Petrobangla legal documents such as the PSC concluded for block 12. More so the area within the ring fenced boundary for the Chattak, Kamta and Feni Gas Fields is clearly established in the* ***Framework of Understanding for the Study for Development and Production of Hydrocarbon from the Nonproducing Marginal Gas Fields of Chattak, Feni and Kamta*** *(****Study Agreement)*** *with coordinates, depth and area defined in Exhibit-A therein.*
>
> *Niko further stated that the Clause 10.06 of the above Study Agreement clearly prevents any party from changing this definition of the Chattak Gas Field. In addition clause 9.01 explicitly states that upon successful completion of the Study Agreement a JVA shall be executed therefore it was well understood at the time of executing this Study Agreement that the area and all relevant terms and conditions of the Study Agreement must be consistent with the JVA.*[655]

1073. Niko also relies on Article 10 of the Marginal Fields Procedure which it understands in the sense that Chattak, Kamta and Feni Gas Fields are declared Marginal/Abandoned Gas Fields and that previously agreed issues are in compliance with the Procedure without room for renegotiations; hence the definition of these fields "*cannot be changed now from what it is recorded in the Study Agreement*".

1074. This is followed by the understanding of the BAPEX committee's view:

> *A. BAPEX committee while deliberating on the above contention of Niko stated that inclusion of Chattak East within the scope of the Joint Study Agreement was because of the nature of the agreement. Normally when a gas field is studied the relevant data covering the entire structure is required for a meaningful analysis.*
>
> *B. BAPEX committee stated that a total gas of 318 BCF which includes 268 BCF gas from Feni was considered for the cash flow analysis. Chattak East reserve was excluded from the cash flow calculation. If the gas reserve of Chattak East is to be included in this JVA than a fresh calculation of the financial analysis followed by*

[655] Minutes of the Meeting to Finalize the JVA between BAPEX Negotiation Committee and Niko for the Development of the Marginal/Abandoned Gas Fields of Chhatak, Kamta and Feni, 25 June 2001, Exhibit R-11, emphasis in the original.

negotiation between the parties is required. The above reserve figures are risked figures.

[…]

D. The JVA is for Marginal gas fields. This means Gas fields already discovered and produced for a period of time. Chattak East is an exploration target and hence can not be termed as a marginal field.

E. It is understood by BAPEX from the deliberations of the meeting conducted at the Energy Ministry chaired by the Energy Secretary on June 24, 2001 that involvement of BGFCL and SGFL in the JVA will be required. Decisions from these two companies are required by BAPEX to proceed further to conclude the proposed JVA.

1075. Niko then records that the terms and conditions to which it agreed were based on the coordinates of the Study Agreement. If Chattak East is excluded from the JVA these terms and conditions are not applicable. It adds:

Niko agrees that only 318 BCF of risked proven plus probable reserve was considered for economic evaluation. But out of this reserve only 155 BCF is proven recoverable from Chattak West and Feni. Therefore the balance 164 BCF has to be proven either from Chattak West, Chattak East or Feni. It is already known from the Study that Kamta in the near future will not contribute any reserve. There fore if Chattak East is excluded from the project then Niko cannot make this project viable due to excessive risk.

1076. The Minutes concluded by recording the Parties' agreement on all other issues:

all other issues, terms and conditions in the Negotiated Draft JVA June 2000 has been agreed to between BAPEX and Niko subject to final approval from BAPEX management[656]

[656] Minutes of the Meeting to Finalize the JVA between BAPEX Negotiation Committee and Niko for the Development of the Marginal/Abandoned Gas Fields of Chhatak, Kamta and Feni, 25 June 2001, Exhibit JD SI-21, paragraph 4.

9.5.3 The attempted compromise at the end of the Awami League period

1077. The meeting seems to have been followed by a meeting at the Ministry on 27 June 2001. Reference is made to this meeting in Niko's letter to BAPEX of 28 June 2001, with copy to the Energy Secretary. In that letter Niko repeats and develops its arguments and proposes amendments to the draft JVA, proposing "*a more attractive fiscal regime for Chattak East in consideration that it is required to be treated as a separate exploratory target even though it is riskier than Chattak West*".[657] Niko explained the risk factors, as they resulted from the MFE, and stated that without Chattak East and a possible discovery of gas there the project would not be viable. It added that "*in light of the directive provided in the meeting on June 27, 2001, at the Energy Ministry, we understand that Chattak East and Chattak West will be treated separately in the JVA*". In an Exhibit A to the Letter, Niko proposed some changes in the draft JVA, reflecting such separate treatment, in particular a "*cash flow distribution*" in which the share of BAPEX is higher for Chattak East then for the other fields.

1078. The Respondents produced in the Arbitrations a new draft JVA, dated 3 July 2001,[658] without a transmission sheet or other indication as to the origin and the addressee of the document. This draft had a new version of Article 3 Contract Area:

> *The Contract Area, as of the Effective Date of this Contract comprises the Chattak (West) Gas Field and Feni Gas Field. The Chattak East field would only be included under the scope of this JVA after through economic analysis and feasibility study by NIKO and may be included in the JVA under separate Investment Multiple upon receipt of requisite approval from Petrobangla and the Government.*

1079. The Respondents produced this draft with their Memorial on Corruption and relied on it in support of the assertion that Niko "*added Chattak East to the draft JVA*" in July 2001.[659] The Claimant objected, asserting that it had not identified any such draft in its records and that the draft does not reflect the amendments proposed by Niko in its letter of 28 June 2001.[660] Without discussing this objection, the Respondents repeated in

[657] Exhibit A to Niko's letter to BAPEX of 28 June 2001, Exhibit C-138.
[658] Draft JVA, 3 July 2001, Exhibit R-338.
[659] R-MC, paragraph 43 and Footnote 47.
[660] C-CMC, paragraph 119 (k), Footnote 140.

their First Post-Hearing Brief the assertion that the July 2001 draft was prepared by Niko.[661]

1080. The Tribunals have considered the conflicting views expressed by the Parties. There is no record identifying the origin of the 3 July 2001 draft. The Tribunals noted that in the Whereas clauses of the draft the definition of the "*Area*" in the Study Agreement is limited specifically to "*Chattak West*", followed by the statement that "*Chattak East was included in the [FOU and the Joint Study Report] for better understanding of the structure*", a position at odds with that taken by Niko.

1081. The Tribunals also note that at the meeting of 27 June 2001 the Energy Secretary seems to have instructed Niko and BAPEX to "*consider the Chattak East portion of the Chattak Gas Field separately from the Chattak West portion of the Chattak Gas Field*".[662]

1082. Niko responded to these Energy Secretary's instructions on 28 June 2001 by insisting that it was "*essential for Niko that Chattak East is included in the JVA for the project viability*"; it added that the definition of the Chattak Gas Field had been "*clearly established in the Study Agreement*". Niko accepted, however, the instructions by treating Chattak West and Chattak East separately in the JVA, with separate fiscal terms.[663] The passage from the 3 July 2001 draft appears as clearly diverging from this position.

1083. No response from BAPEX has been produced. The Tribunals note, however, that BAPEX had taken the position in the 25 June 2001 meeting that Chattak East must be excluded; but if it would be included "*then a fresh calculation of the financial analysis followed by negotiations between the parties is required*". This position is very close to that expressed in Article 3 of the 3 July 2001 draft.

1084. The Tribunals conclude that the 3 July 2001 draft JVA and specifically the version of Article 3 Contract Area in this draft represents the position of BAPEX, responding to the instructions of the Energy Secretary at the meeting on 27 June 2001.

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[661] R-PHB1 (CONFIDENTIAL), paragraph 179.
[662] As recorded in Niko's letter to BAPEX of 28 June 2001, Exhibit C-138, p. 1.
[663] Letter from Niko to BAPEX, 28 June 2001, Exhibit C-138.

1085. The Claimant asserted that by June 2001 "*a JVA including the whole of the Chattak field and not simply Chattak West was, in the view of the Ministry and the Prime Minister, on the verge of being awarded to Niko*"; and that "*the record plainly contradicts the central pillar of the Respondents' theory that Niko could not convince the Awami League Government to include Chattak East and only made headway on Chattak East under the BNP Government of Khaleda Zia and through alleged corruption*".[664]

1086. The Respondents object and assert that "*there is nothing on the record to support this*";[665] they refer to positions expressed by BAPEX and Petrobangla in 2000 and 2001 and maintain that "*the parties did not agree on Chattak East before the government transition in 2001*".[666]

1087. The Tribunals conclude that **by the beginning of July 2001**, presumably as a result of the instructions of the Energy Secretary, the positions of the parties had evolved and came close to overcoming the "*impasse*": **both accepted that Chattak East could be included in the JVA provided separate fiscal conditions for that area were agreed**. While there is no indication that, at that time, an attempt was made to agree on these separate conditions and thus settle the only remaining difference, **the positions** reached at that time are quite **close to those which were finally adopted in the JVA as executed**.

9.5.4 The Chattak issue in the negotiations during the BNP period until March 2003

1088. When the negotiations resumed in July 2002, the positions of the parties again appeared irreconcilable. Following a meeting on 7 July 2002, Niko wrote to BAPEX on 8 July 2002, with copy to Petrobangla, concerning the "*Definition of Chattak Gas Field and inclusion of Chattak East in the Bapex-Niko JVA*".[667] In that letter, Niko set out again its arguments in support of its claim that Chattak East must be included in the JVA area. The letter concluded with the following paragraph:

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[664] Tr. Day 1, p. 275, ll. 20-24, p. 275, l. 25 – p. 276, ll. 1-5.
[665] R-PHB2 (CONFIDENTIAL), paragraph 174.
[666] R-PHB2 (CONFIDENTIAL), paragraph 176.
[667] Letter from Niko to BAPEX, 8 July 2002, Exhibit C-140.

We request that in order to make this project viable, Chattak East be included in the JVA, to mitigate the reserve risk that we face in Chattak West. As you are aware that out of the 268 BCF in Chattak West, 115 BCF is high risk probable reserve. Therefore, the JVA will not be bankable when we approach the market to raise financing for this project without Chattak East and consequently we will not be able to properly embark on the work program. We are prepared to discuss revised fiscal terms for Chattak East to conduct this project.[668]

1089. Following the Niko/Petrobangla/BAPEX meeting on 7 July 2002, **Niko** wrote **to the State Minister on 30 July 2002**. Petrobangla and BAPEX had pointed out to Niko "*that the Chattak East portion of the Chattak Gas Field will be excluded from the JVA*". Niko addressed itself to the State Minister because, in its opinion, such a decision "*would be technically and legally incorrect and shall be in gross contradiction to the norms of the Petroleum Industry practices and will also be in gross contradiction to the norms set by the Government of Bangladesh*". It explained that "*each and every Gas Field owned by GOB is described in a consistent manner*"; the Chattak Gas Field was also described by GOB "*in the same manner*". Niko added that in the Chattak East structure there are exploration as well as appraisal targets, just as in other gas fields which were treated as "*development/appraisal areas*" and excluded from the relevant PSC blocks. In conclusion, Niko requested the State Minister "*to take urgent action and prevent changing the definition of Chattak Gas Field as has been advised to us recently*".

1090. A day before this letter a **meeting at the Ministry on 29 July 2002** had taken place, apparently attended also by Petrobangla and BAPEX.[669] The Minutes of the meeting record the discussion in which various arguments were articulated as to why Chattak East should be treated separately from Chattak West. The Minutes concluded by recording the following decisions:

(iii) Chattak Gas Field means Chattak West. As no gas was discovered in Chattak East geographical structure, there is no scope to include this geographical structure under the Abandoned Gas Field.

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[668] Letter from Niko to BAPEX, 8 July 2002, Exhibit C-140, p. 2.

[669] Ministry of Power, Energy and Mineral Resources, Minutes of the Meeting, 29 July 2002, Exhibit R-303, mention an appendix A containing the "*list of officials attending the meeting*", which has not been produced; but the Minutes indicate that copy is addressed to the Chairman of Petrobangla and the Managing Director of BAPEX.

(iv) The proposal for executing a Joint Venture (JVA) that Niko has made to BAPEX regarding the restart of production of gas from Chattak Abandoned Gas field (Chattak West) shall apply only for the said (Chattak West) gas field. It will not be wise to merge the proposal for drilling the exploration/production wells at Chattak East geographical structure and to produce gas therefrom under this JVA.[670]

1091. Petrobangla transmitted the decisions taken on 29 July 2002 to BAPEX on 7 August 2002. The transmittal letter emphasised that the JVA should "*only be applicable for Chattak West*" and concluded *"[a]s per decision adopted in this meeting being ordered regarding JVA I do hereby request you for taking the subsequent step to BAPEX with NIKO*".[671]

1092. **BAPEX** then wrote **to Niko** in a letter dated **8 August 2002**,[672] responding to the letter of 8 July 2002: "*there is no scope to include Chattak East in the proposed BAPEX-NIKO Joint Venture under the present scope of Marginal/Abandoned Gas Field*".

1093. Following this letter **Niko wrote to the State Minister on 10 August 2002**, mentioning specifically that letter and the Minutes of the 7 July 2002 meeting at Petrobangla. Niko repeated some of its arguments why Chattak East should be included in the JVA area. Referring to the argument of BAPEX and Petrobangla according to which Chattak East is an exploration area Niko added:

> *Niko is prepared to treat Chattak East as an exploratory area, as contended by Bapex, and include it in the JVA with the requisite fiscal terms that are consistent with the fiscal terms GOB has in place for exploration areas.*

The letter concluded with the following offer:

> *In conclusion we would be thankful if you could consider allowing Niko to have a comprehensive JVA for the Chattak Gas Field with both Chattak East and Chattak West. There has not been drilling conducted in Chattak East in the last 43 years ever since the Chattak*

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[670] Ministry of Power, Energy and Mineral Resources, Minutes of Meeting of 29 July 2002, Exhibit R-303, paragraph 8.
[671] Letter from Petrobangla to BAPEX, 7 August 2002, Exhibit JD SI-24
[672] Letter from BAPEX to Niko, 8 August 2002, Exhibit C-143.

Gas Field was discovered. We are prepared to provide better fiscal terms for Chattak East provided the JVA includes Chattak East.[673]

1094. Niko attached to this letter a **legal opinion, dated 10 August 2002** by Md **Azizul Haq**, Advocate, Supreme Court, of the firm Moudud Ahmed and Associates, arguing that "*the definition of Chattak Gas Field*" should not be changed and expressing Niko's belief that "*Bangladesh government will honour the terms and conditions as agreed to and signed in the Bapex and Niko FOU agreement and the Bapex – Niko Study Report wherein the definition of Chattak Gas Field is clearly and unambiguously stated*".[674]

1095. Following this letter from Niko and a letter by BAPEX dated 20 August 2002 (which has not been produced), **Niko wrote again to the State Minister on 15 September 2002**.[675] It listed what was in its views the principal reasons for having Chattak East treated as part of the Chattak Gas Field and added:

> *However, the most significant problem with the decision to exclude Chattak East from the JVA is that it is not commercially viable to embark on the development of Chattak Gas Field with Chattak West only. This established fact has been acknowledged by Bapex.*[676]

1096. The letter repeated that no drilling had been conducted in Chattak East for more than 43 years, which it gave as the primary reason that Chattak East is a "*very high risk venture*". The letter concluded by repeating the offer of better fiscal terms:

> *We are prepared to provide better fiscal terms based upon investment multiples for Chattak East even though there is significant risk in drilling the first well in Chattak East.*

1097. This correspondence was followed by another **meeting at the Ministry on 16 September 2002** at which "*decisions were taken after detailed discussion on the matters on which BAPEX-Niko agreed as well as for those on which the parties did not agree and the matters where it was*

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[673] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 10 August 2002, Exhibit R-353.
[674] Moudud Ahmed and Associates Legal Opinion, 10 August 2002, Attachment to Exhibit R-353, p. 4.
[675] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 15 September 2002, Exhibit C-144.
[676] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 15 September 2002, Exhibit C-144, highlight in the original.

mentioned in the said letter that government decisions should be sought for".[677] The Minutes deal with a number of issues such as responsibility for funding and the Investment Multiple, the well head price for the gas, the transfer of the ownership of the gas fields from the then owners to BAPEX, and the drilling of an exploratory well at Chattak East.

1098. On 23 November 2002 a meeting apparently took place between BAPEX and Niko to implement the decisions from the 16 September 2002 meeting. The result of the meeting later was summarised by BAPEX in a letter for 30 January 2003:

> *It was apparent from the discussion, and agreed between BAPEX and NIKO, that there was apprehension of complexities arising with regards to the Well Head Price, T&D Margin, Corporate Tax, PDF Margin and Exploration Margin. To avoid these complexities Niko offered a new proposal by their letter dated 25/11/2002 with a view to finalise the JV which is mentioned below.*[678]

1099. Niko's letter of 25 November 2002 has not been produced in the Arbitrations but essential elements are reproduced in a subsequent letter from BAPEX: Niko expressed concern about the "*modality of gas sales of the Joint Venture, i.e. Well Head gas price at USD 1.75/MCF and the deduction of T & D Margin and various other GOB/Petrobangla levies from the gas sales proceeds of JV*". In order to deal with this concern, Niko proposed a different approach, in line with the Marginal Fields Procedure and an amended Article 24 of the JVA. It also made some other requests, including the following:

> *We request that the Chattak East be included in this project. However, NIKO will accept the final GOB decision in this regard.*[679]

1100. BAPEX then prepared a revised draft of the JVA "*following the Government decision and the abovementioned proposal by Niko*" and submitted it to the BAPEX Board on 30 December 2002. The Board decided to form a committee, convened by a General Manager of BAPEX and including two General Managers from Petrobangla, and gave directions for the procedure to be followed.[680]

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[677] The Minutes of the meeting have been produced in two separate translations, one as Exhibit R-310, the other as Exhibit JD SI-25; unless otherwise indicated, quotations are from the former translation.
[678] Letter from BAPEX to Petrobangla, 30 January 2003, Exhibit R-309.
[679] Letter from BAPEX to Petrobangla, 30 January 2003, Exhibit R-309, p. 2, item 4.
[680] Quoted from the letter of BAPEX to Petrobangla, 30 January 2003, Exhibit R-309, paragraph 2.1.

1101. The Committee submitted its report on 13 January 2003 and BAPEX commented on the report by making a correction in the draft JVA and recommended the acceptance of the modified draft JVA. It concluded:

> *This is to note that, the committee did not find any Article that goes against the interests of BAPEX/Petrobangla/the Government. In this circumstance, the draft JVA can be rearranged as per the recommendations of the committee.*[681]

1102. On 30 January 2003 BAPEX provided a detailed account to Petrobangla.[682] That letter concluded by a request to the Ministry "*to take further steps for the consideration by and approval of the Ministry regarding decisions*" as per the BAPEX Board decision of 18 January 2003.

1103. Niko then addressed itself to the State Minister requesting his intervention. In February 2003 Mr Sampson met the State Minister and on 26 February wrote to him, summarising the history of the project up to the preparation of the JVA on the basis of the BAPEX May 2000 report. The letter continued:

> *Since this report, Bapex has made numerous other changes to the JVA which Niko has also agreed to* ***except one issue****. Bapex has taken out the Chattak East portion of the Chattak Gas Field from the project. This change makes the project financially unviable for Niko to pursue. We understand that Bapex has also written to the Energy Ministry that this project is not viable with Chattak East alone.*
>
> *We request your intervention in keeping the Chattak Gas Field intact, that is including Chattak East, in the project. Our request to you is in compliance with and as per provisions of the Bapex-Niko "FOU AGREEMENT", Bapex-Niko "STUDY REPORT", "BAPEX NEGOTIATION COMMITTEE REPORT DATED MAY 23, 2000", and most of all the "PROEDURE FOR THE DEVELOPMENT OF MARGINAL/ABANDONED GAS FIEDS" approved by the Hon. Prime Minister of Bangladesh. Excluding Chhatak East from this project would contravene all of the above mentioned documents and Niko will not be able to implement this project.*
>
> *As I had appealed to you that after waiting for five years, Niko's board will not allow me to hold up our resources and pursue this project any*

[681] Letter fron BAPEX to Petrobangla, 30 January 2003, Exhibit R-309, paragraph 2.2(d).
[682] Letter from BAPEX to Petrobangla, 30 January 2003, Exhibit R-309.

further when we close our fiscal year at March end this year. I humbly request your intervention to resolve the pending issues and implement this project without any further delay.[683]

1104. Following this letter a "***Joint meeting between the Energy Ministry, Petrobangla, Bapex and Niko***" was held on **2 March 2003**. At this occasion Niko was given an opportunity "*to present [its] views and concerns regarding this project […] This was the first time in almost two years we had the opportunity to present our case in a joint meeting*",[684] before "*senior representatives of BAPEX, Petrobangla and the Ministry*".[685]

1105. There are on record no minutes of this meeting. Niko summarised the positions presented at the meeting as follows:

> *We understand from the discussions that took place in the referred meeting that Petrobangla/Bapex primarily view Chattak Gas Field as two different fields or entities. Chattak West is Chattak Gas Field being Abandoned. On the other hand, they view Chattak East is not Chattak Gas Field and not abandoned.*
>
> *[…] we view Chattak Gas Field as one gas field consisting of Chattak West and Chattak East. […] we did not see or hear of any legal or regulatory document, other than the decision provided by the erstwhile secretary in-charge, Mr. Khairuzzaman, which forms the basis of Petrobangla/Bapex's contention that Chattak East is required to be excluded.*[686]

1106. In its follow-up **letter of 3 March 2003,**[687] **Niko** again set out its case, insisting that the Chattak Field, historically and geologically, had always been treated as a single field until it was for the first time excluded at the BAPEX Board meeting on 21 August 2000. In the view of Niko, this exclusion was contrary to the PSC Block 12, the FOU, the Report, the Marginal Fields Procedure and the BAPEX Negotiations Report of 23 May 2000. Niko also sought to demonstrate that treating Chattak East as Marginal/Abandoned Gas Field was not contrary to the definition of such fields by the Government in the Marginal Fields Procedure. In the letter Niko presented the following representation of the Chattak Field, showing the four fault blocks, Chattak West and Chattak East:

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[683] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 26 February 2003, Exhibit C-149.
[684] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 3 March 2003, Exhibit C-152.
[685] C-CMC, paragraph 157, relying in Niko's letter to the Ministry, dated 3 March 2003, Exhibit C-152.
[686] As per Niko's letter to the State Minister of 3 March 2003, produced as Exhibits C-152 and R-276.
[687] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 3 March 2003, Exhibit C-152.

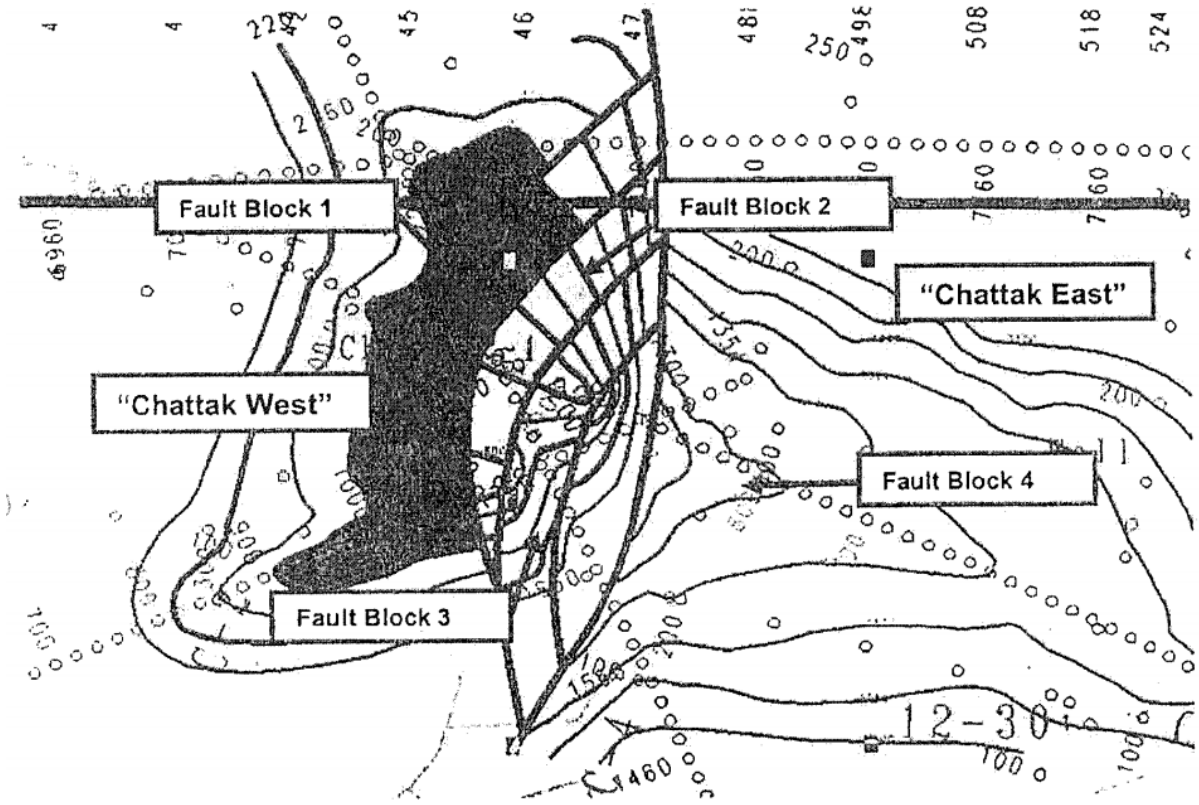

Figure 1 - Chattak Gas Field

1107. Based on this figure, Niko sought to demonstrate that the "*four Chattak fault blocks comprise one 'field': the 'Chattak Field'*". Niko attached to the letter a legal opinion on the letter head of Moudud Ahmed and Associates, dated 27 February 2003 and signed by Md. Azizul Haq, Advocate, Supreme Court.[688]

1108. Referring to a letter of the Ministry of 4 March 2003 (which has not been produced), **BAPEX**, wrote to Petrobangla a **letter of 5 March 2003**,[689] signed by Mr Maqbul-E-Elahi, Managing Director. The letter described the position of BAPEX and Petrobangla, relying on the joint survey (the Report) and the identification of "*two distinct entities i.e. Chattak (West) and Chattak (East) field*", and the reference to Chattak East as an "*exploration Target*". The letter gave a summary of the negotiations for the JVA and noted that in its letter of 8 July 2002, "*Niko would provide entirely different fiscal terms for Chattak (East) if Chattak (East) is included*

[688] Moudud Ahmed & Associates, Legal Opinion, 27 February 2003, Exhibits C-150.
[689] Letter from BAPEX to Petrobangla, 5 March 2003, Exhibit R-302.

in the proposed JVA". Having set out the conflicting positions of the Parties, the letter concluded with the recommendation to submit the difference to the Ministry of Law:

> *Therefore, it is clearly apparent that, in respect of describing the perimeter of Chattak East as a Marginal/Abandoned Gas Filed, there are conflicting views between BAPEX/Petrobangla/Ministry and NIKO.*
>
> *Under such circumstances, in order to reach a final determination of the definition of Marginal/Abandoned Gas Field and what the boundary will be, the Government may, if it deems necessary,* ***seek the advice of the Ministry of Law, Justice and Parliamentary Affairs.***[690]

9.5.5 The opinion of the Law Ministry on Chattak and the decisions following it

1109. The Ministry must have followed this recommendation from BAPEX: On **1 April 2003**, the **Ministry wrote to Petrobangla** with copy to BAPEX,[691] informing them that the Law Ministry's opinion had been sought and communicating the substance of the opinion so obtained. In its opening paragraph, the letter refers to a memorandum by Petrobangla No 46.01.-163 (part-1)/11 of 5 March 2003 and states that "*to resolve the dispute between BAPEX and Niko regarding Chattak Gas Field*" the opinion of the Law Ministry was sought.

1110. The Tribunals note with regret that neither the memorandum nor the opinion itself nor any other document relating to this request for the opinion has been produced. The content of **the Law Ministry's opinion**, however, is reproduced in a letter of the Energy Ministry, dated 1 April 2003, in the following terms:

> *(a) To determine the Marginal/Abandoned Gas field there is a clear guideline in Article 3 [of] the Procedure for Development of Marginal/Abandoned Gas Fields. To determine whether the Gas Fields under Frame Work of Understanding are*

[690] Letter from BAPEX to Petrobangla, 5 March 2003, Exhibit R-302, emphasis added.
[691] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 1 April 2003, Exhibit R-307; a similar but not identical translation is produced as Exhibit C-153 and Exhibit 7 in the Jurisdiction proceedings.

Marginal/Abandoned, the above mentioned procedure should be followed.

(b) But, to determine whether Chattak (East) is included in Chattak Gas Field or not, Exhibit A of Frame Work of Understanding, executed within the parties, may be referred to. The coordinates, volume and depth and of Kamta, Feni and Chattak Gas Fields are clearly mentioned in Exhibit A. The FOU (Frame Work of Understanding) was executed between NIKO Resources (Bangladesh) and Bangladesh Petroleum Exploration Limited (BAPEX). Since the specific description of Chattak Gas Field is mentioned in Exhibit A so the described area will be considered as Chattak Gas Field.[692]

1111. The letter of the Energy Ministry then continues by instructing Petrobangla as to the conclusions to be drawn from this opinion:

In light of the above situation, and as per the kind consent of the Honorable Prime Minister, regarding the above mentioned matter, this is to inform that Petrobangla may take necessary action to finalise the signature of Joint Venture Agreement between BAPEX and NIKO Resources in the light of under mentioned provisions.

1112. The letter then defines the Chattak Gas Field by reference to Exhibit A of the FOU and sets out the coordinates as identified in that Exhibit. The letter concludes by the following instructions:

(b) To achieve the target of finalisation of the Joint Venture Agreement, Petrobangla is hereby requested to send the draft Joint Venture Agreement to this Division following all the term and conditions and Rules and Regulations as approved by the Hon'ble Ex-Prime Minister on 14.06.2001 in 'THE PROCEDURE FOR DEVELOPMENT OF MERGINAL [sic]/ABANDONED GAS FIELDS'.

1113. The letter is signed by Md Safikur Rahman, Senior Assistant Secretary at the Ministry.

[692] Quoted from the translation in Exhibit R-307; a slightly different translation is provided in Exhibit C-153.

9.5.6 The final stage of the negotiations: separate fiscal terms for Chattak East

1114. Following this communication by the Ministry, a "***BAPEX-Niko JVA Committee***" was set up. Md Mokbul-E-Elahi was its Convener. The JVA Committee examined and elaborated changes to be made to the JVA in light of the inclusion of Chattak East. In a **letter of 24 April 2003**,[693] the convener of this committee reported to Petrobangla the work of the committee and its consultations. He explained that discussions had taken place in which Niko was represented by Mr Nuruzzaman Babul as "*local advisor of Niko*", since Mr Qasim Sharif, Vice President of Niko, had been out of the country.[694]

1115. In particular, he wrote:

> *The committee prepared a Comparative Economic Analysis of each of the gas fields i.e. Chattak (West), Chattak (East) and Feni under the JVA with the PSC Moulvibazar Gas Field i.e. Block-12 operated by the IOC which is enclosed herewith (Enclosure 4). On the basis of the analysis, the committee prepared the proposal of investment multiple of Chattak (West), Chattak (East) and Feni Gas Fields; in other words, they proposed the allocation of shares between BAPEX and Niko in many options.*
>
> *Therefore, we request your review of the Comparative Economic Analysis and approval to send the letter to Niko.*

1116. The Committee had prepared a letter to Niko "*asking for their opinion on the decision of the committee*" and submitted it to Petrobangla for approval.

1117. The time fixed for the completion of the Committee's work was extended with Petrobangla's instruction of *"[p]reserving the financial viz overall interest of BAPEX"*[695] and a second time with a final time limit "*in view of finalizing the JVA discussing with Niko you are specially requested to perform the required steps within 22-05-2003 AD*".[696]

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693 Letter from BAPEX to Petrobangla, 24 April 2003, Exhibit C-154.
694 Letter from BAPEX to Petrobangla, 24 April 2003, Exhibit C-154, and Letter from BAPEX to Niko, 26 April 2003, C-155.
695 Letter from Petrobangla to BAPEX, 3 May 2003,Exhibit JD SI-30.
696 Letter from Petrobangla to BAPEX, 17 May 2003, Exhibit JD SI-31.

1118. The results of this work were further examined in June 2003 by the Petrobangla Committee. Petrobangla then prepared amendments of the draft JVA and the revised draft was submitted for approval to the BAPEX Board. After that approval by the BAPEX Board, the draft was sent on 3 July 2003 by Petrobangla to the Ministry.

1119. This revised version, providing separate fiscal conditions for Chattak West and Chattak East and **approved by BAPEX and Petrobangla**, was **then approved by the Ministry**, as shall be discussed below, and executed on 16 October 2003.

9.5.7 The Tribunals' considerations and conclusions

1120. From their examination of the evidence before them, the Tribunals conclude that, **until after the completion of the MFE, the Chattak gas field was treated as a single entity**, even though it was known that several faults divided it. **Between late May and early June 2000 BAPEX decided to treat Chattak East differently from Chattak West** and remove it from the contract area of the JVA; it argued that Chattak East was an "*exploration*" area and as such could not be treated as "*marginal/abandoned*". This position was then also adopted by Petrobangla and the Ministry.

1121. In their discussions about the Chattak issue, the Respondents insist that Chattak West and Chattak East must be considered separately; the concept of "*marginal/abandoned*" field applied only to Chattak West, while Chattak East had to be treated as an exploration target.

1122. That was the position that BAPEX had taken, for instance in the meeting of 25 June 2001 discussed above:

> *The JVA is for Marginal gas fields. This means Gas fields already discovered and produced for a period of time. Chattak East is an exploration target and hence can not be termed as a marginal field.*[697]

[697] Minutes of the Meeting to Finalized the JVA, 25 June 2001, Exhibit R-11.

1123. Mr Chowdhury explained the positions in his Witness Statement. He confirmed that it was "*after the joint study in February 2000*" that BAPEX and Petrobangla "*decided […] that Chattak East was not part of the abandoned Chattak West field to include in the JVA*".[698] When the matter was raised for his review at the Ministry, he "*studied it carefully*" and, at the meeting of 29 July 2002 he reached the same conclusion as the Chairman of Petrobangla and the Managing Director of BAPEX. He defended this position at later occasions as well.

1124. At the hearing Mr Chowdhury explained the position that he had taken also at the meeting of 16 September 2002:

> *Chattak East and West are divided by faults and they are not considered one gas field.*[699]

1125. He conceded then, however, that this was not his own opinion but was based on the technical advice from Petrobangla and BAPEX. He accepted that advice, having seen that the MFE assumed separate treatment for Chattak West and Chattak East. He said that other studies adopted the same position, but had not seen these other studies.[700]

1126. Niko objected to the removal of Chattak East from the area of the JVA, contesting the split of what it considered a single field and relying, among other arguments, on the terms of the FOU and the Marginal Fields Procedure. While also presenting some geological arguments and insisting that the project would not be viable if Chattak were limited to the Western part, the Claimant defended its position primarily on the contractual level, arguing that the "*Chattak Field*" was from the outset of negotiations specifically defined to include both the East and West portions:

> *"Chattak Field" was from the outset of negotiations specifically defined to include both the East and West portions, and that carving out Chattak East from the JVA would have defied both industry practice and practical reality.*[701]

1127. The Claimant also argued that, with respect to the definition of marginal/abandoned fields for the purpose of Bangladeshi law, the

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[698] Chowdhury Witness Statement, paragraph 9.
[699] Tr. Day 3 (CONFIDENTIAL), p. 51, ll. 2-4.
[700] Tr. Day 3 (CONFIDENTIAL), pp. 51 – 55.
[701] C-PHB2 (CONFIDENTIAL), paragraph 27.

Marginal Fields Procedure is decisive; and that Procedure accepts that the Chattak Field is deemed to be a marginal/abandoned field, without the East/West distinction:

> *… in the case of Chattak and Feni specifically, the Marginal Field Procedure passed by Prime Minister Sheikh Hasina in 2001 was the applicable "norms and procedures" and had already explicitly deemed any applicable procedural requirements to have been complied with.*[702]

1128. Concerning international standards for defining marginal/abandoned gas fields, the Claimant relied on the explanations of Mr. Moyes to the effect, as summarised by the Claimant, that "*the inclusion of the entirety of the Chattak Field was wholly consistent with international industry practice and expectations*".[703]

1129. The difference between the Parties about the contract area was resolved by the Law Ministry's opinion. Based on the definition in the FOU, in particular the coordinates set out in its Annex A, the Law Ministry concluded that the JVA had to apply to the Chattak Gas Field as defined in this annex.

1130. The opinion led to a **compromise solution** which had already been envisaged at the end of the Awami League Government: that the JVA applied to the undivided Chattak Field but with separate fiscal terms for its Western and Eastern parts, the latter taking into account terms that had been applied with respect to operations in the surrounding PSC exploration areas.

1131. The Respondents now heavily criticise the Law Ministry's opinion, which they describe as "*facially irrational*" [704] or as the result of "*unreasonable analysis*".[705] The Tribunals will examine in further detail in Section 9.6 the circumstances of the Law Ministry's opinions and their alleged irregularity. At this stage, the Tribunals consider the criticism raised by the Respondents concerning the substance of the opinion on the Chattak issue.

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[702] C-PHB2 (CONFIDENTIAL), paragraph 77.
[703] C-PHB2 (CONFIDENTIAL), paragraph 20.
[704] R-PHB1 (CONFIDENTIAL), paragraph 151.
[705] R-PHB2 (CONFIDENTIAL), paragraph 40.

1132. Contrasting their views with respect to this concept with that attributed to the State Minister, the Respondents assert that the State Minister

> *… endorsed Niko's contrived argument that the FoU obligated the Government to grant Niko rights to an exploration prospect that could in no way be considered a marginal or abandoned field.*[706]

1133. The Tribunals have considered the provision in the FOU according to which, upon the successful completion of the Study and the acceptability of the result, "*the parties would execute a Joint Venture Agreement*". The Respondents are correct in saying that this provision was no guarantee for Niko with respect to the conclusion of the JVA. Indeed, the conditions within this provision must be met and the parties must agree on the terms. The Tribunals are however of the view that the scope for the negotiations, and in particular the area to which they will apply, were defined by the scope of the FOU.

1134. The Tribunals also note that the Marginal Fields Procedure, in its Clause 10, envisaged that the Chattak, Feni and Kamta gas fields "*shall be deemed to have been declared marginal/abandoned gas fields*". Since BAPEX and Petrobangla had by then argued that the Chattak field had to be split, the fact that this provision nevertheless makes no such distinction, in the eyes of the Tribunals is clear recognition that the Awami League Government, by adopting the Marginal Fields Procedure with its Clause 10, had decided that Chattak East would not be removed from the Chattak Field.

1135. The Tribunals therefore conclude that it was reasonable for the Law Ministry to conclude that the Parties had agreed in the FOU that future contract area of the JVA was the Chattak Field in the coordinates of Exhibit A to the FOU. In view of this conclusion concerning the agreement between the Parties, there is no need to resolve geological differences that might otherwise be relevant with respect to the definition of marginal/abandoned fields.

1136. In conclusion on the Chattak issue, the Tribunals note that in the *BELA* Judgment of May 2010 the High Court Division of the Bangladesh Supreme Court also examined the issue. This judgment, like the opinion of the Law Ministry, relies on the coordinates in the FOU which it found

[706] R-MC, paragraph 87.

"*approved by the highest authority*". The Court concluded that this definition of the contract area was binding for the JVA and explained:

> *The coordinations [sic] of Chattak Gas field were defined in FOU. In fact, according to the terms of FOU exclusion of Chattak (East) from JVA and adoption of Swiss Challenge would be illegal as it would breach the terms and conditions of FOU. With respect to "Chattak (East) Explanatory Prospect" [Niko] reiterates that it falls within the coordinates of Chattak gas field as defined in the FOU. The JVA was executed pursuant to the terms and conditions of the FOU. The inclusion of Chattak (East) in the JVA is can not be said malafide as the FOU was approved by the highest authority.*[707]

1137. In other words, far from considering the Law Ministry's opinion of March 2003 "*irrational*" or "*contrived*", the High Court Division adopted it in substance. Based on their own analysis and considering the Judgment of the High Court Division, **the Tribunals have found no reason to impugn the Law Ministry's opinion**; **nor do they find any irregularity in the inclusion of Chattak East in the area of the JVA**.

9.6 Competition and the Swiss Challenge Procedure

1138. With respect to the question whether the conclusion of the JVA with Niko required prior submission of the contract to competition under the procurement rules applicable to such projects in Bangladesh and specifically to the method of Swiss Challenge, the Respondents assert that Niko successfully avoided through corruption that these requirements were applied to the award of the JVA. The Claimant denies that the requirements were applicable in the circumstances of the conclusion of the JVA, or that there was corruption in the decision to award the JVA without competitive procedures.

9.6.1 The Swiss Challenge procedure defined

1139. In its June 1998 Proposal, Niko described the procedure which later was referred to as the Swiss Challenge:

> *Niko will support and follow the procedural requirement the Government of Bangladesh will require to privatise the marginal, non-producing fields. However, in order to ensure transparency, Niko*

[707] *BELA* Judgment, Exhibit CLA-143, pp. 36 – 37.

proposes the following modality for finalising the proposed joint venture contract with BAPEX and putting the subject non-producing marginal fields on production:

A. *To our understanding since Niko is the first international company to promote the development of the marginal fields, the Ministry of Energy and Mineral Resources may execute an MOU with Niko Resources (Bangladesh) Ltd. A copy of the MOU is attached for your consideration.*

B. *Upon execution of the MOU, the terms and conditions of the contract are negotiated between Petrobangla and Niko and a draft contract is prepared.*

C. *Petrobangla then makes a public announcement of the project complete with the finalized terms and conditions. In this public announcement Petrobangla also invites other competent parties to submit offers in two separate packages titled "Technical Proposal" and "Commercial Proposal". Petrobangla opens and reviews all technical proposals first and then the commercial proposals of only the technically qualified parties are opened for evaluation.*

D. *All technically qualified proposals are reviewed, marked and normalised including the one negotiated with Niko.*

E. *If Niko remains the only qualified party or receives the highest mark then the contract negotiated with Niko is executed. If any other party is in the leading position, then Niko is asked to match that offer. If Niko agrees to match the leading offer, then the contract is executed with Niko. If Niko is unable to match the best offer then the contract is executed with the technically qualified and commercially successful party.*[708]

1140. It is uncontested that this proposal, although it does not mention the term Swiss Challenge, describes the procedure to which the Parties refer by this term. Referring to this proposal, Niko wrote on 1 February 1999 to BAPEX: *"[o]ur proposal for the subject project is based upon utilizing the transparent process of Swiss Challenge…"*[709] Petrobangla's 1998 Comments, evaluating the June 1998 Proposal, state the "*Niko has*

[708] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 28 June 1998, Exhibit C-123 and R-265.
[709] Letter from Niko to BAPEX, 1 February 1999, Exhibit R-269.

proposed that the process of Swiss Challenge be adopted in finalising the contract."[710]

1141. There is on the record no other detailed description of the Swiss Challenge procedure. The Tribunals take this quoted description as the Parties' joint understanding of the Swiss Challenge procedure.

1142. Considering this description of Swiss Challenge, the following elements must be taken as characteristic:

(i) The Government or its designated entity concludes a preliminary agreement with a contractor (who can be described as the preselected contractor) about the procedure to be adopted for the award of the future contract. This preliminary agreement, in Niko's proposal described as "*MoU*", is concluded before the element of competition is introduced in the procedure.

(ii) The terms and conditions of the future contract (the JVA) are negotiated with the preselected contractor and a draft contract is prepared.

(iii) Competition is introduced by a public announcement by Petrobangla on the basis of this draft JVA, as the product of the negotiations with the preselected contractor.

(iv) The companies responding to this announcement must submit a technical and a commercial proposal. On the basis of the technical proposal, Petrobangla determines the technically qualified companies. Niko's proposal is included in the "*technically qualified proposals*" without further review.

(v) If there are, in addition to that of Niko, other technically qualified proposals, the commercial proposals are "*reviewed, marked and normalised*".

(vi) If Niko's proposal is the only one technically qualified or none of the other qualified proposals are ranked above that of Niko, the JVA is awarded to Niko.

[710] Comments on M/S Niko Resources Ltd. Canada's Offer on "Marginal and Non-Producing Gas Field Development and Production", undated, Exhibit R-267, paragraph B.3.5.

(vii) If there are proposals ranked higher than that of Niko, Niko will be given the opportunity to match the highest-ranking offer.

1143. The Respondents clearly understood that the application as proposed by Niko required that, as a first step, an MOU be concluded, as a basis for the subsequent JVA negotiations. In its observations on the Niko Proposal, Petrobangla wrote:

> *Niko has proposed that the process of Swiss Challenge be adopted in finalising the contract. The first step in Swiss Challenge is the signing of an MOU between MOEMR and Niko to initiate negotiations by both parties in good faith for this project.*[711]

1144. The Tribunals conclude that, according to the Swiss Challenge process, as understood by the Parties, Niko was in any event treated as technically qualified. If proposals by other companies were ranked higher than that of Niko, Niko would be given an opportunity to match the highest-ranking proposal. In this process, Niko would be assured the preferential treatment in a MOU, concluded before the negotiations for the JVA are started and competition would be introduced only once a negotiated draft of the JVA has been completed.

9.6.2 The Parties' positions

1145. **The Respondents** argue that granting rights as those conferred on Niko in the JVA had to be subject to competitive procedures and specifically through the process described as Swiss Challenge. The JVA was concluded with Niko in the absence of a Swiss Challenge or any other competitive procedure, an advantage that Niko obtained by corruption. They state:

> *Niko's corruption prevented competitive bidding, thereby depriving the people of Bangladesh of a more competent operator for the fields.*[712]

and:

> *The fact is that Niko's corruption allowed it to procure the contracts without BAPEX and the Government having the opportunity to seek*

[711] Petrobangla 1998 Comments, Exhibit R-267, paragraph B 3.5.
[712] R-PHB1 (CONFIDENTIAL), paragraph 24.

more favourable terms and bids from other companies, all of whom would have been far more qualified according to Arthur Andersen.[713]

1146. The Respondents argue that competition in the award of contracts generally and Swiss Challenge in particular was a requirement for the lawful conclusion of the JVA. They state:

> *Swiss Challenge was what Niko offered to get in the door to negotiate the JVA and then evaded through corruption. As Respondents and two of its [sic] witnesses have explained, competition is a cornerstone of Bangladeshi public administration, as corroborated by all other oil and gas tenders and multiple procurement manuals.*[714]

1147. The Respondents deny that the FOU changed the requirement for competition in the award of the JVA; and, if it had done so, they argue that it would not have been binding.

1148. **The Claimant** denies that there was an obligation or a practice in Bangladesh to award contracts as the JVA in competitive procedure.[715] It accepts that its initial proposal and specifically the June 1998 Proposal offered the use of the Swiss Challenge procedure, even though the MOU, attached to the proposal letter, did not make any reference to it.[716] The Claimant argues, however, that the initially proposed approach was fundamentally changed with the adoption of the FOU:

> *… the FOU was a fundamentally different document than the MOU, and established a fundamentally different process to advance the JVA.*[717]

1149. According to the Claimant, BAPEX concluded, with the approval of the Ministry and Petrobangla, the FOU which entitled Niko, upon successful completion of the Study, to enter into the JVA:

> *Most critically, the FOU explicitly provided that the Parties would execute a JVA upon satisfactory completion of the study. This was not*

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[713] R-MC, paragraph 27.
[714] R-PHB2 (CONFIDENTIAL), paragraph 73, with reference to the explanations in R-PHB1 (CONFIDENTIAL), paragraphs 154-166.
[715] C-PHB2 (CONFIDENTIAL), paragraph 78.
[716] C-PHB1 (CONFIDENTIAL), paragraph 124.
[717] C-PHB1 (CONFIDENTIAL), paragraph 127.

qualified by reference to Swiss Challenge or any other bid procedure.[718]

1150. In addition, the Claimant relies on other provisions in the FOU to demonstrate "*the firm nature of the commitment to proceeding with a JVA*", in particular clauses 4.03 and 5.02.[719] The Claimant also relies on the Marginal Fields Procedure[720] and argues that it assured a special status for Niko and the two fields to which the JVA granted rights. Apart from the legal arguments, the Claimant invokes "*clear and present practical challenges to implementing*" the Swiss Challenge procedure in the present case.

9.6.3 The Tribunals' questions and the principal issues to be addressed

1151. The Tribunals have invited the Parties to respond to a number of questions related to the application of competitive procedures in general and of the Swiss Challenge procedure in particular. In Question 6, as quoted above in Section 2.4, the Tribunal invited argument and evidence concerning relevant competitive procedures and information on the procedures applied in practice to the award of petroleum projects and the commercial conditions of such projects. They also invited explanations concerning certain aspects of the negotiations of the JVA and the role which the reference to the Swiss Challenge procedure played in it.

1152. Considering the Parties' arguments and evidence, including their replies to the Tribunals' questions, the Tribunals understand that their analysis must distinguish between

(i) a general requirement for competition or for the Swiss Challenge under the applicable rules and regulations for public procurement in Bangladesh; and

(ii) a specific agreement between the Government/ Petrobangla/ BAPEX and Niko to apply this procedure.

[718] C-PHB1 (CONFIDENTIAL), paragraph 128.
[719] C-PHB1 (CONFIDENTIAL), paragraph 129.
[720] C-PHB1 (CONFIDENTIAL), paragraph 139, with further references, C-PHB2 (CONFIDENTIAL), paragraph 77.

9.6.4 The requirements under the Bangladesh procurement regulations

1153. Concerning the "*normal competitive procedures*", **the Respondents** explained:

> *The laws and regulations at the time required competition for government procurement and service contracts. The public procurement regulations on the record indicate that competition was required …*[721]

1154. In support of this assertion, the Respondents rely on the Public Procurement Regulation of September 2003[722] and an undated Procurement Manual.[723] They also assert:

> *… grant of any rights to develop gas fields, whether for exploration, marginal/abandoned fields, or known discoveries, is done through an open and competitive process in Bangladesh.*[724]

1155. The support for this assertion is found, in the Respondents' view, in the 1978 Manual of Office Procedure (Purchase) (1978), providing under the heading "General Principles of entering into contracts":

> *As far as possible, contract should be placed only after tenders have been openly invited.*[725]

1156. In response to the Tribunals' question, the Respondents provided the following explanation:

> *The laws and regulations at the time required competition for government procurement and service contracts. The public procurement regulations on the record indicate that competition was required:*
>
> - *"The salient features of the Regulations are that they have been prepared in line with international standard introducing improved modern procurement principles and practices that will promote fairness and competition in the procurement process, ensure equitable treatment to all parties."*

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721 R-PHB1 (CONFIDENTIAL), paragraph 160.
722 The Public Procurement Regulations, September 2003, Exhibit R-409.
723 Petrobangla Procurement Manual, Exhibit RH-16.
724 R-PHB1 (CONFIDENTIAL), paragraph 29.
725 Manual of Office Procedure (Purchase), 1978, Exhibit R-408, p. 39, quoted at R-PHB1 (CONFIDENTIAL), 29 and Footnote 43.

- *"[T]he Government of the People's Republic of Bangladesh considers it expedient to regulate procurement of goods, works and services for achieving the objectives of:*

[…] promoting competition among tenderers for the procurement of goods, works or services in the public sector[.]"

- *"Procurement should normally be carried out through one-stage bidding" and for complex works, "a two-stage bidding/two-envelope bidding procedure may be adopted."*[726]

1157. The first two quotations in this passage of the Respondents' First Post-Hearing Brief are from the Public Procurement Regulations (Sept. 2003),[727] and the third quotation from the undated Procurement Manual.[728]

1158. The Respondents also rely on what they describe as the confirmation of a "*general principle*" described in Mr Chowdhury's testimony at the Hearing and quoted by the Respondents as follows:

> *"every purchase or procurement of services must have competitive, comparative bidding".*[729]

1159. Concerning the practice with respect to petroleum contracts, the Respondents assert that

> *Bangladesh has never before or after the JVA awarded rights to exploit petroleum resources without public competitive bidding.*[730]

1160. The Respondents cite three cases to support this statement:

> *First, in 2008, "[i]n order to sign PSCs, Petrobangla […] floated international tenders" for bidding. Seven international companies bid for 15 blocks. The selected companies and Petrobangla ratified drafts subject to approval by the competent authorities, the State Minister of Energy and the Prime Minister.*
>
> *A similar process was followed in 2012. The Government invited bidders with a newspaper announcement. Again, a committee was formed to review the bids and report to the Petrobangla Chairman.*

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[726] R-PHB1 (CONFIDENTIAL), paragraph 160, footnotes omitted, emphasis added by the Respondents.
[727] The Public Procurement Regulations, September 2003, Exhibit R-409, paragraph 6.
[728] Petrobangla Procurement Manual, Exhibit RH-16.
[729] Tr. Day 3 (CONFIDENTIAL), p. 25, ll. 8-10; quoted at R-PHB1 (CONFIDENTIAL), paragraph 161, emphasis added by the Respondents.
[730] R-PHB1 (CONFIDENTIAL), paragraph 162.

Two companies were selected for PSCs and approval of the Ministry of Energy was sought before executing the PSCs.

In 2016, there was a slightly different competitive process. After StatOil showed interest in signing a contract, the Government invited expressions of interest (EOI) from competitors, providing that StatOil would not participate in the EOI, but would be invited to "participat[e] in the legally accepted procedures" that followed, i.e., in the request for proposal (RFP). After evaluating the EOI, the Government chose three companies, including StatOil, to submit competitive proposals.[731]

1161. **The Claimant** denies that, under the law or practice in Bangladesh, there was any requirement to follow a competitive process for the conclusion of the JVA:

> *… there was never any legal or procedural requirement to proceed with a Swiss Challenge process prior to executing the JVA, or indeed to proceed with any other form of competitive bidding. The Respondents have repeatedly asserted that a requirement existed to complete a competitive bidding process before executing the JVA, but despite being given every opportunity to identify such a requirement with specificity, the Respondents and their witnesses have failed to identify anything that supports such a notion, whether as a matter of law or policy.*[732]

1162. The Claimant contests the Respondents' assertion that "*Bangladesh has never before or after the JVA awarded rights to exploit petroleum resources without public competitive bidding*". It refers to 2010 legislation specifically dispensing with any tendering requirements in the power and energy sectors: the *Speedy Supply of Power and Energy (Special Provision) (Amendment) Act*. It asserts that under the provisions of this act, contracts have been awarded "*including gas well drilling contracts to Gazprom*".[733]

1163. As to the 2003 Public Procurement Regulation, on which the Respondents rely, the Claimant points out that it was dated September 2003 and "*came into effect at some later point following publication in the Official Gazette*", possibly March 2004.[734] They add: *"[t]he fact that these*

[731] R-PHB1 (CONFIDENTIAL), paragraphs 163 – 165, internal citations omitted.
[732] C-PHB1 (CONFIDENTIAL), paragraph 138.
[733] C-PHB2 (CONFIDENTIAL), paragraphs 79-80.
[734] C-PHB2 (CONFIDENTIAL), paragraph 78.

Regulations were only being introduced in September 2003 supports the notion that, prior to that time, there were no such requirements in effect".

1164. In any event, the Claimant questions the applicability of the 2003 Procurement Regulation to a licence/concession agreement such as the JVA, under which *Niko* was the party making the applicable financial commitment. It relies on the definition of "*procurement*" in the regulation:

> "***procurement***" *means the purchasing, hiring or obtaining of goods, works and services by any contractual means.*[735]

1165. The Claimant concludes that "*the JVA is plainly not a 'procurement' contract within the meaning of the 2003 Regulations*".[736]

1166. In addition to the FOU, the Claimant relies on the Marginal Fields Procedure of June 2001, in particular Article 10 and Article 4.2 and 4.4, as well as the Briefing Note which the Ministry of Energy issued on 6 June 2001 to Prime Minister Sheikh Hasina, four days before the policy was approved.[737] The Claimant argues:

> *Put simply, under Article 10 of the Marginal Field Procedure, the Chattak/Feni JVA was explicitly deemed to have complied with all aspects of the Marginal Field Procedure. The Marginal Field Procedure included proposal evaluation and approval procedures at Articles 4.2 and 4.4 and, under the terms of Article 10, these were deemed to have been complied with for the purposes of the Chattak, Feni and Kamta fields. Further, Article 4.4 is that which would apply to the JVA, absent Article 10, and it does not contemplate a Swiss Challenge or other bid procedure for marginal field development JVAs.*[738]

1167. **The Tribunals** have examined the bases for the Respondents' assertion that the conclusion of the JVA had to be subject to competitive procedures. In this examination, the Tribunals have noted that the regulations on which the Respondents rely do indeed confirm, as a matter of principle, the desirability of applying competitive procedures. The Respondents have, however, not quoted a single provision that requires competitive procedures in all cases.

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[735] The Public Procurement Regulations, Exhibit R-409, Regulation 2, emphasis in the original.
[736] C-PHB2 (CONFIDENTIAL), paragraph 78.
[737] Procedure for Development of Marginal/Abandoned Gas Fields, 6 June 2001, Exhibit C-203, and explanations at C-RC, paragraph 53 and subsequent submissions by the Claimant.
[738] C-PHB1 (CONFIDENTIAL), paragraph 140.

1168. In their examination, the Tribunals also have considered that the JVA and the circumstances of its conclusion are different from ordinary procurement contracts that are regulated by the provisions on which the Respondents rely.

- The JVA is not a contract by which BAPEX acquires goods, works or services against payment of a price, as they are regulated for instance by the 1978 Manual of Office Procedure (Purchase), in the undated Procurement Manual and in the 2003 Public Procurement Regulation. Indeed, the Respondents have not argued that any of these texts apply directly to the award of the JVA.

- Moreover, the conclusion of the JVA was not the result of an initiative of the Respondents or the Government which could have been expressed in the form of an invitation to tender or a request for proposals. It was initiated by an unsolicited proposal from Niko for the development of a resource which, at the time, the Government and the Respondents had not planned to develop. The Government received a proposal which it could accept or not – a situation quite different from that addressed in the procurement regulations. There was indeed no precedent for the JVA, as Mr Chowdhury testified.[739]

- In addition, the terms and conditions of the JVA were negotiated over a very long period and, as shown above in Section 4.1, were examined at length by several working groups of BAPEX and Petrobangla.

1169. In view of these particularities, it is not apparent to the Tribunals that the conclusion of the JVA must be governed by principles of ordinary procurement. The protection of the public interest in the use of the State's resources may require that other methods be considered.

1170. Indeed, when Niko made its proposal in June 1998, the Respondents and the Government did not envisage applying any of the procedures provided by the procurement regulations or otherwise practiced in Bangladesh. In other words, there is no indication that, by proposing Swiss Challenge,

[739] Tr. Day 3 (CONFIDENTIAL), p. 65, ll. 12-23.

Niko sought to replace a competitive procedure that would otherwise have been applied.

1171. Following receipt of the June 1998 Proposal, the Respondents also proceeded with a thorough analysis of Niko's proposals and the terms of the JVA, as they evolved over time. These examinations were first performed upon receipt of the June 1998 Proposal separately by BAPEX and by Petrobangla and presented in Petrobangla's 1998 Comments, discussed above. Several other examinations were conducted during the following years, in particular by the committees formed at various stages of the negotiations of which some were referred to above in Section 4.1. The intensity of these examinations also found its reflection in the number of drafts of the JVA, as they were prepared over the years by one or the other side to that proposed agreement. In other words, the Government and the Respondents carefully analysed the JVA's terms and conditions, as one would expect in the absence of competitive procedures.

1172. In their explanations on the competition requirement, the Respondents refer, as quoted above, to the practice in Bangladesh specifically with respect to the "*award of rights to exploit petroleum resources*". The Claimant has cast doubt in the consistency of this practice as asserted by the Respondents.[740] The Tribunals note that indeed the examples provided by the Respondents concerned the award of PSCs where the Government or Petrobangla had identified the areas to be awarded. Even if these examples showed a consistent practice, this would not exclude that, in the special circumstances prevailing with respect to the JVA, a different approach could be adopted. Indeed, when the Petrobangla Board of Directors discussed the Niko 1998 Proposal at its meeting on 22 October 2000 and compared it to the conditions of PSCs, the "*Board was informed that this entity [i.e. Niko] has proposed to unilaterally develop the Joint Venture-fields, hence this is not possible to compare this entity with any other entities*".[741]

1173. In any event, the procedure for awarding contracts for the development and exploitation of marginal/abandoned gas fields was first regulated by the Government (under Prime Minister Sheikh Hasina) in June 2001. The

[740] C-PHB2 (CONFIDENTIAL), paragraph 79.
[741] Decision from 287th Petrobangla Board of Directors Meeting of 22 October 2000, Exhibit R-271, p. 10.

Procedure to this effect emphasises that "*a set of procedural guidelines is deemed necessary*",[742] thus indicating that, prior to this procedure, the matter was not, or not adequately, regulated.[743]

1174. The Procedure defines the process by which marginal gas fields are identified and determines the procedure for awarding contracts for private investment in such fields. It distinguishes between (a) investments for which the Government or Petrobangla invites proposals and negotiates a contract with the best proposal and (b) contracts for offers received prior to the adoption of the Procedure.

1175. With respect to the former, a competitive procedure is prescribed in the following terms:

> *4.2 GOB/Petrobangla may invite proposals for private investment for the development of marginal/abandoned gas fields. The offers received will be evaluated on declared criteria and the best offer will be selected for negotiation and finalisation of the contract.*
>
> *4.3 Model Production Sharing Contract 1997 as it relates only to gas and its associated products and as may be modified from time to time by the Government shall be used as far as practicable as guidelines for negotiation. However, established norms and procedures will be taken into consideration while finalising the contract between the parties.*

1176. This procedure leaves no room for the Swiss Challenge, where the terms of the contract are negotiated first with a single bidder and proposals are invited by reference to the terms so negotiated.

1177. The Procedure for Marginal Fields continues in Clause 4 by addressing a different situation:

> *4.4 Offers received prior to the adoption of these procedures will be appraised by a technical committee appointed by Petrobangla. After appraisal a Joint Venture Agreement (JVA) will be concluded between*

[742] Procedure for Development of Marginal/Abandoned Gas Fields, Annex C to JVA, Exhibit R-7, clause 1.2.
[743] The High Court Division of the Supreme Court reached a similar conclusion on the basis of the evidence before it when it issued the order of 5 November 2015 on Writ Petition 4982 of 2008. "*It further appears from the charge sheet that [prior to the Marginal Fields Procedure of 2001] there was no policy or guideline to conclude the JVA with foreign company in respect of exploration and extraction of gas and oil in Bangladesh. Even no model JVA was framed yet.*" (Exhibit R-230, page 37).

the selected investor and Petrobangla/Company(ies) and forwarded to the Government for approval.

1178. An earlier draft contained, beside this provision, another clause dealing with such prior as follows:

> *Unsolicited offers received prior to the adoption of this policy will be appraised by a technical committee appointed by Petrobangla. Such offers will be subject to Swiss Challenge before the contract is finalised.*[744]

1179. This reference to Swiss Challenge in the earlier draft of the Procedure seems in line with correspondence from the Ministry to Petrobangla on 19 and 29 March and 16 April 2001,[745] passed on to BAPEX on 11 April 2001. In the Ministry's letters Petrobangla is instructed to finalise the JVA "*based on Swiss Challenge method*" and "*by following the swiss challenge method after completion of necessary negotiations*", respectively.

1180. The provision in the earlier draft of the Procedure which required the application of the Swiss Challenge method did not find its way into the final version of the Procedure. The provision retained would have regulated offers received prior to June 2001, at the time of the adoption of the Marginal Fields Procedure, and thus covers Niko's June 1998 Proposal. It requires appraisal by a technical committee and the conclusion of a Joint Venture Agreement which must be approved by the Government. This process is implemented without any competitive procedure – Swiss Challenge or otherwise. In other words, the public interest is ensured by the appraisal of a technical committee appointed by Petrobangla and with Government approval.

1181. The Respondents comment on this provision thus:

> *Nothing in this language suggests that the conclusion of a contract would be appropriate absent competition or government approval.*

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[744] Draft attached to a letter from the Ministry to Petrobangla, dated 20 May 2001, Exhibit C-7 to the Claimant's Memorial on Jurisdiction.

[745] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 19 March 2001, Exhibit R-337, Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 29 March 2001, Exhibit R-274, and Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 16 April 2001, Exhibit R-275.

> *And, in any event, the draft Procedure explicitly stated that the Government's interpretation (requiring competition) would prevail.*[746]

1182. The statement refers to Clause 9 of the Procedure:

> *In case of any ambiguity with regard to interpretation of any provision of these procedures, the GOB interpretation shall be final.*[747]

1183. The Tribunals see no ambiguity in Clause 4.4. That clause requires Government approval and does not require competition. The conclusion of a contract "*absent government approval*" is not "*appropriate*"; but there is no basis for asserting that the conclusion of a contract "*absent competition*" is inappropriate. What is "*inappropriate*" is the assertion by the Respondents that the Government may declare that Clause 4.4 required interpretation and, based on Clause 9, interpret it as "*requiring competition*".

1184. It is clear to the Tribunals from the wording of Clause 4.4 of the Marginal Fields Procedure that it was sufficient that the terms of the Agreement were appraised in the manner prescribed and approved by the Government; there was no requirement of a competitive procedure for the conclusion of the JVA in the present case.

1185. The conclusion is confirmed by the fact that an earlier draft of the Procedure provided for the use of the Swiss Challenge procedure and this requirement was removed in the final version. The Tribunals also note that, once the draft Procedure was approved by the special committee for supervision of the Bid evaluation, chaired by the Principal Secretary of the Prime Minister, and shortly before its approval by the Prime Minister, the Ministry instructed "*urgent finalisation*" of the JVA. It announced to Petrobangla on 10 June 2001 the advanced state of the Procedure, communicated a copy of it and gave the following instructions:

> *In this situation in light of the draft procedure for development of Chatak, Kamta and Feni marginal and abandoned gas fields for urgent finalisation of the Joint Venture Agreement between Bapex and Niko Resource:*

[746] R-PHB1 (CONFIDENTIAL), paragraph 149.
[747] Procedure for Development of Marginal/Abandoned Gas Fields, Annex C to JVA, Exhibit R-7, clause 1.2.

(1) *write a letter to Niko Resource mentioning specific date for coming to Bangladesh and*

(2) *after finalization of the negotiations of Joint Venture Agreement between Bapex and Niko Resource, send the JVA to this ministry for approval of the government by 20/06/2001.*[748]

1186. On the same day, these instructions were passed on by Petrobangla to BAPEX and on 11 June 2001 BAPEX wrote to Niko, attaching the Petrobangla letter and stating:

> *Pursuant to the mentioned draft policy of the Government, the proposed draft JVA needs to be reshaped/rearranged accommodating right clauses as and where needed. Accordingly, we invite one of your authorised representative to a Joint meeting between BAPEX and NIKO to be held on 12th June 2001 at 10.00 A.M. at BAPEX office, Dhaka, Bangladesh.*[749]

1187. In none of the three letters was there any mention of Swiss Challenge or any other competitive procedure to be applied before this "*urgent finalisation*" of the JVA. By that time at the latest, the Government and the Respondents evidently considered that Swiss Challenge was not or no longer required.

1188. In the Tribunals' view **the procedure by which the JVA was concluded thus was in compliance with the Marginal Fields Procedure**. The Respondents have **not shown the violation of any other procurement regulation in Bangladesh**.

1189. This conclusion leaves as only other possible basis for requiring the application of the Swiss Challenge an agreement between Niko and the Government or the Respondents.

9.6.5 The alleged agreement to follow the Swiss Challenge procedure

1190. In addition to their assertion that competitive procedures were required for the award of the JVA, the Respondents also argue that the use of the Swiss Challenge procedure had been agreed by the Parties and thus had

[748] Regarding the Approval of the Proposal of Niko Resources on Marginal Gas Fields Development and Production, Annexure 26, 10 June 2001, Exhibit JD C-7 to Claimant's Memorial on Jurisdiction.
[749] Letter from BAPEX to Niko, 11 June 2001, Exhibit C-136, with the letter of Petrobangla attached.

become a binding requirement. The Claimant denies that such a requirement had been agreed and, in any event, the FOU provided for the conclusion of the JVA upon the completion of the Study without the additional step of a Swiss Challenge.

1191. When the **Respondents** discuss their allegation about an agreement on the Swiss Challenge procedure they often do so together with the argument on the general requirement of competitive procedures, which has been discussed above. This combination of the two lines of arguments can be seen for instance when the Respondents rely on Niko's June 1998 Proposal and the offer to apply Swiss Challenge contained in this proposal. They explained in their First Post-Hearing Breif that

> *The Government accepted Niko's proposal to use Swiss Challenge instead of the normal competitive procedures for petroleum rights, and Respondents considered competition through Swiss Challenge as "mandatory".*[750]

1192. The position now taken by the Respondents is that the Government's acceptance of Niko's proposal was expressed when on 25 May 1999 the Ministry "*directed Petrobangla to 'take necessary action in order to implement [Niko's] proposal'*".[751]

1193. When asserting that they considered Swiss Challenge as "*mandatory*", the Respondents make reference to the Minutes of a meeting of the Petrobangla Board of Directors on 22 October 2000. The relevant passage in these Minutes reads as follows:

> *The Board was further informed that Paragraph 'C' of the latter [sic] of the Ministry dated on 05/25/1999 in respect of development and producing gas the proposal prepared by Niko & BAPEX if it is required following the Swiss Challenging method by verifying and taking of steps for implementation has been mentioned. The Board was further informed that competitive terms have been adopted by calling for the international tender following this method. The Board has mentioned*

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[750] R-PHB1 (CONFIDENTIAL), paragraph 160 and FN 270, referring to Decision from 287th Petrobangla Board of Directors Meeting of 22 October 2000, Exhibit R-271.

[751] R-PHB1, paragraph 118, quoting from Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 25 May 1999, Exhibit R-270; in the following paragraph, the Respondents refer to these directions, stating that "*the Government accepted Niko's offer*".

that for following Swiss Challenge method is mandatory not optional.[752]

1194. The Respondents are of the view that the requirement of Swiss Challenge so established was not removed by the FOU but confirmed. They refer to Article 7.01 FOU which provides for strict confidentiality of the Programme Information, i.e. the information developed or acquired in the context of the Study. At the end of this provision one finds the following sentence: "*if swiss challenge process is adopted, this is not applicable*". The Respondents argue:

> *Crucially, unlike the MoU, the FoU expressly refers to the "swiss challenge process". While this reference appears in the section on confidentiality, logic dictates that given this reference, one cannot infer an implicit exclusion of Swiss Challenge.*[753]

1195. The **Claimant** recognises that its June 1998 Proposal included the proposed use of the Swiss Challenge Procedure. It insists, however, that the MoU, attached to the Proposal, was never executed and that there was no agreement to use the Swiss Challenge Procedure:

> *Certainly, the MOU that was proposed by Niko was presented in the context of Niko's then extant proposal. That specific proposal was not pursued. To the contrary, the FOU was the Respondents' (and the Government of Bangladesh's) proposal, not Niko's. Had they wanted to make provision for the inclusion of a Swiss Challenge (or other competitive process), and had Niko been willing to agree to such in the context of the FOU approach, doing so would have been simple to achieve with clarity. Indeed, if the inclusion of such a process was so fundamental as the Respondents now aver, one would expect it would certainly have been made explicit.*[754]

1196. In the Claimant's view, the FOU provided for an award of the JVA without competitive procedures, as it

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[752] Decision from 287th Petrobangla Board of Directors Meeting of 22 October 2000, Exhibit R-271, p. 10.
[753] R-PHB1 (CONFIDENTIAL), paragraph 126, emphasis in the original, internal citation omitted (referring to FOU, Exhibit C-1, Article 7.01).
[754] C-PHB2 (CONFIDENTIAL), paragraph 93.

> *… explicitly provided that the parties would execute a JVA upon satisfactory completion of the study. This was not qualified by reference to Swiss Challenge or any other bid procedure.*[755]

1197. The Claimant also relies on specific provisions in the FOU, including Articles 4.03, 5.02 and 9.01. It explains that Article 5.5 FOU, providing for exclusivity during the "*negotiation period*", "*rendered the application of a Swiss Challenge process, at least as far as Niko is concerned, entirely unworkable*".[756] In the Claimant's view, the "*negotiation period*" contemplated in the FOU "*would end upon the execution of the JVA*".[757] In this context, the Claimant also relies on the testimony of Mr Elahi who "*considered the study information could not be given to potential bidders in the Swiss Challenge process, unless Niko first consented (which is difficult to imagine)…*"[758]

1198. With respect to the reference to Swiss Challenge in Article 7.01, the Claimant states that

> *… at best, the conditional nature of the reference to Swiss Challenge suggests nothing more than that Swiss Challenge process might be adopted in the future, although the circumstances in which that might occur are nowhere defined in the FOU. This also contradicts the Respondents' assertion that Swiss Challenge process was mandatory.*[759]

1199. The Claimant also points out that the reference to Swiss Challenge in the FOU was made in the context of the provision on the "*confidentiality of the Program Information, not the process of arriving at an executed JVA*". If there were a conflict between the "*indirect contingent reference to Swiss Challenge in Article 7.01*" and the "*very explicit commitment under Article 9.01 to execute a JVA with Niko upon successful completion of the study*", the latter must prevail.[760]

1200. More generally, the Claimant asserts that "*a legal analysis of the terms of the FOU and Marginal Fields Policy supports the position that a Swiss*

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[755] C-PHB1 (CONFIDENTIAL), paragraph 128, referring to FOU, Article 9.01.
[756] C-PHB1 (CONFIDENTIAL), paragraph 134; for the text of FOU, Article 5.05 see above Section 4.1.
[757] C-PHB1 (CONFIDENTIAL), paragraph 135.
[758] C-PHB1 (CONFIDENTIAL), paragraph 136, referring to Elahi at Tr. Day 4 (CONFIDENTIAL), p. 283, l. 25 to p. 285, l. 23.
[759] C-PHB1 (CONFIDENTIAL), paragraph 131.
[760] C-PHB1 (CONFIDENTIAL), paragraph 132.

Challenge process was not intended". In support of this assertion, the Claimant relies on:

> *… two independent legal opinions from different Bangladesh law firms on the issue, each confirming that, on the basis of the terms of the FOU and/or the provisions of the Marginal Field Policy, a Swiss Challenge Process was either precluded or at least not required to be undertaking in relation to the Chattak and Feni fields.*[761]

1201. The Claimant insists that the issue of Swiss Challenge never was a "*sticking point*" in the negotiations.[762] It asserts: *"… [T]here is virtually no indication of the issue of Swiss Challenge being a sticking point in the JVA negotiations. Certainly, there is not a record similar to the Chattak East issue of Niko pressing the issue with BAPEX, Petrobangla or the Government."*[763]

1202. The **Tribunals** start their analysis by observing that Niko clearly included in its June 1998 Proposal the use of a procedure which came to be described thereafter as Swiss Challenge. While the draft MoU attached to the proposal did not contain any reference to the Swiss Challenge method but simply made reference to "*internationally accepted terms and conditions prevalent in agreements for the development of non producing, marginal oil and gas fields*", this procedure was included in the proposal and described it in some detail, as set out above.

1203. Niko confirmed this proposal in its letter of 1 February 2000:

> *Our proposal for the subject project is based upon utilising the transparent process of Swiss Challenge as the award process to ensure a public solicitation and availing the best offer from qualified parties.*[764]

1204. There is evidence to show that, at that time, Niko did indeed plan on the Swiss Challenge method being actually applied. When Mr Sharif reported on 13 November 1999 to Niko Canada the status of the project and the steps that remained to be taken, he wrote:

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[761] C-RC, paragraph 49.
[762] C-RC, paragraph 4; C-PHB1 (CONFIDENTIAL), paragraph 141.
[763] C-PHB1 (CONFIDENTIAL), paragraph 141 (emphasis added).
[764] Letter from Niko Resources Ltd. to BAPEX, 1 February 1999, Exhibit R-269.

After the MOU the ball will be back in petrobangla's court to negotiate with us and satisfy the requirements of the swiss challenge process before signing the contract.[765]

1205. The evidence also shows that the proposed use of the Swiss Challenge procedure was considered by the Respondents and the Government. The document dated 3 May 1999, concerning a meeting of the Ministry and Petrobangla on 26 January 1999, records the discussion about Niko's proposal, leading to a positive conclusion, envisaging a joint venture agreement between BAPEX and Niko. The decisions in this respect conclude by a reference to the Swiss Challenge procedure:

> *In respect of development and producing gas from these gas fields th[e] Swiss Challenge Method might be abided by.*[766]

1206. The decision is formally notified to Petrobangla by a letter of the Ministry, dated 25 May 1999. This letter is frequently referred to as the expression of the Government's decision to respond favourably to Niko's June 1998 Proposal, instructing BAPEX to proceed with negotiations for the JVA. The full text of the 25 May 1999 letter, in the two translations produced in the Arbitrations, has been quoted above in Section 4.1. For the discussion here, the Tribunals quote again the relevant part which provides for the finalisation of the JVA before signing the MoU and then states:

> *(c) Thereafter, steps may be taken to implement the proposal prepared by Niko and BAPEX, after evaluation by using the Swiss Challenge method, if necessary.*[767]

1207. In the Respondents' earlier translation, this paragraph read as follows:

> *The 'Swiss Challenge' method may be adopted for developing the said gas fields.*[768]

1208. The Tribunals note that neither of these versions states that the use of the Swiss Challenge procedure is ordered. Both of them refer to this procedure as a possibility: "*may be adopted*" or "*might be abided by*". The

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[765] Internal Niko email, 13 November 1998, Exhibit C-98.
[766] Minutes of the Meeting of the Ministry of Power, Energy and Mineral Resources of 26 January 1999, Exhibit C-124.
[767] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 25 May 1999, Exhibit R-270.
[768] Letter from Ministry of Energy, Power and Mineral Resources to Petrobangla, 25 May 1999, Exhibit JD SI-11, Appendix B to R-CMJ.1, emphasis in the original, quoted from the Decision on Jurisdiction, paragraph 29.

version that states "*if necessary*" provides no indication about the criteria for determining when the use of Swiss Challenge would be necessary. The report on the discussion preceding the text of the decision of 26 January 1999 does not contain any reference to Swiss Challenge and does not provide an indication why the decision that followed this discussion states that "*the Swiss Challenge Method might be abided by*".[769] The Respondents have not provided any explanations in this respect.

1209. The Tribunals conclude that, when it decided to accept Niko's proposal by initiating JVA negotiations, the Government did not take a firm decision to the effect that Swiss Challenge had to be used. There is no indication that in the context of this decision of 25 May 1999, the Swiss Challenge procedure was considered as "*mandatory*" by the Government.[770]

1210. Both the record of the 26 January 1999 meeting and the letter of 25 May 1999 are documents internal to the Ministry and Petrobangla. There is no indication that they were intended to be communicated to Niko or that they were formally communicated to Niko as acceptance of the June 1998 Proposal.

1211. In this context it is of interest to consider the letter by which BAPEX communicated to Niko the decision to enter into negotiations for a joint venture agreement with it. BAPEX did so by its letter of 6 May 1999,[771] responding to Niko's letter of 1 February 1999. In that letter, as pointed out above, Niko had repeated its offer to base the project "*upon utilising the transparent process of Swiss Challenge as the award process to ensure a public solicitation and availing the best offer from qualified parties*".[772]

1212. When BAPEX, in its response of 6 May 1999, announced the decision in principle "*to formulate a Joint Venture Agreement*" between BAPEX and Niko, it specified that it was writing "*with reference to*" Niko's 1 February

[769] Minutes of the Meeting of the Ministry of Power, Energy and Mineral Resources of 26 January 1999, Exhibit C-124.
[770] The ACC seems to have reached a similar conclusion by stating in the 5 May 2008 Charge Sheet that "*the provisio of Swiss Challenge system […] was proposed to be adopted preventing tendering system and the condition of 'if needed' was used to pave the way for refraining from adopting the Swiss challenge system later*" (Exhibit R-211).
[771] Letter from BAPEX to Niko, 6 May 1999, Exhibit C-125.
[772] Letter from Niko Resources Ltd. to BAPEX, 1 February 1999, Exhibit R-269.

1999 letter. One might consider that such a reference could imply the acceptance of the Swiss Challenge method that Niko had proposed. BAPEX does, however, not make any reference to Swiss Challenge, nor does it state that it is prepared to execute the proposed MOU. It goes a step further and clearly states at the end of the letter that it was "*issued WITHOUT ANY PREJUDICE and any obligation on the part of BAPEX*".[773]

1213. To recall, the use of the Swiss Challenge method, as understood in the present case, implies that Niko is granted a privileged position in the competition process: its technical qualification is accepted (while possible other bidders will be examined for their qualification); and Niko is granted a right of first refusal, the possibility to match competing bids. In other words, it is not enough for the Respondents and the Government to say they want to apply the Swiss Challenge method. A commitment to this effect also requires that Niko's technical qualification and its right of first refusal are accepted. An invitation to negotiations for a joint venture agreement without prejudice and without any commitment by BAPEX is not an acceptance of the proposed use of Swiss Challenge.

1214. The Tribunals conclude that **by May 1999** the Government had not taken a firm decision on a requirement of Swiss Challenge and BAPEX had refused to make any commitments. In other words, by that time, **there was no agreement between Niko and the Respondents on the use of Swiss Challenge**.

1215. The negotiations to which BAPEX invited Niko in May 1999 did indeed lead to an agreement; but that agreement was not the MOU as Niko had proposed it. Instead, the Respondents proposed a different approach and the FOU was concluded. This agreement clearly states in its Article 9.01 that "*on successful completion of the Technical Program & on the basis of the acceptability of the result thereof the parties would execute a Joint Venture Agreement.*" The provision speaks not of negotiations of a Joint Venture Agreement but of its execution. No mention is made in this provision of any other procedures required before this execution.

1216. The Tribunals have considered the Respondents' reliance on Article 7.1: "*[i]f swiss challenge process is adopted, this is not applicable*". In the Tribunals' view the provision reserves the possibility of applying the Swiss

[773] Letter from BAPEX to Niko, 6 May 1999, Exhibit C-125.

Challenge procedure. In other words, this procedure may be applied, but not necessarily. The Respondents are correct when they write that "*one cannot infer [from this provision] an implicit exclusion of Swiss Challenge*".[774] Equally, one cannot infer from this provision a *requirement* of the Swiss Challenge Procedure. The provision contains neither a commitment, nor a confirmation of a prior commitment, to apply this procedure. Consequently, it cannot be invoked as a basis for requiring that, before a Joint Venture Agreement is executed according to Article 9.01, the negotiated agreement be submitted to the Swiss Challenge procedure.

1217. In the Tribunals' analysis the evidence shows that **there was no agreement with the Government or the Respondents which required the use of the Swiss Challenge prior to the conclusion of the JVA with Niko**.

9.6.6 The alleged insistence of the Respondents on the application of Swiss Challenge

1218. The Tribunals have concluded that Swiss Challenge was not required for the Niko project under the procurement law of Bangladesh and that this was recognised by the Marginal Fields Procedure; they have also concluded that the FOU provided for the execution of the JVA and that there was no contractual commitment to the effect that, upon completion of the JVA negotiations, the final draft be subject to Swiss Challenge.

1219. **The Respondents** argue that they insisted on the application of the Swiss Challenge method and that Niko was aware of this condition. They deny the Claimant's assertion that the requirement of Swiss Challenge was never a "*sticking point*".[775]

1220. According to the Respondents, the Government and the Respondents continued to insist on the application of the Swiss Challenge procedure. The Respondents rely on the passage from the Minutes of the 22 October 2000 meeting of the Petrobangla Board of Directors quoted above and on the correspondence from the Ministry in March and April 2001

[774] R-PHB1 (CONFIDENTIAL), paragraph 126.
[775] R-PHB1 (CONFIDENTIAL), paragraph 144.

The Government maintained its position on Swiss Challenge through the end of the Awami League administration, as reflected by two Ministry letters sent in March and April of 2001, as well as a handwritten note by the Minister himself, to "Pl[ease] write to [Petrobangla] to formalize/finalize the JVA before putting it to Swiss Challenge."[776]

1221. The following passages are relevant:

(i) A letter dated 29 March 2001 from the Ministry (signed Md Mizanur Rahman, Senior Assistant Secretary) to the Chairman of Petrobangla:

… you are requested to take necessary steps for finalizing the JVA by following the swiss challenge method after completion of necessary negotiation in light of in accordance with the guidelines prepared in light of the feasibility study completed for development and possible increase of production of Chattak, Kamta and Feni Non-producing marginal/abandoned gas fields by Canadian entity Niko resources Limited.[777]

(ii) A letter dated 16 April 2001 from the Ministry (also signed by Md Mizanur Rahman, Senior Assistant Secretary) to the Chairman of Petrobangla:

… attention is being drawn to letter dated 5 April 2001 from Niko 2001 from Niko Resources (Bangladesh) (copy enclosed). Regarding this matter, before going for a Swiss Challenge, as per instructions you are being requested to formalize/finalize the JVA submitted by Petrobangla.[778]

1222. The handwritten note quoted by the Respondents can be found on Niko's letter of 5 April 2001 in the version produced by the Respondents. The Respondents assert that this note is "*by the Minister himself*" but do not indicate on what basis this assertion is made.

1223. For their assertion that Niko knew of the importance of their insistence on the application of the Swiss Challenge method and resisted it, the

[776] R-PHB1 (CONFIDENTIAL), paragraph 147, internal citations omitted.
[777] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 29 March 2001, Exhibit R-274.
[778] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 16 April 2001, Exhibit R-275.

Respondents rely on Mr Chowdhury's witness statement where he asserted that "*Niko was now insisting that the Swiss Challenge procedure should not be applied to them because they argued that the FoU and the procedure for the development of marginal gas fields somehow prohibited it*".[779] He confirmed at the Hearing that "*after that, Niko was insisting that Swiss Challenge was not necessary in that case*".[780]

1224. In the Respondents' view, the legal opinions of 1 November 2000 and of 27 February 2003 which the Claimant presented to the Government[781] and which both address the Swiss Challenge issue, are also evidence that Niko considered this issue as one of serious concern.[782]

1225. The Respondents conclude:

> *Clearly, Niko knew the Government intended to apply Swiss Challenge. That intention was overcome only after the BNP administration came to power; after the new Acting Secretary of the Energy and Mineral Resources Division was removed for refusing to accede to the State Minister's demand that he request an opinion from the Law Minister; and after that Law Minister issued a legal opinion which, from the available record, was facially irrational. By that time, according to Qasim Sharif, the parties had been fighting over both Chattak East and Swiss Challenge "for years […], for three four years."*[783]

1226. **The Claimant** states that by July 2001, at the end of the Sheikh Hasina's Awami League Government, "*there was no reference to a Swiss Challenge process being applied*".[784]

1227. More generally, the Claimant asserts that the issue of Swiss Challenge did not arise in its discussions with the Respondents:

> *Significantly, there is no indication from the contemporaneous correspondence that BAPEX and Petrobangla were taking the position that a Swiss Challenge process was applicable, let alone mandatory,*

[779] Chowdhury Witness Statement, paragraph 10.
[780] Tr. Day 3 (CONFIDENTIAL), p 123, ll. 21-22.
[781] Lee, Khan & Associates, Legal Opinion, 1 November 2000, Exhibit C-131(CONFIDENTIAL) and Moudoud Ahmed & Associates, Legal Opinion, 27 February 2003, Exhibit C-150.
[782] R-PHB1 (CONFIDENTIAL), paragraphs 146 and 150.
[783] R-PHB1 (CONFIDENTIAL), paragraph 151 (emphasis in original).
[784] C-CMC, paragraphs 116 and 119 (i).

nor is there any indication of Niko insisting on its non-application. This is consistent with the evidence of Bill Hornaday, who recalls that at this time the inclusion of Chattak East was the issue under debate.[785]

1228. After the Hearing, the Claimant confirmed this position as quoted above, arguing that, contrary to the controversial issue of Chattak East, the application Swiss Challenge was no serious issue:

> *… there is virtually no indication of the issue of Swiss Challenge being a sticking point in JVA negotiations. Certainly, there is not a record similar to the Chattak East issue of Niko pressing the issue with BAPEX, Petrobangla or the Government.*[786]

1229. As to the evidence on which the Respondents rely in order to show that the Swiss Challenge issue was alive during this period, the Claimant argues that it reveals no more than

> *… internal discussions between BAPEX, Petrobangla and the Ministry of Energy as to whether the Swiss Challenge process was required […] there is virtually no reference to Swiss Challenge being discussed with Niko in negotiations after 2001, let alone any suggestion that Niko was vehemently opposed to it.*[787]

1230. Addressing Mr Chowdhury's assertion about Niko's insistent objection to the application of Swiss Challenge, the Claimant points out that, at the Hearing,

> *… Mr. Chowdhury conceded during his testimony that he had no personal knowledge of Niko having sought to avoid a Swiss Challenge process, despite having implied that in his Witness Statement.*[788]

1231. **The Tribunals** are of the view that the internal documents reflecting the Respondents' view about the requirement of applying the Swiss Challenge method are not sufficient to establish an understanding between the Parties that this method must be applied. As explained above, the Swiss Challenge method is not simply a procedure by which the Respondents invite offers from interested companies. It implies a commitment from the Respondents to afford to Niko a preferential position insofar as its technical qualification is accepted and the assurance that it will be given the option to match any offer from other companies that are more

[785] C-CMC, paragraph 155, referring also to Hornaday Witness Statement , paragraph 10.
[786] C-PHB1 (CONFIDENTIAL), paragraph 141.
[787] C-RC, paragraph 48.
[788] C-PHB1 (CONFIDENTIAL), paragraph 141.

favourable to the Respondents. The fact that BAPEX, in its letter of 6 May 1999, clearly stated that it proposed discussions "*WITHOUT ANY PREJUDICE and any obligation on the part of BAPEX*" makes it quite clear that no agreement on the use of Swiss Challenge had been concluded at that stage; and, as explained, there is no evidence that such an agreement was concluded later.

1232. Nevertheless, the positions which the Government and the Respondents took during negotiations about the JVA is not without relevance for the question whether this agreement was procured by corruption. The Tribunal therefore will examine whether the position about the Swiss Challenge method was held consistently and how it was eventually overcome.

1233. While conducting this examination, the Tribunals noted that both the 22 October 2000 meeting and the correspondence of March and April 2001 took place before the adoption of the Marginal Fields Procedure by the Sheikh Hasina's Awami League Government. Neither can therefore be taken as evidence of the position taken by the Government and the Respondents during the period thereafter.

1234. The Tribunals also observe, however, that over a year after this adoption, the issue of Swiss Challenge was indeed revived during the time of the BNP Government. This occurred during the meeting on 16 September 2002 which, according to the Minutes of the meeting, was presided by the "*Secretary of Energy and Mineral Resources*", presumably Mr Chowdhury, as "*Acting Secretary of Energy*", and attended by the Chairman of Petrobangla and the Managing Director of BAPEX.[789]

1235. Mr Chowdhury explained in his Witness Statement that he "*believed that the JVA could not be awarded without competition and Petrobangla and BAPEX agreed*".[790] At the Hearing, he confirmed "*we all agreed […] that we should go for Swiss Challenge*"; and he added that he had asked Petrobangla "*to come up with a formal proposal because Petrobangla […] never submitted a concrete proposal to the Ministry about this matter*".[791] In his witness statement he had explained:

[789] Chowdhury Witness Statement, paragraphs 2 and 10.
[790] Chowdhury Witness Statement, paragraph 10.
[791] Tr. Day 3 (CONFIDENTIAL), pp. 146, l. 23 to p. 147, l. 11.

> *We determined that the best way to proceed would be to have Petrobangla prepare a proposal on the application of Swiss Challenge to the consideration of the Ministry. I knew that Petrobangla would conclude that the Swiss Challenge process should be followed.*[792]

1236. But the Minutes of the 16 September 2002 meeting create a different impression. They do not reflect a unanimous conclusion, as Mr Chowdhury asserted. Instead they reflect doubts about the correct approach. The Minutes show that the discussion referred to the original decision of the Government of 25 May 1999 and compared it to the terms of the FOU and the Marginal Fields Procedure. The discussion concluded that the issue required further examination. The Minutes record:

> *It needs to be examined whether the Swiss Challenge Method is applicable for BAPEX-Niko JVA as per the FOU signed by Niko with BAPEX on 23-08-1999 and the Procedure for Development of Marginal/Abandoned Gas Fields issued by the Government in 2001 as well as in accordance with the letter dated 25-05-1999 sent from this department to Petrobangla.*[793]

1237. The Minutes do indeed record that Petrobangla should make a "*proposal*"; but, according to the Minutes, this proposal was not simply the formal confirmation of a foregone conclusion as implied by Mr Chowdhury's statement. Petrobangla was invited to resolve the doubts that had been voiced during the meeting. The following decision was taken:

> *Petrobangla will submit specific proposal concerning whether, as per the FOU signed by Niko with BAPEX on 23-08-1999 and the Procedure for Development of Marginal/Abandoned Gas Fields issued by the Government in 2001, Swiss Challenge Method is applicable for the BAPEX-Niko JVA.*[794]

1238. Whether doubts about the correct position prevailed at the meeting, as the Minutes suggest, or the participants were unanimous, as asserted by Mr Choudhury, one point seems clear: the situation required clarification. Even in Mr Chowdhury's explanation, the participants felt the need to clarify the position and they decided, according to him, to obtain a "*proposal*" from Petrobangla of which they knew already the conclusion. The Minutes however show that the clarification which Mr

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[792] Chowdhury Witness Statement, paragraph 10.
[793] Minutes of Meeting of Ministry of Power, Energy and Mineral Resources,16 September 2002, Exhibit R-310, Section 3.19.
[794] Minutes of Meeting of Ministry of Power, Energy and Mineral Resources,16 September 2002, Exhibit R-310.

Chowdhury sought to obtain by this "*proposal*" concerned the question whether, in view of the FOU and the Marginal Fields Procedure, Swiss Challenge was required or not.

1239. Mr Chowdhury left the Ministry in "*late September*" 2002;[795] the record does not show that, by that time or at any time thereafter, Petrobangla did indeed prepare the "*specific proposal*" as provided at the 16 September 2002 meeting. The next document on record concerning this issue is a letter from BAPEX dated 9 October 2002 which provides comments on the Minutes of the 16 September 2002 meeting. BAPEX expresses its opinion as follows:

> *The decision regarding the acceptance of the Swiss Challenge procedure resides in the Ministry's [letter of 25 May 1999]. With the exception of this, as per the comments given in the explanation note of section 10 of Procedure for development of Marginal/Abandoned gas fields with the other subjects, there is no option of excluding the Swiss Challenge because the due proposal by Niko is an unsolicited offer. The given decision [sic] can be amended in the minutes as "To follow the Swiss Challenge procedure will be reasonable to make the proposed JV transparent."*[796]

1240. It does not seem clear what the exception resulting from the comments to the Procedure is meant to say. The proposed addition in the Minutes, however, is clear: Swiss Challenge is not mandatory but "*will be reasonable*" for reasons of transparency.

1241. Petrobangla passed these observations from BAPEX on to the Ministry on the following day, 10 October 2002, seeking "*specific guidance*" from the Ministry:

> *Regarding the acceptance of the Swiss Challenge Procedure, as per the decision referred in section 3.19 of the minutes on following the Swiss Challenge Procedure, the appropriate authority can take necessary steps as per link no – EFMR/AR – 4/NIKO Reso: - 22/97/204 dated: 05-25-1999 of the ministry.*[797]

1242. This communication simply makes reference to the Government's letter of 25 May 1999 but does not address the FOU and the Marginal Fields

[795] Tr. Day 3 (CONFIDENTIAL), p. 63, ll. 1-5.
[796] Letter from BAPEX to Petrobangla,9 October 2002, Exhibit R-311.
[797] Letter from Petrobangla to Ministry of Power, Energy and Mineral Resources, 10 October 2002, Exhibit R-312.

Procedure, as Petrobangla had been instructed to do. In other words, Petrobangla was not here coming to grips with the uncertainty that had prevailed at the 16 September 2002 meeting and passed the unresolved question on to the Ministry.

1243. There is no indication that Petrobangla or the Ministry ever issued the "*proposal*" that had to be submitted according to the Minutes of the 16 September 2002 meeting in order to clarify whether, in view of the FOU and the Marginal Fields Procedure, Swiss Challenge was still applicable.

1244. When the Ministry wrote to Petrobangla on 30 October 2002, complaining that it still had not received the draft BAPEX/Niko JVA, it referred to the decisions of the 16 September meeting; but it made no mention of Swiss Challenge.[798]

1245. The evidence on record shows that thereafter the internal consultations and the negotiations with Niko concentrated on a number of technical and commercial issues, including the question of Chattak East. A letter from BAPEX to Petrobangla, dated 30 January 2003, reported on the progress of the negotiations and the report of a committee composed of representatives of BAPEX and Petrobangla who had examined the latest draft of the JVA and decisions of the BAPEX company board. The last item on the list of decisions states:

> *Petrobangla may be served with a letter for taking proper steps in regard to taking measures for appointing contractors based on Swiss Challenge method before signing the final JVA in light of the Government decision dated 16/09/2002.*[799]

1246. There is no indication that Petrobangla was indeed served with such a letter. Indeed, while the other technical and commercial issues raised in the 30 January 2003 letter were dealt with in subsequent negotiations, the Swiss Challenge issue seems to have had no follow-up. There is no indication that Petrobangla did indeed take any steps to initiate the Swiss Challenge procedure; there is not even a confirmation by Petrobangla that

[798] Letter from Ministry of Energy, Power and Mineral Resources to Petrobangla, 30 October 2002, Exhibit JD SI-28.
[799] Letter from BAPEX to Petrobangla, 30 January 2003, Exhibit R-309, section 2.3(j).

it intended to take the steps necessary for proceeding with the Swiss Challenge method.

1247. The uncertainty that had been raised at the 16 September 2002 meeting was addressed in a the legal opinion dated 27 February 2003 signed by Md Azizul Haq of Mudud Ahmed and Associates[800] and submitted by Niko with its letter to the State Minister of 3 March 2003.[801] The opinion deals with the inclusion of Chattak East in the area of the JVA and then with the requirement of Swiss Challenge. Relying on the FOU and the Marginal Fields Procedure, the opinion concludes that "*there is no legal ground for Bapex, Petrobangla or GOB to conduct Swiss Challenge or any other form of bidding for this project*".[802]

1248. Following this opinion, there is no further reference to Swiss Challenge in the documents on record: In the letter by which it presented the opinion to the Government Niko discussed the Joint meeting with the Ministry, Petrobangla and BAPEX. It argued its position concerning Chattak East but made no reference to Swiss Challenge or other competitive procedures.[803] On 5 March 2003, BAPEX wrote to Petrobangla, commenting on Niko's presentation at the meeting and in the letter. It noted "*conflicting views between BAPEX/Petrobangla/Ministry and NIKO*" with respect to the Chattak field and recommended that the Government seek the advice of the Law Ministry. BAPEX did not mention Swiss Challenge and made no reference to the views expressed on that subject in the legal opinion present by Niko, nor did it refer to the views expressed in its letter of 30 January 2003.[804]

1249. As discussed above in the context of the Chattak issue, an opinion was requested from the Law Ministry and provided in terms reported in a letter of 1 April 2003 from the Ministry to Petrobangla with copy to

[800] Moudud Ahmed and Associates, Legal Opinion, 27 February 2003, Exhibit C-150.
[801] Letter from Niko to Ministry of Power, Energy and Minearl Resources, 3 March 2003, Exhibits C-152 and R-276.
[802] Moudud Ahmed & Associates, Legal Opinion, 27 February 2003, Exhibit C-150.
[803] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 3 March 2003, Exhibits C-152 and R-276.
[804] Letter from BAPEX to Petrobangla, 5 March 2003, Exhibit R-302.

BAPEX.[805] Following the information about the Law Ministry's opinion on Chattak, the letter states that "Petrobangla may take necessary action to finalise the matter of signing of Joint Venture Agreement …"; in alternative translation the passage speaks of "necessary action to finalise the signature of the Joint Venture Agreement …".[806] No reservation of the Swiss Challenge issue is made.

1250. The record about the communications between the different entities on the Bangladeshi side and their internal decisions produced in the Arbitrations does not seem to be complete. The evidence produced shows details about the negotiations for the completion of the JVA and in particular its fiscal terms but no reference to the Swiss Challenge issue since the 30 January 2003 letter of BAPEX. At the meeting of the Petrobangla Managing Committee of 22 July 2003, for instance, a detailed account of the latest issues in the JVA negotiations and their resolution is provided and the remaining steps are identified. Again there is no mention of any requirement for further steps of competition nor of a Swiss Challenge procedure still outstanding.[807]

1251. The Claimant also pointed out that there were "clear and present practical challenges to implementing" the Swiss Challenge Process.[808] There is no indication that these were considered at the time and that any preparations for applying Swiss Challenge had been made on the part of the Respondents. As Petrobangla had noted in its 1998 Comments, applying Swiss Challenge starts by the conclusion of an MOU "*to initiate negotiations by both parties in good faith for this project*".[809] No such MOU had been concluded and, as pointed out above, the record shows no evidence that any engagement had been taken by the Respondents that Niko's preferential position would be assured. In the view of Mr Chowdhury the situation of Niko remained uncertain, even with respect to the question whether Niko had the right of first refusal:

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[805] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 1 April 2003, Exhibit C-153 and, with a different translation, R-307.
[806] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 1 April 2003, Exhibits C-153 and R-307.
[807] Extracts from the Agenda of 333rd Petrobangla Managing Committee Meeting, 22 July 2003, Exhibit C-11, also produced with the original and in a different translation as Exhibit JD SI-32.
[808] C-PHB1, paragraph 143.
[809] Exhibit R-267, paragraph B 3.5.

That was likely, but since the terms of the Swiss Challenge were not finalised – I cannot say for certain, but it is likely that Niko has to get the option of right of refusal.[810]

1252. Since Mr Chowdhury left his function in the Ministry in September 2002, this statement must be understood as relating to the situation by that time. There no explanation about any subsequent steps taken to "finalise" the terms of the Swiss Challenge procedure. One must conclude that these terms were never finalised.

1253. Moreover, applying the Swiss Challenge process requires procedures to be followed. In particular, potential competitors are invited to make proposals which, as underlined by Mr Chowdhury, consist in a commercial and a technical offer.[811] Mr Chowdhury explained that, in his understanding, the draft JVA negotiated with Niko would be made available to potential bidders: "*they will provide the JVA to all the offerors, so that they consider and they come up with a better proposal than Niko*".[812] In order to allow such other offerors to make their proposal on the same basis as Niko, they would have to be provided with the same information. Mr Chowdhury explained that the information gathered by the joint Niko/BAPEX Study at the expense of Niko would have to be "*made available to those who participate in the Swiss Challenge*". He did not think that this would be free of charge but he did not know what the conditions would have been, as these conditions had not been discussed to his knowledge.[813]

1254. Applying Swiss Challenge also requires that the proposals, once they have been received, are evaluated and ranked by reference to criteria that have to be determined in advance. If there are offers that meet the technical requirements they will have to be examined with respect to the commercial conditions. If the commercial conditions of any of the bidders that are found technically qualified are better than those of Niko, Niko will have the right to match them, assuming that had been clarified in the "*finalised*" Swiss Challenge procedure.

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[810] Tr. Day 3 (CONFIDENTIAL), p. 90, ll. 22-25 to p. 91, l. 1.
[811] Tr. Day 3 (CONFIDENTIAL), p. 90.
[812] Tr. Day 3 (CONFIDENTIAL), p. 89, ll. 17-19.
[813] Tr. Day 3 (CONFIDENTIAL), pp. 94 – 97, 150.

1255. Concerning the implementation of this process, Mr Elahi stated in his witness statement that, during his time as Managing Director of BAPEX (5 August 2001 to 9 July 2003),[814]

> *There were competing companies, such as Unocal, that would have been interested in exploring the Chattak field, particularly Chattak East, and it was our intention to given them the opportunity to compete with Niko for this work. This was even more important after BAPEX and Petrobangla were ordered to include Chattak East in the JVA because this was an exploration target/prospect that should have been put up for bid in a bid round for PSC under the standard procedure in Bangladesh used for petroleum exploration.*[815]

1256. At the Hearing, Mr Elahi clarified that "*Unocal came to me twice*".[816] He did not identify the persons who contacted him but simply stated that they were "*Unocal professionals*". He recognised, however, that, according to the Marginal Fields Procedure, Unocal was barred from pursuing marginal field development, adding "*that is why they could not pursue vigorously because there was a bar*". He summarised his explanations:

> *So it was basically the Unocal professionals, they came to me and they have shown their interest, but I could not proceed with them because there was a bar in the procedure for the development of the marginal gas fields I was dealing with, and for exploration area it was not within my purview. It was the purview within the Petrobangla and I told them please go to Petrobangla and talk to them and settle over there.*[817]

1257. Mr Elahi explained that he "*did not maintain a record*" and he did not know what happened at Petrogangla where he sent the Unical professionals to discuss matters of a PSC for Chattak East. As to marginal and abandoned fields, "*no other company came*", Mr Elahi did not remember any other company having shown interest.

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[814] Elahi Witness Statement, paragraph 3.
[815] Elahi Witness Statement, paragraph 22.
[816] Mr Elahi's testimony on this matter is at Tr. Day 4 (CONFIDENTIAL) from pages 263 to 269 and pages 281 to 293; he first mentioned Chevron, but then corrected himself that "*it was Unocal, it is not Chevron*".
[817] Tr. Day 4 (CONFIDENTIAL), p. 267.

1258. There is indeed no indication that any eligible company showed interest in the fields to which the JVA applied; nor is there any indication that the Respondents or the Government had sought to identify any potential candidates. Indeed, Mr Chowdhury explained that no companies had been identified to him; but there was the expectation "*if they invite, they might get better offers*".[818] When Mr Elahi left in July 2003, no potential bidders thus had been identified. He explained that applying the Swiss Challenge process would have meant to "*put it in the newspaper*" and that "*internationally there could be a number of companies for this. There are many small companies […] There are hundreds of companies*".[819]

1259. If there had been any companies that showed interest in response to the newspaper adds, they would have had to be given the same information that had been available to Niko during the work on the Study. Contrary to Mr Chowdury, Mr Elahi was of the opinion that "it would not have been prudent" to give to the bidders the Study prepared by Niko and BAPEX.[820] According to Mr Elahi the interested bidders would do the "same exercise".[821] As summarised by the Respondents' counsel, Mr Elahi was of the opinion that the "other companies would have the exact same opportunity to do the exact same thing before putting in their bids".[822] Through this exercise, which took Niko some six months, the bidders would seek to achieve the same degree of knowledge which Niko had reached through the Study under the FOU at its own expense,[823] enabling them to submit bids which then would have to be evaluated.

1260. None of these points had been addressed, let alone settled in June 2001, when the Awami League Government had instructed "*the urgent finalisation of the Joint Venture Agreement between BAPEX and Niko*".[824] The situation had not changed in 2002 when Mr Chowdhury was at the Ministry, and it had not changed in 2003 when the JVA was finalised. There is no indication that throughout the JVA negotiations until their very end, the issues that had to be addressed for the implementation of a Swiss Challenge process had been considered and no allowance was

[818] Tr. Day 3 (CONFIDENTIAL), p. 88.
[819] Tr. Day 4 (CONFIDENTIAL), p. 283.
[820] Tr. Day 4 (CONFIDENTIAL), p. 284.
[821] Tr. Day 4 (CONFIDENTIAL), p. 289.
[822] Tr. Day 4 (CONFIDENTIAL), p. 287.
[823] Tr. Day 4 (CONFIDENTIAL), p. 291.
[824] Memorandum of the Ministry to Petrobangla of 10 June 2001, Exhibit C-135.

made for the time required after the completion of the JVA negotiations for these steps.

1261. The Tribunals conclude that, **at the latest since the time of the Marginal Fields Procedure of the Awami League Government, the application of the Swiss Challenge procedure was no longer a serious concern of the Respondents**. The question concerning the effect of the MOU and the Marginal Fields Procedure, raised at the 16 September 2002 meeting, was not resolved by a "*proposal*". In practice, the conduct of the Respondents, as it results from the evidence on record, suggests that they **did not count on the application of Swiss Challenge**. Although finalisation or even signature of the JVA had been instructed, no action was taken to prepare the implementation of the Swiss Challenge process, nor was there any indication that the time necessary for this implementation was allowed or even considered. The letter of BAPEX of 30 January 2003 proposing that Petrobangla take steps to this effect remained without effect.

1262. In these circumstances there is also **no basis for assuming that any company would have shown interest** in the project and would have been **prepared to engage in time and costs** for making the evaluation necessary for submitting a technical and commercial bid. For the same reason there is **no basis for assuming** that there would have been **any bids more favourable** than the terms that the Respondents had negotiated with Niko.

1263. The Swiss Challenge issue was eventually resolved by a second opinion of the Law Ministry.[825] In the Arbitrations this second opinion was presented as attachment to the letter of the Ministry to Petrobangla and BAPEX, dated 11 October 2003. The signatures on this opinion show various dates, between 21 and 29 August 2003.

1264. No information has been provided about the circumstances in which this second opinion was prepared, such as the source of the proposal that such an opinion be prepared, or the reasons were given for it..

1265. Mr Chowdhury wrote in his Witness Statement:

[825] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 11 October 2003, Exhibit R-280; for details see below Section 9.7.

When the [State] Minister saw that I would not give in to his efforts to get me to approve the Niko project on Niko's terms, he began to insist that I submit the matter to the Law Ministry for a legal opinion on the interpretation of the FoU.[826]

1266. From the Witness Statement it appears that the request concerned only the Chattak issue.[827] At the Hearing Mr Chowdhury's explanations about this request also extended to the issue of Swiss Challenge.[828] At the Hearing he also clarified that the request was made "*in the July/August 2002 time-frame*".[829] Mr Chowdhury was replaced at the Ministry towards the end of September 2002.

1267. The explanations of Mr Chowdhury concerning a request in July/August 2002 cannot cast light on what happened a year later with respect to this issue, this all the less so since the evidence shows that the request that prompted the opinion about the Chattak issue was suggested by BAPEX and not by the State Minister. Moreover, if the opinion was sought on request of the State Minister, the question remains why in April 2003 only the Chattak issue was submitted to the Law Ministry and not both issues.

1268. The opinion resolved the question that had been raised at the 16 September 2002 meeting. Any doubts that may have remained about the requirement of the Swiss Challenge method were removed. The application of the Swiss Challenge method was not required.

1269. The opinion was attached to the letter by which the Ministry gave instruction to conclude the JVA, thus demonstrating that the decisive step resolving any remaining difference concerning the requirement of applying the Swiss Challenge method was the opinion of the Law Ministry in August 2003, concluding that the Swiss Challenge method was not mandatory and that, in any event, it had been excluded by the FOU.

[826] Chowdhury Witness Statement, paragraph 13.
[827] Chowdhury Witness Statement, paragraph 13.
[828] Tr. Day 3 (CONFIDENTIAL), pp. 119-123.
[829] Tr. Day 3 (CONFIDENTIAL), p. 119, pp. 5-7.

9.6.7 Conclusions on the requirement to apply Swiss Challenge method

1270. The transaction for which the JVA was concluded is not a case of "*procurement*", providing goods or services for which the Government or a public entity has identified the need and the general terms at which they are to be provided. Instead it grants rights in response to resources which, at the time of the proposal the Government had not considered as a valuable resource that could be subject of exploitation. Niko proposed to unlock these resources, providing gas to the local market and revenue to BAPEX without any financial contribution by the Government, Petrobangla or BAPEX.

1271. The Procurement Regulations in Bangladesh did not make any provision for such a process. While the Respondents now argue that competitive procedures should have been implemented for the conclusion of the JVA, they do not indicate any specific procedures required for this particular type of transaction, apart from the Swiss Challenge method. The Tribunals concluded that there is no applicable provision in the procurement law of Bangladesh that required competition for a contract like the JVA.

1272. Nor is the Swiss Challenge method provided for anywhere in the procurement law of Bangladesh. Such a procedure was unknown in Bangladesh before it was mentioned in Niko's proposal of 28 June 1998. The Tribunals conclude that there was no legal requirement to use this method. Contrary to the Respondents' assertions, Swiss Challenge was not "*mandatory*" or otherwise required.

1273. Niko had offered the use of Swiss Challenge in its proposal to the Ministry of 28 June 1998 and confirmed this offer in its letter to Petrobangla of 1 February 1999. This offer was not accepted by the Ministry, nor by Petrobangla or BAPEX. Instead, when BAPEX invited Niko for JVA negotiations on 6 May 1999, it specified that this was done without prejudice and without "*any obligation on the part of BAPEX*". On 25 May 1999 the Ministry informed Petrobangla of its decision to proceed with the project. It referred to the Swiss Challenge method, but qualified the reference by the words "*if necessary*", thus reserving the decision whether the additional time and complications of this procedure were justified.

1274. At no time did any of the Bangladeshi parties make any commitments concerning the acceptance of Niko's technical qualifications and its right to match better offers which are essential elements of the Swiss Challenge method, as understood by the Parties in the present case. The Tribunals conclude that there was no agreement on the use of Swiss Challenge.

1275. The approach which Niko had described in its proposal of 28 June 1998 was modified at the request of the Bangladeshi parties. Instead of concluding an MoU, as Niko had proposed, Niko was required to perform, jointly with BAPEX but at its expense, a study on the identified areas and concluded with BAPEX the FOU of 23 August 1999. In the FOU, with the approval of the Government, BAPEX agreed to conclude the JVA without any requirement for Swiss Challenge or other competitive procedure.

1276. The Marginal Fields Procedure of June 2001 made it clear that the Swiss Challenge method was not required, whether as part of Bangladesh procurement law or per agreement to that effect.

1277. Under the BNP Government the question of a Swiss Challenge requirement was raised at a meeting on 16 September 2002, in light of the FOU and the Marginal Fields Procedure. At that meeting Petrobangla was instructed to prepare a "*proposal*" concerning these issues. No such proposal was produced in the Arbitrations. The issue was not, on the evidence before the Tribunals, pursued in the final negotiations for the JVA. The issues that had to be dealt with in order to implement a Swiss Challenge Procedure were never addressed and no preparation for such implementation were made even at a time when the completion and execution of the JVA was imminent.

1278. Possible doubts concerning the requirement of Swiss Challenge were removed by the second legal opinion of the Law Ministry in late August 2003 which determined that the Swiss Challenge procedure was not applicable.

1279. The Tribunals conclude that there was no requirement to apply the Swiss Challenge method before concluding the JVA. In their opinion, the **conclusion of the JVA without such application does not constitute**

any irregularity. **The High Court Division of the Supreme Court reached the same conclusion in the *BELA* Judgement**.[830]

9.7 The Opinions of the Law Ministry

1280. In the resolution of the two controversial issues which held up the conclusion of the JVA, the opinions of the Law Ministry played a decisive role: it was following the opinion concerning Chattak East that the Respondents accepted that the JVA extend to the entire Chattak Field, and the opinion concerning the Swiss Challenge method was provided before the JVA was eventually executed.

9.7.1 The Parties' position

1281. **The Respondents** argue that "*the impropriety of the Law Minister's opinion [...] is sufficient to render any decision made on the basis of that opinion without legal effect.*"[831]

1282. The Respondents criticise the opinion on a number of grounds, partly contradictory, that require some preliminary clarifications:

(i) The Respondents speak of one opinion, asserting that the opinion "*was apparently given orally in March and then in writing in August 2003*".[832] The record shows that the Ministry prepared two opinions, one concerning Chattak East, the other Swiss Challenge. The first opinion has not been produced but is summarised in the Ministry's letter of 1 April 2003;[833] the other opinion, signed at different dates at the end of August 2003, was attached to the Ministry's letter of 11 October 2003.[834]

[830] *BELA* Judgment, CLA-143, pp. 35 and 40.
[831] R-PHB2 (CONFIDENTIAL), paragraph 145.
[832] R-MC, paragraph 93.
[833] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 1 April 2003, Exhibit C-153.
[834] Letter from Ministry of Power, Energy and Mineral Resource to Petrobangla, 11 October 2003, Exhibit R-280.

(ii) The Respondents assert that they "*made every effort to locate the opinion of the Law Minister, but it cannot be found*".[835] They see in their inability to find the opinion a reflection of "*the irregularity of the process*", while the Claimant considers this claimed inability as surprising and unbelievable.[836] The Respondents rely only on the description of the "*content of the opinion*" in the Ministry's letter of 11 October 2003.[837] As shown above, the August 2003 opinion, including its signature page, have been found and were produced in the Arbitrations as attachment to the 11 October 2003 letter.[838]

(iii) The Respondents speak of an "*opinion of the Law Minister*"[839] or even of "*Mr Ahmed's opinion*",[840] while the documentary evidence systematically speaks not of opinions of the Minister but of the Law Ministry. The April 2003 summary of the first opinion states that "*the Ministry of Law has expressed its opinion*" and the August 2003 opinion itself is signed by several high level members of the Ministry. The assertion that one of the signatures is that of the Minister himself is contested.

(iv) At the Hearing, the Respondents stated clearly:

> *There is no claim made by the Respondents about this opinion having been obtained as a result of corruption. The only thing that the Respondents have advanced with respect to this opinion is that it was obtained when the Minister had a conflict of interest.*[841]

1283. Yet in their Second Post-Hearing Submission the Respondents assert that the "*Law Minister's opinion was tainted by corruption*"[842] and "*Corruption is the only explanation for the Law Minister's disregard of the considered views of other officials and his unreasonable and extreme position favoring Niko*".[843]

1284. Apart from the corruption allegation made in their final submission, which will be considered below in Section 10, the Respondents' criticism

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[835] R-PHB1 (CONFIDENTIAL), paragraph 170.
[836] C-PHB2 (CONFIDENTIAL), paragraph 76.
[837] R-PHB1 (CONFIDENTIAL), paragraph 170.
[838] Letter from Ministry of Power, Energy and Mineral Resource to Petrobangla, 11 October 2003, Exhibit R-280.
[839] E.g. R-MC, paragraph 91 *et passim*; R-PHB1 (CONFIDENTIAL), paragraph 169 *et passim*.
[840] R-PHB2 (CONFIDENTIAL), paragraph 42.
[841] Tr. Day 2 (CONFIDENTIAL), p. 28, ll. 5-10 (Statement by Ms. Dufetre).
[842] R-PHB2 (CONFIDENTIAL), title before paragraph 38.
[843] R-PHB2 (CONFIDENTIAL), paragraph 43.

of the Law Ministry's opinions concern the alleged conflict of interest of the Minister and the content of the opinions. The Claimant's positions on these issues will be presented in the relevant sections below.

1285. Given the contradictory information about the Law Ministry's opinions, the Tribunal will first examine the available evidence about the origin and content of these opinions.

9.7.2 The evidence about the Law Ministry's opinions

1286. As explained above, it appears clearly from the evidence that there were two opinions provided by the Law Ministry, the first presented some time in March 2003 concerning Chattak East, the second issued in August 2003 concerning Swiss Challenge.

1287. The **first opinion** has not been produced. Although the Respondents assert that they have not been able to find the opinion, they compare it with those which Niko submitted to the Ministry. They do not state on what basis these comparisons are made. Since there is on record no other documentary evidence about the content of the first opinion but the Ministry's letter of 1 April 2003,[844] the Tribunals conclude that the comparison can only be based on the summary in this letter.

1288. Following Niko's joint presentation, summarised in Niko's letter of 3 March 2003,[845] and Petrobangla's memorandum of 5 March 2003,[846] BAPEX, in its letter to Petrobangla of 5 March 2003, took note "*that there are conflicting views between BAPEX/Petrobangla/Ministry and NIKO*" and concluded:

> *In such circumstances, in order to reach a final determination of the definition of the Marginal/Abandoned Gas Field and what the boundary will be, the Government may, if it deems necessary, seek the advice of the Ministry of Law, Justice and Parliamentary Affairs.*[847]

[844] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 1 April 2003, Exhibit C-153.
[845] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 3 March 2003; produced both as Exhibit C-152 and as Exhibit R-276.
[846] This memorandum has not been produced in these Arbitrations.
[847] Letter from BAPEX to Petrobangla, 5 March 2003, Exhibit R-302.

1289. The Tribunals conclude that the first opinion was requested some time after 5 March 2003 and produced towards the end of March 2003.

1290. The Respondents also assert that Mr Shahidul Islam, Mr Chowdhury's replacement as Acting Secretary in the Ministry, "*promptly*" after Mr Chowdhury's transfer at the end of September 2002[848] "*requested an opinion from the Law Minister*".[849] There is no evidence of such a request by Mr Islam,[850] nor for an opinion from the "*Law Minister*" in response. The letter of 1 April 2003 is signed by "*Shafiqur Rahman, Senior Assistant Secretary*" and there is no mention of Mr Islam. If Mr Islam did make a request, as alleged by the Respondents, there is no trace of it – direct or by reference – in the record.

1291. The suggestion of BAPEX was implemented and the advice of the Law Ministry was sought. There is no indication that Petrobangla and the Ministry did not support the suggestion. The Tribunals conclude that **the opinion of the Law Ministry was sought upon suggestion of BAPEX with the support of Petrobangla and the Ministry**.

1292. The letter of 1 April 2003 states the opinion was sought "*to resolve the dispute between BAPEX and Niko regarding Chattak Gas Field*". There is no mention of any other dispute in that letter. In particular, there is no reference to Swiss Challenge. The Tribunals conclude that the first opinion concerned only the Chattak issue.

1293. **The second opinion** has not been produced either. The Respondents assert that this opinion is equally inaccessible to them.[851] The Respondents have, however, produced an extract of it, including the signature page.

1294. This extract has been produced together with a letter from the Ministry to Petrobangla, with copy to BAPEX, dated 11 October 2003. The letter

[848] Mr Chowdhury left his position in the Ministry in late September 2002 by which time, as he testified, he had been replaced (Chowdhury Witness Statement, paragraph 16).
[849] R-PHB1 (CONFIDENTIAL), paragraph 169 and Footnote 287.
[850] The Respondents refer to p. 1 of the ACC Charge Sheet, Exhibit R-211, which does indeed name Mr Islam among the accused persons, but makes no mention of the alleged request.
[851] R-RC, paragraph 165.

itself has been produced in three translations, with slight variations.[852] It communicates "*the approved direction*" of the Prime Minister.

1295. The letter contains two references to an opinion of the Law Ministry. The first reference states that "*in light of the opinion by the Ministry of Law, Justice and Parliamentary Affairs the Chattak Gas Field will be considered as per Exhibit A*" of the FOU. In the circumstances, the Tribunals conclude that the opinion referred to is the first opinion of March 2003.

1296. The letter gives directions for the signing of the JVA, following the "*entire terms & conditions and the related rules*" of the Marginal Fields Procedure. It concludes with a sentence which, in one of the translations, reads as follows:

> *On the above mentioned subject matter the opinion (Photocopy) of the Ministry of Law, Justice and Parliamentary Affairs provided on 25-08-2003 AD has been sent for taking required steps.*[853]

1297. All three translations mention two enclosures: two pages and a copy of the JVA. The Tribunals conclude that a copy of the Law Ministry's opinion was joined to this letter, together with a copy of the JVA to be executed. Of the three exhibits producing this letter, however, only Exhibit R-280 is produced with an enclosure.[854]

1298. This enclosure in Exhibit R-280 consists of two pages of text followed by a number of signatures.

1299. The document does not seem to be the complete opinion; it has no heading and the page and paragraph numbers seem out of sequence. The extract of the opinion that has been produced deals with the Swiss Challenge issue. It recites the history of the negotiations, referring specifically to the Government's decision of 25 May 1999 and to the FOU. The document states that, according to the 25 May 1999 decision, "*following Swiss Challenge Method or any other tender method was not mandatory, that was optional. In that decision, the mention of the phrase*

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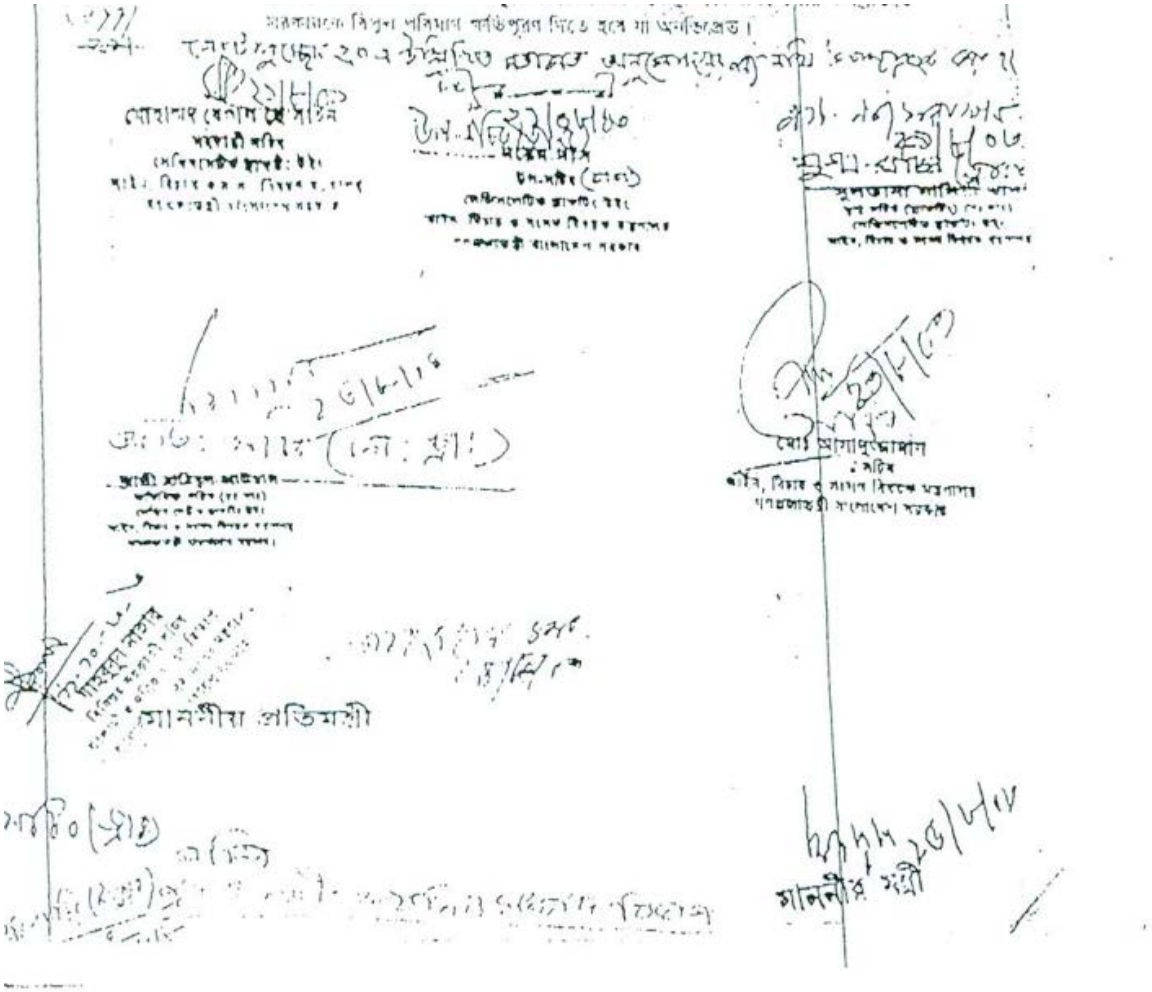
[852] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 11 October 2003, Exhibit K to RfA II, Exhibit JD SI-33 and Exhibit R-280.
[853] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 11 October 2003, Exhibit JD SI-33; the translation in Exhibit R-280 does not mention the date.
[854] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 11 October 2003, Exhibit JD- SI-33 has attached the letter of 13 October 2003 by which Petrobangla transmitted the instructions to BAPEX; this is obviously not an attachment to the original of the letter.

'if necessary' would indicate that." Referring to Article 5.05 FOU, the opinion declares that Swiss Challenge would constitute a breach of that obligation, entailing claims for damages.

1300. The signatures following the text are arranged in two blocks. The first block consists of signatures and stamps of five persons identified as high-ranking persons from the Ministry of Justice, with different dates between 13 and 29 August 2003. The second block, under the heading "*attested*", consists of the signatures of four other persons. Two of these signatories are identified by titles from the Ministry of Energy; two others as "*Honourable Minister*", without stating which Ministry. The last date on the page is 25 August 2003.

1301. The signature page, in the Bengali original, appears as follows:



1302. The translation appears as follows:

377/ 21. The opinion provided in Article 20 of this note has been presented for approval.

[signature] *08/21/2003*
[stamp:]
Mohammed Belal Hossain
Assistant Secretary
Ministry of Law, Justice
and Parliamentary Affairs

[signature] *08/22/2003*
[stamp:]
Deputy Secretary
[illegible]
Deputy Secretary (Dhaka)
Ministry of Law, Justice
and Parliamentary Affairs

[signature] *08/29/2003*
[stamp:]
Joint Secretary
Sultana [illegible]
Joint Secretary [illegible]
[illegible]
Ministry of Law, Justice
and Parliamentary Affairs

[signature] *08/13/*[illegible]
[stamp:]
Additional Secretary [illegible]
[illegible]
Additional Secretary [illegible]
Ministry of Law, Justice and
Parliamentary Affairs

[signature] *08/23/2003*
[stamp:]
Md. Asaduzzaman
Secretary
Ministry of Law, Justice and Parliamentary
Affairs

Attested
[signature] *10-12-2003*
[stamp:]
Mahbubul Nahabr
Senior Assistant Secretary
Energy and Mineral Resources Division
Ministry of Power, Energy and Mineral Resources

[illegible]

[signature] [illegible date]
[stamp:]
Honorable Minister

[signature] *08/25/2003*
[stamp:]
Honorable Minister

Deputy Secretary [Drafting]
Energy and Mineral Resources Division
[illegible]

1303. The signature block of the second opinion, as presented above, shows clearly that the opinion is presented under the responsibility of five senior officials of the Law Ministry, in the position of Secretary, Deputy Secretary, Joint Secretary, Assistant Secretary, and an Additional Secretary. The Law Minister is not among them. If the Law Minister is one of the two "*Honorable Ministers*" at the bottom of the page, his signature appears in a separate block under "*Attested*" in a place distinct from the senior officials in the block under the opinion.

1304. The Respondents assert that "*it is clear that Moudud Ahmed was involved in the Ministry legal opinion – his signature appears on the August 2003*

extract".[855] They explain the assertion in a footnote: *"[w]here the English translation indicates a signature of an Honourable Minister on the bottom right corner, Moudud Ahmed's signature appears in the original*".[856]

1305. The Claimant points out that there is no evidence for this. The Law Minister is not identified as such, even though one might assume that one of the two "*Honourable Ministers*" is the Law Minister. The Claimant adds that "*none of the signatures on the Bangla version matches the signature of Moudud Ahmed.*"[857] Furthermore, even if there were such evidence, the signature of the Honourable Ministers is at a location distinct from the senior officials first identified. In any event, the identification of these five senior officials clearly shows that it is an opinion of the Law Ministry and not one of the Law Minister personally. As the Claimant states, "*the mere presence of his signature certainly would not reveal what input, if any, Moudud Ahmed himself had on the preparation and substance of the opinion*".

1306. No such signature page has been produced for the first opinion regarding the Chattak issue. The letter summarising the first opinion states, however, that it was the "*Ministry of Law, Justice and Parliamentary Affairs*" that was requested and it was the "*Ministry of Law*" that "*expressed its opinion*". There is no indication that it was the Minister personally who expressed the opinion. A comparison of the letter summarizing the former with the second opinion suggests that the first opinion was issued in the same manner, i.e. by senior members of the Law Ministry and not by the Minister himself.

1307. The Tribunals conclude that it is inaccurate for the Respondents systematically to speak of the "*opinion of the Law Minister*", "*Mr Ahmed's opinion*"[858] or "*Barrister Moudud Ahmed's Legal Opinion as Minister*".[859] The evidence on record shows that **it is the opinion of the Ministry.**

[855] R-RC, paragraph 163.
[856] R-RC, paragraph 163, Footnote 289.
[857] C-RC, paragraph 67 and Footnote 62.
[858] R-PHB2 (CONFIDENTIAL), paragraph 42.
[859] R-MC, paragraph 93.

9.7.3 The alleged conflict of interest

1308. With respect to the Respondents' argument concerning the Law Minister's alleged conflict of interest, the **following facts result from the record**:

(i) In the year 2000, i.e. during the time of the Awami League Government, Niko had engaged Moudud Ahmed and Associates, providing retainer. The retainer arrangement was terminated at the end of 2000 and Mr Ahmed personally wrote to Mr Sharif of Niko on 10 December 2000 submitting a bill for the retainer (US$6,000 for the time from June to December 2000) and another for additional work, totalling US$8,250.[860] With respect to a payment of US$6,000 made by Niko in 2000, which the Respondents questioned as unexplained,[861] the Claimant produced the bill for the first six months of the retainer in 2000.[862]

(ii) The two bills were paid in January 2002,[863] after a new bill for these services had been sent by the Moudud Ahmed law firm on 9 January 2002.[864]

(iii) Following the meeting between Petrobangla, BAPEX and Niko on 7 July 2002, after Mr Ahmed had been appointed Law Minister, Niko again engaged the law firm Moudud Ahmed and Associates which delivered a legal opinion on the Chattak issue, dated 10 August 2002. Niko submitted this opinion to the State Minister with its letter of the same date.[865]

(iv) The law firm Moudud Ahmed and Associates prepared a second opinion, dated 27 February 2002, concerning both the Chattak and

[860] Letter from Moudud Ahmed & Associates to Niko, 10 December 2000, Exhibit R-398 (CONFIDENTIAL).
[861] R-RC, paragraph 165.
[862] Letter from Moudud Ahmed & Associates to Niko, Exhibit C-202 (CONFIDENTIAL) and C-RC, paragraph 70.
[863] As confirmed by letter from Moudud Ahmed & Associates to Niko, 9 March 2003, Exhibit R-400 (CONFIDENTIAL).
[864] Letter from Moudud Ahmed & Associates to Niko, 9 January 2002, Exhibit R-399 (CONFIDENTIAL).
[865] Both the letter and the opinion are presented as Exhibit R-353, Letter from Niko to Ministry of Power, Energy and Mineral Resources, 10 August 2002.

the Swiss Challenge issues.[866] The opinion was submitted to the State Minister with Niko's letter of 3 March 2003.[867]

(v) Both legal opinions of the law firm Moudud Ahmed and Associates are signed by "*Md. Azizul Haq, Advocate, Supreme Court*". On 3 March 2003, Md Haq confirmed receipt of payment for "*legal opinion in my personal capacity*".[868]

1309. Discussing the first legal opinion of the Law Ministry, **the Respondents** asserted

> *The Law Minister's opinion essentially repeats the opinions that Niko obtained from his private law firm and submitted to the Ministry of Energy to support Niko's position. At the very least, Moudud Ahmed had a conflict of interest.*[869]

1310. In support of their argument, the Respondents described the law of Bangladesh with respect to conflicts of interest in the situation of the Law Minister. They stated that the relevant provisions

> *… [P]rohibit Barrister Ahmed from exercising Ministerial functions in a matter in which he had a prior pecuniary and professional interest, but he was also duty-bound, as a legal practitioner, to refrain from participating in any Government business involving Claimant.*[870]

1311. Applied to the situation of the present case, the Respondents argued

> *Barrister Ahmed's conduct was in complete disregard of these ethical regulations and standards. First, he manifestly failed to disclose the prior professional relationship between Niko and his law firm or the fact that his law firm (and he personally) was bound to benefit from any favorable advice issued by the Law Ministry. Second, as an advocate, Barrister Ahmed failed to recuse himself from Government business involving Claimant, and avoid "conflicting interests".*[871]

1312. **The Claimant** responded by pointing out, *inter alia*,

> *a) First, while the Law Minister at the time was indeed Moudud Ahmed, he had obviously left private practice when taking office. There is no evidence whatsoever that he had any input into the*

[866] Moudud Ahmed & Associates, Legal Opinion, 27 February 2003, Exhibit C-150.
[867] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 3 March 2003, Exhibit C-152.
[868] Letter from Moudud Ahmed & Associates to Niko, 3 March 2003, Exhibit C-151 (CONFIDENTIAL).
[869] R-MC, paragraph 91.
[870] R-MC, paragraph 97.
[871] R-MC, paragraph 98.

opinions issued by the particular barrister at his former firm, which had simply continued to use its established name.

b) Second, there is no evidence in the record that the opinion of the Law Ministry was in fact proffered by Moudud Ahmed himself or that he even had any involvement in it; while the identity of the lawyer(s) within the Ministry responsible for the opinion is not known to Niko, it is entirely possible, if not probable, that it was prepared by staff counsel within the Ministry rather than the Law Minister.[872]

1313. The Respondents challenged the contention that Mr Ahmed "*cut ties with his associates practicing at the firm under his name, especially when they were advising his former client and were paid, while he was Minister, a significant outstanding sum due by Niko for <u>his</u> earlier work for Niko*".[873] The Respondents also point to what they described as the "*many oddities surrounding the Legal Opinion*".[874] The Claimant sought to rebut the Respondents' points.[875]

1314. **The Tribunals** have examined this exchange and concluded that the Respondents' arguments and the alleged oddities, to the extent to which they are supported by the evidence, do not justify the alleged conflict of interest: The Tribunals see no basis for the Respondents' assertion that the Law Minister failed to disclose the link of his law firm to Niko.

1315. Even if the Law Minister had not cut his ties with the law firm bearing his name, the link of this firm with Niko was fully transparent, since Niko submitted the two opinions it had obtained in the form showing the letterhead of that law firm. The Ministry and the Respondents thus could clearly see that Niko had obtained two legal opinions from the firm. BAPEX nevertheless suggested that the controversy concerning Chattak East be submitted to the Law Ministry.

1316. The Respondents' statement that "*Barrister Ahmed failed to recuse himself from Government business involving Claimant, and avoid 'conflicting interests'*", is an assertion without any evidentiary basis. The Respondents have not provided any evidence nor even explanations about the circumstances in which the Law Ministry's opinions were produced. There is therefore strictly no basis for the assertion that the

[872] C-CMC, paragraph 166.
[873] R-RC, paragraph 163 (emphasis in the original).
[874] R-RC, paragraph 165.
[875] C-RC, paragraphs 58-76.

Law Minister failed to "*recuse himself*". The Respondents seek to cover this lacking evidence by consistently speaking of opinions by the "*Law Minister*" where the evidence only shows references to the opinions of the Law Ministry.

1317. The Tribunals see **no basis for assuming that the opinions presented by the Law Ministry were affected by irregularity with respect to professional ethics obligation or rules of transparency** applying to Mr Ahmed's function as Minister **or by a conflict of interest** on the side of the Law Minister.

9.7.4 The reasoning of the Law Ministry's opinions and their similarity with those obtained by Niko

1318. **The Respondents** also criticise the content of the Law Ministry's opinions. They characterise these opinions as "*facially irrational*",[876] "*grounded on fundamentally unsound reasoning*"[877] "*unreasonable*"[878] and "*with threadbare, unreasonable analysis*".[879] In addition, the Respondents state:

> *In addition to its dubious provenance, the reasoning of the Law Minister's opinion raises serious doubts as to its legitimacy as an objective legal opinion by an independent Law Minister. Like Niko, the Law Minister's opinion relied on Article 5.05 of the FoU to reject the Swiss Challenge process. This contradicts the very decision of the former Prime Minister it purported to interpret, which accepts Niko's proposal including the Swiss Challenge process.*[880]

1319. As mentioned above, the Respondents' criticism also stresses that the Law Ministry's opinions repeat those which Niko had submitted. With respect to the March 2003 opinion concerning Chattak East, the Respondents say that it "*essentially repeats the opinions that Niko obtained from [the Law Minister's] private law firm and submitted to the Ministry of Energy to support Niko's position*".[881]

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[876] R-PHB1 (CONFIDENTIAL), paragraph 151.
[877] R-PHB1 (CONFIDENTIAL), paragraph 172.
[878] R-PHB2 (CONFIDENTIAL), paragraph 42.
[879] R-PHB2 (CONFIDENTIAL), paragraph 40.
[880] R-MC, paragraph 94.
[881] R-MC, paragraph 91.

1320. The consistency of the opinions that Niko had obtained from the Moudud Ahmed law firm with the opinion by the Law Ministry is taken by the Respondents as a major argument against the Law Ministry's opinion:

> *… the fact that the Law Ministry's opinion was consistent with the position taken by the Minister's law firm completely blurred the line between public and private interests, thereby violating the Constitution, the applicable laws of Bangladesh, and the Professional Conduct Canons applicable to Barrister Ahmed personally.*[882]

1321. Finally, the Respondents criticise the Law Ministry's opinions for having "*adopted Niko's positions contrary to the views of BAPEX and Petrobangla (and the Ministry of Energy before bribes were paid)*".[883]

1322. **The Claimant** rejects the proposition that the consistency between the opinions should give rise to any suspicion:

> *Such a proposition is patently meritless, particularly in circumstances where Niko's position was plainly meritorious, and where Niko had clearly and convincingly argued its position in multiple written communications. In contrast to Niko's robust approach, BAPEX (and Petrobangla) had utterly failed to provide any substantive basis in support of its position.*[884]

1323. **The Tribunals** see no merit in the Respondents' criticism based on the similarity between the Law Ministry's opinions and those that the Claimant had presented. As long as the Ministry's opinions defend reasonable positions there should be no grounds for concern or criticism.

1324. It was at the suggestion of BAPEX that the issue of Chattak East was submitted to the Law Ministry. The opinion of that Ministry should be controlling when the regularity of the adoption of the JVA is considered. Whether the view adopted by the Law Ministry differs from that which the Respondents or the Claimant defend in the Arbitrations or took at the time, as a matter of principle, is not decisive for the regularity of the process. It is only if the opinions of the Law Ministry turned out to be "*facially irrational*", as the Respondents argue, that there would be grounds for concern.

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[882] R-MC, paragraph 98.
[883] R-PHB2 (CONFIDENTIAL), paragraph 40.
[884] C-CMC, paragraph 167.

1325. In their examination of the opinions of the Law Ministry, the Tribunals could not rely on the opinions themselves, since the opinions have not been produced, as the Respondents assert that they cannot find them. When forming a view on the reasonableness of the Law Ministry's opinions, the Tribunals must therefore have regard to the evidence about these opinions made available: the summary of the first opinion provided in the Ministry's letter of 1 April 2003[885] and the extract of the second opinion attached to the Ministry's letter of 11 October 2003.[886]

9.7.4.1 The First Opinion

1326. With respect to **the first opinion**, dealing with the Chattak East issue, the Ministry's letter of 1 April 2003 refers to the Marginal Fields Procedure and the manner in which, in that procedure, Marginal/Abandoned Gas Fields are identified. It contrasts this procedure with the Annex A of the FOU:

> *But to determine whether Chattak (East) is included in the Chattak Gas Field or not, attention to be drawn to the Exhibit A of the Framework of Understanding. The co-ordinates, area and depth of Kamta, Feni and Chattak gas fields have been specifically mentioned in the Exhibit A. FOU (Frame Work of understanding) was completed between Niko Resources (Bangladesh) and Bangladesh Petroleum Exploration Company Ltd. (BAPEX). As there is specific description of Chattak Gas Field in Exhibit A, therefore the explained area will be considered as Chattak Gas Field.*[887]

1327. On this basis, the Ministry sets out the coordinates of the Chattak Gas Field as in Annex A to the FOU.

1328. In their examination of the Chattak East issue, the Tribunals have considered the reference to Annex A as a relevant and valid criterion for determining the contract area. There are indeed good reasons to accept that the FOU, as the first agreement concluded with respect to the Niko project, sets out the area to which the envisaged cooperation between BAPEX and Niko would apply. The Tribunals have presented above their

[885] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 1 April 2003, Exhibit C-153.
[886] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 11 October 2003, Exhibit R-280.
[887] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 1 April 2003, Exhibit C-153.

analysis of this question; they see no grounds to view the Law Ministry's opinion, as reported in the Ministry's letter, as irrational or otherwise indefensible.

9.7.4.2 The Second Opinion

1329. **The second opinion** of the Law Ministry, as far as can be seen from the attachment to the Ministry's letter of 11 October 2003, deals with two issues:

(a) Vetting the JVA; and

(b) Provide a legal opinion whether, in light of the FOU, Swiss Challenge Method or any tendering method has to be followed to develop the proposed four Marginal Gas Fields and to produce gas from them.

1330. The opinion starts by presenting the principal steps leading to the JVA, viz. Niko's proposal of 28 June 1998, the Government's decision of 25 May 1999, the Framework of Understanding of 23 August 1998 and the Marginal Field Procedure of 14 June 2001. It explains that "*based on*" this procedure, a JVA was prepared, the Prime Minister directed its finalisation on 18 March 2003, and the Board of Petrobangla approved it on 22 July 2003. Thereupon the "*Ministry of Administration [sic] has requested to vet the draft JVA*".

1331. With respect to the issue of vetting the JVA, the opinion states that the draft JVA was examined and corrections were "*penciled*" in the draft. "*Upon making those amendments, there is no legal bar to finalize the JVA*".[888]

1332. Concerning the Swiss Challenge method, the opinion sets out the background to the issue:

> *Decision (c) of the government's Memorandum dated May 25, 1999 has a reference to adopting the Swiss Challenge Method for the proposed four Marginal Gas Fields. On the other hand, Article 5.05 of the government-approved FOU says that, BAPEX cannot negotiate*

[888] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 11 October 2003, Exhibit R-280, paragraph 376/20.

with any third party in order to develop the proposed Marginal Gas Fields and to produce gas from them. Since the government's decision (c) dated May 25, 1999 and the government-approved FOU dated August 23, 1999 are contradictory, the Ministry of Administration hence seeks the opinion of this Ministry that, for the proposed Marginal Gas Fields, whether, in light of the FOU, it is required to follow Swiss Challenge Method or any tendering method.[889]

1333. After referring to the 25 May 1999 decision and Article 5.05 of the FOU, the conclusion is presented as follows:

> *Swiss Challenge method cannot be followed in the proposed Marginal Gas Fields, because reviewing the decision (c) dated May 25, 1999 reveals that following Swiss Challenge Method or any other tender method was not mandatory, that was optional. In that decision, the mention of the phrase "if necessary" would indicate that. As per Article 5.05 of the government-approved FOU dated August 23, 1999, tender or discussion with any third party was barred, meaning that by that Article the Government has legally discarded the (c) decision taken on May 25, 1999. Therefore, if the Government enters into any discussion or agreement with a third-party following Swiss Challenge method or any such method, the Government will be held liable for breaching the agreement, henceforth, will have to pay huge compensation, which is unacceptable.*

1334. The Claimant concludes that the State Minister was "*entirely justified*" in seeking an opinion from the Law Ministry and that "*the Law Ministry had clear and substantial ground to conclude that the JVA could, and even should, be executed without a Swiss Challenge process being followed.*" The Claimant concludes:

> *There is absolutely nothing that invites an inference of corruption in either case. On the contrary, the circumstances suggest only the exercise of good judgment by both the State Minister and the Ministry of Law.*[890]

1335. The Respondents object to the reasoning of the Law Ministry's opinion, and in particular to the reliance on Article 5.05 FOU.

> *In addition to its dubious provenance, the reasoning of the Law Minister's opinion raises serious doubts as to its legitimacy as an objective legal opinion by an independent Law Minister. Like Niko, the*

[889] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 11 October 2003, Exhibit R-280, paragraph 374/18.
[890] C-PHB1 (CONFIDENTIAL), paragraph 148.

Law Minister's opinion relied on Article 5.05 of the FoU to reject the Swiss Challenge process. This contradicts the very decision of the former Prime Minister it purported to interpret, which accepts Niko's proposal including the Swiss Challenge process.[891]

1336. The criticism is unjustified: the opinion interprets the decision of 25 May 1999. Relying on the qualification "*if necessary*", the opinion concludes that according to the decision Swiss Challenge is not mandatory but optional. The Tribunals consider this interpretation reasonable.

1337. Elsewhere in their submissions, the Respondents assert that the "*sole provision the Law Minister cited on Swiss Challenge was apparently Article 5.5 of the FoU*".[892] The above quotation shows that this is not correct; as just seen, the opinion also considered the decision of 25 May 1999.

1338. By Article 5.05 of the FOU BAPEX granted exclusivity to Niko "*during the negotiation period*". The Respondents argue that the exclusivity applied only during the negotiations but not thereafter and that the invitation of other offers according to the Swiss Challenge procedure was fully consistent with this Article.[893] The Claimant relies on Article 9.01 of the FOU, which provides that "*on successful completion of the Technical Program & on the basis of the acceptability of the result thereof the parties would execute a Joint Venture Agreement*". It concludes: "*[c]learly, the 'negotiation period' contemplated by the FOU would end upon the execution of the JVA".*[894]

1339. The Tribunals note that the FOU provides for a "*negotiation period*" and for the execution of the JVA. It does not call for a phase following the negotiations and prior to the conclusion of the JVA, as would be required if the Swiss Challenge method were applicable. As discussed above, Article 7.01 of the FOU, the only reference to the Swiss Challenge method in the FOU, does not prescribe that method; it simply indicates what shall happen with the confidentiality obligation in case that method were applied. The Tribunals conclude that it is reasonable to assume that the "*negotiation period*", as understood in Article 5.05, makes no allowance for Swiss Challenge. Once agreement on the terms of the JVA were

[891] R-MC, paragraph 94.
[892] R-PHB1 (CONFIDENTIAL), paragraph 170.
[893] R-MC, paragraphs 95 and 96; also R-PHB1 (CONFIDENTIAL), paragraph 171.
[894] C-PHB1 (CONFIDENTIAL), paragraph 135.

reached, as this was the case in August 2003, Article 5.05 of FOU would apply and it would not be admissible for BAPEX to "*encourage, entertain, solicit or engage in negotiations or discussion with any party other then Niko with respect to this project*" or to conclude a conflicting agreement.[895]

1340. With respect to the second opinion, too, the Tribunals therefore see no grounds to view the Law Ministry's opinion, as reported in the Ministry's letter, as irrational or otherwise indefensible.

1341. As to the Respondents' criticism that the Law Ministry's opinions resemble the arguments developed in the opinions that Niko had presented but did not discuss specifically the views of the Respondents, the Tribunals note that the Respondents have not provided any information about the materials that were provided to the Law Ministry when it was requested to provide its opinions.

1342. The suggestion of BAPEX to consult the Law Minister was made in its letter of 5 March 2003,[896] which made express reference to the legal opinion which Niko had presented at the meeting of 2 March 2003. One may assume that this opinion was communicated to the Law Ministry when the opinion on the Chattak issue was requested. It is therefore not surprising that the arguments in that opinion were considered and reflected in the Law Ministry's opinion on that subject.

1343. In the absence of the actual text of the second opinion and surrounding material, it cannot be said whether the Law Ministry took into account other arguments, including those of BAPEX and Petrobangla. The Respondents' failure or inability to disclose documents or information on this issue in the Arbitrations is disappointing given that such materials should have existed in official files; in the end their allegations concerning the arguments considered by the Law Ministry are simply unsupported by the evidence on record.

9.8 Government Approval for the JVA

1344. The Respondents allege that (i) the final terms of the JVA and specifically the inclusion of Chattak East and the omission of Swiss Challenge were

[895] FOU, Article 5.05 (a).
[896] Letter from BAPEX to Petrobangla, 5 March 2003, Exhibit R-302.

the result of interventions from the State Minister and the Prime Minister and (ii) the "*proper procedures*" were not followed for the approval of the JVA[897] by the Government was not properly followed; they rely on "*repeated instances of mala fides and impropriety in the decision-making process*".[898] The Respondents rely on irregularities in the governmental decision-making process as a basis for seeking application of the Supreme Court's jurisprudence developed under Article 102 of the Constitution.[899]

1345. The Claimant denies these allegations. It asserts that there is no evidence to suggest that there was any deviation form the appropriate internal approval procedure; it finds corroboration in the fact that the usual approval process was followed and in the absence of any "*contemporaneous query or complaint [...] that the usual governmental approval procedure had been jettisoned in relation to the JVA*".[900]

9.8.1 The requirements of the approval process

1346. It is undisputed that "*Government approval*" was required for the execution of the JVA. This requirement was expressed in the Marginal Fields Procedure and was consistently confirmed in internal documents of BAPEX and Petrobangla. The MFE states that "*a joint venture contract may be executed between BAPEX and Niko as stipulated in the study upon approval of Petrobangla and the Ministry of Energy and Mineral Resources*".[901]

1347. **The Respondents** assert that "*normal procedures for approving the JVA were not followed*". They have, however, provided little information about the process that had to be followed with respect to this approval.

1348. Prior to the Hearing, the Respondents argued that, during the BNP reign, the approval process was "*perverted*". Relying on the testimony of Mr Khan and Ms LaPrevotte, the Respondents described the "*extent of the*

[897] R-PHB2 (CONFIDENTIAL), title before paragraph 35.
[898] R-PHB2 (CONFIDENTIAL), paragraph 145.
[899] E.g. R-PHB1 (CONFIDENTIAL), paragraph 20 *et seq.*; for the argument in general see above, Section 6.2.
[900] C-PHB2 (CONFIDENTIAL), paragraphs 86 and 87.
[901] MFE, Exhibit R-1, p. B-15.

perversion of the Government's approval process", referring to the "*widespread corruption in the granting of licenses and public contracts*".[902] They insisted that "*the Government approval for the JVA and GPSA was tainted by improper, and indeed illegal acts of the Government officials approving them*";[903] but they did not describe in any detail the approval process that had to be followed.

1349. At the Hearing, Mr Chowdhury, in response to questions from the Tribunals, explained what he understood the normal procedure to have been during his time at the Ministry.[904] From his testimony, the Tribunals understand that the approval is given on the basis of a proposal which must originate from Petrobangla: "*proposal is initiated by Petrobangla and goes to the [State] Minister through the secretary.*"[905] Mr Chowdhury clarified: "*[w]ithout a proposal submitted to the Minister by the secretary there was no scope for the [State] Minister to approve it.*"[906]

1350. According to the procedure described by Mr Chowdhury, the Minister then submits the proposal to a "*Cabinet committee on financial matters [which] is set up by the Prime Minister*" and makes a recommendation to the Prime Minister.[907] "*This Cabinet committee is normally called the purchase committee.*"[908] The convener of the committee is the Finance Minister; other ministers are those for Industry, Commerce and some others depending on the subject matter.[909] The proposal then is submitted to the Prime Minister with the recommendation of the Committee, even if the recommendation is negative.[910]

1351. Mr Chowdhury explained that his brief experience at the Ministry, from February to September 2002, consisted of two or three contracts for the procurement of petroleum which he submitted to the Cabinet Committee.[911] Concerning the Niko project, he assumed, since "*they have*

[902] R-MC, paragraph 185.
[903] R-RC, paragraph 345.
[904] Tr. Day 3 (CONFIDENTIAL), pp. 140 – 155.
[905] Tr. Day 3 (CONFIDENTIAL), p. 152, ll. 23-25.
[906] Tr. Day 3 (CONFIDENTIAL), p. 153, ll. 6-8.
[907] Tr. Day 3 (CONFIDENTIAL), 141, l. 20 to p. 142, l. 1.
[908] Tr. Day 3 (CONFIDENTIAL), p. 155, ll. 22-24.
[909] Tr. Day 3 (CONFIDENTIAL), p. 143, ll. 10-16.
[910] Tr. Day 3 (CONFIDENTIAL), p. 142, l. 18 to p. 143, l. 4.
[911] Tr. Day 3 (CONFIDENTIAL), p. 144, ll. 1-3.

got this deal approved they have got the approval of the Prime Minister" and it passed the Committee;[912] but he does not know since he "*was not involved then.*"[913]

1352. The steps described by Mr Chowdhury, thus are as follows:

- A proposal by Petrobangla to the Ministry;
- Transmission of the proposal by the Ministry to the Cabinet (or Procurement) Committee convened by the Ministry of Finance;
- Recommendation by the Ministry; and
- Approval by the Prime Minister.

1353. No other evidence has been provided about the approval process. Mr Chowdhury explained that this was the process normally followed during his presence at the Ministry. He did not state that this process was prescribed by any rule; and he could not testify to the process followed after his departure.

1354. The Respondents refer to the description by Mr Chowdhury as the "*normal procedures in Bangladesh*"; but they provide no further support to show that the procedure was required generally in Bangladesh for Government approval and was applied in the approvals of contracts other than the procurement contracts which Mr Chowdhury witnessed.

1355. The Tribunals conclude from Mr Chowdhury's testimony and the Respondents' endorsement of his description of the "*normal process*" **that the Government approval process was not generally "*perverted*" during the BNP reign**; a normal process for Government approval did function. In order to prevail with their corruption allegation, the Respondents would have to establish that the approval process was "*perverted*" in the particular case of Niko, and that the approval of the JVA was procured by corruption.

1356. The Tribunals thus need to examine the steps that led to the Government approval and determine whether, in the specific case of the JVA, the

[912] Tr. Day 3 (CONFIDENTIAL), p. 144, ll. 12-14.
[913] Tr. Day 3 (CONFIDENTIAL), p. 142, ll. 9-10.

Government approval process was vitiated in any manner and, in Section 10 below, whether the approval was procured by corruption.

9.8.2 The steps actually taken in relation to the Government approval

1357. When asserting that proper procedures were not followed for the approval of the JVA, the Respondents relied on Mr Chowdhury's description of the "*normal procedures*" to assert that these procedures were not followed. When discussing the procedures followed for obtaining Government approval, the Respondents stress their allegations of corruption. These will be considered in other parts of this Decision. The issue considered here concern the approval process itself and the alleged irregularities in it.

1358. The Tribunals have examined the steps leading to the Government approval of the JVA, in order to determine whether the alleged irregularities have been established.

1359. During the time between the submission of Niko's first proposal in 1997 or 1998 and the final execution of the JVA, Government authorities intervened at various occasions. Starting with the Government's decision in 1999 to enter into negotiations with Niko, the Government continued to be involved in the process that led to the finalisation of the JVA. This involvement and the acts of Government approval that occurred through it have been discussed above. The steps that must be considered now are those surrounding the finalisation of the JVA.

1360. Following the correspondence with Niko and internal meetings of BAPEX and Petrobangla in the second half of 2002 and following instructions from the meeting of 16 September 2002, BAPEX and Niko met on 23 November 2002. BAPEX reported on the meeting:

> *It was apparent from the discussions, and agreed between BAPEX and NIKO, that there was apprehension of complexities arising with regards to the Well Head Price, T&D Margin, Corporate Tax, PDF Margin and Exploration Margin. To avoid these complexities Niko*

offered a new proposal by their letter dated 25/11/2002 with a view to finalize the JV which is mentioned below.[914]

1361. In that follow-up letter of 25 November 2002, Niko addressed a number of questions remaining open. With respect to Chattak East, Niko confirmed its position but added that it "will accept the final GOB decision in this regard."[915]

1362. Thereafter, BAPEX prepared a draft JVA, "*seconded by Niko*". This draft was submitted to the BAPEX Board which decided on 30 December 2002 to form a committee "*to minutely check out whether the terms and conditions contained in the JVA presented before the Board are consistent with the decisions taken in the joint meetings of BAPEX, Petrobangla and the Ministry.*"[916] Various tasks for the committee were identified, including these:

> *a) The committee will send letters through Petrobangla for reconsidering the decision from the Ministry on the points where the presented JVA contradicts the Government decisions already issued.*
>
> *b) The committee will send appropriate recommendations to the Ministry through Petrobangla for receiving proper decisions on the specified matters where there is no decision from the Ministry.*
>
> *c) The committee will send the draft JVA to the Ministry through Petrobangla on amendment of the same after receiving decisions from the Ministry regarding the matters contained in "a" and "b."*[917]

1363. This committee presented its report on 13 January 2003. It made a number of recommendations and concluded:

> *… the committee did not find any Article that goes against the interests of BAPEX/Petrobangla/the Government. In this*

[914] Letter from BAPEX to Petrobangla, 30 January 2003, Exhibit R-309.
[915] Letter from Niko to BAPEX, 25 November 2002, Exhibit R-304.
[916] Letter from BAPEX to Petrobangla, 30 January 2003, Exhibit R-309, section 2.
[917] Letter from BAPEX to Petrobangla, 30 January 2003, Exhibit R-309, section 2.1.

circumstance, the draft JVA can be rearranged as per the recommendations of the committee.[918]

1364. The report was considered and approved by the BAPEX Board on 10 January 2003 with a number of decisions or issues for determination by Petrobangla or the Ministry, including the contract area, the marketing of the JV gas and the wellhead price, the investment multiple, tax issues and Swiss Challenge.[919]

1365. In its letter of 30 January 2003, BAPEX requested Petrobangla to take "*proper steps for the consideration by and approval of the Ministry regarding decisions*" of the BAPEX Board of 10 January 2003.[920]

1366. Following a decision of the BAPEX Board of 20 February 2003, Petrobangla sent to the Ministry a draft JVA, which did not include Chattak East.[921]

1367. On 2 March 2003 a joint meeting of the Ministry, Petrobangla, BAPEX and Niko was held at which Niko insisted on the inclusion of Chattak East.[922] In the follow-up letter of 3 March 2003 to the State Minister, Niko confirmed and developed its position in this respect.[923]

1368. In his letter of 5 March 2003 to Petrobangla, Mr Elahi, the Managing Director of BAPEX, recognised the "*conflicting views*" and, as discussed above, suggested that the matter be submitted to the Law Ministry which resolve the issue.[924]

1369. On 18 March 2003 a summary of the project was prepared and submitted for approval by the Prime Minister. The summary, presumably prepared by the Ministry, has not been produced; nor has the approval by the Prime Minister. The summary is mentioned in the Ministry's letter of 11 October 2003[925] and the approval is reported in the Ministry's letter of 1 April 2003.

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[918] Reported in the 30 January 2003 letter Letter from BAPEX to Petrobangla, 30 January 2003, Exhibit R-309, section 2.2 (d).
[919] Letter from BAPEX to Petrobangla, 30 January 2003, Exhibit R-309, section 2.3.
[920] Letter from BAPEX to Petrobangla, 30 January 2003, Exhibit R-309, section 2.3(j).
[921] Letter from BAPEX to Petrobangla, 5 March 2003, Exhibit R-302.
[922] Letter from BAPEX to Petrobangla, 5 March 2003, Exhibit R-302.
[923] Letter from Niko to Ministry of Power, Energy and Mineral Resources, 3 March 2003, Exhibit C-152.
[924] Letter from BAPEX to Petrobangla, 5 March 2003, Exhibit R-302.
[925] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 11 October 2003, Exhibit R-280.

1370. On that basis, the Ministry invited Petrobangla to finalise the JVA, "*following all the terms and conditions and Rules and Regulations as approved by the Hon'ble Ex-Prime Minister on 14.06.2001*" in the Marginal Fields Procedure.

1371. Following this communication by the Ministry, a "*BAPEX-Niko JVA Committee*" was set up.[926] Mr Elahi, Managing Director of BAPEX, was its Convener. The committee examined and elaborated changes to be made to the JVA in light of the inclusion of Chattak East.

1372. Mr Elahi reported to Petrobangla in a letter of 24 April 2003 explaining *inter alia*:

> *The committee prepared a Comparative Economic Analysis of each of the gas fields i.e. Chattak (West), Chattak (East) and Feni under the JVA with the PSC Moulvibazar Gas Field i.e. Block-12 operated by the IOC which is enclosed herewith (Enclosure 4). On the basis of the analysis, the committee prepared the proposal of investment multiple of Chattak (West), Chattak (East) and Feni Gas Fields; in other words, they proposed the allocation of shares between BAPEX and Niko in many options.*
>
> *Therefore, we request your review of the Comparative Economic Analysis and approval to send the letter to Niko.*[927]

1373. The committee submitted its report to Petrobangla on 3 June 2003 and a new committee was formed by Petrobangla to evaluate it. This work led to further changes in the JVA draft which was then submitted to the BAPEX Board. The draft approved by the BAPEX Board was sent to the Ministry by Petrobangla on 3 July 2003.[928]

1374. The Ministry then gave instructions on 21 July 2003:

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[926] See Petrobangla Department Order, 3 April 2003, Exhibit R-308.
[927] Letter from BAPEX to Petrobangla, Exhibit C-154.
[928] Minutes of the 333rd Petrobangla Managing Committee Meeting on 22 July 2003 (Exhibit JD SI-32; also in a different translation Exhibit C-11).

(a) To get immediate legal vetting on the JVA accepted by BAPEX board and adopted by BAPEX and Niko Resources(BD) Ltd.. This is to be done by Petrobangla panel of Lawyers.

(b) To get approval on the JVA by Petrobangla Governing/Managing Committee.[929]

1375. The "*legal vetting*" was performed by Barrister Azhrul Hoque from "*Legal Remedy*" and was submitted to the Petrobangla Management Committee.[930]

1376. The Ministry also sought further clarification from Petrobangla, including the question whether the Investment Multiple was "*beneficial to BAPEX and Bangladesh*" and whether "*there are any other sectors where such initiative has been implemented*". The Minutes of the 22 July 2003 Petrobangla Management Board meeting record the reply:

There will be no benefit unless the Abandoned/Marginal Gas Fields are developed for production.

No JVA was signed till date in Bangladesh Gas sector.[931]

1377. The Minutes deal in particular with the determination of the gas price, point out the difference with price determination under the PSC and address certain tax and related issues as well as the registration of Niko in Barbados.

1378. The Minutes then provide replies to certain questions:

Justification of the Proposal discussed:

7. It was hoped that if Gas could be extracted from Chattak and Feni Gas fields under the said agreement it could meet the growing demand for gas.

Concerned Department opinion:

8. Legal vetting was taken on the final draft.

[929] Minutes of the 333rd Petrobangla Managing Committee Meeting on 22 July 2003, Exhibit C-11, section 17.
[930] Minutes of the 333rd Petrobangla Managing Committee Meeting on 22 July 2003, Exhibit C-11, section 18.
[931] Minutes of the 333rd Petrobangla Managing Committee Meeting on 22 July 2003, Exhibit C-11, p. 2

Monetary Matters:

9. Neither Petrobangla nor BAPEX has any monetary involvement to operate the JVA.

Expected proposals/Recommendation

10. The JVA is recommended for approval.

Decision/Actions:

11. No possibility of adverse effect.

12. Placed for approval by the board.[932]

1379. The Minutes also record that it was pointed out again that

> *… no fund is required by BAPEX to run the said Joint Venture. Niko will bear all the investment needed. Earning from the produced gas will be distributed through Investment Multiple basis …*[933]

1380. The Petrobangla Management Committee considered further issues, including comparisons with the terms of PSCs, noting that "*there will be no cost recovery in the said JVA as for the case of PSC*". The discussion concluded as follows:

> *25. The board referred the draft JVA to the Ministry for Government approval.*
>
> *26. The board recommended the approval of Joint initiative between BAPEX and Niko for the development and exploration of Gas from Chattak and Feni Non-Producing Marginal/Abandoned gas fields. The board also advised the director (PSC) to send the matter to the concerned Ministry for need full Government approval.*[934]

1381. Petrobangla sent a letter to the Ministry on 24 July 2003, "*directing the next steps required*". This letter has not been produced, even though it formed Attachment 6 to the Ministry's Summary for the Prime Minister, produced as Exhibit R-281.

1382. In August 2003, the Law Ministry delivered the second opinion, dealing with Swiss Challenge, as discussed above.

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[932] Minutes of the 333rd Petrobangla Managing Committee Meeting on 22 July 2003, Exhibit C-11, p. 4.
[933] Minutes of the 333rd Petrobangla Managing Committee Meeting on 22 July 2003, Exhibit C-11, p. 8.
[934] Minutes of the 333rd Petrobangla Managing Committee Meeting on 22 July 2003, Exhibit C-11p. 9.

1383. In addition to the opinions from the Law Ministry, the "*Finance Division*" (presumably the Ministry of Finance) and the National Revenue Board also prepared opinions on the JVA. These opinions, forming Attachments 7 and 9 to the Ministry's Summary (Exhibit R-280), have not been produced. The August opinion of the Law Ministry is attached to the Summary as Attachment 8, but not produced with this document.

1384. The Summary to the Prime Minister concluded:

> *07. In this circumstance, the BAPEX-Niko ratified JVA needs to be presented before the Honorable Prime Minister for her final signature after making necessary amendments to the ratified JVA as per the opinion/recommendations given by the Ministry of Finance, and Ministry of Law, Justice and Parliamentary Affairs.*
>
> *08. The proposal of the aforementioned paragraph 7 has been presented before the Honorable Prime Minister for her kind consideration and approval.*[935]

1385. The Prime Minister's approval has not been produced. Petrobangla was informed of the approval by the Ministry on 11 October 2003 in the following terms, under the reference to the Ministry's notification of 1 April 2003 and Petrobangla's letter of 3 July 2003:

> *Following the Honorable Prime Minister's kind approval to the summary presented to her on 03-18-2003, it is requested to arrange final signature of the mentioned JVA.*
>
> *2. The direction approved by Honorable Prime Minister is as follows:*
>
> *a) In light of the opinion by the Ministry of Law, Justice, and Parliamentary Affairs, Chatak Gas Field will be considered as per Exhibit-A of the Frame Work of Understanding.*
>
> *and*
>
> *b) Petrobangla shall be directed to finalise the draft Joint Venture Agreement in accordance with all terms and relevant conditions stated in the Procedure for Development of Marginal/Abandoned Gas Fields approved by former Honorable Prime Minister on 06-14-2001;*

[935] Letter from Minister of Power, Energy and Mineral Resources to Primer Minister, 7 September 2003, Exhibit R-281, p. 4.

the draft JVA between BAPEX and Niko Resources was presented before the Honorable Prime Minister and she signed it on 06-14-2001.

3. The opinion of the Ministry of Law, Justice, and Parliamentary Affairs on the mentioned subject has been sent for taking necessary steps.[936]

1386. The Ministry's letter of instruction was copied to BAPEX which informed Niko on 13 October 2003 as follows:

> *In accordance with the approval accorded by the Government of the Peoples Republic of Bangladesh to sign the [JVA] you are requested to send your Authorized representative with due authorization to sign the said contract on 16th October, 2003 at 12.00 Noon to the Registered office of BAPEX, Dhaka, Bangladesh.*[937]

1387. JVA was then signed on 16 October 2003, as recorded on the agreement itself.

9.8.3 The Tribunals' assessment of the regularity of the JVA's approval

1388. It is uncontested that the approvals were indeed given. The Respondents state that "*the evidence shows that the State Minister personally and informally obtained the Prime Minister's approval.*" The Parties disagree, however, as to whether the approval occurred in a proper manner.

1389. The Respondents argue that the "*proper procedures*" were not followed for the approval of the JVA; they assert that "*Niko's corrupt deals with Mr Mamoon and Nationwide meant that normal procedures for approving the JVA were not followed*".[938] They rely on the description which Mr Chowdhury had given at the Hearing about the procedure that was normally followed for Government approval.[939]

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[936] Letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 11 October 2003, Exhibit R-280 (emphasis in the original). The last paragraph reads in the translation of Exhibit JD SI-33: "*On the above-mentioned subject matter the opinion (Photocopy) of the Ministry of Law, Justice and Parliamentary Affairs provided on 25-08-2003 AD has been sent for taking required steps.*"
[937] Letter from BAPEX to Niko, 13 October 2003, Exhibit JD SI-34.
[938] R-PHB2 (CONFIDENTIAL), paragraph 35, title "b".
[939] Tr. Day 3 (CONFIDENTIAL), p. 140 *et seq.*

1390. The Claimant concludes from this testimony:

> *… Mr. Chowdhury revealed in his testimony, the decision to approve the JVA was ultimately made by the Prime Minister, and only after a Cabinet Committee had convened and authorized the matter for presentation to her. Fundamentally, the evidence indicates that the decision to approve the JVA was therefore not in the State Minister's control in any event …*[940]

1391. The Respondents object that there "*is no record of any such Cabinet Committee meeting, because it never happened*";[941] and they point out that Mr Chowdhury had left his position at the Ministry more than a year before the JVA was concluded, and thus could not say whether this procedure was followed in the case of the JVA.[942] Indeed, Mr Chowdhury explained that he did not know whether the procedure was followed in the case of the JVA, adding "*because I was not involved then*".[943]

1392. The Claimant also contests the Respondents' assertion that the appropriate internal approval procedure was not followed and states: "*there is no evidence to suggest there was in fact a deviation in the case of the JVA*".[944]

1393. **The Tribunals** have considered **first** that, according to Mr Chowdhury's testimony, there must first be a **proposal from Petrobangla to the Ministry**; without such a proposal, "*there was no scope for the Minister to approve it*".[945]

1394. The Respondents assert that no such proposal existed; they go further and identify as one of the deviations in the actual approval process that Niko obtained the approval "*outside the normal procedures and avoided the normal chain of needing approval from the public servants between it and the Minister*".[946]

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[940] C-PHB1 (CONFIDENTIAL), paragraph 178.
[941] R-PHB2 (CONFIDENTIAL), paragraph 35.
[942] R-PHB2 (CONFIDENTIAL), paragraph 35 referring to Tr. Day 3 (CONFIDENTIAL), p. 140 *et seq*.
[943] Tr. Day 3 (CONFIDENTIAL), 142, ll. 9-10.
[944] C-PHB2 (CONFIDENTIAL), paragraph 86.
[945] Tr. Day 3 (CONFIDENTIAL), p. 153, ll. 6-8.
[946] R-PHB2 (CONFIDENTIAL), paragraph 37.

1395. While Mr Chowdhury was at the Ministry, no proposal for approval from Petrobangla had reached the Ministry; he assumed that, after his departure, the Secretary at the Ministry received a proposal from Petrobangla.[947]

1396. At the Hearing, counsel for the Respondents explained that they had not seen such a proposal. The Respondents informed the Tribunals subsequently that they "*investigated and, to [counsel's] knowledge, such a proposal does not exist*".[948]

1397. The account given above about the events following Mr Chowdhury's departure from the Ministry and the evidence on which it relied show, however, that BAPEX and Petrobangla played the leading role in the negotiations with Niko and that there were several proposals to the Ministry. There was indeed an exchange between BAPEX, through Petrobangla, and the Ministry about the terms of the JVA, as they evolved over time. The record shows that there were proposals submitted to the Ministry following the BAPEX Board decision of 20 February 2003 and a "*Petrobangla Memorandum*" dated 5 March 2003.[949] Following the receipt of the opinion of the Law Ministry, the Energy Ministry directed that a JVA be prepared and a committee was formed by Petrobangla and BAPEX. After revisions of the draft JVA by the "*BAPEX-Niko JVA Committee*" and the Petrobangla evaluation committee, a new draft was submitted to the Ministry on 3 July 2003. The Ministry commented and requested further clarifications which were addressed at a meeting of the Petrobangla Management Board on 22 July 2003, following which a new draft JVA was sent to the Ministry "*for Government approval*".

1398. The Tribunals conclude that there were several proposals submitted to the Ministry. These proposals reflected the positions adopted by BAPEX and Petrobangla and their views as they were developed in committees of BAPEX and Petrobangla, before and after the Law Ministry's opinion on the Chattak issue. The JVA draft developed after this opinion in this process adapted the terms and conditions to reflect the inclusion of Chattak East and provided a revenue sharing ratio more favourable for BAPEX in relation to Chattak East. In the course of this process, BAPEX

[947] Tr. Day 3 (CONFIDENTIAL), pp. 152 – 154.
[948] Respondents' letter of 22 May 2017, p. 4.
[949] Mentioned in the letter from Ministry of Power, Energy and Mineral Resources to Petrobangla, 1 April 2003, Exhibit C-153

also conducted a "*Comparative Economic Analysis*", comparing the financial conditions of the JVA with those of a gas field operated by an "*IOC*" (International Oil Company). On the basis of this analysis, the BAPEX committee prepared the Investment Multiple for the Niko JVA.

1399. The Ministry requested additional "*legal vetting*" by the "*Petrobangla panel of Lawyers*" and requested that the revised draft JVA prepared in the BAPEX-Niko negotiations be approved by the Petrobangla Board. It also sought clarification that this draft was "*beneficial to BAPEX and Bangladesh*".

1400. The evidence of these proposals and exchanges shows that this phase of the approval process, contrary to the Respondents assertion, was not "*driven from above*";[950] rather it was conducted in a cooperative and responsible manner, in which BAPEX and Petrobangla as well as the Ministry sought to ensure the most advantageous conditions for BAPEX and Bangladesh. The Tribunals have found no sign of impropriety in the process.

1401. In a **second phase** of the process described by Mr Chowdhury the proposal would be submitted **to the Cabinet/Procurement Committee**. As the Respondents point out, there is no evidence of a submission to such a committee. The Claimant asserts that "*the usual approval process was followed*" and finds support in the Summary to Prime Minister which reports on the prior consultation not only with the Law Ministry but also with "*the Finance Division and the National Revenue Board*".[951]

1402. The Tribunals note that other governmental bodies were consulted on the proposal, specifically the Ministry of Finance, the National Revenue Board and the Law Ministry. The "*necessary amendments*" were made in the draft JVA before it was submitted to the Prime Minister.[952] Apart from Mr Chowdhury's explanations about what occurred during his very limited practice during a short period at the Ministry, concerning "*two or three contracts for petroleum procurement*",[953] no evidence was provided about the choice of the governmental authorities that were consulted on

[950] Respondents' letter of 22 May 2017, p. 4.
[951] C-PHB2 (CONFIDENTIAL), paragraph 86.
[952] Summary to the Prime Minister, dated 7 September 2003, Exhibit R-281.
[953] Tr. Day 3 (CONFIDENTIAL), p. 144, ll. 1-3.

proposals; nor is there any evidence on procedural requirements with respect to such consultations.

1403. In the present case, the terms and conditions of the JVA were elaborated over a long period of time in cooperation of BAPEX, Petrobangla and the competent Ministry; the issues that required further vetting were legal and financial. The Law Ministry, as well as the Ministry of Finance and the National Revenue Board, appear as inherently appropriate entities for prior consultation in the approval process.

1404. In the absence of any evidence that other consultations were required under the law and that other mandatory practices were applicable to governmental approvals, the Tribunals see no irregularity in the choice of the entities that were consulted by the Ministry prior to the submission of the JVA for approval to the Prime Minister and the method in which this was done.

1405. The **third phase** in the procedure described by Mr Chowdhury consisted in a **recommendation by the Ministry**. Mr Chowdhury had explained that the approval had to be given by the Prime Minister "*on the recommendation of the Ministry*".[954] Following Mr Chowdhury's oral testimony about the procedure the following exchange took place:

> *THE PRESIDENT: So the Niko contract you are saying was not approved by the Minister of Energy but by the Prime Minister?*
>
> *MR CHOWDHURY: Yes, on the recommendation of the Ministry, the Prime Minister approves it.*
>
> *THE PRESIDENT: So the recommendation for the Niko contract was given by the Minister to the Prime Minister?*
>
> *MR CHOWDHURY: Yes, it is the process.*[955]

1406. Mr Chowdhury clarified that this was "*the process*" but, since he had left the Ministry by the time of the approval, he could not know whether this process was actually followed in the case of the JVA.

[954] Tr. Day 3 (CONFIDENTIAL), p. 141, ll. 10-12.
[955] Tr. Day 3 (CONFIDENTIAL), p. 141, ll. 7-16.

1407. The evidence on record shows that there must have been two recommendations by the Minister:

- The first of these recommendations is dated 18 March 2003. It is the one to which the Respondents seem to refer as "*summary*" when they write: the "*Prime Minister approved a summary in March 2003, before a final draft had even been prepared and before Swiss Challenge was discarded*".[956] It is mentioned in the 11 October 2003 letter of the Ministries and identified by the date of 18 March 2003. It has not been produced in the Arbitrations;
- The second recommendation is dated 7 September 2003 and has been produced as Exhibit R-281.

1408. Concerning the first of these documents, the letter of 11 October 2003 speaks of a "*summary*" presented to the Prime Minister on 18 March 2003. Judging from the second text, also entitled "*summary*", one may presume that it was indeed a recommendation on the basis of which the Prime Minister could express her approval.

1409. The content of this first recommendation is not known. Since it was dated some two weeks after BAPEX had suggested that the Chattak issue be submitted to the Law Ministry for an opinion, one may presume that the recommendation made reference to the request for such an opinion; one might also expect that the Minister would not recommend approval of the JVA before he had received this opinion. Indeed, in the letter of 1 April 2003, which announces the approval by the Prime Minister, this announcement is made after the content of the Law Ministry's opinion is described and introduced by the words "*in accordance with the above circumstances*". It would seem therefore likely that the recommendation of 18 March 2003 contained information about the resolution of the Chattak issue as per the Law Ministry's opinion.

1410. The Respondents assert that the summary approved by the Prime Minister in March 2003 was issued "*before Swiss Challenge was discussed*". Since the issue that was referred to the Law Ministry at that time apparently concerned only the Chattak issue, this assertion by the Respondents seems reasonable.

[956] R-PHB2 (CONFIDENTIAL), paragraph 35.

1411. The Tribunals have examined whether the absence of a discussion of the Swiss Challenge issue must be seen as an irregularity in the Minister's first recommendation. The Tribunals have explained in Section 9.6 that it appears from the evidence produced that in 2002 it was uncertain whether, following the MOU and the Marginal Fields Procedure, Swiss Challenge was required; they noted that this uncertainty had not been resolved by 2003 and that the application of the process was not actively pursued. The absence of discussion of the Swiss Challenge method thus does not seem surprising and cannot be taken as an irregularity.

1412. The second recommendation, dated 7 September 2003, has not given rise to any criticism in these Arbitrations. The Tribunals see no irregularity in it.

1413. The **final phase** in the process described by Mr Chowdhury is the **approval by the Prime Minister**. According to Mr Chowdhury, this is the decisive step: "*on the recommendation of the Ministry, the Prime Minister approves it.*"[957]

1414. The Respondents state that "*the evidence shows that the State Minister personally and informally obtained the Prime Minister's approval*".[958] The evidence on which they rely is the sentence in the 11 October 2003 letter of the Ministry to Petrobangla: "*Following the Honorable Prime Minister's kind approval to the summary presented to her on 03-18-2003, it is requested to arrange final signature of the mentioned JVA*".

1415. The quoted passage does not provide any indication about the manner in which the approval was obtained. In any event, there has been no indication of a regulation that requires a specific form in which the Prime Minister's approval is obtained, nor is there any evidence that the, in the present case, any requirements of form were violated.

1416. Since the approval by the Prime Minister is uncontested and the allegations concerning the form in which this has been done have not been shown to violate any prescribed form, the Tribunals cannot see any irregularity in the Prime Minister's approval.

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[957] Tr. Day 3 (CONFIDENTIAL), p. 141, ll. 20-12.
[958] R-PHB2 (CONFIDENTIAL), paragraph 35, and FN 67 quoting from the State Minister's letter of 11 October 2003 (Exhibit R-280)..

1417. The Tribunals conclude that the JVA as executed had been approved by BAPEX and Petrobangla and was submitted by Petrobangla to the Ministry. Following consultation of other Governmental authorities and corrections in the JVA in response to their comments, the draft JVA was submitted to the Prime Minister with the State Minister's recommendation of 7 September 2003. On 11 October 2003, the Ministry gave direction to execute the JVA "*approved by Honorable Prime Minister*".

1418. In light of these facts and considerations there is **no basis for considering the approval process as "*perverted*" or tainted by irregularities**.

9.8.4 The alleged interventions by the State Minister and the Prime Minister

1419. As mentioned above, the Respondents also alleged that the State Minister and the Prime Minister intervened in the preparation of the JVA and influenced the terms of this agreement in favour of Niko. In this context they wrote:

> *The corrupted State Minister and the Prime Minister's office reversed the consistent positions of the Government, Petrobangla, and BAPEX that the JVA would be subject to the Swiss Challenge process and could not include Chattak East, and the Ministry ordered Petrobangla and BAPEX to enter into the JVA on Niko's terms.*[959]

1420. There is no evidence on record about any such order by the Ministry or by the State Minister to the Respondents; the assertion concerning the reversal of the Government's and the Respondents' consistent position is contrary to the evidence on record.

1421. Mr Chowdhury stated in his witness statement that the State Minister tried to convince him to approve Niko's project and he refused to do so.[960] Mr Chowdhury does not state that someone else in the Ministry gave such an order; he provided testimony that his replacement Mr Islam "*sent the request for a legal opinion to the Law Ministry*",[961] a point that has been discussed above. If there was a request by the State Minister to adopt the

[959] R-MC, paragraph 7.
[960] Chowdhury Witness Statement, paragraph 11.
[961] Chowdhury Witness Statement, paragraph 15.

Niko project at Niko's terms, it remained without effect given the events described above.

1422. Concerning the consistent position of BAPEX, Petrobangla and the Government, allegedly reversed by the State Minister and the Prime Minister, it is clear from the evidence that the position concerning the Chattak field was indeed consistently held until 5 March 2003;[962] but the evidence shows that it was reversed as a result of the Law Ministry's opinion. The terms for the Chattak field were not concluded at "*Niko's terms*". They were *renegotiated* following the Law Ministry's opinion on the contract area and in consideration *inter alia* of a Comparative Economic Analysis of Niko's conditions compared to a contract with an IOC. The renegotiated terms were more favourable to BAPEX.

1423. The situation is no different with respect to the Swiss Challenge issue. There is no evidence that the State Minister or the Prime Minister intervened with the objective of excluding the recourse to this method. Based on the evidence before these Tribunals, doubts about the requirement of Swiss Challenge that remained in 2003 were dispelled by an opinion by the Law Ministry.

9.8.5 Conclusions on the Government approval for the JVA

1424. The Tribunals have considered the Respondents' request for a declaration "*that the Government's approval* [of the Agreements] *was not transparent, was mala fide, and was illegal under Bangladeshi law*"[963] and the allegation that this approval was obtained by "*repeated instances of mala fides and impropriety in the decision-making process*" and their conclusion that any of these acts

> *… invalidates the Government's decision to approve and direct Respondents to enter into the Agreements. Together, they overwhelmingly meet the criteria for holding the Agreements void ab initio under Bangladeshi law.*[964]

[962] Letter from BAPEX to Petrobangla, 5 March 2003, Exhibit R-302.
[963] Request for Relief (d) in the Respondents' Memorial on Corruption at paragraph 196.
[964] R-PHB2 (CONFIDENTIAL), paragraphs 145 and 146.

1425. They have also considered the conclusion of the Claimant according to which:

> *Fundamentally, the evidence indicates that the decision to approve the JVA was therefore not in the State Minister's control in any event; but even if it was, there is no evidence of any improper conduct on his part.*[965]

1426. The Tribunals have examined the evidence and concluded that **the approvals and the negotiations leading to them were conducted by BAPEX and Petrobangla in a thorough manner in the interest of BAPEX and Bangladesh**. The evidence about the role of **the Ministry** in that process does **not show any intervention with the objective of promoting the interests of Niko**. Instead it supported the efforts of BAPEX and Petrobangla and instructed them to ensure that the allocations under the JVA were "*beneficial to BAPEX and Bangladesh*".

1427. When concluding that the JVA was not affected by any irregularities, the Tribunals found additional support in the conclusions reached by the **decision of May 2010** by the Bangladesh Supreme Court, High Court Division **in the *BELA* case**. The court concluded:

> *We have seen that exhaustive discussions took place at the several meetings of the Board of Petrobangla and Bapex before JVA was approved and signed. We have seen also that JVA was approved by the highest authority also.*
>
> *[…]*
>
> *From the above, we do find that the JVA was not obtained by flawed process by resorting to fraudulent means.* [966]

1428. In that case, decided after the end of the BNP rule, the new Government, represented by the Ministry, and the Respondents in the present Arbitrations, appeared as party. They had every opportunity to demonstrate any irregularities in the approval procedure. The Court nevertheless arrived at the conclusions just quoted.

1429. True enough, the Respondents insist that the Court did not and could not have considered the allegations of corruption. The Tribunals, for their

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[965] C-PHB1 (CONFIDENTIAL), paragraph 178.
[966] *BELA* Judgment, CLA-143, pp. 30 and 40, emphasis added.

part, have considered these allegations in depth and now turn to the allegations of specific corrupting payments.

10 THE FACETS OF THE ALLEGED CORRUPTION

1430. The conduct alleged by the Respondents in support of the Corruption Claim, as pointed out above, does not consist in a single act. Instead the Respondents and their witnesses, in particular the Investigators, present a complex picture of corruption with different facets. These facets range from concrete acts of bribery, sanctioned by the conviction in Canada, to the allegation of a corrupt scheme or "*corrupt apparatus*"[967] through which Niko is said to have channelled bribes and procured the Agreements. For instance, when the Tribunals first invited the Respondents to produce evidence for corruption in the negotiation and conclusion of the JVA and the GSPA, the Respondents explained:

> *This is not about a single payment to get the desired agreements. Rather, Niko offered to pay, paid, and exerted influence on different people to wrongfully obtain rights to develop Bangladesh's resources. The developments that led to the conclusion of the Joint Venture Agreement ("JVA") and Gas Purchase and Sale Agreement ("GPSA") took place over a period of years, and there is not direct evidence of corruption in every communication and interaction. But it is clear from the evidence now in the record that Niko, either directly or through affiliates, agents, and third parties, offered and paid bribes to the Government officials ultimately responsible for the approval of the JVA and their approval was obtained by that corruption.*[968]

According to the Respondents,

> *From the time Niko first stepped foot in Bangladesh in 1997 through the end of 2006, it used a network of so-called "consultants" to promise and pay bribes to avoid an open and transparent bidding process, obtain influence, and ultimately acquire government approval for the JVA and the GPSA.*[969]

1431. The Tribunals have examined the different facets of the corruption, as alleged by the Respondents, considering the Parties' submissions and the evidence adduced in support thereof.

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[967] R-MC, paragraph 188.
[968] R-RPO13, paragraph 1.
[969] R-MC, paragraph 184.

10.1 Corruption "*in kind*" - the Canadian conviction (Toyota Landcruiser and travel expenses)

1432. The facts leading to the conviction of Niko Canada in the Queen's Bench Court of Alberta were recorded in the Agreed Statement of Facts on which the conviction is based. They have been described in these Arbitrations, first in the Decision on Jurisdiction and now in this Decision on the Corruption Claim.

1433. The State Minister, who had to approve the GPSA and played a role in the action following the blowouts, was given an expensive motor vehicle (a Toyota Landcruiser) and the "*non-business related portion of [his] travel and expenses*" were paid by Niko Canada.[970] The Agreed Statement of Facts records:

> *Niko Canada made these payments in order to persuade the Bangladeshi Energy Minister to exercise his influence to ensure that Niko was able to secure a gas purchase and sales agreement acceptable to Niko, as well as to ensure the company was dealt with fairly in relation to claims for compensation for the blowouts, which represented potentially very large amounts of money.*[971]

1434. The bribes took place in May and June 2005; the Minister resigned on 18 June 2005; the GPSA was signed on 27 December 2006 at a price substantially below that requested by Niko. The RCMP was alerted by the DFAIT on 20 June 2005 and commenced its investigation which concluded with a conviction on 23 June 2011 on the basis of an Agreed Statement of Facts.

1435. This sequence of events shows clearly that the bribes to the State Minister in May and June 2005 had no influence on the approval of the GPSA some one and a half years later by the State Minister's successor. When determining the fine that Niko Canada had to pay as part of its conviction in Canada, the Court pointed out that the "*Crown is unable to prove that any influence was obtained as a result of providing the benefits to the Minister*".[972]

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[970] Agreed Statement of Facts, Exhibit R-215, paragraphs 5, 35 - 37 and 55.
[971] Agreed Statement of Facts, Exhibit R-215, paragraph 58.
[972] Agreed Statement of Facts, Exhibit R-215, paragraph 58.

1436. The Tribunals concluded in their Decision on Jurisdiction that the acts leading to the conviction in Canada do not justify treating the Agreements as procured by corruption.

1437. The Respondents nevertheless rely on these acts in support of their case. They do so by arguing that, under the law of Bangladesh, corruption payments are punishable even if they do not succeed in bringing about the desired result. The Tribunals have discussed this issue above in Section 6, concluding that causation is a requirement both for treating as void a Governmental act under Article 102 of the Constitution and for avoiding a contract under the Contract Act.

1438. The Respondents also rely on the acts on which the Canadian conviction is based as a sign of Niko's inclination to corruption. Quoting Ms LaPrevotte, they argue that "*the guilty plea in Canada supports the idea that Niko had a disposition to pay bribes to get a favorable outcome*";[973] and they rely on these acts to defend the *Alam* Judgment of the High Court Division in its conclusion that "*the Government approval process was tainted by a corrupt scheme and thus ultra vires.*"[974]

1439. The Tribunals will now examine whether the acts on which the Canadian conviction was based provide a foundation for the far broader allegation according to which Niko had established a broad corruption scheme or "*apparatus*" in Bangladesh. This requires first a closer look at the circumstances in which the acts were performed and then the comparison of these circumstances with the general scheme alleged by the Respondents.

1440. The principal detailed account of the gift of a Toyota Landcruiser to the State Minister, apart from newspaper articles, is the Agreed Statement of Facts. The events recorded there are as follows:

1441. The vehicle had been purchased for the use by BAPEX pursuant to the JVA; the purchase was apparently requested by BAPEX.[975] The Agreed Statement of Facts records:

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[973] R-RC, paragraph 138, quoting LaPrevotte Second Witness Statement, paragraph 15.
[974] Respondents' letter of 21 December 2018, p.7.
[975] The Agreed Statement of Facts records that the request had been made "*pursuant to the terms of the JVA*" and thus can only have been made by Niko's JV-partner, BAPEX to which the vehicle was registered. The statement of Mr Sharif confirms that the request was made by BAPEX (see below paragraph 1445).

Niko Bangladesh had originally been requested to purchase the Land Cruiser pursuant to the terms of the JVA which allowed for assets to be purchased by the Operator (Niko Bangladesh) for use by the JVA partner (BAPEX). The vehicle was registered to BAPEX in Bangladesh.[976]

1442. The amount of the purchase price corresponds to some US$153,500,[977] which was intended to be a Joint Venture expense. The Agreed Statement of Facts continues the account of the events as follows:

The vehicle was registered to BAPEX in Bangladesh.

The Land Cruiser was not given to BAPEX. BAPEX instructed Niko Bangladesh to deliver the vehicle to the Minister. As a result, arrangements were made such that the SUV [Sport Utility Vehicle] would be sent directly to the Energy Minister, AKM Mosharraf Hossain. Qasim Sharif said that he himself advised Mr. Sampson of the delivery. Mr Sampson denied that he was ever told that the SUV was being delivered to the Minister.

Nevertheless, the re-direction of the vehicle from BAPEX to the Minister operated as follows. On May 5, 2005, Mohamad Khan, Personal Secretary to Energy Minister Hossain, wrote a letter to the Chairman of Petrobangla requesting the vehicle be turned over for use by Energy Minister Hossain.

On May 9, 2005, a letter signed by the Managing Director of BAPEX was sent to Niko Bangladesh requesting the vehicle with all documents and accessories be handed over to the Administration Division of BAPEX. On the same day, a letter was sent from the Administration Division of BAPEX to the General Manager (Services) at Petrobangla advising that the vehicle is being sent for use by Energy Minister Hossain. In addition during this time there were a series of discussions within Niko Bangladesh trying to determine the appropriate method of recording the vehicle in order to allow the company to claim cost recovery of the vehicle expense under the JVA. Three prior vehicles had been obtained under the JVA and in this case

[976] Agreed Statement of Facts, ExhibitR-215, paragraph 29.
[977] In the Agreed Statement of Facts, Exhibit R-215, paragraph 28, the value of the Toyota Landcruiser is indicated at CAD 190,894.

the vehicle was dealt with differently due to the fact that it was to be registered to BAPEX.[978]

1443. The vehicle was then "*delivered to the home of Energy Minister Hossain in Dhaka, Bangladesh*", in the presence of "*Qasim Sharif and Sayed Kabir, both representing Niko Bangladesh*".[979] On 20 June 2005, after the Minister had resigned, "*BAPEX took the vehicle back from the Ministry.*"[980]

1444. While this account is taken from a statement of facts agreed by Niko, it is the culmination of the investigation conducted since 2005 by the RCMP and made before a court that must have had the RCMP records before it. The Tribunals have no reason to doubt that the account reflects correctly the recorded events.

1445. In his interview with the RCMP, Mr Sharif provided some additional details. In particular, Mr Sharif confirmed that the Toyota Landcruiser was ordered at the request of BAPEX under the JVA. When the vehicle was delivered, the State Minister requisitioned it and Mr Sharif delivered it to the Minister:

> *The car came. We immediately registered it to BAPEX. Before the car came he, BAPEX MD told me I think the minister's going to requisition this car. Because any car that belongs to in any under any minister he send official requisition for that car for ministry use or for his use. […] So when the car, the day the car came BAPEX MD was there. I was there. And we actually delivered the car to the minister's driver.*[981]

1446. The Tribunals conclude that the gift of the Toyota Landcruiser to the State Minister was not a clandestine operation, hidden behind layers of "*consultancy*" contracts. It was carried out directly and openly by Niko, with the active involvement of both Respondents, BAPEX and Petrobangla. In the end it benefitted BAPEX, which received the vehicle after the resignation of the Minister. If the gift of the Toyota Landcruiser

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[978] Agreed Statement of Facts, Exhibit R-215, paragraphs 29-32. See also C-CM, paragraph 308 quoting from contemporaneous correspondence with BAPEX and further references concerning the registration of the vehicle.
[979] Agreed Statement of Facts, Exhibit R-215, paragraph 34.
[980] Agreed Statement of Facts, Exhibit R-215, paragraph 44.
[981] Quasim Sharif Statement Transcript, RCMP, File No. 2005-1943, 16 December 2010,Exhibit R-333, p. 52

is the sign of Niko's "*disposition to pay bribes*", this sign was known to the Respondents since May 2005; and the Respondents had their share in it.

1447. The circumstances in which the gift was made to the State Minister is relevant also for a different reason: the *modus operandi* in this incident is quite different from that which characterised, according to the Respondents, the operations of Niko in Bangladesh.[982] In this case, **Niko did not operate *"through affiliates, agents, and third parties"*,** using "*a network of so-called 'consultants' to promise and pay bribes*", but **openly with the support of its Joint Venture partner BAPEX and the knowledge of Petrobangla and indeed their active involvement**. The *modus operandi* in this instance thus is no confirmation of that described by the Respondents and the Investigators; it may even be said to contradict it.

1448. To be clear, these considerations do not diminish, in the eyes of the Tribunals, the seriousness of the attempted corruption of the State Minister committed by Niko when it made the gift of the Toyota Landcruiser and the travel expenses. They do, however, raise doubts about the Respondents' allegations concerning Niko's "*network*" of corruption based on these acts.

10.2 Corruption in a state of Kleptocracy

1449. The Respondents and their experts have described the BNP Government under Prime Minister Khaleda Zia as "a kleptocratic regime",[983] rife with corruption. They asserted that the decisions of the Government were effectively controlled by a "*powerhouse*" run by her sons, Tarique and Arafat (Koko) Rahman, with a network of friends and associates. "*Respondents have described corruption of the State Minister of Energy and the Prime Minister's son running a parallel government*".[984] In their

[982] The difference is highlighted by the Respondents themselves, e.g. at R-MC, paragraph 3: "*Unlike the $190,000 CAD Toyota Landcruiser Niko gave to the State Minister to buy his favor in procuring the GPSA, Niko's other bribes to procure the Joint Venture Agreement (JVA) and GPSA were hidden in layers of 'consulting agreements' concluded with individuals who paid bribes on Niko's behalf, often using cash and other financial transactions designed to hide the ultimate recipient of the payments.*"
[983] R-PHB1, paragraph 42.
[984] R-PHB1 (CONFIDENTIAL), paragraph 66.

Memorial on Corruption, the Respondents present the "*extent of perversion of the Government's approval process*":

> *The testimony of Mr. Khan and FBI Agent LaPrevotte, as well as contemporaneous reporting from the United States Embassy in Dhaka, demonstrate that from October 2001 to January 2007, the Prime Minister's office, under the effective control of the sons of the Prime Minister and their associates, together with the various ministries of the Government, engaged in widespread corruption in the granting of licenses and public contracts. Many contracts were granted to companies, not based on merit and the promotion of the interests of the people of Bangladesh, but based on the payment of "consultancy fees" that were channelled to the people in power through their associates. Niko promised and paid bribes to Giasuddin al Mamoon, the very powerful associate of the son of the Prime Minister, Tarique Rahman, in order to obtain the Government's approval of the JVA and GPSA. Niko also paid bribes to the State Minister in the line of authority for the approval of its contracts and at least one Petrobangla official.*[985]

1450. Elsewhere in the same submission, the Respondents write and quote Mr Ferdous Khan, one of their experts:

> *There was systematic corruption in Bangladesh at the time Niko procured its contracts, and, according to an expert who was closely involved in all of the investigations of corruption during this period, it would not have been possible for Niko to obtain the JVA or the GPSA without participating in that corruption.*
>
> *Five of the six years from 2001 to 2006, when Niko worked to procure and eventually procured the JVA and GPSA, Bangladesh was placed at the bottom of Transparency International's Corruption Perceptions Index and was near the bottom in the sixth year.*
>
> *The Prime Minister's sons, and especially her eldest son, Tarique Rahman, held tremendous power in her Government. According to one commentator: "Tarique's office at that time [2001-2006] located in a building called Hawa Bhavan in Dhaka was the real power center*

[985] R-MC, paragraphs 185; the report from the United States Embassy in Dhaka, referred to in this passage is an extract from a classified message sent by the United States Ambassador, undated but subsequent to 11 September 2008 (the date of departure of Tarique Rahman from Bangladesh) mentioned in the report. The report, produced as Exhibit R-343 from WikiLeaks, describes the situation in Bangladesh and specifically the actions of Tarique Rahman, mentioning some of the bribery cases uncovered, including Siemens and Harbin, but not Niko.

of the government. His mother Khaleda Zia, the prime minister, could do little else but agree to his demands."

Mr. Ferdous Khan, a chartered accountant engaged to assist the Government of Bangladesh's corruption investigation, explains:

investigations uncovered that the decisions of the Prime Minister's office on government contracts and concessions were controlled by Tarique and Koko among others; and favorable decisions could be obtained by promising and paying money to close friends and business associates of theirs cynically referred to as "consultancy fees". These "consultants" would then channel this bribe money to Tarique and Koko and others, and who would in turn get the Prime Minister's office to approve the contracts.

The primary consultant linked to Tarique was his secondary school friend and business associate Md. Gias Uddin al Mamoon. Mamoon's brother, Member of Parliament Hafiz Ibrahim, also collected bribes for Tarique and Koko. Tarique and Mamoon set up their headquarters in a rented house, known as Hawa Bhaban, which became infamous as a center of government power and corruption in Bangladesh from 2001 to January 2007.[986]

1451. The Respondents make a point of linking the general system of corruption so described to Niko's attempts to obtain the JVA and the GPSA:

> *… the evidence is clear that, from October 2001 to January 2007, the individuals controlling the decisions of the Prime Minister's office and various Ministers of the BNP Government were engaged in widespread corruption in the granting of licenses and public contracts. In this environment, Niko thrived, promising and paying bribes to Mr. Mamoon, who was connected to the son of the Prime Minister, Tarique Rahman, and to the State Minister for Energy, in order to obtain the Government's approval of the JVA and GPSA. Niko also paid smaller bribes to lower level officials.*[987]

1452. The Respondents rely on this characterisation of the BNP Government as a "*red flag*". Referring to some cases and legal writings, the Respondents argue that

> *… the standard of proof can be met by an unrebutted presentation of prima facie evidence of corruption. This is because it is an "established" rule of international law that "in case a party 'adduces*

[986] R-MC, paragraph 46-49; footnotes omitted; the quotation is from Khan Witness Statement, paragraph 20-21.
[987] R-RC, paragraph 344.

some evidence which prima facie supports his allegation, the burden of proof shifts to his opponent'." Indeed, certain classic "red flags" of corruption can suffice to shift the burden onto the party denying its existence.[988]

1453. Quoting a publication of the International Chamber of Commerce, the Respondents assert that one such red flag is raised when "*[t]he operation takes place in a country known for corrupt payments*".[989] The Respondents consider that one may accept "*that the general prevalence of corruption in a country is not independently sufficient proof of corruption in a particular case*". They are, however, of the view that "*the evidence of corruption in Bangladesh at the relevant time and Niko's agreement with a key corrupt player is very relevant to determining the likelihood of corruption in this case".*[990]

1454. Indeed, as will be seen below when Niko's proven or alleged relations with certain players in Bangladesh are discussed, the Respondents seek to establish dealings of Niko with certain players related to the "*power house*" as evidence for corruption, or at least as *prima facie* evidence which the Claimant would have to rebut. It is alleged that by such a demonstration the Respondents could, in the absence of such rebuttal, dispense with having to prove that certain payments were used for corrupting a Government official.

1455. It is not the role of these Tribunals to pass judgment on the Government of Bangladesh during a certain period and the general corruption allegations made by the Respondents and their experts. Without making a determination in this respect, the Tribunals nevertheless take account of these allegations and the supporting material presented by the Respondents.

1456. This does not relieve the Tribunals of their duty to examine concretely, and carefully, whether acts of corruption occurred in the procurement of the Agreements. This is all the more necessary as the testimony at the April 2017 Hearing provided indications that the corruption in the Government in general and the Ministry of Energy specifically may not

[988] R-MC, paragraph 165; internal citations omitted.
[989] R-MC, paragraph 165, referring to International Chamber of Commerce, Commission on Corporate Responsibility and Anti-Corruption, *ICC Guidelines on Agents, Intermediaries and Other Third Parties,* 19 November 2010, RLA-222, p. 5.
[990] R-RC, paragraph 91.

have been as generalised as the Respondents and the two Investigators stated in their testimony.

1457. The Claimant has pointed out that this evidence that came out at the Hearing paints a significantly different picture.[991]

1458. To the extent that the Respondents' theory relies on the general allegation that an all-encompassing kleptocracy existed under the BNP Government, the evidence of the Respondents' own witnesses did not support the assertion that the Energy Ministry was rife with influence peddling, much less that it was subject to the control of Mr. Mamoon. As noted above, Mr. Chowdhury, who had served as Joint Secretary in the Energy Ministry during the BNP Administration, testified that he saw no signs of corruption or attempted corruption in connection with any other Energy project.[992]

1459. At the Hearing, Mr Chowdhury was questioned by the Tribunals about his experience with corruption. In his witness statement he had explained his experience as Acting Secretary in the Ministry of Energy from February to September 2002.[993] The State Minister

> *… tried very hard to convince me to approve Niko's project, but I was convinced that BAPEX and Petrobangla were correct that Chattak East could not be included and that a competitive bidding process had to be followed. The State Minister was known for his unscrupulous character, and I was not persuaded by him.*[994]

1460. At the Hearing the Tribunals sought to understand more generally the state of corruption which Mr Chowdhury experienced. During his time at the Energy Ministry, "*there were three or four procurements of petroleum*"[995] by public tenders that were "*worth million or dollars*";[996] but Mr Chowdhury was not aware of "*any other attempts to secure contracts through corrupt means*".[997] He did not experience any other case of corruption.

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991 C-PHB2 (CONFIDENTIAL), paragraph 45; see also paragraph 14.
992 C-PHB2 (CONFIDENTIAL), paragraph 45.
993 Chowdhury Witness Statement, paragraphs 2 and 6 *et seq*.
994 Chowdhury Witness Statement, paragraph 11.
995 Tr. Day 3 (CONFIDENTIAL), p. 132.
996 Tr. Day 3 (CONFIDENTIAL), p. 133.
997 Tr. Day 3 (CONFIDENTIAL), p. 129.

1461. During the prior tenure of Prime Minister Khalida Zia, Mr Chowdhury had been appointed by her to the Prime Minister's Department where he served as Director General[998] and, after his service at the Energy Ministry, he was transferred to the Food Ministry as Acting Secretary.[999] He did not experience corruption in these positions either. Before being posted to the Ministry of Energy, he held positions in the Election Commission and the Ministry of Finance.[1000] Summing up, he was questioned by the Tribunals:

> *Is my understanding of your evidence correct that, in your experience in this period, the only corrupt contract you encountered or in an attempt to procure, a corrupt contract that you encountered was the Niko contract?*
>
> *MR CHOWDHURY: Yes.*

1462. Questioned about Mr Khan's description of the organised system of corruption, referred to as "*Kleptocracy*", Mr Chowdhury stated that "*it was widely known at that time that the Prime Minister's eldest son, through his friend Giasuddin Mamoon, they were intervening in different contracts and making money out of it*".[1001] But he did not relate any concrete example. Questioned about the acts of the State Minister whom he had qualified as "*unscrupulous*", Mr Chowdhury, qualified:

> *Before. It all occurred before he became minister.*

1463. Considering the evidence of Mr Chowdhury, who had direct inside experience in senior positions in the Government, it appears that the system of corruption may not have been as pervasive as the Respondents and the Investigators now present it.

1464. The Claimant also points out that, contrary to other cases mentioned by the Investigators, such as the *Harbin* case, "*there is no evidence of a payment directly or indirectly benefitting Mr. Rahman in this case, despite the Respondents having access to an extensive set of banking records for those individuals*".[1002]

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[998] Tr. Day 3 (CONFIDENTIAL), p. 127.
[999] Tr. Day 3 (CONFIDENTIAL), p. 130.
[1000] Tr. Day 3 (CONFIDENTIAL), p. 62.
[1001] Tr. Day 3 (CONFIDENTIAL), p. 131.
[1002] C-PHB2 (CONFIDENTIAL), paragraph 44.

1465. The Tribunals conclude that, taking at face value the Respondents' assertions that during the time of the BNP government there was widespread corruption, such broad-brush aspersions on an entire State cannot replace the evidence that is required to establish guilt in individual cases.

10.3 The use of consultants and "*layering*"

1466. A major pillar in the Respondents' demonstration of Niko's alleged corrupt procurement of the Agreements rests on the agreements which Niko concluded with companies or persons referred to as "*consultants*". Referring to a *modus operandi* the Respondents observed when examining the conduct of some other companies, specifically Siemens, when bidding for a project in Bangladesh, the Respondents and the Investigators perceive Niko's consultants as engaged for the sole purpose of channelling corrupt payments to the relevant decision makers. Ms LaPrevotte explained it thus:

> *Based on my investigation, I believe that Niko Resources hired consultants and set up companies for the express purpose of paying bribes to politically influential people and their family members to obtain a number of favourable rulings and the ultimate awarding of the gas exploration rights in Bangladesh.*[1003]

1467. Mr Khan summarised the position:

> *…actual corruption also occurred when Niko retained the services of Stratum through Qasim Sharif.*[1004]

1468. For the Respondents the engagement of consultants is evidence of corruption. The Respondents go even further and speak of a "*prohibition in Bangladeshi law against using consultancy agreements with private citizens to influence Government officials*".[1005]

[1003] LaPrevotte First Witness Statement, paragraph 43.
[1004] Tr. Day 2 (CONFIDENTIAL), p. 168, ll. 12-14.
[1005] R-RC, paragraph 306.

1469. The Claimant disputes this contention:

> *… the record clearly demonstrates that Niko's engagement of Stratum, Nationwide and Five Feathers was undertaken openly and for entirely legitimate purposes, and was in accordance with well-established practice in the international oil and gas industry.*[1006]

1470. The Tribunals will consider first the use of consultants by Niko in general and then examine specifically the agreements with each of the consultants engaged by Niko.

10.3.1 Niko's use of consultants

1471. **The Respondents** describe the *modus operandi* which the Investigators found in the practice of Siemens and other companies, seeking contracts in Bangladesh. They assert that Niko followed the same *modus operandi* and conclude that the use of consultants by Niko was a sign that Niko used corruption. The Respondents argue:

> *Siemens plead guilty to corruption and using the same "consultants" structure as Niko in Bangladesh during the same time period.*[1007]

1472. Ms LaPrevotte asserted:

> *During my time investigating corruption in Bangladesh, I saw a familiar modus operandi for obtaining contracts by bribery. Bribes were paid to government officials through 'on the ground" consultants who then funnelled the money to government officials and their adult children. Front-men, like Giasuddin al Mamoon and his brother Hafiz Ibrahim serve as intermediaries to channel money from companies to the sons of people in power, like Tarique Rahman and other adult children of government ministers who then exercise political influence to ensure contracts are awarded to the paying company. Companies seeking contracts in Bangladesh hire these intermediaries as "consultants" even though they often have no expertise in the relevant field (such as telecommunications, hydropower, or oil and gas) and use them as the conduits for bribes because of their well-known connections to family members of public officials. While conducting my investigations in Bangladesh, I investigated several allegations of*

[1006] C-PHB1 (CONFIDENTIAL), paragraph 16.
[1007] R-MC, paragraph 71.

bribes paid to the sons of ministers to influence the awarding of contracts.[1008]

1473. In her investigation of the Niko case, Ms LaPrevotte "*saw many parallels*" with the Siemens case, and "*the hiring of 'on the ground' consultants to influence actions (the modus operandi in Bangladesh at the time)*" was among those which she specifically highlighted.[1009]

1474. On the basis of these assertions, the Respondents argue:

> *…Niko's use of consultants to carry out its corruption began when it entered the country and hired Sharfuddin Ahmed in 1997 and Qasim Sharif in 1998. Qasim Sharif and his company, Stratum Developments Ltd., were the center of Niko's corrupt transactions in Bangladesh after the relationship with Sharfuddin Ahmed soured.*[1010]

and

> *From the time Niko first stepped foot in Bangladesh in 1997 through the end of 2006, it used a network of so-called "consultants" to promise and pay bribes to avoid an open and transparent bidding process, obtain influence, and ultimately acquire government approval for the JVA and the GPSA.*[1011]

1475. In addition, the Respondents make a more broad-brush argument, based on Section 163 of the Penal Code and assert that consultancy agreements as such are illegal. They assert:

> *Independently of Niko's bribes, as described above, Claimant's written agreements with Five Feathers, Qasim Sharif, and Nationwide and its verbal agreement with Mr. Mamoon are patently illegal agreements under Section 163 of the Penal Code of Bangladesh. Niko's consultants were guilty of this crime and Niko was equally guilty of abetting this crime.*[1012]

1476. **The Claimant** objects against the assimilation of Niko's consultants with the *modus operandi* in the cases referred to by the Respondents:

> *… the Respondents rely upon the "similar fact" theory asserted by their witnesses Ferdous Khan and Debra LaPrevotte Griffith that*

[1008] LaPrevotte First Witness Statement, paragraph 14.
[1009] LaPrevotte First Witness Statement, paragraph 19.
[1010] R-MC, paragraph 65.
[1011] R-MC, paragraph 184.
[1012] R-RC, paragraph 304.

Niko's alleged "layering" scheme was virtually identical to the scheme deployed in several reported corruption cases, most notably by Siemens in connection with a telecommunications tender in Bangladesh during the BNP-Jamaat e Eslami Government.

Yet an examination of the evidentiary record in these proceedings reveals that the circumstances surrounding Niko's use of consultants was nothing like the situation in the Siemens case, or indeed any of the other cases referred to by the Respondents. Instead, the record clearly demonstrates that Niko's engagement of Stratum, Nationwide and Five Feathers was undertaken openly and for entirely legitimate purposes, and was in accordance with well-established practice in the international oil and gas industry.[1013]

1477. **The Tribunals** conclude that in order to form an opinion on the justification of Niko's consultancy agreements, and on the question whether these agreements can be taken as evidence for corruption, they must consider the circumstances under which the agreements were concluded and the objectives they were to serve. The Respondents seem to recognise that the circumstances must be examined with care when they discuss the "*red flags*" of corruption, which are warning signals and possible clues but not evidence. They argue that

> *…certain classic "red flags" of corruption can suffice to shift the burden onto the party denying its existence. Such red flags include circumstances in which:*
>
> *[…]*
>
> - *a consultant's or third party intermediary's "commission or fee seems disproportionate in relation to the services to be rendered";*
> - *"[t]he only qualification the [t]hird party brings to the venture is influence over public officials"; …*[1014]

1478. Ms LaPrevotte makes a similar observation:

> *The existence of a so-called "consultancy agreement" that provides for payment for obtaining a government contract is a huge red flag for bribery.* [1015]

[1013] C-PHB1 (CONFIDENTIAL), paragraphs 15 and 16.
[1014] R-MC, paragraph 165.
[1015] LaPrevotte First Witness Statement, paragraph 17.

1479. When considering the justification of the consultancy agreements concluded by Niko, the Tribunals have first of all considered that, when it made its proposal to the Government of Bangladesh in April 1997 and June 1998, Niko was not simply responding to an invitation to tender for the sale of equipment but presented an unusual proposal. At the time, the Respondents and the Government did not have any plans to exploit the gas resources in marginal/abandoned gas fields. As the Respondents and the Investigators repeatedly have pointed out, the very concept of marginal/abandoned gas fields was not known in Bangladesh.[1016]

1480. Niko's first task was therefore to demonstrate to the Respondents and the Government that this new concept was worth pursuing. Since this was a new project developed by Niko, it would seem only logical that Niko needed to establish credibility in some form in the eyes of relevant officials in the proper exercise of their functions. In these circumstances, a person or company familiar with the organisational structures and administrative procedures in the country would seem to be essential to ensure the fullest comprehension and consideration of the project in the local context and through effective presentation to the competent authorities.

1481. Furthermore, Niko had no prior engagement in Bangladesh. Before agreeing to the conditions of an investment in the country, careful examination of the local conditions would seem essential.

1482. The Claimant presented Mr Christopher P. Moyes as expert. Mr Moyes has had many years of experience in the oil and gas industry, including in senior management position in in Gaffney, Cline & Associates, which he describes as a "*leading global petroleum advisory firm*", and since 1983 in his own group of companies. He provides "*advisory services to clients for investment in acquisition, valuation, and financing of oil and gas projects*" and states that he has "*provided a wide range of consulting services to a variety of oil and gas clients, including national oil companies, super-majors, and small international start-ups,*" adding that, in the preparation of his report, he has drawn from his experience in "*direct negotiations of Host Government Instruments and other oil and gas*

[1016] E.g. R-PHB1 (CONFIDENTIAL), paragraph 30.

agreements in various phases including in the countries of Ecuador, the Philippines, Columbia, Bangladesh and Mozambique".[1017]

1483. In his Expert Report of 10 January 2017, Mr Moyes describes the difficulties in the process of negotiating for Host Government Instruments from the perspective of (a) a new country entry for the investor and (b) in particular in what he describes as "*underdeveloped jurisdictions*". He contrasts the "*relatively organised laws and regulations in developed countries with this latter category of countries*." He states:

> *In contrast, in many undeveloped jurisdictions the process of winning a Host Government Instrument, even in a bid process, may be a long, tortuous, uncertain, and opaque multi-year process. This uncertainty may carry over after the bid process, with the selected bidder, or possibly the top three bidders, being invited to enter into protracted negotiations to finalize the Host Government Instrument terms.*[1018]

1484. Mr Moyes provides an example from Bangladesh bidding practice:

> *… based on my experience, I am aware that the Bangladesh 2008 Bid Round for 28 blocks was announced February 2008, with bids to be submitted May 2008. The two Production Sharing Contracts (PSCs) ultimately concluded were signed with ConocoPhillips in June 2011, over 3 years after the bids were submitted.*[1019]

1485. Mr Moyes opines on the practice of in-country advisors:

> *In undeveloped jurisdictions, the use of in-country advisors with extensive local knowledge, who are integrated into the society and business community, advising on the logistics and negotiation of investment agreements including Host Government Instruments was, in the period 1997 – 2003 (and remains), common for small and midsize companies, even more so when the opportunity is a new country entry for the investor. Even some major oil and gas companies would retain in-country advisors in similar situations.*[1020]

1486. The Respondents have rightly pointed out that Mr Moyes "*had no understanding of the facts of this case and was testifying based on*

[1017] Christopher Moyes Expert Report, 10 January 2017, paragraphs 4-6.
[1018] Moyes Expert Report, paragraph 33.
[1019] Moyes Expert Report, paragraph 33.
[1020] Expert Report of Christopher P. Moyes, paragraph 35(a).

assumption."[1021] Indeed, at the Hearing the Tribunals could establish that some of the statements in Mr Moyes' Expert Report were assumptions.[1022] The Tribunals conclude that they cannot rely on Mr Moyes' opinion concerning the justification or reasonableness of the particular terms and conduct agreed between Niko and its consultants in this case. This does not, however, exclude that opinions based on his broad international experience in international oil and gas projects be given some weight.

1487. Indeed, the opinion Mr Moyes has expressed about the desirability and necessity for an investor in the situation of Niko to have an in-country representative, in the form of a consultant or otherwise, appears sensible to the Tribunals.

1488. In these circumstances the Tribunals conclude that, especially in the initial phase of the project development and the negotiations, the engagement of consultants by Niko was not unusual in the oil and gas industry. In the initial phase it may even have been insufficient, as one may have to conclude from a document on which the Respondents relied in a different context: In May 1999 the Senior Commercial Officer of the DFAIT, based in Dhaka, wrote to the Canadian Coordinator South Asia Division reported on the status of Niko's bids and then concluded:

> *From these two indications we would suggest that (a) There may still be scope for Niko at least in Block 9 & 10, but (b) In order to explore this Niko needs to be much more active on the ground here, both in terms of senior executives from Calgary and through an effective local partner/agent which can deal with the government and other IOCs.*[1023]

1489. A similar view had been expressed by the Energy Minister[1024] himself in late 1997. On 24 December 1997, DFAIT wrote to Mr Ohlson:

> *The High Commissioner met the Energy Minister and mentioned NIKO's interest, but the impression that Minister gave was that NIKO*

[1021] R-PHB1 (CONFIDENTIAL), paragraph 187; similarly, at R-PHB2 (CONFIDENTIAL), paragraph 106.
[1022] Tr. Day 6 (CONFIDENTIAL), pp. 73-74, questioned by Professor Paulsson.
[1023] Fax from the Department of Foreign Affairs and International Trade to PSA, 11 May 1998, Exhibit C-195.
[1024] It should be pointed out that this was not the State Minister who received the Toyota Landcruiser in 2005.

should have more exposure and presence here during the initial stages.[1025]

1490. The quotation concerns the period of the Awami League Government, and the Energy Minister referred to is not the State Minister who requested that the Toyota Landcruiser be delivered to him.

1491. The service of local consultants, as used by Niko in the circumstances, consisted in advice and assistance to the principal in the organisation of its investment. One may also expect from such consultants, that they provide assistance in advising the principal how to approach relevant decision makers with information and proposals – a service for which an effective consultant must be well versed in the decision-making practices of the Government. Where necessary, direct contacts with the competent authorities may also be part of the consultant's activity, if the principal itself is not available. As Mr Chowdhury explained: "*[i]f Niko had any issues, they may come to the Ministry*". While he added that "*normally, we do not entertain that*", he also stated that "*there is nothing wrong, I found nothing wrong*" with the consultant coming to the Ministry.[1026]

1492. Such assistance in itself is not a ground for reproach, provided, of course, that legalities are scrupulously observed and interventions are not obtained or accompanied by bribes or other improper forms of influence.

1493. Such assistance is a legitimate activity which also embassies consider as part of their task. For instance, interventions of the Canadian Head of Mission in Bangladesh have been described as follows:

As Head of Mission, David Sproule made representations on behalf of Canadian companies many times at all of his postings. Indeed it was not unusual for the Canadian Mission to intervene on behalf of Canadian companies. The Mission would assist in identifying who would be the decision maker in the case and provide knowledge in terms of the issues involved, perhaps introducing a member of the company "to relevant government players" who had authority in the award of such contract. It did not include any suggestion of payment of bribes.[1027]

[1025] Fax from the Department of Foreign Affairs and International Trade to Niko, 24 December 1997, Exhibit C-194.
[1026] Tr. Day 3 (CONFIDENTIAL), p. 69.
[1027] Agreed Statement of Facts, Exhibit R-215, paragraph 50.

1494. The conclusion from this evidence and these considerations is that **it was reasonable for Niko to engage one or, possibly several, consultants**. The engagement of consultants in itself is no evidence that bribery was intended or committed. At the same time, the conclusion that, in the circumstances, Niko's recourse to consultants was justified, does not exclude that through these consultants acts of bribery were committed. The Tribunals therefore must examine, one by one, the consultancy agreements concluded by Niko in order to determine whether their engagement aimed at the performance of corruption or, when procuring the JVA and the GPSA, the consultants committed acts of corruption.

1495. When proceeding with this examination, it must be borne in mind that the *modus operandi* on which the Respondents and the Investigators rely consists in the system described in the previous section. The Respondents' claim of corrupt practices by Niko consist essentially of assertions that Niko was part of the corrupt system in which bribes were channelled to and through Tarique Rahman and his entourage and thus, directly or indirectly, corrupted the decision makers in the Government.

1496. According to the Respondents, this alleged corrupt system as described by themselves and the various Investigators was set up only once the BNP Government with Prime Minister Begum Khaleda Zia at its head came to power; she was sworn in on 10 October 2001.[1028] Niko's systematic corruption, as described by the Respondents, thus can have started only in late 2001 or 2002. This is indeed what the Respondents have asserted in one of their submissions:

> *The behind the scenes corrupt activities to influence the negotiations and approval of the JVA began in 2002.*[1029]

1497. It is true that the Respondents do not exclude that incidents of corruption occurred during the government of Sheikh Hasina who left office in July 2001.[1030] Such instances, however, did not in the Respondents' submission implicate that Government; they contend that during the years 1997 to 2001 the subsequent network of corruption did not exist – or at least was not connected to the power of the government then in

[1028] R-RPO13, paragraph 14.
[1029] R-RPO13, paragraph 20.
[1030] R-RPO13, paragraph 14.

place. Indeed, the criminal proceedings against Sheik Hasina that had been initiated with respect to the Niko case during her period in power were quashed while those against Khalida Zia continue.[1031]

1498. It is therefore inconsistent for the Respondents to assert, as quoted above:

> *From the time Niko first stepped foot in Bangladesh in 1997 through the end of 2006, it used a network of so-called "consultants" to promise and pay bribes ...".*[1032]

or

> *Niko's use of consultants to carry out its corruption began when it entered the country and hired Sharfuddin Ahmed in 1997 and Qasim Sharif in 1998.*[1033]

1499. If there was any systematic corruption by Niko, it could, according to the Respondents' own argument, have started only in 2002. Similarly, the Tribunals find Ms LaPrevotte's assertion that Niko's consultants were "*all well familialy and politically connected with the BNP Government*" to be unsupported, and must be rejected.[1034]

1500. Based on the Respondents' submissions, the Respondents' allegations of Niko's systematic corruption therefore, if they are correct, do not apply to the initial period of Niko's entry into Bangladesh and the negotiations of the JVA until late 2001.

1501. In order to leave no stone unturned, the Tribunals will nevertheless examine the allegations of the Respondents in their entirety, starting with the first steps of Niko towards participation in the development of gas reserves in Bangladesh.

[1031] See above Section 2.6.3.
[1032] R-MC, paragraph 184.
[1033] R-MC, paragraph 65.
[1034] Tr. Day 3 (CONFIDENTIAL), p. 182, ll. 14-21.

10.3.2 Five Feathers and Sharfuddin Ahmed

1502. On 15 August 1997 Niko Canada, acting by its President, Robert N. Ohlson, concluded an **Agreement with Five Feathers**, referred to as the "*Representative*" and acting by Sharfuddin Ahmed, Chief Executive.[1035] The agreement starts by pointing out

> *That Niko has proposed a Joint Venture Contract (hereinafter referred to as the "Contract"), with Sylhet Gas ·Field Ltd. through the ministry of Energy & Mineral Resources, Government of Peoples Republic of Bangladesh for the development, production and marketing of hydrocarbon from the Beanibazar and Fenchuganj Gas Fields located in Sylhet, Bangladesh, at the sole risk and expense of Niko under the terms and conditions as stipulated in Annexure "A".*

1503. This proposal for a Joint Venture contract with Sylhet Gas Field Ltd. has not been produced. From subsequent correspondence on records of these Arbitrations one may conclude, however, that it was made on 12 April 1997 and was "*a preliminary proposal*" to that which Niko made on 28 June 1998 and which eventually led to the JVA.[1036] It is not known, however, how closely the April 1997 preliminary proposal resembled that of June 1998. The two proposals differed at least insofar as, in the June 1998 Proposal, the number of fields was extended by two additional fields, Chattak and Kamta.

1504. The services of the Representatives in the Five Feathers agreement are described as follows:

> *… Niko requires the active assistance of Five Feathers to secure and execute the Contract as mentioned above· (hereinafter referred to as the "Services") without having to engage in a competitive bidding exercise.*
>
> *… both parties agree to work diligently and professionally to secure and execute the Contract and that Five Feathers will work exclusively with Niko and will under no circumstance represent any other corporation, individual or entity, to explore, produce, develop or market hydrocarbon from the Beanibazar and Fenchuganj Gas Fields.*[1037]

[1035] Agreement between Niko Resources Ltd. and Five Feathers, Exhibit R-329.
[1036] Letter from Niko Resources Ltd. to BAPEX, 1 February 1999, Exhibit R-269; see also above Section 4.1.
[1037] Agreement between Niko Resources Ltd. and Five Feathers, Exhibit R-329.

1505. The following compensation is provided for the Representative:

> *… in consideration of Services to be rendered by Five Feathers to Niko, Niko will compensate Five Feathers as follows:*
>
> *(a) US$25,000 (Twenty five Thousand) payable immediately upon signing this agreement.*
>
> *(b) US$1 00,000*[1038] *(One Million) payable on the same calendar day of signing the Contract.*
>
> *(c) A running commission of 1.5% (with a deductible of US$25,000) of the total capital expenditure of the field development work in the Beanibazar & Fenchuganj Gas Fields as described in Annexure "A".*[1039]

1506. With respect to its duration, the Agreement provides:

> *This agreement will remain valid for a period of one year to allow execution of the Contract and will remain valid for so long as Niko operates the Beanibazar & Fenchuganj Gas Fields.*

1507. The Claimant asserts that its "*relationship with Five Feathers and Sharfuddin Ahmed had ceased by 2000, well before the start of the Targeted Period*"[1040] and that it has no evidence that any services were performed after 2000.[1041] This is not contradicted.

1508. Five Feathers seem to have been involved in the presentation of the June 1998 Proposal. A sheet presenting Five Feathers is attached to that the proposal:

> *We cover the whole gamut of the oilfield services and equipments supply and represent the following International reputed Companies.*[1042]

1509. This is followed on the sheet by a list of 24 companies from Europe and the U.S.

[1038] Sic; the correct number, nevertheless, seems to have been 1,000,000.
[1039] Agreement between Niko Resources Ltd. and Five Feathers, Exhibit R-329.
[1040] C-CMC, paragraph 219.
[1041] C-PHB1 (CONFIDENTIAL), paragraph 103.
[1042] Letter from Niko Resources Ltd. to Ministry of Energy and Mineral Resources, 28 June 1998, Exhibit C-123, last page.

1510. The engagement of Five Feathers was thus disclosed to the addressee of this proposal, i.e. the Ministry, as well as all to those who received a copy of the proposal. The engagement must have been disclosed also to others. For instance, the Senior Commercial Officer at the Canadian High Commission in Dhaka, in his message reporting to Mr Ohlson on latest developments about the PSC bidding round, seems not only to have understood Five Feathers to be the local contact of Niko in Bangladesh, but indeed sought to contact him:

> *I have tried several times to contact Mr. Sharfuddin of Five Feathers but to no avail.*[1043]

1511. In February 2000, Niko recognised that Five Feathers had been "*actively supporting*" its efforts, possibly in relation to the FOU, as the invoice of 26 August 1999 seems to indicate; but otherwise, there is little known in these Arbitrations about the activity of Five Feathers for Niko. The Claimant explains this by pointing out that "*it was not anticipated that Niko would be required to address matters occurring wholly outside the Targeted Period*".[1044]

1512. With respect to payments to Five Feathers, Niko made the initial payment of US$25,000. The balance gave rise to disputes which merit attention.

1513. After the conclusion of the FOU on 23 August 1999, Five Feathers addressed an invoice to Niko on 26 August 1999, claiming payment of US$111,683 in consideration of "*concluding signing of Agreement dated 23-08-99 between BAPEX and NIKO on Framework of Understanding for the study of Development & Production of Hydrocarbon from the Nonproducing Marginal Gas Fields of Chattak, Feni and Kamta*".[1045] In a letter of 14 February 2000, Niko recognised that Five Feathers was "*actively supporting our efforts up until our dispute arose some time on the first week of November, 1999*"[1046] and agreed to settle the claim for compensation by an immediate payment of US$35,000, an amount which

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[1043] Fax from the Department of Foreign Affairs and International Trade to Niko, 24 December 1997, Exhibit C-194.
[1044] C-PHB1 (CONFIDENTIAL), paragraph 105.
[1045] Letter from Five Feathers to Niko Resources Ltd., 26 August 1999, Exhibit R-335.
[1046] Letter from Niko to Five Feathers, 14 February 2000, Exhibit C-128 (CONFIDENTIAL); the year is not fully legible in the copy produced; in the circumstances, the Tribunals presume that it was 1999.

was actually paid. The balance of US$76,683 was reserved for payment upon conclusion of the BAPEX/Niko JVA.

1514. After the JVA had been executed on 16 October 2003, Five Feathers claimed payment of the balance. Since it does not seem to have succeeded, it retained a lawyer who claimed the amount in a letter of 5 February 2004.[1047] The Claimant asserts that it is "*not aware of any payment being made by Stratum or Niko in response to this demand*".[1048] This is uncontested[1049] and the Tribunals have not seen any evidence for a payment of the claimed amount of US$76,683 or any other payment apart from those of US$25,000 and US$35,000, mentioned above.

1515. The Tribunals conclude, based on the evidence on record, that the total amount paid to Five Feathers is US$60,000.

1516. In the eyes of **the Respondents,** the Five Feathers agreement is part of Niko's scheme of corruption. They describe this agreement as fitting "*the mold of a classic arrangement to use a consultant as a conduit for bribery*",[1050] where bribes were "*hidden in layers of 'consulting agreements'*".[1051]

1517. When considering this allegation, it should first of all be pointed out that the engagement of Five Feathers was fully transparent: as just mentioned, the company was presented by Niko together with its June 1998 Proposal and its appointment was known also to others.

1518. Apart from the general assimilation of consultancy contracts with "*a method to facilitate bribery*", as described by Ms LaPrevotte,[1052] the Respondents provide as support for this characterisation of the Five Feathers agreement (i) the allegation of a deceitful contradiction between the promise of a competitive process in the form of Swiss Challenge and

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[1047] Letter from S.R. Roy & Associates to Niko Resources Ltd. and Niko Resources (Bangladesh) Ltd., 5 February 2004, Exhibit R-334.
[1048] C-PHB1 (CONFIDENTIAL), paragraph 107.
[1049] C-PHB1 (CONFIDENTIAL), paragraphs 105-108; not contradicted; at the Hearing Mr Khan testified: "*We do not know whether the other amount has been paid or not we just got proof that at least one-third of that amount was paid to him.*" Tr. Day 2 (CONFIDENTIAL), p. 144, ll. 18-20.
[1050] R-MC, paragraph 36.
[1051] R-MC, paragraph 3.
[1052] LaPrevotte First Witness Statement, paragraph 16; relied upon in R-MC, paragraph 36.

the engagement of Five Feathers to avoid "*a competitive bidding exercise*" and (ii) an "*astronomical*" compensation.[1053]

1519. **The Claimant** has denied these allegations.[1054] The Tribunals have examined them closely and examined them against the evidence relied upon by the Respondents.

1520. The first of the Respondents' allegations presents Niko's proposal as **an attempt to avoid competitive procedures for which Niko was not qualified**. The allegation consists in saying that, having failed in the PSC bid, Niko sought to obtain rights to petroleum rights in Bangladesh by introducing the hitherto unknown concept of abandoned and marginal fields, thus avoiding competitive procedures while, at the same time, promising competition through Swiss Challenge:

> *Niko knew from the earlier bid round for production-sharing contracts that it would not be able to stand up to competition from any minimally qualified internationally company.*[1055]

1521. According to the Respondents, Niko's corrupt practices

> *… began in 1997, when it was found financially and technically unqualified to participate in the legally-sanctioned bid rounds for oil and gas contracts. Niko set out to obtain rights outside the normal competitive bidding process. It sought rights by introducing the concept of abandoned and marginal fields.*[1056]

1522. The Five Feathers consultancy, according to the Respondents, was intended to avoid competition which Niko nevertheless promised:

> *… at the same time as it was making the offer to the Government with a commitment to an open and transparent bidding process, Niko—using a contract that had all the earmarks of a contract for corruption—hired a "consultant" to "secure and execute" the JVA "without having to engage in a competitive bidding exercise."*[1057]

1523. In a similar line of argument, the alleged contradiction is taken as a sign that the Five Feathers agreement was a "*vehicle for the payment of bribes*":

[1053] R-MC, paragraphs 35 and 36.
[1054] E.g. C-CMC, paragraphs 223 – 226 and C-PHB1 (CONFIDENTIAL), paragraphs 103-112.
[1055] R-MC, paragraph 35.
[1056] R-MC, paragraph 4.
[1057] R-MC, paragraph 35, emphasis in the original.

> *But Niko was anything but transparent. Just prior to sending this letter to the Ministry, Niko had entered into the first of many consultancy agreements for the sole purpose of helping it procure "a Joint Venture Contract […] through the Ministry of Energy & Mineral Resources […] without having to engage in a competitive bidding exercise." The consultant would receive one million dollars on the day such a contract was signed and a lucrative running commission. The contract has the earmarks of a thinly-veiled vehicle for the payment of bribes. And, in light of all the evidence in this case, it clearly was just that. It also shows that Niko's first approach to the Government with respect to its investment was made in bad faith. Niko's behavior only got worse thereafter.*[1058]

1524. The assertion is maintained throughout the proceedings on the Corruption Claim. In their last submission, the Respondents refer to the quoted passage as one of the examples establishing Niko's bad faith:

> *Hiring a consultant for a success fee of $1 million to obtain a JVA "without having to engage in a competitive bidding exercise," at the same time that it convinced the Government to consider its project based on promising a Swiss Challenge process "in order to ensure transparency."*[1059]

1525. The Respondents go even further and take the Five Feathers agreement as a sign of conspiracy:

> *Entering into an agreement with Five Feathers for "active assistance […] to secure and execute the [Joint Venture] Contract […] without having to engage in competitive bidding" constitutes conspiracy to cause, and the aiding and abetting of, public servants' violations of Section 161 and Section 165, as well as the aiding and abetting Five Feathers' violation of Sections 162 and 163.*[1060]

1526. Mr Khan made the same allegation. As mentioned before, he testified about the agreement with Five Feathers and his understanding that they were asked to bribe.

> *THE PRESIDENT: On what basis do you say that they were asked to bribe?*

[1058] R-MC, paragraph 4.
[1059] R-PHB2 (CONFIDENTIAL), paragraph 115.
[1060] R-PHB2 (CONFIDENTIAL), paragraph 117.

MR KHAN: He was given an engagement letter, as a consultancy agreement, as agent, on a success fee basis that he would procure a contract from them on a non-competitive tender basis whilst the formal arrangement from Niko as an offer to Petrobangla and BAPEX was that they will do a tender and a Swiss Challenge.[1061]

1527. The Respondents' allegation is in conflict with the evidence on record on at least two accounts.

1528. First, there is no evidence on the record and it is highly unlikely that, in August 1997, when Niko concluded the agreement with Five Feathers, it had any feedback from the PSC bidding round. The only evidence on record about the evaluation process is the letter of Arthur Andersen of 29 September 1997 with the attached extracts from the evaluation.

1529. The relevance of this evaluation for the present project has been discussed above in Section 9.1; it appears that the criteria on which Niko's ranking was to be made do not indicate its lack of qualification for the project at hand.[1062] What matters now is that, in August 1997, when the Five Feathers agreement was concluded, the PSC bid evaluation was still ongoing. It is not plausible for the Respondents and the Investigators to assert that Niko knew at that time how its PSC bid had been evaluated and therefore set about devising a substitute method for obtaining petroleum rights in Bangladesh.

1530. In any event there is no evidence to show at what time the evaluation was completed and when it was communicated to Niko. The Respondents assert that in "*May of 1998, Niko was notified that the Ministry and Negotiation Committee considered its PSC bid offer 'weak' and its balance sheet 'not healthy', such that Niko was 'not in the race, let alone one of the serious contenders'*".[1063] This statement misrepresents the evidence. The support on which the Respondents rely is not a notification by Petrobangla or any other authority in Bangladesh about the results of the PSC bid. It is an internal message of the Canadian foreign service, from the DFAIT High Commission in Dhaka to the Coordinator South Asia Division in Ottawa.[1064] There is no information in the file as to the time

[1061] Tr. Day 2 (CONFIDENTIAL), p. 139, ll. 6-14.
[1062] See Section 9.1.
[1063] R-PHB1 (CONFIDENTIAL), paragraph 28.
[1064] Fax from the Department of Foreign Affairs and International Trade to PSA, 11 May 1998, Exhibit C-195.

when this information related to the qualification was communicated to Niko, nor as to whether and, if so, when Niko was notified of the outcome of the PSC bid.

1531. The DFAIT message of May 1998 does indeed contain the passage quoted above, reflecting the low rating of Niko. It does, however, also state that the Government of Bangladesh seemed to have deferred the decision on Block 9 and 10, for which Niko had submitted its bids; and it states that "*there may still be scope for Niko, at least in Block 9 & 10*".[1065]

1532. The Tribunals conclude that there is no basis to assume that Niko made its proposal for the marginal/abandoned fields as a result of its failure to succeed in the PSC bid. Indeed, it appears that, from the start, Niko pursued two tracks, the PSC bid and the marginal/abandoned fields, both of which had been initiated by the time when the Five Feathers agreement was concluded – the Sylhet proposal on 12 April 1997 and the PSC bid probably in early 1997.[1066]

1533. The Five Feathers agreement, however, deals with one of these tracks only. The agreement did not apply to the PSC bid, to which competitive procedures applied. This bid was not even mentioned in the Five Feathers agreement. In other words, Five Feathers was not expected to represent Niko in the PSC bid, following competitive procedures.

1534. The Respondents and the Investigators also assert that there is a **contradiction between the offer of Swiss Challenge and the terms of the Five Feathers consultancy agreement**. The assertion conflates two dates. The agreement was concluded not "*at the same time*" or "*shortly before*" the Swiss Challenge proposal, as the Respondents affirm. As the Claimant points out, the two events are almost a year apart.[1067] The consultancy agreement was concluded on 15 August 1997, while the Swiss Challenge proposal was made almost a year later, on 28 June 1998. The Respondents do not explain how Niko "*conspired*" in August 1997 to avoid the need to pursue a proposal which it had not made and was not obliged to make.

[1065] Exhibit C-195.
[1066] Neither the bid itself nor any other record attesting the submission of the bid has been produced in the Arbitrations.
[1067] C-CM, paragraph 225 (f).

1535. Moreover, the consultancy agreement specifies the "*terms and conditions*" of the contract which the Representative is to promote. These terms and conditions were annexed to the Five Feather agreement. Although this annexure has not been produced, there is no evidence nor allegation that the terms and conditions annexed to the Five Feathers contract made any reference to Swiss Challenge. It is indeed not very plausible that the Representative would be required and accepted to promote a project that contradicts the proposal which the Principal made to the potential client. Indeed, such a contradiction would have deprived the Representative of his entitlement to obtain the remuneration.

1536. In any event, as the Claimant pointed out, it is not very plausible for the Respondents to argue that Niko engaged Five Feathers in August 1997 with the objective of avoiding by corruption the recourse to competition by Swiss Challenge which they then proposed a year later.

> *If Niko, at the time of entering into the 1997 Agreement, was intending to circumvent a Swiss Challenge process by bribery as the Respondents' allege, why would it later propose a Swiss Challenge process at all, much less as part of its initial proposal?*[1068]

1537. As seen above, the proposal of Swiss Challenge and the engagement of a consultant to avoid competitive bidding was almost a year apart. Therefore, the Respondents' presentation of the Five Feathers agreement and its objectives is misleading: the alleged deceitful contradiction between the proposal of competitive Swiss Challenge and "*at the same time*" the engagement of a consultant to avoid competitive bidding exercise is the result of the Respondents' **conflation of two dates almost a year apart** and has no evidentiary basis in the record of these Arbitrations.

1538. It also must be pointed out that, as shown above, an internal message of 13 November 1999 provides an indication that, prior to the FOU, Niko planned on complying with the Swiss Challenge procedure.[1069] Indeed, in its letter of 1 February 2000 Niko confirmed its proposal of having Swiss Challenge applied.[1070]

[1068] C-CM, paragraph 225 (f).
[1069] Exhibit C-98 discussed above in Section 9.6.5.
[1070] Exhibit R-269.

1539. **The second basis** on which the Respondents rely in presenting the Five Feathers agreement as part of Niko's scheme of corruption concerns **the amount of the agreed compensation**. Apart from the US$25,000 upon conclusion of the agreement, Five Feathers was promised US$1 million upon conclusion of the joint venture agreement and 1.5% commission on the total capital expenditures that would be made for field development work, if the joint venture contract would be awarded. The services required for this compensation are "*active assistance of Five Feathers to secure and execute the Contract*".

1540. When examining whether such compensation is reasonable, one must consider not only the value for Niko of the expected contract with Sylhet Gas Fields but also that Niko had no "*on the ground*" base in Bangladesh, and was proposing a project for a type of work which was unknown at the time in Bangladesh. Five Feathers and Mr Ahmed were engaged as Niko's only representatives of Niko in Bangladesh. Mr Sharif was given power of attorney only in April 1998 and Stratum was engaged even later. Five Feathers was to provide its support for an up-front payment of only US$25,000 and had to work on an exclusive basis. If the efforts failed, no other remuneration was due. If the efforts would not succeed, Five Feathers would not receive any other compensation.

1541. In these circumstances, the Tribunals cannot see the agreed compensation as "*disproportionate to the services*" to be provided. The Respondents' characterisation of that consultancy agreement as "*thinly-veiled vehicle for the payment of bribes*", in the Tribunals' view is not justified.

1542. Finally, it should be pointed out that Five Feathers or Mr Ahmad do not seem to have made any corrupt payment. Mr Khan, when questioned about corruption by Mr Ahmed, was quite clear:

> *THE PRESIDENT: Mr Ahmed came after the JV was signed and said, "I want my money".*
>
> *MR KHAN: Correct.*
>
> *THE PRESIDENT: Yes, he also said, "I did not bribe anybody".*

MR KHAN: He told us that he did not bribe anybody but he asked them when the contract was signed, so he still wanted his success fee.

THE PRESIDENT: Yes, because -- he wanted his success fee because the success was achieved and do you have any indication that Mr Ahmed bribed anybody?

MR KHAN: No, I did not.

[…]

THE PRESIDENT: Mr Khan, if the JVA was procured by corruption, it was not Mr Ahmed –

MR KHAN: No, it is not.

THE PRESIDENT: It was somebody else?

MR KHAN: Yes.

THE PRESIDENT: So the contract with Mr Ahmed is no proof for the corruption. We must -- if you want to show that the JVA was obtained by corruption you have to look at somebody else because Mr Ahmed said, "I did not pay the corruption". Well?

MR KHAN: Yes.

THE PRESIDENT: Thank you.[1071]

1543. From the evidence before the Tribunals, the Tribunals conclude that there is **no evidence that Mr Ahmed or his company bribed anybody on Niko's behalf, nor did he make a commitment to pay bribes**. There is **no evidence** in the record that the consultancy agreement required them to make such commitments nor is there any evidence that Niko itself had made such a commitment or planned to do so**, intending to use Five Feathers as a "*conduit*"**.

1544. Against this background and in view of this evidence, it is quite surprising that Ms LaPrevotte, after having explained that Niko hired "*at least three 'on the ground' consultants*" of which the first was Five Feathers, asserts, without distinction between the three consultants:

[1071] Tr. Day 2 (CONFIDENTIAL), pp. 146-148.

My investigation provided probable cause to believe that money was paid by Niko to these consultants who then made sure that money was provided to those people with the power to influence a determination that the fields were only marginal fields and to influence the approval of the Joint Venture Agreement (JVA).[1072]

1545. At the end of their examination of the first of these consultancy contracts, the Tribunals have seen no evidence in these Arbitrations that would justify Ms LaPrevotte's asserted belief. It is uncontested that Five Feathers was paid only US$60,000 and there is not even an allegation that any part of this money was provided to anybody else. With respect to the first consultant, Ms LaPrevotte's belief is unfounded. Her testimony might well have benefitted from deeper critical analysis of the evidence provided.

1546. In conclusion: the evidence on the record in these Arbitrations does **not support the assertions** made by the Respondents and the Investigators about the Five Feathers agreement as evidence for corruption, for intended corruption, for conspiracy, or for bad faith on the side of Niko.

10.3.3 Stratum Development Limited and Qasim Sharif

1547. Mr Qasim Sharif and his company Stratum Development Ltd (Stratum) were the second consultants retained by Niko. They were Niko's principal representatives in Bangladesh. In the words of the Claimant, during the time from Niko's submission of the June 1998 Proposal until the execution of the JVA, "*Qasim Sharif, through Stratum, was Niko's sole permanent presence in Bangladesh and the cornerstone of its activities*".[1073]

10.3.3.1 Niko's agreements with Mr Sharif and his company Stratum

1548. From the record in these Arbitrations, the Tribunals understand the history of the Sharif/Stratum involvement with Niko and the principal agreements concluded in respect of Mr Sharif's activity to be as follows.

[1072] La Prevotte First Witness Statement, paragraph 20.
[1073] C-CMC, paragraph 193.

1549. Mr Sharif explained that in 1997 he was assisting Niko informally.[1074] The Claimant states that Mr Sharif and Mr Ohlson knew each other from projects they had worked on together in the South Asia region and that Mr Sharif introduced the idea of marginal field development in Bangladesh to Mr Ohlson and Niko.[1075]

1550. Mr Robert Ohlson then appointed Mr Sharif, by a **Special Power of Attorney** dated **8 April 1998**, as "*True and Lawful Attorney*" for Niko Canada and Niko Bangladesh, to act on his behalf

> *… in negotiating and carrying out the terms of any oil and gas transaction within the Country of Bangladesh and to sign any documentation relating to any acquisition on the Company's behalf.*[1076]

1551. Following the submission of the June 1998 Proposal, Niko entered into several agreements with Mr Sharif's company Stratum.

1552. A **Carried Interest Agreement**, providing for a 10% interest in the net profits of Niko, if any, earned from production from a minimum 51% Niko interest in the Kamta, Chattak and Feni gas fields as may be acquired from BAPEX.[1077] The agreement is dated **7 July 1999**. The Minutes of the 23 March 2000 Niko Board meeting, however, note that "*The Carried Interest Agreement was in its final draft form which contained only minor changes to the draft provided previously.*"[1078] In any event the conditions under which such interest would have been earned by Stratum were never met and no payment was ever made under this agreement.[1079]

1553. A **Consultancy Agreement**, dated **27 July 1999**, under which Stratum was required to provide specified services: these included assistance to Niko in a broad range of fields, negotiating and furnishing of information to BAPEX and the Government on behalf of Niko.[1080] The cost of any

[1074] Mr Sharif's Statement to the ACC, Exhibit C-176, p. 9.
[1075] C-CMC, paragraph 202.
[1076] Special Power of Attorney from R. Ohlson to Q. Sharif, Exhibit R-332.
[1077] Carried Interest Agreement, 7 July 1999, Exhibit C-126 (CONFIDENTIAL).
[1078] Minutes of the Meeting of the Board of Directors of Niko Resources (Bangladesh) Ltd., 23 March 2000, Exhibit C-129 (CONFIDENTIAL).
[1079] C-CMC, paragraph 203 (c).
[1080] For details of these services see below Section 10.3.3.4.

employees or agents of Stratum assisting it in performing the services would be borne by Stratum.

1554. The fee due to Stratum was expressed as a percentage of the net share of established proven reserves in Niko's interest in the gas fields covered by the future JVA and amounted to US$0.03 per mcf. The agreement contained a detailed provision concerning the determination of this share. As a "*minimum initial consulting fee*", US$4 million were payable upon execution of the JVA; "*[a]ll monies paid under the Management Services Contract*" would be deducted from that amount. The agreement had been concluded for one year, but was renewed several times.[1081]

1555. A Management Services Contract (the "**Management Agreement**"),[1082] dated **1 October 1999**, under which Stratum agreed to provide, on an as requested basis,

> *… the necessary Services to Niko Bangladesh to enable Niko Bangladesh to satisfy its obligations in respect of the Project, including, without limitation, technical, professional, legal, accounting, administrative, marketing and advisory services.*

1556. These services were then defined in a detailed manner. The defined services included providing technical and engineering advice, preparing and coordinating plans and studies, procurement services, and recruitment of highly-skilled technical or professional employees. The agreement permitted Stratum to engage third parties to assist it performing the stipulated services, the cost of such third-party services was to be borne by Stratum.

1557. The Management Agreement provided for a one-off up-front payment of US$50,000 to cover start-up costs. Stratum's compensation consisted in a monthly fee of US$40,000 which had to cover "*all costs and expenses of Stratum including but not limited to personnel, overhead, rent, materials*

[1081] Consultancy Agreement between Niko Resources (Bangladesh) Ltd. and Stratum Developments Limited, 1999, 2000, 2002, 2003, Exhibit R-315.
[1082] Management Services Contract between Stratum Developments Limited and Niko Resources (Bangladesh) Ltd., 1999, 2003, Exhibit R-318.

and supplies, vehicles, transportation, taxes, third party charges and insurance". Effective 1 April 2001 the fee was reduced to US$20,000.[1083]

1558. Subsequently Mr Sharif was appointed by Niko to the post of its **Vice President South Asia**.[1084] This position was confirmed in a document of 25 June 2003, in which Mr Ohlson, acting for Niko Bangladesh and for Niko Canada certified that Stratum was an "*affiliate*" of Niko and that the two companies were

> *… pursuing the development· Chhatak and Feni gas fields in Bangladesh. Mr Qasim Sharif, Vice President South Asia of Niko Resources (Bangladesh) Limited is also the Managing Director of Stratum Developments Limited.*
>
> *We expect to start operations in Bangladesh before the end of this year. All costs and revenue of Stratum attributable to the Chhatak and Feni Gas Fields will be from Niko. Mr. Qasim Sharif will continue to be the head of our business unit in Bangladesh when operations start.*[1085]

1559. On 1 September 2003 Niko Canada confirmed to Mr Sharif his appointment as the **President of Niko** Resources (Bangladesh) Ltd. and specified the terms, including a monthly salary of US$16,666.67 and other benefits valued at US$4,166.67.

1560. When the JVA was about to be concluded, a new **Management Services Contact**, dated **1 October 2003**, was concluded by Niko with Stratum, providing for a fee of US$20,000.[1086] An amendment, dated 1 November 2005, increased this retainer fee to US$30,000.[1087] This agreement was similar to the earlier one. It contained, however, the following provision concerning the fee:

> *… This fee shall cover Stratum's fee in addition to all costs and expenses made or incurred by Stratum related to the provision of the Services such as payments made to expedite or secure the performance by a foreign public official of any act of a routine nature*

[1083] Minutes of the Meeting of the Board of Directors of Niko Resources (Bangladesh) Ltd., 26 April 2001, Exhibit C-134 (CONFIDENTIAL).
[1084] Mr Sharif acted in this function on 5 July 2003, when he signed the agreement for Nationwide's remuneration (Exhibit R-375 (CONFIDENTIAL)).
[1085] Letter from Niko Resources Ltd., 25 June 2003, Exhibit R-368.
[1086] Management Services Contract between Stratum Developments Limited and Niko Resources (Bangladesh) Ltd., 2003, 2005, Exhibit R-355; also produced as part of Exhibit R-318.
[1087] Management Services Contract between Stratum Developments Limited and Niko Resources (Bangladesh) Ltd., 2003, 2005, Exhibit R-355.

that is part of the foreign public official's duties or functions, such as the issuance of permits or licenses required for the Project, the processing of official documents, visas or work permits and the like.

(b) In addition to the foregoing fees Stratum shall invoice Niko Bangladesh for, and Niko Bangladesh shall reimburse Stratum for, all out of pocket expenses made or incurred by Stratum in relation to the provision of the Services such as the costs of travel, boarding and lodging, etc. In the event Stratum anticipates such expenses will exceed US$5.000 in a Calendar Quarter·, Stratum shall obtain the approval of Niko Bangladesh prior to incurring such expenses.

1561. According to the Claimant, Mr Sharif's / Stratum's work entailed acting as president of Niko and overseeing its operations in Bangladesh until November 2005.[1088]

1562. The Minutes of the 23 March 2000 Niko Board meeting, Exhibit C-129 (CONFIDENTIAL) state:

> *The meeting was informed that the Company had executed the Management Services contract and Consultancy Agreement with Stratum Developments Ltd.*

1563. The Minutes of the 23 March 2000 Niko Board meeting provide:

> *Upon securing the fields, the Company would make a payment of US$4M to the agent.*[1089]

1564. The funding for the Stratum activity was provided by Niko Canada through Niko. For instance, the Minutes of the 23 March 2000 Niko Board meeting record, for the period from March to December 1999:

> *It was noted that during the nine months ended 31st December, 1999, the Company received funds in the amount of $264,764 by way of a loan from Niko Resources (Cayman) Ltd.*
>
> *Capital expenditure of $248,885 was incurred during the period. The majority of the funds expended ($175,187) were in relation to the management services contract with Stratum. The remainder of the funds were expended in the contract negotiations and technical work*

[1088] Rejoinder on Corruption dated 5 April 2017 (CONFIDENTIAL), para. 78, p 25.
[1089] Minutes of the Meeting of the Board of Directors of Niko Resources (Bangladesh) Ltd., 23 March 2000, Exhibit C-129 (CONFIDENTIAL).

involved in preparing a field development plan and in drafting the joint venture agreement between the Company and the Bangladesh Petroleum Exploration Co. Ltd. ("BAPEX").[1090]

1565. The Respondents argue that

> *… based on the record, the conclusion stands that Qasim Sharif, first as agent, then as Vice President and President of Niko, received vast sums of money from Niko and used that money to pay bribes for Government approval of Niko's project on Niko's terms. Claimant failed to show that its payments to Stratum and Qasim Sharif were legitimate.*[1091]

1566. Similarly, Ms LaPrevotte asserted that Mr Sharif "*was also hired to facilitate bribes payments*".[1092]

1567. The principal allegations on which the Respondents rely for their assertion concerning the Sharif/Stratum consultancy are:

- The fictitious nature of Stratum as a "*dummy corporation*";
- Stratum being set up as a case of "*layering*" and "*to further a corrupt scheme*";
- The terms of the agreements, in particular the amount of the compensation and its legitimacy; and
- The alleged absence of evidence for any work done by Sharif/Stratum, in particular the absence of reports.

The Tribunals will consider these allegations seriatim.

10.3.3.2 The role of Stratum as a "dummy corporation" and as evidence of Niko's alleged scheme of corruption

1568. **The Respondents** assert "*that Stratum was set up to further a corrupt scheme*".[1093] The Respondents rely on answers given to an FBI enquiry

[1090] Minutes of the Meeting of the Board of Directors of Niko Resources (Bangladesh) Ltd., 23 March 2000, Exhibit C-129 (CONFIDENTIAL).
[1091] R-PHB2 (CONFIDENTIAL), paragraph 18.
[1092] LaPrevotte First Witness Statement, paragraph 20.
[1093] R-PHB1 (CONFIDENTIAL), paragraph 33.

by the Zurich lawyer who had assisted in the creation of Stratum as a Jersey company.[1094] In spring 1999 a person identified as "*P*", presumably Mr Sharif, contacted this lawyer upon recommendation of Union Bancaire Privée (UBP). The lawyer explained that he was hired to advise on setting up "*an offshore company that would enter into contracts […] with the Canadian firm NICO Resources*".[1095] He described Stratum as a "*dummy corporation*" which did not have offices, not even in Jersey.[1096] Ms LaPrevotte concluded that "*Stratum Development was owned and used by [Mr Sharif] to further his activities in Bangladesh*".[1097] She testified that Mr Sharif, however, provided "*false statements*" to the FBI,[1098] telling that he was the Managing Director and there were other investors and "*that is not my company*".[1099]

1569. The Respondents conclude that "*[i]nvestigations revealed that Mr. Sharif created Stratum solely to make a contract with Niko and move money*".[1100] Relying on the assertions of the Investigators, the Respondents also argue that Stratum was used to distance Niko from corrupt payments. With reference to Mr Khan, the Respondents state:

> *Mr. Khan explained that Niko used Stratum to distance itself from payments by paying its consultant, not in the ordinary course of business, but by having Mr. Sharif and his wife pay what Niko owed under consultancy contracts personally to individuals, such as Mr. Bhuiyan. Special Agent LaPrevotte further explained that: "In my investigation the only role that Stratum Development played was layering, distancing, the plausible deniability of the payment to individuals."*[1101]

1570. Ms LaPrevotte also stated:

> *Based on my experience and knowledge of money laundering and corruption, it is clear to me that payments made from the Stratum*

[1094] Response to a request for legal assistance from FBI to Zurich Cantonal Police, 23 October 2008, Exhibit R-328.
[1095] Response to a request for legal assistance from FBI to Zurich Cantonal Police, 23 October 2008, Exhibit R-328, p. 9.
[1096] Response to a request for legal assistance from FBI to Zurich Cantonal Police, 23 October 2008, Exhibit R-328, p. 11.
[1097] LaPrevotte First Witness Statement, paragraph 25.
[1098] LaPrevotte First Witness Statement, paragraph 25.
[1099] Tr. Day 3 (CONFIDENTIAL), pp. 194, 192; see also LaPrevotte First Witness Statement paragraph, 25.
[1100] R-MC, paragraph 67.
[1101] R-PHB1 (CONFIDENTIAL), paragraph 34.

> *Development account for work being conducted on behalf of Niko was done with the intent to distance Niko from the bribes being paid to officials and their family members in Bangladesh.*[1102]

1571. **The Claimant** argues that it is "*a well-established business practice for people to utilize a corporate vehicle for the conduct of their business (including in the consulting field) whether incorporated offshore (often for tax reasons) or locally*". It also states

> *… there was clearly never any attempt to conceal the fact that Qasim Sharif was [Stratum's] principal, nor is there any suggestion that any Bangladesh government official ever had any beneficial interest in Stratum.*[1103]

1572. The Claimant also asserts that Mr Sharif "*continues to this day to be operating in the international oil and gas business under the Stratum name (as Stratum Energy)*". It refers to the Stratum Energy's website and the "*international oil and gas projects undertaken*" by the company. It adds that

> *It is difficult to fathom anyone choosing to carry on with a particular corporate name, and advertising their prior association with Niko if, as the Respondents want one to believe, Mr Sharif set Stratum up as a dummy corporation with the purpose and intent to further a corrupt scheme in Bangladesh.*[1104]

1573. **The Tribunals** note that it is uncontested that Mr Sharif created Stratum. The controversy about the reasons why he did so, in the opinion of the Tribunals, is not decisive here. Mr Sharif may have set up Stratum for tax reasons, as the Claimant mentions as a possible reason; he may have intended to "*distance*" himself from payments made to him or by him; but there is no evidence that Stratum was created by or at the instructions of Niko or that Stratum and its accounts were used, as stated by Ms LaPrevotte, "*with the intent to distance Niko*" from the alleged bribes. The statement of Ms LaPrevotte to this effect simply relies on her "*experience and knowledge of money laundering and corruption*" and no evidence is provided for the alleged intent.[1105]

[1102] LaPrevotte First Witness Statement, 38.
[1103] C-CMC, paragraphs 197, 196.
[1104] C-CMC, paragraph 199.
[1105] LaPrevotte First Witness Statement, paragraph 38.

1574. Ms LaPrevotte's statement also is in contradiction with the Respondents' assertions, when they say that "*Niko used Stratum*" by "*having Mr. Sharif and his wife pay what Niko owed under consultancy contracts personally to individuals*".[1106] It is also in contradiction with Mr Khan's testimony. He explained "*Niko appointed Stratum through Qasim Sharif*", referred to Stratum as an off-shore company and described what he found out about the payment flows. He concluded:

> *What we discovered was the money was being paid to the individuals personally, so Five Feathers was not getting paid, Sharfuddin Ahmed personal account paid for, even though there was a contract. It is Qasim Sharif and Noreen Sharif writing out checks to Sharfuddin Ahmed.*[1107]

1575. When Mr Khan observed that payments were made to the individuals personally and not to the off-shore companies and that the individuals then made the payments, it is not plausible to assert that the off-shore companies were created to distance Niko or the individuals from the alleged corrupt payments.

1576. Similarly, Mr LaPrevotte considered that the incorporation of a company in an off-shore jurisdiction is a "*major factor*" in assuming the pursuit of "*illegitimate purposes*" by the company or individual. At the Hearing she had the following exchange with the Claimant's counsel:

> *MR COLE: …. are you suggesting that the only reason a company would incorporate in an off-shore or an individual would incorporate a company in an off-shore jurisdiction is for illegitimate purposes?*
>
> *MS LAPREVOTTE: No, I am not. I am saying that it has been my understanding in my investigations that frequently when a company incorporates in the Channel Islands, Jersey, Isle of Man, Guernsey, it was because they have incredible secrecy laws and …*
>
> *MR COLE: So if a company incorporates in one of those jurisdictions you can make an assumption that they are doing so for an illegitimate purpose and that may be rebutted but do you start from the proposition that you will assume it is for illegitimate purposes until proven otherwise?*

[1106] R-PHB1(CONFIDENTIAL), paragraph 34.
[1107] Tr. Day 2 (CONFIDENTIAL), p. 117, ll. 12-17.

MS LAPREVOTTE: No, I do not start from that proposition. It is just one factor I considered while investigating.

MR COLE: But you said it was a major factor here for you.

MS LAPREVOTTE: It was a factor.

MR COLE: A major factor you said, I think.

MS LAPREVOTTE: Well, yes, in totality of circumstances? It was a major factor.[1108]

1577. **The Tribunals** have considered this exchange and concluded that they need not determine whether and to what extent the creation of an off-shore company is "*a factor*" or a "*major factor*" in assuming illegality. In the present case the off-shore company was created by Mr Sharif and not by Niko. If this creation is a factor in assuming an illegal purpose, such a purpose would be attributable to Mr Sharif, not to Niko.

1578. In conclusion, in the Tribunals' view, the record shows that Stratum was set up by Mr Sharif for his work for Niko and for his own reasons. The Tribunals find **no evidence to show that Stratum was set up for the purposes of Niko's alleged scheme of corruption**. The fact that the agreements for the provision of Mr Sharif's services to Niko and for his remuneration by Niko were concluded not with him personally but with his company Stratum, in the opinion of the Tribunals, does not support the allegation of a corrupt intention by Niko.

10.3.3.3 The engagement of Sharif/Stratum as a "layer" in Niko's alleged corrupt scheme

1579. The Tribunals consider that the discussion about Stratum as a "*dummy corporation*" distracts from the relevant issue that must be considered here: are the agreements concluded by Niko with Mr Sharif's company evidence of "*layering*", as suggested by the Respondents and the Investigators, and does the conclusion of these agreement support the allegation of Niko's intention to create a corrupt scheme? If that is not the case, the Tribunals will then have to consider whether, in fact, Niko used its cooperation with Mr Sharif and his company for procuring by corruption the JVA and the GPSA.

[1108] Tr. Day 3 (CONFIDENTIAL), p. 196, l. 17 to p.197, l. 19.

1580. In the Claimant's view, Mr Sharif and his company were, until the commencement of operational activities following the conclusion of the JVA, "*Niko's sole permanent presence in Bangladesh and the cornerstone of its activities*".[1109] As mentioned above, the Respondents and the Investigators deem the engagement of consultants to be evidence for corruption.

1581. **The Respondents** assimilate the engagement of Niko's consultants with a "*modus operandi*" described by the Investigators:

> *As Mr. Khan and Special Agent LaPrevotte explain in their statements, the U.S., Canadian, and Bangladeshi investigations of corruption in Bangladesh found several companies using the same methods: "hiring of so-called consultants to funnel money to the sons of the Prime Minister and the minister with authority to approve or deny their contract proposals."*
>
> *The evidence shows that Niko used this system to illegally seek its own advantage by paying bribes to obtain the JVA and GPSA and left its own perverse influence on Bangladeshi society.*[1110]

1582. The engagement of Sharif/Stratum by Niko, in the view of the Respondents, is part of the same *modus operandi*:

> *… Niko's use of consultants to carry out its corruption began when it entered the country and hired Sharfudding Ahmed in 1997 and Qasim Sharif in 1998. Qasim Sharif and his company, Stratum Developments Ltd., were the center of Niko's corrupt transactions in Bangladesh after the relationship with Sharfudding Ahmed soured.*[1111]

1583. Mr Khan described the layering system he had observed with other companies and then concluded that Sharif/Stratum were used by Niko as such a layer:

> *During the BNP's reign between 2001 and January 2007, the most substantial evidence of Niko's bribe payments that we uncovered followed the same pattern as those paid by Siemens, China Harbour, Harbin and other companies. Niko used arrangements with "consultants" to pay bribes to government officials and their family*

[1109] C-CMC, paragraph 193.
[1110] R-MC, paragraphs 57 and 58.
[1111] R-MC, paragraph 65.

members. The evidence demonstrated that Niko entered into the type of layered "consultancy" arrangement often used by corrupt companies to attempt to distance the company and its home-office from the corruption.

The first layer of Niko's arrangement were contracts with Qasim Sharif and his company Stratum. Niko contracted with Qasim Sharif to pay him what was by Bangladeshi standards an astronomical success fee of a minimum of $4,000,000 if he was able to procure the Chattak/Feni project for them.[1112]

1584. **The Claimant** objects to the Respondents' attempt to categorise "*Qasim Sharif and Stratum as a mere conduit for bribes to officials*". They state

> *Throughout the more than five year period commencing with Niko's submission of the July 1998 Proposal and ending with the execution of the JVA, Qasim Sharif, through Stratum, was Niko's sole permanent presence in Bangladesh and the cornerstone of its activities. Subsequently, just prior to the execution of the JVA, Qasim Sharif became Niko's President until his departure from the company in late 2005.*[1113]

1585. The Tribunals have concluded that, in the circumstances of Niko in Bangladesh, the engagement of consultants is not evidence in itself that bribery was intended or committed. One of the questions that does have to be examined is whether the consultants that Niko did engage were qualified for the task to justify the agreed compensation for their services or, as the Respondents argue, were engaged merely as a conduit for passing bribes from Niko to officials without Niko appearing.

1586. Concerning Sharif/Stratum, the Respondents contest the qualifications of Stratum as a separate entity, a "*dummy corporation*", as just discussed; but do not discuss the qualifications of Mr Sharif.

1587. According to the Claimant, Mr Sharif had been

> *… employed as a senior oil and gas executive for one of the world's largest oilfield service companies, BJ Services. Mr. Sharif had held*

[1112] Khan First Witness Statement, paragraph 36.
[1113] C-CMC, paragraph 193.

positions with BJ Services as a Country Manager in several jurisdictions in the South Asia Region, including India.[1114]

1588. The Claimant explains that Mr Sharif, a dual Bangladesh and U.S. citizen[1115] (born in Bangladesh, relocated in the U.S. in 1979),[1116] was at the origin of the "*concept of pursuing marginal field development in Bangladesh, with the knowledge he undoubtedly had of Bangladesh and potential marginal fields*".[1117] Immediately prior to working for Niko he had spent years as a Country Manager for a leading international oil and gas services company across various jurisdictions, including in South Asia.[1118] In the Agreed Statement of Facts the expected role of Mr Sharif is described as follows:

> *Although Qasim Sharif is an American citizen, he is also a Bangladeshi and it was expected that his background would be such that he would have had the expertise to navigate the often complex relationship of business and government officials which existed in Bangladesh at the time. In 2005 Bangladesh was tied as the most corrupt country in the world in which to do business according to Transparency International.*[1119]

1589. It is not seriously contested that Mr Sharif was highly qualified for assisting Niko in the promotion of its project in Bangladesh. Reference to his qualifications has been made above.

1590. The *modus operandi* described by Ms LaPrevotte included the use of consultants with "*no expertise in the relevant fields*".[1120] In cross examination she clarified her position, recognising the qualifications of Mr Sharif:

> *MR COLE: You are implying here that these consultants did not provide any legitimate services, correct?*
>
> *MS LAPREVOTTE: I am saying that none of them were -- with the possible exception of [Mr Sharif], had any background in oil exploration. One was an insurance agent and a travel agent and one of them now runs a soccer club. They had no expertise that would*

[1114] C-CMC, paragraph 201.
[1115] C-PHB1 (CONFIDENTIAL), paragraph 22.
[1116] Mr Sharif's Statement to the ACC, Exhibit C-176.
[1117] C-CMC, paragraph 213 (d); see also C-PHB1 (CONFIDENTIAL), paragraph 23 and Hornaday Witness Statement on Corruption Claim, paragraph 14.
[1118] C-PHB1 (CONFIDENTIAL), paragraph 22,
[1119] Agreed Statement of Facts, Exhibit R-215, paragraph 20.
[1120] Witness Statement LaPrevotte, paragraph 14.

have assisted Niko but they were all well familially and politically connected with the BNP Government.

MR COLE: In your statement you do not qualify that. You do not offer or concede the expertise of [Mr Sharif], do you?

MS LAPREVOTTE: I do not believe I do.

MR COLE: Do you accept that he provided substantial legitimate services to Niko?

MS LAPREVOTTE: I think that he was qualified to be an agent for Niko. He had extreme expertise in the oil industry.[1121]

1591. Ms LaPrevotte also stated that, contrary to what she had observed in the case of Siemens, Mr Sharif provided legitimate services to Niko and was entitled to compensation:

MS LAPREVOTTE: I would say he provided some legitimate service, yes.

MR COLE: But that is a difference between Siemens and Niko.

MS LAPREVOTTE: Yes.

[…]

MS LAPREVOTTE: Yes, he is entitled to compensation.[1122]

1592. Mr Khan explained that the layering system of corruption, on which the Respondents rely, was part of the corruption prevailing during "*BNP's reign between 2001 and January 2007.*"[1123] The agreements of Niko with Sharif/Stratum were concluded in 1999, over two years before the installation of the BNP government. It is therefore not plausible for the Respondents and the Investigators to associate these agreements with corrupt schemes said to have been set up during the BNP government's tenure.

1593. Apart from this asserted analogy, the Respondents produce no evidence that the Sharif/Stratum agreements were concluded for purposes of layering. The Respondents imply that Mr Sharif understood that his

[1121] Tr. Day 3 (CONFIDENTIAL), p. 182, l. 11 to p. 183, l. 5.
[1122] Tr. Day 3 (CONFIDENTIAL), p. 184, l. 23 to and p. 185, l. 18.
[1123] Khan First Witness Statement, paragraph 36, quoted above.

mandate was to pay bribes to officials. They describe the special Power of Attorney granted to Mr Sharif in April 1998 and then state:

> *Qasim Sharif understood his mandate. As he told the Canadian investigators, "there was money [...] that [was] suppose[d] to go to officials or that went to officials."*[1124]

1594. The attribution of these words to Mr Sharif is incorrect. In support of their statement, the Respondents refer to the transcript of Mr Sharif's questioning by the RCMP. The text of this transcript shows that the quoted words are not those of Mr Sharif but of Corporal Duggan. Moreover, Corporal Duggan does not summarise what he heard from Mr Sharif but what he heard when talking to "*several people who were involved in the process that led to getting the JVA*", mentioning Sharfuddin Ahmed, Salim [Bhuiyan] and Mamoon. The discussion then proceeds:

> *DUGGAN: Urn, now each of these people say that there was money....*
>
> *SHARIF: ....uh-huh....*
>
> *DUGGAN: ....that's suppose to go to officials or that went to officials.*
>
> *SHARIF: Uh-huh*
>
> *DUGGAN: And if you kind, we're trying to figure out ah, where that came, where the idea came from and how it was carried out and.*
>
> *SHARIF: So let's talk about MAMOON.*[1125]

1595. In the view of the Tribunals, this exchange does not offer evidence for Mr Sharif's understanding of his mandate and does not support the Respondents' assertion that the Sharif/Stratum agreements were concluded as part of a layering scheme through which Niko intended to pay bribes by distancing itself from its corruption.

1596. **The Tribunals conclude** that Niko's engagement of Sharif/Stratum had a good reason and legitimate purposes. There is **no evidence** to justify the Respondents' allegation **that its objective was illicit layering in pursuance of a corrupt scheme**.

[1124] R-MC, paragraph 37.
[1125] Sharif Transcript, Exhibit R-333, p. 30.

1597. This conclusion does not exclude the possibility that the terms of the agreements and in particular the remuneration provided by Niko were out of proportion with the services to be provided under the agreements and/or that the agreements were used later, during the BNP reign, for corrupt payments by Niko through Sharif/Stratum. The Tribunals will now examine the evidence in this respect.

10.3.3.4 The terms of the Sharif/Stratum engagement as red flags for corruption

1598. As mentioned, the Tribunals' acceptance that Niko's engagement of Sharif/Stratum was not a case of layering, in the sense used by the Respondents and the Investigators, does not exclude that corruption was carried out through this relationship. The Tribunals have found that the Sharif/Stratum engagement was for a legitimate purpose and that Mr Sharif's qualifications justified remuneration. That leaves open the question whether the remuneration was out of proportion with the services that he was expected to provide.

1599. The Respondents assert that Mr Sharif received "*vast sums of money from Niko*" and that the Claimant "*failed to show that its payments to Stratum and Qasim Sharif were legitimate*".[1126] The Respondents consider the amounts agreed and paid as exorbitant, and in particular describe the payment of US$4 million due on conclusion of the JVA as a "*stratospheric success fee*".[1127]

1600. The Tribunals will therefore examine **whether the amounts** which Niko **agreed** to pay to Sharif/Stratum are such that they give **rise to doubt about the legitimacy of the services expected** in return. To be clear, it is not the purpose of such an examination to determine the consultant's adequate remuneration; the examination merely has to determine whether there is such a discrepancy between the remuneration and the services to be rendered which suggests that at least part of the amounts paid are intended for corrupt payments.

[1126] R-PHB2 (CONFIDENTIAL), paragraph 18.
[1127] R-RC, paragraph 131.

10.3.3.5 Compensation compared to services - as agreed

1601. Based on the record, the **agreed payments** are known as follows and were indicated above in the summary of the agreements:

- A payment for start-up costs of US$50,000;
- A monthly Management Fee of US$40,000, reduced to US$20,000 as of 1 April 2001, and again increased to US$30,000 as of 1 November 2005;
- A share in Niko's interest in the proven net share of established proven reserves, but a minimum of US$4 million upon conclusion of the JVA, from which amount any Management Fees actually paid had to be deducted; and
- A profit share, as described above, pursuant to the Carried Interest Agreement.

1602. **The services** for which this remuneration was provided were defined in the Consultancy Agreement, which required Stratum to

> *(1) assist the Company in conducting research and due diligence in relation to the JVA; in gathering general and technical data and information; in facilitating all meetings in relation to the execution of the JVA; and in assisting the Company in negotiating and executing the JVA;*
>
> *(2) act on behalf of the Company, as requested, with respect to negotiating and furnishing information to BAPEX and the Government of Bangladesh as required by BAPEX and the Government of Bangladesh to facilitate the approval process in relation to the JVA;*
>
> *(3) pay, on behalf of the Company, any good faith deposit required to be paid on account of the execution of the JVA, from monies made available to the Consultant by the Company; and*
>
> *(4) provide such information as could be reasonably required to assist the Company in financing and structuring of the execution of the JVA.*[1128]

1603. The quoted description of the expected services has a broad scope and may well have required extensive work and costs born by Stratum. These

[1128] Consultancy Agreement between Niko Resources (Bangladesh) Ltd. and Stratum Developments Limited, 1999, 2000, 2002, 2003, Exhibit R-315, p. 2.

services go beyond advice and information which consultants often agree to provide. They include an active role in representing Niko in its relations with BAPEX and the Government.

1604. It must also be borne in mind that the payments were not only the fee for these services; according to the Management Agreement, they also covered "*all costs and expenses of Stratum including but not limited to personnel, overhead, rent, material and supplies, vehicles, transportation, taxes third party charges and insurance*".[1129] The agreements with Stratum also provided that the consultant could retain third parties to assist in performing the services; but that had to be done "*without charging any additional fees therefor*".[1130]

1605. When considering the value of the agreed services the costs of any alternatives must be borne in mind. As the above quoted observation from the Senior Commercial Officer of the DFAIT show, the arrangement with Fife Feathers does not seem to have provided adequate local support. On 11 May 1998 he wrote

> *… Niko needs to be much more active on the ground here, both in terms of senior executives from Calgary and through an effective local partner/agent which can deal with the government and other IOCs.*[1131]

1606. When assessing the value of the Sharif/Stratum services from the perspective of Niko, one would have to consider the budget that would have been necessary for a Canadian company having no experience in Bangladesh to establish its own presence in order to pursue the project. The costs of sending personnel (with expatriation benefits) and setting up a local office for a period of years might well have been in the same order as the amount Niko agreed to pay to Mr Sharif, or even more – without counting the opportunity cost of losing the service of those personnel and with no assurance of success.

1607. Moreover, the explanations provided by the Claimant and Mr Sharif indicate that Mr Sharif played an important role in the development of the concept and the project. He was therefore well placed in introducing

[1129] Management Services Contract, Exhibit R-318, Article 4.
[1130] Management Services Contract, Exhibit R-318, Article 3.
[1131] Fax from the Department of Foreign Affairs and International Trade to PSA (DFAIT High Commission in Dhaka to the Coordinator South Asia Division in Ottawa) 11 May 1998, Exhibit C-195.

to the relevant authorities in Bangladesh the idea of developing marginal/abandoned gas fields, as Niko had done with success in India. As a recognised oil and gas specialist, familiar with the industry and with Bangladesh, the Tribunals consider that it was more than plausible that he had credibility with these authorities in the presentation of the project.

1608. The Respondents qualify the amounts due to Sharif/Stratum as "*huge sums of money*" and add:

> *That monthly payment was around 10 times the annual salary of a BAPEX or Petrobangla official at the time. In fact, that monthly payment was more than four times the annual salary of the Prime Minister of Bangladesh in 2015. This provided Qasim Sharif with huge sums of cash to be used to obtain the JVA. Considering that Niko paid Mr. Sharif's home and office rent and Niko had no operations whatsoever in Bangladesh at this time, it is hard to see what use would be made of this money other than to pay bribes.*[1132]

1609. The Claimant corrected this statement by pointing out that, according to an express provision of the Management Agreement, the agreed fee had to cover all costs of Stratum.[1133]

1610. The Claimant also questioned the relevance of a comparison with salaries in Bangladesh. The Respondents then compared the Sharif/Stratum compensation with the salaries of oil and gas workers at an international level, stating:

> *In 2010, more than a decade after the original Stratum agreement, the average annual salary for permanently staffed foreign laborers in the oil and gas industry in India was $77,800, and worldwide, oil and gas workers with "20+" years of experience in "Business development" earned average salaries of $126,600.*[1134]

1611. The Respondents also questioned that Mr Sharif, before he left his prior employment, "*was accustomed*" to compensation on the level of that offered by Niko. In support, the Respondents present a document stating that Mr Sharif of BJ Services Company Middle East was assessed for the

[1132] R-MC, paragraph 66.
[1133] C-CMC, paragraph 209, referring to the Management Agreement, Exhibit R-318, Article 4.
[1134] R-RC, paragraph 134.

year 2000-2001 on a declared income of Taka 458,640 (according to the Respondents corresponding to US$1,200).[1135]

1612. The Claimant discussed the various examples which the Respondents presented for comparison with the payments agreed with Sharif/Stratum. With respect to the Bangladesh tax return, it states that the document is of questionable value on a number of counts and cannot be taken as reflecting the full income of Mr Sharif. The Claimant points out that Mr Sharif had a residence in Texas and had his last employment with BJ Services in India, implying that he would have been paying taxes on what he earned in India.[1136]

1613. On this subject Mr Adolph testified:

> *Based on my substantial personal experience as an expatriate Country Manager, including from around the same time period in which Mr. Sharif was performing an apparently similar function for BJ Services, the suggestion that Qasim Sharif was paid a total of $1,200 per month by BJ Services as an expatriate Country Manager is, to put it politely, completely at odds with the reality of the international oil and gas business.*[1137]

1614. Similarly, the Claimant contested the comparison with data from the 2010 Oil & Gas Global Salary Guide, questioning the choice of categories and applications.[1138] It referred to the testimony of Mr Adolph:

> *In my personal industry experience, an expatriate working for a substantial North American Company as a Country Manager would expect to receive a remuneration package of a minimum of USD $250,000, but in many cases it would be at least double that, depending of the size of the company and the jurisdiction in which it was headquartered. To illustrate, after several years of growth, from 2009 onwards Niko Canada's Country Manager in India was receiving a remuneration package worth well over USD $500,000. On the other end, when I started as Country Manager with Niko in Bangladesh, I estimate that my total remuneration package was*

[1135] R-RC, 131 with reference to Computation of Income Tax for Mr. Quasim Sharif, 1 July – 31 December of 1999, Government of the People's Republic of Bangladesh, Office of the Deputy Commissioner of Taxes, Exhibit R-396.
[1136] C-RC, paragraph 87.
[1137] Brian Adoph Second Witness Statement (CONFIDENTIAL), paragraph 8.
[1138] C-RC, paragraph 94.

> *worth somewhere in the region of USD $250,000 to $300,000. I would also note that as Country Manager for Bangladesh, my role was technically subordinate to Qasim Sharif, who was President of Niko at the time.*[1139]

1615. In a more general manner, the Claimant distinguishes the payments agreed in the present case from those in the *Spentex* case by pointing out that in that case the claimant had failed to disclose the existence of consulting contracts and failed to produce documents despite repeated requests. In contrast, Niko not only disclosed the consultancy agreements and complied with the Tribunals' production orders. It also had published contemporaneously in its 2004 annual information form, available to the public, details of its material payments to consultants. The Claimant also pointed to the lack of qualifications of the consultants and the absence of evidence of services provided by the *Spentex* consultants.[1140]

1616. The Claimant also asserts that the agreed compensation was "*in line with industry practice*". In support, the Claimant refers in particular to the expert report of Mr Moyes and his explanations at the Hearing. In that report, Mr Moyes states the "*services provided by Mr Sharif, through Stratum, were significantly greater than a typical in-country advisor and went on for a significantly greater period than is typical*".[1141] With respect to the services actually provided by Mr Sharif, he relies entirely on assumptions which he had not verified.[1142] The verification of these assumptions will be addressed by the Tribunals below. If one accepts, however, the description of the services as a correct representation, Mr Moyes explanations are a useful contribution. He states:

> *His central role as Niko's sole presence in Bangladesh and management of all of its activities in Bangladesh, including the direct conduct of extensive substantive and regular communications (written and oral), technical presentations, and negotiations with numerous representatives of BAPEX, Petrobangla and the government, are functions that exceed the general role of a typical in-country advisor.*[1143]

[1139] Adolph Second Witness Statement (CONFIDENTIAL), paragraph 8.
[1140] C-PHB2 (CONFIDENTIAL), paragraphs 107 – 109.
[1141] Moyes Expert Report, paragraph 51 (b).
[1142] As he conceded at the Hearing in response to questions from the Tribunals (Tr. Day 6 (CONFIDENTIAL), p. 74); also in cross examination (p. 76).
[1143] Moyes Expert Report, paragraph 51 (b).

1617. The Respondents and the Investigators have not contested this statement, nor the observation that this broad scope of services reflects the general and valuable role of an in-country executive and advisor. Mr Moyes also points out another aspect of Mr Sharif's contribution:

> *Additionally, the fact the pursuit of marginal field development in Bangladesh was a concept developed by him and provided to Niko must also be considered in understanding his remuneration package. It is common practice in the industry for those who develop a play, concept or project to obtain a carried interest of some nature (often in addition to other remuneration), in particular where they then play a material role in carrying out the project. The remuneration package of Stratum is entirely consistent with industry practices and norms.*[1144]

1618. Here again, Mr Moyes cannot provide any evidence about Mr Sharif's role in the development of the project; what he describes as "*the fact*" is, on his side, a mere assumption. The Claimant has referred to this role and Mr Sharif has described it in his interview by the RCMP;[1145] it has not been questioned in the Arbitrations. The Tribunals have no reason to doubt that Mr Sharif did in fact play an important role in the development of the project. The explanations of Mr Moyes concerning industry practice appear plausible. In Bangladesh the idea of marginal/abandoned gas fields was new and Mr Sharif had pointed this out to Niko. He could explain to the relevant authorities in Bangladesh that Niko was in a position to develop them. Those parts of the Sharif/Stratum remuneration which provide for a share in future profits can be taken as a confirmation that Mr Sharif was not simply a consultant but made contributions which could justify that he be granted an interest in the success of the project.

1619. When considering this compensation, the monthly Management Fee must be seen in the context of the overall compensation package, the elements of which have been presented above. The central parts of this package are two provisions granting Stratum a share in the results of the project: the Carried Interest Agreement and the Consultancy Fee under the Consultancy Contract. With respect to the latter a Minimum Initial Consulting Fee of US$4 million was to be paid upon the conclusion of the

[1144] Moyes Expert Report, paragraph 51 (b).
[1145] Exhibit R-333; see also Mr Sharif's statement to the ACC, attached to e-mail chain from Brian Adolph, 15 March 2008, Exhibit C-176, p. 9.

JVA; but "*all monies paid under the Management Services Contract*" would be deducted from it.[1146] The monthly Management Fee can thus be seen as an advance on this initial consulting fee, except that, if no JVA was concluded, the monthly fees were lost for Niko. The Consultancy Fee itself consisted of a share in the project, expressed as US$0.03 per mcf of Niko's "*net share of established proven reserves based on an independent engineering report …*" Annual payments for increases in Niko's net share in the proven reserves were also foreseen.[1147]

1620. Such a fee arrangement is quite different from those described by the Respondents and the Investigators as typical for the corruption in Bangladesh. The Tribunals must consider its specificity when examining whether the fees are out of proportion with the services to be provided. This requires that the share granted to Sharif/Stratum be considered and the US$4 million of the initial consultancy fee and not simply the amounts payable as monthly Management Fees.

1621. The Claimant discusses the "*proportionality of Stratum's fees […] in the context of the potential value of the project*" and concludes that this value "*was orders of magnitude larger than the Stratum fees*". In support of this assertion, the Claimant takes the "*remaining, recoverable, and risked and probable gas reserves of the Chattak and Feni fields, as assessed in the Marginal Fields Evaluation at 319 BCF, and quantifies this volume at three possible prices for the gas (US$1.75/mcf, $2.25mcf and 2.70mcf), leading to a total revenue estimates of US$558.25 million, US$717.75 million and US$ 861.3 million, respectively. Niko's share in this revenue would be between 50% and 80%, depending on the applicable investment multiple.*"[1148]

1622. The Respondents have not contested this calculation. Indeed, they have quantified the loss to the Chattak field alone from the blowouts by

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[1146] Consultancy Agreement between Niko Resources (Bangladesh) Ltd. And Stratum Developments Limited, 1999, 2000, 2002, 2003, Exhibit R-315, Clause 6. The Respondents mischaracterize this provision by asserting that the payment of US$4 million was in addition to the monthly fee payments (R-RC, paragraph 134: "*And the monthly payment was not all: the Stratum agreements included additional promised payments in terms of a success fee of at least $4 million or more based on $.03 per MCF of Niko's share of proven reserves*").

[1147] Consultancy Agreement between Niko Resources (Bangladesh) Ltd. And Stratum Developments Limited, 1999, 2000, 2002, 2003, Exhibit R-315, Clause 6.

[1148] C-PHB1 (CONFIDENTIAL), paragraph 36

amounts of similar magnitude.[1149] They have, however, not addressed the valuation of the Sharif/Stratum services by reference to the value of the project. Apart from characterising the initial consultancy fee as high, "*stratospheric*" or by similar terms as excessive, the Respondents have not presented any other calculation that would place the agreed fees in proportion to the value of the services provided by Sharif/Stratum; nor have the Investigators.

1623. Without verifying in detail the Claimant's calculation of Niko's potential revenue from the project, the Tribunals consider it a useful approach to an examination of proportionality. In the absence of any contrary or alternative demonstration, they find the Claimant's conclusion in this respect as plausible. They have nevertheless examined attentively and in detail the Respondents' arguments and demonstrations relating to the monthly Management Fee.

1624. Concerning the comparison of this monthly fee with the compensation which Mr Sharif received at his previous employment and which he gave up for his work for Niko, the Tribunals do not find it reasonable to assume that this compensation was US$1,200, but rather part of a package reflecting work in more than one country. They did not find the Respondents' assertion in this respect as very helpful and accept Mr Adolph's observation as quoted above. Similarly, the comparative amounts of compensation for different oil and gas workers do not appear as relating to activities that are comparable to that of Mr Sharif in the given circumstance.

1625. The Tribunals have considered the testimony of Ms LaPrevotte concerning Mr Sharif's remuneration. They noted that she considered Mr Sharif as "*qualified to be an agent for Niko*" and that he had "*extreme expertise in the oil industry*".[1150] She nevertheless found his remuneration "*high*"[1151] but did not make any sustained attempt to determine with particularity whether the remuneration was disproportionate to the services he agreed to provide. Instead she considered the consultants globally:

[1149] R-RC, paragraph 272, Footnote 464 with references to R-MD, paragraph 237 and the Brattle Group Report.
[1150] Tr. Day 3 (CONFIDENTIAL), p. 182.
[1151] Tr. Day 3 (CONFIDENTIAL), p. 188, l. 18.

> *I was looking at how much were the Niko consultants paid and you can pull out [Mr Sharif] but I looked at all of the Niko consultants and I can tell you by looking at the next consultant, Selim Bhuiyan, he was paid $10,000 a month. He is a Bangladeshi in Bangladesh where the Minister's salary was $6,000 per year at the same time Mr Bhuiyan was being paid $10,000 per month and so I did not pick and choose whose salaries I looked at. I looked at the totality of the payments to the Niko consultants and found them high.*[1152]

1626. In other words, when assessing the legitimacy of Niko's agreements with consultants, Ms LaPrevotte amalgamated the engagement in 1998/1999 of Niko's principal in-country representative and the subsequent engagement of an additional consultant. The agreements providing for the engagement and for the compensation of Mr Bhuiyan were concluded in 2003, after the BNP Government had come to power in late 2001. It is questionable to assess the legitimacy of Niko's engagement of its principal representative in 1998/1999 in a sort of global assessment without distinguishing between the different consultants – amalgamating it with those of a different consultant engaged in 2003, in circumstances which, in the Respondents' own explanations, had fundamentally changed by the arrival of a Government of which Ms LaPrevotte herself described the corrupt character, calling it a Kleptocracy.[1153]

1627. Similar amalgamations are made by Mr Khan and the Respondents themselves who systematically refer to the Bhuiyan/Nationwide agreements and the surrounding circumstances. The Tribunals are of the view that the agreements which Niko concluded in 1998/1999 with Sharif/Stratum for its principal in-country representative must be clearly distinguished from those concluded some five years later with Mr Bhuiyan and Nationwide. The Tribunals do not consider it admissible to impute corruptive intent to Niko in 1998/1999 by reference to much later acts in very different circumstances. The Respondents' amalgamation of the Sharif/Stratum agreements and the Bhuiyan/Nationwide agreements is all the less admissible as the Respondents have emphasised the difference in the political situation during the Awami League and the BNP government. The Respondents have insisted heavily on the system of corruption under the BNP government. One may not assess the legitimacy of earlier agreements as if Niko had anticipated the installation of this system more than two years later.

[1152] Tr. Day 3 (CONFIDENTIAL), p. 187, ll. 7-18.
[1153] LaPrevotte First Witness Statement, section I. Corruption in Bangladesh in 2001-2006.

1628. For this reason, the Tribunals consider it important that the Sharif/Stratum agreements of 1998/1999 be examined separately from those concluded by Niko in later years during the BNP regime.

1629. In view of these considerations, Ms LaPrevotte's examination, amalgamating Niko's agreements, and other similar arguments by the Respondents and Mr Khan, are not helpful to the Tribunals for determining whether the agreed Sharif/Stratum compensation is disproportionate to the services they agreed to provide.

1630. The Tribunals are **not persuaded that the compensation agreed in 1999 by Niko in the Sharif/Stratum agreements was disproportionate to the services to be provided and thus must serve as a red flag for corruption**.

10.3.3.6 Compensation compared to services - actual

1631. The Tribunals have verified whether their conclusion concerning the proportionality of services and compensation warrant revision in light of the services actually provided and the payments made as compensation. This required an examination whether the services actually provided were indeed as important as the description in the agreements indicates and the payments actually made were in line with these agreements.

1632. Concerning the **payments actually made** by Niko to Sharif/Stratum, it is uncontested that in October 2003, Niko paid Stratum US$2.93 million.[1154] The Annual Information Form of Niko Canada, filed with the applicable Canadian securities regulator,[1155] states the following:

> *In October, 2003, Niko paid Stratum, under the terms of the consulting arrangement, an advance on the above fee of US$2.93 million, being*

[1154] See Barclays Plc./First Caribbean International Bank (Offshore) Limited, Niko Resources (Bangladesh) Ltd., Statement of Account, 1999-2004, Exhibit R-356, p. 46.
[1155] C-PHB1, paragraph 33.

> *US$4.0 million less the aggregate amount of the monthly fees paid by Niko to Stratum since its retainer in 1999.*[1156]

1633. The Respondents agreed that the attribution of the October 2003 payment occured as described. They noted the payment made by Niko on 21 October 2003 and explained that this *"$2.93 million was the remaining portion of the promised $4 million 'Consultancy Fee' to Stratum".*[1157]

1634. The Respondents however present a different calculation by reference to the payments made from Niko's account to Stratum, as shown in Ms LaPrevotte's table (the "*Spider Web*"). They assert that "*Niko paid almost US$5 million to Stratum and Qasim Sharif*".[1158] The amount is explained as follows:

> *In the Payments Chart, Respondents show that Niko paid more than US$ 4.9 million into the UBP bank accounts of Stratum and Qasim Sharif between October 1999 and 10 February 2006.*[1159]

1635. The difference between the US$4.9 million and the US$4 million pursuant to the Consultancy Agreement is due largely to the fact that the Respondents' calculation includes payments following the conclusion of the JVA, between November 2003 and February 2006 and, during the period before, some payments which seem to be additional to the monthly Management Fee. A precise reconciliation of the amounts has not been provided; but, for the present exercise, the Tribunals take it that US$4 million were paid by Niko for the work until the conclusion of the JVA and that the balance quoted by the Respondents ("*more than US$ 4.9 million*" or "*almost US$5 million*") include services provided thereafter.

1636. As will be discussed in the following section, Mr Sharif also applied part of the compensation he received upon completion of the JVA to the payment of Mr Bhuiyan and his company Nationwide, who were engaged by Niko but treated as subcontractors to Sharif/Stratum.

[1156] Niko Resources Ltd., Renewal Annual Information Form for the Year Ended March 31, 2004, 31 July 2004, Exhibit C-160, pp. 32-33; see also C-CMC, paragraph 213 and C-PHB1 (CONFIDENTIAL), paragraph 32.
[1157] R-MC, paragraph 108.
[1158] R-PHB1 (CONFIDENTIAL), paragraph 56.
[1159] R-PHB1 (CONFIDENTIAL), paragraph 53.

1637. The Tribunals see no indication that the payments actually received by Sharif/Stratum from Niko for achieving the JVA exceeded the amounts agreed in 1999.

1638. Concerning the **services actually provided** by Sharif/Stratum, the Claimant asserts that the "*evidence clearly establishes that the fees paid to Stratum under the Consultancy and Management Services Agreement were proportionate having regard to the amount and value of the work expected of and duly performed by Stratum*".[1160] Concerning these services, the Claimant states:

> *… the evidentiary record is replete with examples of the extensive work Mr. Sharif/Stratum performed in relation to the JVA. This work included attending virtually all meetings with the Respondents and the Government of Bangladesh, as well as conducting substantial written correspondence (including of a technical nature), and engaging with the Canadian High Commission in Bangladesh. In essence, the record establishes that Stratum performed two roles for Niko in connection with the procurement of the JVA: first, the role of "in-country manager" – i.e. as the primary or sole in-country day-to-day point of contact for the government (including Petrobangla and BAPEX), and for all other third parties in connection with the project; and second, the role of "in-country advisor" – i.e. providing lobbying and government relations advisory services and related logistical support, such as the facilitation of meetings with key government representatives.*[1161]

1639. Mr Sharif explained in the RCMP interrogation the division of responsibilities between him and Mr Hornaday:

> *SHARIF: Well Bill HORNADAY was in charge basically he was operationally, operationally so when we got started with this Bob made it very clear to me that Qasim you will handle all the permits and making sure that, that you know we can get to work. […] So it was very clear you know that, that Bill would run the operations and I would do the liaising with the government making sure that all the finer issues in the country were, were not ah, you know we have certain regulations you have to follow you have to get all the permits and all those things, there were environmental issues, there's you know.*[1162]

[1160] C-PHB1 (CONFIDENTIAL), paragraph 35.
[1161] C-PHB1 (CONFIDENTIAL), paragraph 24.
[1162] Sharif Transcript, Exhibit R-333, p. 11, ll. 411-414, 423-428.

SHARIF: *A lot of issues, you know that was my area.*

DUGGAN: *So you brought the Bangladeshi expertise essentially?*

SHARIF: *Yes.*[1163]

1640. The Respondents refer to the Claimant's quotations from the Stratum agreements and the description of certain activities, such as "*evaluations and advice on exploration, development and production of petroleum*," "*prepare studies, survey, and other programs for transportation and marketing*," "*provide, by secondment or otherwise, individuals to assist in the conduct of operations*," and "*maintain accounting records*." They assert that "*Stratum did none of this legitimate work*".[1164]

1641. In particular, the Respondents insist on the absence of evidence for the alleged activities of Sharif/Stratum:

> *Niko has provided, for example, no communications between Stratum and Niko discussing legitimate work: no progress reports, meeting minutes, budgets, or any indication of a normal business relationship with Niko. Indeed, either Mr. Sharif almost never communicated with Niko, or Niko considered such communications unhelpful to its case. Notably, there is no record of any discussion of the deal with Mr. Bhuiyan. The only communication Niko provided is a suspicious 1998 e-mail from Mr. Sharif, then Niko's agent, forwarding comments that should only have been exchanged between Petrobangla and the Ministry.*[1165]

1642. With respect to the Claimant's assertion that Mr Sharif's 2002 bank statements "*reflect multiple payments associated with the ordinary expenses of maintaining an office and fulfilling Stratum's role*", the Respondents reply:

> *Niko mentions payments for travel, internet service, security, phone, insurance, and a golf tournament totalling about US$ 2000, and provides no evidence they had to do with Stratum's work for Niko.*

[1163] Sharif Transcript, Exhibit R-333, p. 12, ll. 432-436.
[1164] R-PHB2 (CONFIDENTIAL), paragraph 10.
[1165] R-PHB2 (CONFIDENTIAL), paragraph 11.

These payments could be Mr. Sharif's personal expenses, as there is no indication that Stratum even had an office in 2002.[1166]

1643. When contesting the legitimacy of the US$4 million payment to Mr Sharif, the Respondents point out that "*Niko's witnesses claim no knowledge of what he might have done to earn so much*".[1167]

1644. The Tribunals note that Mr Hornaday joined Niko Canada in 2001 as Vice President, International Operations. His main responsibilities during the period up to the signing of the JVA were primarily in connection with Niko's operations in India. He added, however, that he was made aware of key developments in Bangladesh and made "*occasional visits there from 2001 to 2004*".[1168] Mr Adolph explained that he had not been involved in any negotiations relating to the JVA and "*indeed had no involvement in matters relating to Bangladesh until [he] was appointed as Country Manager at the end of 2004*".[1169]

1645. The Tribunals also note that, when the production of documentary evidence was considered in the Arbitrations, the emphasis with respect to Niko was on payments made by Niko and Niko Canada in Bangladesh. The Tribunals therefore gave special instructions in Procedural Order No 15 concerning Financial Records.

1646. The evidence which the Respondents had requested since May 2016, with respect to the production of which the Tribunals gave directions in Procedural Order No 15 and at other occasions, was however much broader and included "*communications dated between 2001-2003 regarding negotiations and signing of the JVA, and dated from 2004-2006 regarding negotiation and finalisation of the GPSA, between Niko Resources Ltd. its affiliates, its officers or its agents*" and several persons including in particular Mr Sharif.[1170] While the Tribunals shared the Claimant's view that the Respondents document production requests were "*overbroad*", they nevertheless recognised the relevance of the directions sought by this request and made clear in Procedural Order No 14 that they wished to "*proceed along the lines indicated in the*

[1166] R-PHB2 (CONFIDENTIAL), paragraph 12.
[1167] R-PHB1 (CONFIDENTIAL), paragraph 38.
[1168] Hornaday Witness Statement in the Corruption Claim, paragraphs 6 and 7.
[1169] Adolph Second Witness Statement (CONFIDENTIAL), paragraph 7.
[1170] Letter from the Respondents to the Claimant, 19 April 2016, produced to the Tribunals with the Respondents' letter of 10 May 2016, Annex C.

Respondents' request". In any event, it was in the Claimant's interest to provide evidence for the legitimacy of the activity of Sharif/Stratum, including for instance any relevant reports which Mr Sharif may have produced.

1647. Examining the documentary evidence produced, the Tribunals note that, since 2000, almost all correspondence in Bangladesh is signed by Mr Sharif and the correspondence to Niko is addressed to him. Where there are records of meetings, they also show Mr Sharif's attendance, occasionally together with Mr Hornaday.[1171] A rare exception seems to have been the meeting on 22 April 2003 where Mr Sharif could not attend ("*due to pre-occupation*") and Niko was represented by Mr Gazi Nuruzzaman Babul.[1172]

1648. The Tribunals also note the message of Mr Sharif of 13 November 1998, in which the reports on the progress of the project and communicates Petrobangla's comments on it.[1173] This report reflects communications and the gathering of information on actions of BAPEX, Petrobangla and the Ministry as well as on developments of other petroleum projects in Bangladesh; and it provides advice for further action and planning. This information and advice no doubt required substantial work on the side of Mr Sharif, and significant interventions which replaced costly trips of executives from Canada or elsewhere.

1649. There is, however, in the record no similar report for subsequent work by Mr Sharif. In his RCMP interrogation Mr Sharif explained that "*most of [his] discussions were with Bob [Ohlson]*" and "*on some occasions with Ed [Sampson] and not so much but ah, and it was Bob's role to talk to everybody*"; after 2004, communications were with Ed Sampson. Mr Sharif also explained that communications with the head office were "*mostly on the phone with Ed some emails*".[1174]

1650. The Tribunals find it surprising that there should be no written traces about these communications, no reports on Mr Sharif's activity on the progress of the JVA negotiations and other events relevant to Niko's

[1171] See e.g. Minutes of the Meeting to Finalize the JVA between BAPEX Negotiating Committee and Niko for the Development of the Marginal/Abandoned Gas Fields of Chhatak, Kamta and Feni, 25 June 2001, Exhibit R-11.
[1172] Letter BAPEX to the Niko Vice President, dated 26 April 2003, Exhibit C-155.
[1173] Internal Niko Email, attaching Petrobangla Memorandum, Exhibit C-98.
[1174] Sharif Transcript, Exhibit R-333, pp. 12, 14 and 27.

project and activity, as this had been provided in the message of 13 November 1998. This is yet another example of the gaps in this otherwise voluminous record – surprising gaps in the evidence produced by both sides in these Arbitrations, as were noted at repeated occasions by the Tribunals.

1651. The evidence that was produced, however, does show, in relation with the Respondents and the Government, the sustained presence of Mr Sharif as Niko's in-country representative, not only in a formal manner but also to address in detail the complex issues of substance which arose in the negotiations. The Tribunals see as examples the Minutes of the 25 June 2001 meeting,[1175] mentioned already, the letter to BAPEX of 8 July 2002,[1176] the letters to the State Minister of 30 July,[1177] 10 August[1178] and 15 September 2002[1179] and the letter to the State Minister of 3 March 2003.[1180] Indeed even Mr Chowdhury testified that Mr Sharif contacted him during his brief tenure at the Ministry.[1181] As will be discussed in the following section, Mr Sharif also assumed the payment out of the US$4 million compensation of Mr Bhuiyan and his company, Nationwide.

1652. In view of the evidence relating to Mr Sharif's activity in Bangladesh and his compensation, the Tribunals are not persuaded that the services actually provided by Sharif/Stratum were substantially different from those for which compensation had been agreed and disproportionate to the compensation he actually received.

1653. Generally on the allegation of the Sharif/Stratum contracts as a case of "*layering*", the Tribunals found the **engagement of Mr Sharif and his company Stratum as a reasonable business decision**, quite remote from the modus operandi which the Respondents and the Investigators described under that label.

[1175] Exhibit R-11.
[1176] Exhibit C-140.
[1177] Exhibit C-142.
[1178] Exhibit R-353.
[1179] Exhibit C-144.
[1180] Exhibit C-152.
[1181] E.g. Chowdhury Witness Statement, paragraph 6.

10.3.4 Nationwide, Salim Bhuiyan and Giasuddin Al-Mamoon

1654. The third consultant engaged by Niko was Nationwide Company Limited, a Bangladeshi company represented by Mr Salim Bhuiyan. The Respondents allege that Niko also engaged Mr Giasudding Al-Mamoon and through him Mr Tarique Rahman, one of the sons of former Prime Minister Zia. According to the Respondents, corrupt payments were channelled through these channels to the State Minister and to the Prime Minister. The Claimant accepts that it engaged Nationwide and Mr Bhuiyan in June/July 2003 and states that it does not know of any other contracts nor of any corrupt payments through them.

10.3.4.1 The agreements with Nationwide

1655. [redacted],[1182] [redacted][1183] These two agreements were produced by the Claimant to the Respondents as part of the document production and are covered by the confidentiality provisions.[1184]

1656. [redacted]

1657. [redacted]

[1182] [redacted]

[1183] [redacted]

[1184] Procedural Order No 17 and above Section 2.4.7.

[redacted][1185]

1658. [redacted]

[redacted]1186

1659. [redacted]

1660. [redacted]

[redacted]

[redacted]

1185 [redacted]

1186 [redacted]

[redacted]1187

1661. [redacted]1188

[redacted]

[redacted]

1663. The Respondents assert that Niko also concluded an **agreement with Mr Mamoon** which preceded Niko's agreements with Nationwide and which, according to the Respondents, included also Mr Tarique Rahman. No such agreement has been produced in the Arbitrations.

1664. [redacted]1189[redacted].

10.3.4.2 The agreements with Mr Mamoon

1665. The **Respondents** assert that

1187 [redacted]

1188 [redacted]

1189 C-CMC, paragraph 229.

> *… in early 2002, Niko contacted Giasuddin al Mamoon and promised to pay substantial "consultancy fees" in exchange for approval of the JVA. Niko's efforts and bribes were successful: it got the access it wanted to the new Government, all outstanding issues were resolved in its favor, and it was awarded the JVA without a competitive tender in October 2003.*[1190]
>
> *Mr. Sharif admitted that he hired Giasuddin al Mamoon as a "super lobbyist" to get the JVA and GPSA concluded.*[1191]
>
> *… in 2002, Mr Sharif made a deal with Giasudding al Mamoon….*[1192]
>
> *Mr Sharif […] made the deal with Mr Mamoon to get the BNP Government's support …*[1193]

1666. The Respondents rely on Mr Khan's statement:

> *[W]hen interviewed by investigators, Mamoon confirmed that Qasim Sharif sought him out to assist Niko to obtain the JVA and GPSA at a time when the approval of the JVA was being withheld.*[1194]

1667. According to the Respondents, Niko concluded three agreements with Mr Bhuiyan, in November 2002 and June and July 2003 and an "*unwritten agreement with Mr Mamoon in early 2002*".[1195]

1668. The Respondents summarise their position on the role of Mr Mamoon in their Second Post-Hearing Submission:

> *In sum, Qasim Sharif made a "consultancy" agreement with Mr. Mamoon, providing a retainer payment and $1,000,000 for the execution of the JVA. Mr. Mamoon later put him in contact with Mr. Bhuiyan, the State Minister intervened on Niko's behalf, the JVA was concluded with Chattak East, competition was avoided, and the first $500,000 was paid and shared between Mr. Bhuiyan, Mr. Mamoon, and the State Minister.*[1196]

1669. **The Claimant** asserts that it has no knowledge about any involvement of Mr Mamoon in connection with the JVA:

[1190] R-MC, paragraph 63.
[1191] R-MC, paragraph 72.
[1192] R-MC, paragraph 74.
[1193] R-PHB1 (CONFIDENTIAL), paragraph 12.
[1194] Khan First Witness Statement, 44, quoted at R-MC, paragraph 74.
[1195] R-RC, paragraph 9.
[1196] R-PHB2 (CONFIDENTIAL), paragraph 25.

> *As Niko clearly stated in its First Post-Hearing Brief, Niko has no knowledge of any discussions between Stratum/Qasim Sharif and Giasuddin Al Mamoon in connection with the JVA. Similarly, while Niko was fully aware of the engagement of Nationwide and the terms of its remuneration, it has no knowledge of any purported remuneration-sharing agreement between Nationwide/Mr. Bhuiyan and Mr. Mamoon. In this regard, Niko again emphasizes that the only "evidence" that such an agreement existed comes from unreliable hearsay statements that cannot be properly explored or tested in these proceedings.*[1197]

1670. The Respondents' assertions concerning the role of Mr Mamoon rely (i) on the transcripts of the explanations he provided when interrogated by the RCMP on 1 and 2 November 2008[1198] and (ii) on the transcript of Mr Sharif's interrogation.[1199] The involvement of Mr Mamoon is mentioned also in Mr Bhuiyan's subsequently withdrawn Confession[1200] and in the report about his interrogation.[1201] For reasons of simplicity the Tribunals refers to these three persons, Mr Sharif, Mr Mamoon, and Mr Bhuiyan, as "*witnesses*", while not forgetting the procedural reservations which have been raised against them being treated as such.

1671. **Mr Mamoon's explanations** are summarised by the Respondents as follows:

> *Mr. Mamoon admitted in a videotaped interview with Canadian law enforcement officers that Niko's agent, Qasim Sharif, approached him in early 2002 to enter into an arrangement and that they agreed that Niko would pay him a monthly retainer of thousands of dollars and a success fee of one million dollars to procure the JVA and GPSA for Niko. He further admits that he then set out to obtain the approval of Niko's agreements, with the assistance of State Minister Mosharraf Hossain.*[1202]

and

[1197] C-PHB2 (CONFIDENTIAL), paragraph 34; see also C-PHB1 (CONFIDENTIAL), paragraph 99.
[1198] Transcript of Statement by G. Al-Mamoon, RCMP, File No. 2003-1943 (updated), 1 November 2008, Exhibit R-316, and 2 November 2008, Exhibit R-352, respectively.
[1199] Sharif Transcript, RCMP, File No. 2005-1943, Exhibit R-333.
[1200] Selim Bhuiyan Confession Statement, Tejgaon P.S. Case No. 20(12)2006, Exhibit R-324.
[1201] Bangladeshi Investigatoris' Notes on Selim Bhuiyan Interview, undated, Exhibit R-317.
[1202] R-RC, paragraph 5.

Mr. Mamoon told the RCMP that he entered into a "sub-agent agreement" with Mr. Sharif to help Niko in 2002. Under the terms of the agreement (which Niko has not disclosed), Mr. Mamoon was promised a million dollars and a monthly retainer of $5,000 - $10,000. After some months, seeing that it was going to be more complicated than originally anticipated to get the JVA on the terms Niko wanted, Mr. Mamoon directed Mr. Sharif to sign the Nationwide agreement with Selim Bhuiyan.[1203]

1672. The Tribunals have verified the transcript of Mr Mamoon's interrogation. The transcript is difficult to understand.[1204] As the comparison with the video tape[1205] shows, this is due to a large extent to the evident difficulties of Mr Mamoon to express himself in English. The Tribunals conclude nevertheless that the summaries presented by the Respondents in the above quotations reflect essential aspects of the transcript with respect to Mr Mamoon's and Mr Bhuiyan's agreements with Niko as described by Mr Mamoon. They remain, however, to be completed on a number of points.

1673. Considering the transcripts of the Mamoon interrogation in comparison with the Sharif transcripts and the withdrawn Confession of Mr Bhuiyan, the following picture emerges:

1674. All three "*witnesses*" confirm that, prior to the agreement with Mr Bhuiyan through Nationwide, Mr Sharif had been in contact with Mr Mamoon and had made an agreement with him. The Mamoon transcript is the most detailed in describing this relationship.

10.3.4.3 The explanations in the Mamoon Transcript

1675. Mr Mamoon explains that, during the first quarter of 2002, a friend brought him into contact with Mr Sharif.[1206] When Mr Sharif presented the project to him, Mr Mamoon found it interesting and in the interest of

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[1203] R-PHB1 (CONFIDENTIAL), paragraph 55, relying on Gias U. Al-Mamoon Statement Transcript, RCMP, File No. 2003-1943 (updated), 1 November 2008, Exhibit R-316, pp. 16-17, 41, 5, 18; Sharif Transcript, Exhibit R-333,, pp. 36 – 37.
[1204] The Claimant describes the Mamoon transcripts as "*generally garbled and ambiguous*", C-PHB2 (CONFIDENTIAL), paragraph 37.
[1205] Also filed as Exhibit R-316.
[1206] Mamoon Transcript, 1 November 2008, Exhibit R-316, p. 7.

the country: "*So he had a very good proposal […] Bangladesh government, they don't invest any, not a single penny*".[1207] "*If they're getting gas, so they'll share with our government, our government they don't have invest any single penny*".[1208]

1676. Mr Mamoon was prepared to support the project with the State Minister whom he knew well.[1209]

1677. Mr Mamoon first said that he made an agreement with Mr Sharif. He then explained that, on his side the agreement was signed by Manzurul Islam, whom he had known since 1993 or 1994.[1210] The person also is referred to as Moudoud Islam;[1211] Mr Mamoon clarified "*Moudoud Islam on behalf of me, Moudoud Islam signed agreement*".[1212]

1678. Mr Mamoon first identified the other party to the agreement as Mr Sharif: "*Qasim Sharif and Manzurul Islam they are signing one agreement*".[1213] When one of the interrogators asserted "*you knew he was acting on behalf of Niko. Right, did he tell you he was acting on behalf of Niko?*", Mr Mamoon responded: "*Yeah. I mean … um… see Vice-President or President of Niko …*" and added "*you know, he presented his Visiting Card*".[1214] Later in the interrogation, Mr Mamoon stated: "*that time me and my friend, Moudoud Islam we're, we're the agent of Niko Resources Bangladesh Limited*".[1215]

1679. The agreement between Mr Sharif and Mr Mamoon provided for a lump sum which Mr Mamoon remembers as one million US Dollar and a monthly retainer for two or three years.[1216] Elsewhere reference is to

[1207] Mamoon Transcript, 2 November 2008,Exhibit R-352, p. 49.
[1208] Mamoon Transcript, 1 November 2008, Exhibit R-316, p. 45.
[1209] Mamoon Transcript, 1 November 2008, Exhibit R-316, p. 9, 22 and 31.
[1210] Mamoon Transcript, 1 November 2008, Exhibit R-316, pp. 50, 51 and 53.
[1211] E.g. Mamoon Transcript, 2 November 2008, Exhibit R-352, pp. 67 and 75.
[1212] Mamoon Transcript, 2 November 2008, Exhibit R-352, p. 71.
[1213] Mamoon Transcript, 1 November 2008, Exhibit R-316, p. 51; similar p. 50.
[1214] Mamoon Transcript, 1 November 2008, Exhibit R-316, p. 52. In the exhibit produced by the Respondents, these two passages are underlined. There is no explanation whether this has any relation to the response given by Mr Mamoon.
[1215] Mamoon Transcript, 2 November 2008, Exhibit R-352, p. 71. The Tribunals note in passing some surprise that Mr Mamoon whose statements often are unclear, at this particular occasion, is recorded in the transcript as giving the complete name of the company.
[1216] Mamoon Transcript, 1 November 2008, Exhibit R-316, p. 51; Mamoon Transcript, 2 November 2008, Exhibit R-352, p. 50.

three or four years of a retainer and "*I think five thousand UD dollar or ten thousand I don't know, I forget …*".[1217] He did not specify when the payment of this retainer would start.

1680. Following this agreement Mr Mamoon went to the State Minister, Mr Mosharraf Hossain. In the RCMP transcript the meeting is described as follows:

> *So, this is good proposal. So I, I propose it to ah, Mosharraf.*
>
> *[…]*
>
> *Moshahrraf, he after go through this ah, proposal you ah, ah, he was also convinced yes, this is good project.*[1218]

1681. Later in the RCMP interrogation, Mr Mamoon developed the presentation:

> *So I went to Mosharraf because I, I know him very, very well and he' s a nice chap. And dynamic. So I went to Mosharraf then explain him that this is a business proposal. If you help me then we can do this business. Then af, after heard the proposal then he told yes, this is a nice proposal. So you can try I can, I can help you my 'in legal process, what, what do you need? After then ah, then ah, we told Qasim SHARIF to ah, submit a proposal or something. Then I think Qasim SHARIF submit the proposal.*[1219]

1682. The Respondents explain that, following the submission of the project to the State Minister, "*there was resistance form the former Finance Minister and others stating 'we need to do tender or something', and the State Minister told him it was difficult for the government to implement Niko's project, Mr Mamoon brought in Selim Bhuiyan …*"[1220]

1683. As he explained in the RCMP interrogation, Mr Mamoon waited for several months but had no feedback and no progress was made on Niko's project. The State Minister's assurance that he could "*help*" remained without effect. Mr Mamoon noted that there was opposition to the project which

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[1217] Mamoon Transcript, 1 November 2008, Exhibit R-316, p. 5; see also Mamoon Transcript, 2 November 2008, Exhibit R-352, p. 70, where only five thousand US Dollar are mentioned.
[1218] Mamoon Transcript, 1 November 2008, Exhibit R-316, p. 45.
[1219] Mamoon Transcript, 2 November 2008, Exhibit R-352, pp. 50-51.
[1220] R-MC, paragraph 87, relying on the Mamoon transcript; see also R-PHB1 (CONFIDENTIAL), paragraph 55.

the State Minister could not overcome; he could "*not do this thing*";[1221] "*no this project can not be happen*".[1222] Mr Mamoon concluded that Mr Mosharraf Hossain "*tried but he failed*".[1223]

1684. Mr Mamoon does not have clear explanations about the reasons for this failure. He was firm in declaring to the RCMP that the reason for the failure was not a question of money:

> *KABIR:*[1224] *Was there any problem with the negotiations or for the …*
>
> *MAMOON: … no …*
>
> *KABIR: … money that means?*
>
> *MAMOON: No, nothing, nothing.*[1225]

1685. From the State Minister's explanations Mr Mamoon seemed to conclude that the State Minister's inability to advance the project was due to opposition in the administration. During the course of the interrogation, Mr Mamoon gave a number of explanations pointing in this direction:

> *…I heard that time ah, some parties committee people, are, our ex ah, Finance Minister they told no, we need ah, for this we are, we need to do tender or something.*[1226]
>
> *… bureaucratic people who were involved in ah, say Petrobangla Ministry or …*[1227]

1686. When he was questioned more specifically who had the influence "*for getting through the project*", the stated that it was the Ministry of Mr Mosharraf Hossain; but before he could approve the case had to be vetted by the purchase committee. He explained:

> *MAMOON: … eight or nine, senior minister they represent the.....*
>
> *[…]*

[1221] Mamoon Transcript, 1 November 2008, Exhibit R-316, p. 45.
[1222] Mamoon Transcript, 2 November 2008, Exhibit R-352, p. 51.
[1223] Mamoon Transcript, 1 November 2008, Exhibit R-316, p. 5.
[1224] Apparently one of the interrogators who spoke Bengali.
[1225] Mamoon Transcript, 2 November 2008, Exhibit R-352, p. 51.
[1226] Mamoon Transcript, 1 November 2008, Exhibit R-316, p. 45.
[1227] Mamoon Transcript, 2 November 2008, Exhibit R-352, p. 51

DUGGAN: Umn, he's got to be able to get that through and the Prime minister heads that committee?

MAMOON: No. That committee headed by ah, our Finance Minister.

DUGGAN: She's not the senior member of the committee?

MAMOON: No, Finance Minister, our Finance Minister in Bangladesh (indiscernible) Finance Minister he always chair the ah, purchase committee meeting.

DUGGAN: So it's the Finance and the Law Minister has to approve the contract legally, right vett [sic] it?

MAMOON: Ah, yes.

DUGGAN: Okay.[1228]

1687. When he understood that the State Minister would not succeed to get "*the project through*", Mr Mamoon lost interest: "*then I silent*".[1229]

So after two three months when I ah, when I get this feed back from Mosharraf, then I think no, no, this, this can not be happen. So if I ah, my give time to this project, time will be wasted. So then I totally silent.[1230]

and

I quit from this project … not quit but was I was totally silent.[1231]

1688. Several months later, Mr Sharif and Mr Bhuiyan came to Mr Mamoon to ask him whether he was still interested and, if he was not interested, whether Mr Bhuiyan could take over the assignment. Mr Mamoon agreed to let Mr Bhuiyan proceed with the project but requested that he receive a share of the success fee:

And after three or four month, Salim BHUlYAN come to my office and when he approach me, that if you are not interested then give it to me. I can try. That time I told him yes you can try this but ah, if, if it can happen, so can you give me something?[1232]

[1228] Mamoon Transcript, 1 November 2008, Exhibit R-316, p. 62; confirmation of the role of the purchase committee, discouraging the project, See: Mamoon Transcript, 2 November 2008, Exhibit R-352, p. 54.
[1229] Mamoon Transcript, 2 November 2008, Exhibit R-352, p. 74.
[1230] Mamoon Transcript, 1 November 2008, Exhibit R-316, p. 46.
[1231] Mamoon Transcript, 1 November 2008, Exhibit R-316, p. 9.
[1232] Mamoon Transcript, 1 November 2008, Exhibit R-316, p. 9.

1689. Later in the interrogation Mr Mamoon added some further detail:

> *I, I know Salim BHUIYAN from ah, 19, ah, 90. So Salim, then I, I know Mr. Qasim SHARIF, Salim BHUJYAN told me the yeah, this project belongs to you and your friend Manzurul . So you are not doing anything ah, and ah, Manzurul tried to do this project, but ah, he, he don't have that much time because he's an established businessman. So ah, I know Salim BHUIYAN people know that Salim BHUIYAN their background is project business. They do lot of project. So, if, if you ah, if you ah, clear me then ah, I want to, I want to do this project. If your give me the clearance. So I think ah, yes, because I, I'm not doing anything. So if he, he can do this business there is no wrong with me. So I just ah, ask Salim BHUIYAN in front of Qasim SHARIF, dah, if, if you make through this business so I, I, I explain Salim BHUIYAN ah, I think this, this with me and Manzurul, Qasim SHARIF committed this, this so …*
>
> *[…]*
>
> *… if you can do this business so can you give us something. So he told me yes, of course why not. Then chapter is closed. Salim BHUIYAN got clearance and he make his own way.*[1233]

1690. According to Mr Mamoon's statements provided during the RCMP investigation. Mr Sharif and Mr Bhuiyan then made a new agreement:

> *Then Qasim SHARIF and Salim BHUIYAN, they made it another agreement. I don't know, what is the terms condition and what thing with that, that agreement. So they make a agreement and Salim BHUIYAN start work.*[1234]

1691. Based on the information in the record of these Arbitrations, Mr Mamoon said that the scope of work in the new agreement was the same as for the one he had concluded: "*job is same previous work*"; but he did not know the financial conditions: "*this is his secret he never discloses to me*".[1235]

[1233] Mamoon Transcript, 2 November 2008, Exhibit R-352, pp. 55-56.
[1234] Mamoon Transcript, 1 November 2008, Exhibit R-316, p. 18.
[1235] Mamoon Transcript, 2 November 2008, Exhibit R-352, 83.

10.3.4.4 Mr Sharif's explanations

1692. The explanation which Mr Sharif gave in the RCMP interrogation corresponds in some respects with that of Mr Mamoon. Mr Sharif stated that he first went to Mr Mamoon. He did not know Mr Bhuiyan until Mr Mamoon introduced him and told Mr Sharif "*he's our guy so you will do the contract with him*";[1236] and he elaborated:

> *… Mamoon said, "Salim is the, is the point man."*
>
> *[…]*
>
> *Is the point man so please organize the agreement with him. So we'd organise the agreement with Salim. And after the project happened we paid him.*[1237]

1693. According to the transcript of his RCMP interrogation, Mr Sharif explained the reasons why he first went to Mr Mamoon, but he did not give any details of the agreement concluded with Mr Mamoon.

1694. Mr Sharif also provided some confirmation as to by whom the decisions concerning the Niko project were made, in particular the importance of what he called the "*bureaucrats*", as distinct from the "*political people*". Mr Sharif described the opposition from Petrobangla and BAPEX, specifically with respect to Chattak East: "*so that puts the people in the ministry in a difficult situation because they cannot make that decision, they cannot say*".[1238] he identified Dr Kamal Siddique, the Principal Secretary at the Prime Minister's office, as a person of decisive influence and explained that the break-through was brought about by the opinion of the Law Ministry.[1239] The influence of the State Minister on the "*bureaucracy*", according to Mr Sharif, "*was probably zero*".[1240]

[1236] Sharif Transcript, Exhibit R-333, p. 31.
[1237] Sharif Transcript, Exhibit R-333, p. 36.
[1238] Sharif Transcript, Exhibit R-333, p. 34.
[1239] Sharif Transcript, Exhibit R-333, p. 34.
[1240] Sharif Transcript, Exhibit R-333, p. 33.

10.3.4.5 Explanations in Mr Bhuiyan's Confession

1695. **Mr Bhuiyan stated in** what is referred to here as **his Confession**[1241] that, when he first met Mr Sharif at Mr Mamoon's office "*sometime in 2002*", Mr Sharif told him that "*he has had an understanding with Mr Mamoon on the matter*".[1242] Mr Bhuiyan's reaction, according to the Confession, was that he could provide useful assistance with subcontracts for the construction of pipelines, gas stations and other work that would be required, once the JVA had been concluded. He made a proposal to this effect and "*[o]n the basis of [this] proposal Mr Qasim asked [him] to cooperate with Niko to get the work*".[1243]

1696. In his Confession, Mr Bhuiyan explained that Mr Mamoon would "*help to get various Government approvals at different stages*" for the JVA and the GPSAs for Feni and Chattak. Upon successful completion "*Niko will give Mr Mamoon six (6) crore Taka and 240 thousand US Dollar at three stages*",[1244] the Taka amount in two equal instalments, one at the completion of the JVA, the other after signing of the Chattak GPSA; the US Dollar amount would be paid in 24 monthly instalments of US$10,000, starting with the Feni GPSA.

1697. Mr Bhuiyan stated that he "*agreed to assist*"; but he does not mention any new contract, whether the contracts of June and July 2003 that are on the record or the November 2002 contracts mentioned in them. From this Confession it appears that there was just one "*understanding*" between Mr Sharif and Mr Mamoon and Mr Bhuiyan provided assistance in the performance of this "*understanding*".

1698. With respect to the performance of this understanding, Mr Bhuiyan's Confession states that, one week after he had agreed to assist Mr Mamoon in the work for Niko,

> *… Mr Mamoon and I went to the ex-Energy State Minister Mr. Mosharraf's House, and Mr. Mamoon explained full subject to State minister and sought help from him. Ex-State Minister after listening assured his help to his best abilities. Thereafter I used to contact Mr.*

[1241] For details see below Section 11.5.1.
[1242] Bhuiyan Confession, Exhibit R-324, p. 5.
[1243] Bhuiyan Confession, Exhibit R-324, p. 5.
[1244] Bhuiyan Confession, Exhibit R-324, p. 5.

> *Mosharraf regularly on this subject and he used to say that the work is in process. Mr. Mamoon also used to keep in touch with him regularly, and follow up with him.*[1245]

After the JVA was concluded,

> *… as per promise from Niko, they deposited 3 crore Taka in my account at Standard Chartered Bank in Gulshan branch at different times. At different times in various amounts Mr. Quashem Sharif deposited total of 3 crore Taka in my account. From that money I gave Mr. Mamoon 80 lac Taka by one pay order and at different times in different sums paid by cash cheque 1 crore Taka. I gave Mr. Mamoon total 180 lac Taka. From the money deposited in my account, I paid the Ex-State Minister Mr. Mosharraf, at different times in different amounts, total 60 lac in cash. The balance of 60 lac Taka I kept for my work. It is worth mentioning here that Mr. Mamoon had said to me that he is keeping the majority portion of the taka because Tarique Rahman is also with him.*[1246]

1699. At an exchange rate of 60 lakh to a US Dollar, the US$500,000 received by Mr Bhuiyan correspond to the 3 crore mentioned in his Confession. At that rate, the allocation corresponded to US$300,000 to Mr Mamoon and US$100,000 to the State Minister and to Mr Bhuiyan.

1700. **The Tribunals note** that all three statements coincide in as much as Mr Sharif, as Vice President of Niko, first contacted Mr Mamoon in 2002 and made an agreement (or "*understanding*") with him in terms that were very similar if not identical with those of the Bhuiyan/Nationwide agreements of June/July 2003 (and presumably also those of their predecessors in November 2002) and that, upon conclusion of the JVA, payments as per these agreements were made. It also appears from the accounts of the three "*witnesses*" that it was Mr Mamoon who not only determined the remuneration but also the scope of the work. In view of the close resemblance in the records of the statements of all three witnesses, the Tribunals accept, despite the reservations against these records taken individually, that Mr Mamoon was indeed engaged by Mr Sharif, acting for Niko, to support Niko's project.

1701. The differences concern the questions as to who actually signed the Mamoon agreement with Niko and the degree of involvement of Mr

[1245] Bhuiyan Confession, Exhibit R-324, p. 6.
[1246] Bhuiyan Confession, Exhibit R-324, p. 6.

Mamoon after the time when Mr Bhuiyan agreed "*to assist*". These questions do not appear essential for the resolution of the issues before the Tribunals.

1702. There is one point, however, where the explanations in the Mamoon Transcript find a confirmation by other evidence: this point concerns the reasons for the entry of Mr Bhuiyan into the relationship, assisting or replacing Mr Mamoon; these reasons are addressed only in the Mamoon Transcript. Mr Mamoon explained that, after he had brought the project to the State Minister and had received the assurance of his support, no progress was made. After some time, the State Minister informed him that he faced objections against the project as it was pursued by Niko and he was unable to overcome these objections. In that situation Mr Mamoon did not wish to waste his time with a project with only limited chances of success.

1703. This explanation finds support in the Respondents' version of the circumstances of the State Minister's intervention. They write that in July 2002, "*Ministry officials held [a meeting] with BAPEX and Petrobangla officials at which they confirmed that Chattak East could not be considered marginal/abandoned and could not be included in the JVA*". They continue: "*Niko and those promised bribes from Niko interjected themselves to reverse the consistent position of the Ministry, BAPEX, and Petrobangla*".[1247] The Respondents then refer to a letter which Niko had written to the State Minister on 10 August 2002, attaching a legal opinion by a lawyer from Moudoud and Associates, the firm of the Law Minister,[1248] and conclude as follows:

> *The State Minister, already aware of Niko's deal with Mr. Mamoon, wrote a note on the letter before passing it on for further action:*
>
> *This matter is hanging […] indecision for a time. This is unfortunate. A very simple matter [has] been made complicated. The main issue is an 'FOU' has already been […] which is more or less binding. It is a question of implementation. Why BAPEX has to give approval –*

[1247] R-MC, paragraph 86.
[1248] Letter from Niko Resources (Bangladesh) Ltd. to Ministry of Power, Energy, and Mineral Resources, 10 August 2002, Exhibit R-353.

Ministry should give the approval. A legal advise to this is also enclosed. Please take immediate action as per FOU.

Thus, the State Minister, after Niko agreed to bribe Mr. Mamoon, unquestioningly accepted the self-serving "legal" opinion interpreting the FoU that Niko had obtained from the Law Minister's private law firm.[1249]

1704. Despite this opinion from a barrister of the Law Minister's private law firm and the written support of the State Minister, Petrobangla and BAPEX did not change their position and Niko's objection to the exclusion of Chattak East was disregarded. In other words, as Mr Mamoon had stated in the RCMP interrogation, the State Minister's intervention remained without effect. Niko had to wait more than another year before the JVA was concluded.

1705. Taking the information from the documents available in these Arbitrations as a start, the following sequence of the Mamoon/Bhuiyan agreements would seem the most probable:

- Agreement with Mr Mamoon some time after the first quarter of 2002, concluded according to Mr Mamoon by Mr Islam on his behalf probably with Niko;
- [redacted][1250]
- [redacted][1251]
- [redacted][1252]

[1249] R-MC, paragraphs 86-87.

[1250] [redacted]

[1251] [redacted]

[1252] [redacted]

1706. Concerning the **payments actually made to Mr Mamoon** following the conclusion of the JVA, the Respondents assert that Mr Mamoon was paid "*a total of approximately US$308,000*".[1253] In support, the Respondents rely on a statement in the ACC Charge Sheet, asserting that from the money received from Mr Sharif, Mr Bhuiyan paid to Mr Mamoon

> *Taka 80 lakh by a single pay order and Taka 1 crore by several cash cheques on several dates to Mr Mamun totalling Taka 1 crore 80 lakh and Taka 60 lakh to the then Minister of State AKM Mosharraf Hossain in cash on several occasions.*[1254]

1707. That statement appears to be taken from the above quoted passage of Mr Bhuiyan's confession. At least there is no other basis for this allocation in the record and the ACC Charge Sheet does not refer to any evidence.

1708. The Claimant pointed out at the Hearing that the only payment by Mr Bhuiyan to Mr Mamoon that is supported by documentary evidence is a payment for one crore eight lakh. This amount is evidenced by a pay order of 7 January 2004;[1255] but this pay order is not for 80 lakh, as stated in Mr Bhuiyan's confession and the ACC Charge Sheet, but for 1 crore 8 lakh, corresponding at the rate of 60:1 to US$180,000; the Respondents indicate the amount of US$184,000, likely reflecting nothing more than a different exchange rate. Elsewhere the Respondents also refer to a "*pay order for the amount Mr Bhuiyan confessed to transferring to Mr Mamoon (about US$300,000)*"; but the support on which the Respondents rely is an order to Mr Bhuiyan and only for 20 lakh (corresponding to some US$33,333).

1709. At the Hearing the Claimant presented an extract from the Mamoon interrogation, where one of the interrogators asserted that 1 crore 80 lakh were paid to Mr Mamoon and Mr Mamoon corrected him stating that he received only one crore eight lakh.[1256] In response, the Respondents did not refer to the "*different sums paid by cash cheque*", mentioned in Mr Bhuiyan's confession but referred to another passage in Mr Mamoon's

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[1253] B-MD, paragraph 35.
[1254] ACC Charge Sheet for *Niko Graft Case*, Exhibit R-211, p. 20, quoted at B-MD, paragraph 35, Footnote 42.
[1255] Payment Order from Salim Bhuiyan to Giasuddin A. Mamoon, Exhibit R-225.
[1256] Slide 53 of the Claimant's Opening Statement, Exhibit CH 13, referring to the Mamoon Transcript, 2 November 2008, Exhibit R-352, p. 88.

interrogation in which he had mentioned a loan from Mr Bhuiyan which he did not have to pay back.[1257]

1710. Thus, the Tribunals have seen no evidence for the payment of the alleged balance "*several cash cheques on several dates*" in a total 72 lakh (US$120,000). When the Respondents assert in the Table of Outgoing Payments[1258] that their "*evidence also shows that Mr. Bhuiyan paid an additional amount to Mr. Mamoon (totalling about US$300,000)*", it must be clarified that **only US$180,000 find support by evidence on the record**.

10.3.4.6 Mr Mamoon as channel for Niko's bribes and as agent of the Prime Minister

1711. **The Respondents** describe Mr Mamoon and his role with respect to Niko's alleged bribes in different ways. They see in him (i) as a channel for Niko's corrupt payments to the State Minister and to the Prime Minister, acting in the same way as Mr Bhuiyan and his company Nationwide; they also see him (ii) as an agent of the Prime Minister and her office and they refer to him as "*super lobbyist*".

1712. In the first of these roles, that as channel for bribes, the Respondents attribute to him the same function as that of Mr Bhuiyan:

> *… Niko sought Mr. Mamoon's and Mr. Bhuiyan's assistance to channel bribes to the State Minister and the Prime Minister's son to overcome the long-standing, legitimate positions of Respondents and Ministry public servants.*[1259]

1713. In another function, the Respondents describe Mr Mamoon as "*agent of the Prime Minister's office*".[1260] They do so presumably because of his close relation to the Prime Minister's son, Tarique Rahman. Describing Mr Mamoon as agent of the Prime Minister's office, in the Respondents' view, seems to justify their assertion that payments to him were bribery: "*bribing an agent of the Prime Minister's office (Giasuddin al Mamoon)*".[1261]

[1257] R-PHB1 (CONFIDENTIAL), paragraph 44, FN 75, referring to Mamoon Transcript, 1 November 2008, Exhibit R-316, pp. 15-16.
[1258] Table of Payments Referenced in R-320, Exhibit RH-14, p.2.
[1259] R-PHB1 (CONFIDENTIAL), paragraph 303.
[1260] R-RC, paragraph 184, and R-PHB1 (CONFIDENTIAL), paragraph 196.
[1261] R-PHB1 (CONFIDENTIAL), paragraph 196.

1714. Finally, the Respondents quoted Mr Sharif who described Mr Mamoon as a "super lobbyist":

> *P [presumably Mr Bhuiyan] worked with an individual named MAMOON, who was known as a "super lobbyist" in regards to his activities with the Bangladesh government.*[1262]

1715. The Respondents assert that "*Mr Sharif admitted that he hired Giasuddin al Mamoon as a 'super lobbyist' to get the JVA and the GPSA concluded*".[1263]

1716. While **the Claimant**, as quoted above, denies having any knowledge about discussions or agreements between Sharif/Stratum and Mr Mamoon, it points out that Mr Mamoon is not a government official;[1264] and it does not accept that the record in the Arbitrations justify the conclusion that Mr Mamoon's "*involvement necessarily entailed the involvement of Tarique Rahman, which in turn (based on the false comparison to the Siemens case) inevitably infers corrupt influence in the project*".[1265]

1717. **The Tribunals** have examined the evidence concerning the involvement of Mr Mamoon and note that in the RCMP interrogation, Mr Sharif explained in some detail the reasons why he engaged Mr Mamoon as consultant. He emphasised the importance of being associated with Mr Mamoon **during the implementation of the project**, "*the support we could get from MAMOON you know when we were actually running the operations*".[1266] Mr Sharif was asked about "*the nature of MAMOON's power*" and he explained:

> *...my understanding I can tell you about my understanding. That he and Tarique single handily was responsible for the overwhelming majority for the strategies they took during the election for BNP to win so many seats in the parliament. This was my understanding. And this was in the rumors and media and all the top AWAMI people or*

[1262] Federal Bureau of Investigation, FD-302, Transcript of Interviews, 10 April, 15 May 2008, Exhibit R-327, p. 3, referred to in R-MC, paragraph 72.
[1263] R-MC, paragraph 72.
[1264] C-PHB1 (CONFIDENTIAL), paragraph 100.
[1265] C-PHB1 (CONFIDENTIAL), paragraph 101.
[1266] Sharif Transcript, Exhibit R-333, p. 105.

BNP people that I met that's what they said. So when I went to see MAMOON it was my understanding that just his name because MAMOON would not led his name to anybody. He would not do just any project you know. I'm sure he was after high dollar projects ours was not a high dollar project. But ours was I think sexy enough that it had been talked about and there was a lot of media ...[1267]

1718. Mr Sharif elaborated on this aspect:

The primary purpose of doing the agreement with MAMOON was to give us protection in Bangladesh. Is that, so that we have somebody politically so strong so overwhelming that ah we will not get killed you know once we go to our, once we are in operation you know because we need to the local politicians in Feni and Chattak we need them out of our way. You know we don't want our barges stopped, we don't you know we need a political cover.[1268]

In addition Mr Sharif explained:

SHARIF: … You know just not even for him just for his name, so that we could have his name and if we needed any help with the police any regulators with this, with that you know just prevent bad things from happening to us. That was the whole idea.

DUGGAN: Okay, it was insurance type thing....

SHARIF: ....yeah, basically, you know I mean.

SCHOEPP: I, I believe your expression during the last interview was you couldn't, you couldn't even get a cup of tea somewhere at the minister's office unless you had some sort of....

SHARIF: ....yeah....

SCHOEP. … connection …

SHARIF: … I mean you, yeah you be you know ah, if I called the secretary to see me you know it the call won't get past the his assistant.

DUGGAN: Okay.

[1267] Sharif Transcript, Exhibit R-333, p. 66.
[1268] Sharif Transcript, Exhibit R-333, pp 34-35.

SHARIF: If MAMOON assistant, MAMOON does not have to call it, MAMOON's assistant calls the secretary's office I can see him in half an hour probably.[1269]

1719. Prompted by Corporal Duggan, one of the interrogators, Mr Sharif also highlighted the usefulness of Mr Mamoon's support. Corporal Duggan explained that, although the Canadian investigators "*had the law on [their] side*", they faced many "*bureaucratic impediments*" by "*small people*", "*blocking you just for the sake of blocking you*":

DUGGAN: … we still had great difficulty in getting things done because there, there was many bureaucratic impediments.

SHARIF: Yeah.

DUGGAN: Where we had, I hate to use the term but small people.

SHARIF: Yeah.

DUGGAN: Um, blocking you just for the sake of blocking you.

SHARIF: Yes, absolutely....

DUGGAN: I think it's ah....

SHARIF: ....absolutely.

DUGGAN: Ah.... '...

SHARIF: Absolutely, so when you have a guy like MAMOON on board you know you can just forget about those guys. You know and if MAMOON calls the secretary then you go see him.[1270]

1720. Mr Sharif developed the point by an example concerning the transportation of materials to Niko's work sites:

… having a guy like MAMOON as our agent gave us a lot of protection from all this little guys. Especially the problem is this you go work in Feni and the council chairman says no, no ah, this road there won't be any trucks going in to this site, you know. No, you know we're done we cannot work, nobody will dare to drive, you cannot find a transport company that will drive in there you know. But he will never say that

[1269] Sharif Transcript, Exhibit R-333, pp. 38-39.
[1270] Sharif Transcript, Exhibit R-333, p. 65.

if he knows MAMOON is our, is our agent they will never get in our way.[1271]

1721. Mr Sharif added an example for such administrative interventions and the costs they caused to a project; and he concluded:

> *So these are the sort of things that, that was foremost in my mind drilling a well in Bangladesh has its challenges but it's nothing compared to the logistical challenges.*[1272]

1722. Finally, the references must be mentioned which Mr Sharif made to the relationship of Mr Mamoon to Tarique Rahman, the son of the Prime Minister who had a leading role in the BNP. He stated that, jointly with Mr Rahman, Mr Mamoon "*single handily was responsible for the overwhelming majority*"[1273] of the BNP in the 2001 elections and decided "*who will be the State Ministers in different ministries*".[1274]

1723. Mr Mamoon emphasised the importance of his relationship with Mr Rahman. He attributed fifty percent of his success, power and influence to Mr Rahman and fifty percent to his own competence as a business man; at least this is what the Tribunals understood from the following passage, which also gives an idea of the difficulties in understanding the transcript of Mr Mamoon's interrogation:

> *My power is say, my power is fifty percent, I'm the friend of Tarique RAHMAN. I'm fifty, because of, I'm the friend of Tarique RAHMAN. And another fifty percent say you are, you are, you, you are the um, you are (indiscernible) my ah, say Niko project is come to your, your credit. You are taking monies from say three, three project are coming, say you are taking money from Mr. NAME, so if Mr. NAME give you one taka, why not me. I can give you one ta, taka or one take twenty percent. Twenty-five percent. So fifty percent what is this? They yes, because, because of Tarique RAHMAN friend, yeah, obviously fifty percent people know me yeah, yes, I'm the friend of Tarique RAHMAN. This is number one. And number two I am, I, I also a business man.*

[1271] Sharif Transcript, Exhibit R-333, p. 66.
[1272] Sharif Transcript, Exhibit R-333, p. 66.
[1273] Sharif Transcript, Exhibit R-333, p. 66.
[1274] Sharif Transcript, Exhibit R-333, p. 33.

I'm starting my career in 1986. I have now a days, I have almost ten to twelve industry. And money …[1275]

1724. Similar statement about Tarique Rahman are repeated at different occasions during the interrogation; at some stage Mr Mamoon summarised it:

… obviously I'm a, number one I'm a business man, number two I'm ah, attached with power.[1276]

1725. For the reasons explained, **the Tribunals** take these statements with caution, as they are untested by examination of their authors at a hearing. The Tribunals see no indication in them that would support the Respondents' descriptions of Mr Mamoon in the first of the roles attributed to him: assuming that Mr Mamoon's statement about the basis of his influence is correct and he did indeed derive this influence to fifty percent from his association with Mr Rahman, does not make him an "*agent of the Prime Minister's office*". It does not justify the assertion that payment to him, in itself, must be taken as an act of corruption. The transcript of Mr Mamoon's RCMP interrogation makes it clear that Mr Mamoon considered his transaction with Mr Sharif and Niko as his own business, not as the business of Mr Rahman or the Prime Minister and her office. Explanations by Mr Khan that such agency role may have occurred in other circumstances, such as the *Siemens* case, if they were established, are not evidence for accepting that Mr Mamoon took this role in the Niko case.

1726. The Tribunals also do not accept the Respondents' second characterisation of Mr Mamoon's role; they do not believe that Mr Mamoon can be considered simply as a "*layer*" or conduit by which Niko passed money to Government officials, in the *modus operandi* described by the Investigators for the *Siemens* case. Whatever else he may have been, in the Tribunals' estimation, Mr Mamoon plainly operated independently from Niko.

1727. The description given by Mr Sharif suggests that the role of Mr Mamoon and the agreement with him had two other purposes. One of them is what Corporal Duggan, in the quotation above, described as "*insurance*", i.e. discouraging vexatious interference in the operation of the project. The

[1275] Mamoon transcript, 1 November 2008, Exhibit R-316, p. 56.
[1276] Mamoon transcript, 2 November 2008, Exhibit -352, p. 65.

plausibility of this explanation of Mr Mamoon's role has not been addressed by the Respondents. In any event, it would become effective only after the conclusion of the JVA and is unrelated to the agreement on the GPSA. It need not be considered in the present context.

1728. The other role, which in the view of the Tribunals seems to have motivated Mr Sharif in engaging Mr Mamoon, corresponds to the third of the three roles which the Respondents attributed to him: according to the statements by Mr Sharif quoted above, Mr Mamoon was engaged as a lobbyist, or "*super-lobbyist*" and expected to provide access to relevant people in the Government and support for Niko's efforts to obtain the JVA and the GPSA.

10.3.4.7 Mr Mamoon as Lobbyist, engaged to exercise influence

1729. **The Claimant** discusses lobbying and support services in the context of the Bhuiyan/Nationwide agreements. It expected from Mr Bhuiyan

> *… to deliver the one aspect of Stratum's mandate that it had been struggling to perform effectively: specifically, providing lobbying and logistical support in relation to engagement with the government, especially in the face of the intransigent reversal of positions of BAPEX and other public servants, as reflected predominantly in the positions taken by Mr. Elahi as described below.*[1277]

1730. Referring in particular to the testimony of Mr Chowdhury and Mr Elahi and the positions taken by them and others towards Niko's project, the Claimant explains:

> *The record also shows that, at the time Nationwide in particular was retained, there was a compelling reason for the retention of an effective lobbying and government relations consultant in order to try to break a deadlock created by misguided and ill-informed obstinacy on the part of the officials with whom Niko was dealing. Indeed, the testimony of Mr. Chowdhury and Mr. Elahi provided telling insight into the obstinacy that Niko faced at the time.*[1278]

[1277] C-PHB1 (CONFIDENTIAL), paragraph 102.
[1278] C-PHB1 (CONFIDENTIAL), paragraph 181.

1731. These observations can be applied also to the engagement of Mr Mamoon whose services were retained prior to Niko's agreements with Mr Bhuiyan.

1732. The Claimant argues that the engagement of consultants to provide such lobbying services "*was indeed common practice in the oil and gas industry in Bangladesh, including by the major and super-major oil companies who participated in the 1998 PSC bid rounds*".[1279] The Claimant also refers to testimony by Ms LaPrevotte who "*freely acknowledged that lobbying was a large industry in the U.S., and that she understood that common lobbying activities included facilitating meetings or phone calls with Government decision-makers, and attempting to persuade such decision-makers of the merits of a particular course of action".*[1280]

1733. The Claimant concludes that the engagement of Nationwide for such lobbying activity was thus "*for entirely legitimate purposes*".[1281] In the circumstances, the Claimant's conclusion can be taken as representing their view also with respect to the engagement of Mr Mamoon who, according the Tribunals' view, preceded Mr Bhuiyan and Nationwide.

1734. **The Respondents** argue that, as lobbyists or otherwise, Mr Bhuiyan and Mr Mamoon engaged in illegal activities, paying bribes and "*exerting personal influence*":

> *The so-called "effective lobbying and government relations" efforts undertaken by Niko's agents comprised of distributing Niko's money and exerting personal influence to induce the Government to override honest public servants and give Niko benefits to which it was not entitled. Niko admits it paid Mr. Bhuiyan to get the Government to take the extreme position it did. Neither Niko's methods nor the interpretations it obtained from the Law Minister withstand scrutiny.*[1282]

1735. The Tribunals have examined in Section 6.5.4 the Respondents' argument concerning the law of Bangladesh, as expressed in Section 163 of the Penal Code, sanctioning "*any gratifications whatever, as motive or reward for inducing, by the exercise of personal influence, any public*

[1279] C-PHB1 (CONFIDENTIAL), 58, referring to earlier explanations in C-RC, paragraphs 114-115.
[1280] C-PHB1 (CONFIDENTIAL), paragraph 59, referring to Ms LaPrevotte's testimony at Tr. Day 3 (CONFIDENTIAL), p. 198, ll. 6-18.
[1281] C-PHB1 (CONFIDENTIAL), paragraph 102.
[1282] R-PHB2 (CONFIDENTIAL), paragraph 43.

servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person". They concluded that this provision did not prohibit contracts for lobbying in general, as argued by the Respondents, but only the exercise of "*personal influence*", in the sense of bringing to bear special personal relations in order to induce a public servant to perform the desired action.

1736. To apply this provision to the situation before these Tribunals, one would have to examine whether (i) the relationship between Mr Mamoon and the State Minister could be characterised as "*personal*", in the sense used in Section 163 of the Penal Act and (ii) that Mr Mamoon was paid (or promised payment) by Mr Sharif or Niko to rely on that relationship in order to influence the action of the State Minister with respect to the JVA.

1737. In the Tribunals' understanding of the crime under Section 163 of the Penal Code is correct, there are reasons to assume that the relationship between Mr Mamoon and the State Minister could be characterised as "*personal*". It does not seem that family ties exist between the two; but according to the transcript of Mr Sharif's interrogation, "*MAMOON decided who will be the different State Ministers*".[1283] If such were indeed his position, one may presume that Mr Mamoon's personal relationship with the State Minister gave him a strong basis for inducing the State Minister to act in a certain manner, thus exercising "*personal influence*".

1738. At the RCMP interrogation, this relationship was also the subject of an exchange between Mr Sharif and Corporal Duggan. When asked by the interrogators whether the money given to Mr Mamoon would go to the State Minister, Mr Sharif responded:

> *… why would he? First of all there has to be need for him to give to Mosharraf [the State Minister]. It's usually the other way around. Mosharraf is suppose to raise money you know to give to MAMOON that's why he, he placed all this seven or eight State Ministers in the Ministries. They're supposed to raise money give it to the political party. You know.*
>
> *DUGGAN: Okay.*
>
> *SHARIF: Or give it to MAMOON give to political party because these are the top guys in the political party you know. So it was not even a*

[1283] Sharif Transcript, Exhibit R-333, p. 33; see also p. 66, as quoted above.

consideration that MAMOON would pay Mosharraf. You know why would MAMOON pay Mosharraf? I mean for what, he, he appointed him, you know.

DUGGAN: He controls him?

SHARIF: He controls him, its, it's not the other way around you know. What would Mosharraf do for us? Mosharraf told me very clearly from very beginning you know that the, that he that you know MAMOON is his major benefactor and he didn't have to say it. It was just so implied …[1284]

1739. The Tribunals are mindful about the concern that reliance on this and other transcripts raise. The statement of Mr Sharif has not been tested at a hearing and, in any event, it is second hand, reporting what Mr Mamoon told him. It does, however, reflect the understanding of Mr Sharif when he decided to engage Mr Mamoon for the promotion of Niko's project. These observations correspond to the manner in which the Investigators have described the political network in Bangladesh during the BNP period. Assuming, with this precaution, that Mr Mamoon did indeed consider himself the "*benefactor*" of the State Minister, it may well be justified to treat this relationship as "*personal*" in the sense of Section 163.

1740. The next question to be examined is thus whether Mr Mamoon was engaged to "*exercise*" this personal relationship and whether he did exercise it. In other words, was Mr Mamoon engaged to obtain the intervention of the State Minister by relying on his position as his benefactor? In the Tribunals' understanding of Section 163 of the Penal Code, it is not the existence of a personal relationship which makes this section applicable, but the exercise of the potential for influence resulting by this relationship and the engagement to induce the public servant "*by the exercise of personal influence*".

1741. None of the persons involved in the engagement of Mr Mamoon as Niko's lobbyist have appeared before the Tribunals; and there is no documentary evidence on this engagement and its objectives.

1742. There is, however, evidence on the manner in which Niko considered the issues for which it engaged support. As shown in Section 8 above, there

[1284] Sharif Transcript, Exhibit R-333, p. 67.

was consensus among all concerned that the Niko project was in the interest of the Respondents and Bangladesh; so were the conditions negotiated by the Respondents with Niko. What held up the finalisation of the JVA was the Chattak East issue and possibly the Swiss Challenge question. Niko had expressed its views in this respect openly both in correspondence and in meetings; the view was shared by the Law Ministry and the Tribunals found it not unreasonable.

1743. Niko's position, thus, was of a nature that could very well be defended on a rational basis, as Niko did in correspondence, without there being a need to make it prevail through the exercise of "*personal influence*". The explanations given by the Claimant, as quoted above, are not implausible.

1744. There is indeed reference in the Mamoon transcript to the joint understanding of Mr Mamoon and the State Minister that the Niko project was a good project which was in the interest of the country: "*So he had a very good proposal […] Bangladesh government, they don't invest any, not a single penny*".[1285] After having examined the proposal, the State Minister "*was also convinced yes, this is a good project*".[1286] This would seem to indicate that the State Minister supported the Niko project not because of Mr Mamoon's exercise of personal influence but as a result of his own assessment of the value of the project and its interest for the country.

1745. This being said, the explanations contained in Mr Mamoon's RCMP transcript concerning his discussion with the State Minister about the Niko project also contain other indications. In the relevant passages there is mention of a "*business proposal*" and Mr Mamoon's request for help; these passages might indicate that Mr Mamoon appealed to a personal relationship with the State Minister and the resulting duties.

1746. In the end, it may well have been a combination of the two, the personal relationship between Mr Mamoon and the State Minister and the conviction that the project was in the interest of the country.

1747. The Tribunals can leave the question unresolved whether the intervention of Mr Mamoon with the State Minister and the fee he

[1285] Mamoon Transcript, 1 November 2008, Exhibit R-316, p. 45.
[1286] Mamoon Transcript, 1 November 2008, Exhibit R-316, p. 45.

requested for this intervention was an exercise of personal influence or not. The Tribunals do not have to decide the question whether Mr Mamoon must be condemned for violation of Section 163 of the Penal Code. The Tribunals' issue is whether the Agreements were procured by illegal means.

1748. It is clear from the transcript of Mr Mamoon's RCMP interrogation that Mr Mamoon's intervention with the State Minister remained without effect on the approval of the JVA. As explained above,[1287] the State Minister's support of the project met with the opposition from the "*bureaucrats*". The objections from BAPEX, Petrobangla and others were not overcome.

1749. Mr Mamoon's explanations are confirmed by the evidence about the course of events: the agreement with Mr Mamoon was concluded presumably during the first half of 2002 and his intervention with the State Minister must have occurred around that time. It took over a year until, in October 2003, the JVA was concluded. The sequence of events has been described above in Section 9. The obstacle was not the State Minister, but BAPEX and Petrobangla; the breakthrough was not due to Mr Mamoon's intervention with the State Minister but came about when BAPEX suggested that matter be submitted to the Law Ministry and by the opinions which the Law Ministry then delivered.

1750. In conclusion, there are good reasons to believe that the agreement of Mr Sharif for Niko with Mr Mamoon was for ordinary lobbying services; but even if the exercise of personal influence of Mr Mamoon with the State Minister was the objective or one of the objectives, **this agreement did not procure the JVA**.

10.3.4.8 The Bhuiyan/Nationwide agreements as "layering"

1751. Much of what has been said above about the agreement with Mr Mamoon also applies to the agreements with Mr Bhuiyan and his company Nationwide. Indeed, as explained above, Mr Mamoon stated that he passed on to Mr Bhuiyan the agreement that he (or Mr Islam for him) had

[1287] Section 10.3.4.2.

concluded with Mr Sharif. The Respondents quote the transcript of the RCMP interrogation:

> *… Mamoon said, 'Salim is […] the point man so please organize the agreement with him. So we'd organize the agreement with Salim. And after the project happened we paid him.*[1288]

1752. The RCMP transcript records further explanations by Mr Sharif about the transfer of the assignment and the arrangements for the signature of the new agreements:

> *[…] the main agreement was signed by Bob [Ohlson] by Niko and then the secondary agreement Salim did not want Stratum to sign any agreement. He wanted Niko on the hook, he said we need […] to make sure that we have a foreign company […[the main company that holds the license here […] we want an agreement with Niko and that's how it was done. So I talked to Bob, Bob signed the agreement […] the agreements are structured between Niko and Stratum such that Stratum has to pay their, has to pay their fee […] once Stratum get paid by Niko …*[1289]

1753. Although it thus appears that the Mamoon agreement was passed on to Mr Bhuiyan, there are some important differences between the situation of the Mamoon agreement and that concerning Bhuiyan/Nationwide: there is written evidence for the second set of agreements with Nationwide, i.e. those concluded in June/July 2003; the terms of this second set thus are known. Moreover, the first phase of the Bhuiyan/Nationwide agreements, the one concerning the JVA, was completed and the agreed fees were paid by Mr Sharif out of the funds which Niko paid to him at this occasion.

1754. As in the case of the agreement with Mr Mamoon, the Respondents see in the agreements concluded by Niko and Mr Sharif with Mr Bhuiyan and his company Nationwide a clear example of "*layering*". In their view, Bhuiyan/Nationwide served as conduit for Niko's corrupt payments, following the *modus operandi* which the Investigators had seen with Siemens and other foreign companies. The Respondents' assertions to the effect that Mr Mamoon helped channel bribes to the State Minister and Prime Minister's son to overcome the opposition against the JVA, as quoted above, apply equally to Bhuiyan/Nationwide.

[1288] Sharif Transcript, Exhibit R-333, p. 36, quoted at R-MC, paragraph 84.
[1289] Sharif Transcript, R-333, p. 37.

1755. The Respondents and the Investigators argue that the agreement with Mr Bhuiyan and his company Nationwide reflects an attempt by Niko to distance itself from its corrupt payments.

> *The Niko agent [Mr Sharif] informed the F.B.I. that he was working with an individual in Bangladesh named Selim Bhuiyan. The Niko agent told the F.B.I. that he had hired Nationwide, a company owned by Bhuiyan, as a consultant for Niko to assist with obtaining contracts in Bangladesh. The Niko agent stated that he paid Nationwide for the work it was doing for Niko from the Stratum Development bank account in Switzerland. Based on my experience and knowledge of money laundering and corruption, it is clear to me that payments made from the Stratum Development account for work being conducted on behalf of Niko was done with the intent to distance Niko from the bribes being paid to officials and their family members in Bangladesh. The accounts opened for Niko Resources Bangladesh and for the Niko agent and for Stratum Development were open at a Caribbean bank and a Swiss bank, and thus transactions were not conducted from accounts in Canada or Bangladesh. This could be seen as evidence of an attempt to hide, disguise or conceal the origin and nature of the payments.*[1290]

1756. The Claimant disputes this characterisation of Mr Bhuiyan's role by noting the need and legitimacy of lobbying services. The arguments concerning the issues of principle have been addressed above in Section 6.5.4 when considering the case of Mr Mamoon. With respect to Mr Bhuiyan, the controversy concerns specifically the services which he was engaged to provide and which in fact he did provide.

1757. The Respondents and the Investigators describe Mr Bhuiyan as "*a consultant with no operational function*" and assert:

> *… Claimant provided no evidence of legitimate services Mr. Bhuiyan provided to earn US$500,000 or why Mr. Bhuiyan paid Mr. Mamoon if not as a bribe to be shared with Tarique Rahman, or why Mr. Sharif originally approached Mr. Mamoon for a subagent agreement to help Niko other than to pay him to obtain the approval of the Ministry and the Prime Minister's office.*[1291]

[1290] LaPrevotte First Witness Statement, paragraph 38.
[1291] R-PHB1 (CONFIDENTIAL), paragraph 111.

1758. The Respondents refer to the Claimant's assertions about Mr Bhuiyan's services and contrast these assertions with the testimony of the Claimant's witnesses at the Hearing. They quote from the Claimant's Counter-Memorial:

> *The specific nature of services to be provided under the Nationwide Consultancy Agreement were described as providing marketing and logistical support to Niko in securing the JVA and the GPSAs. It also specifically provided that:*
>
> *a. Nationwide would "provide all necessary liaison with Bapex, Petrobangla, Ministry of Energy & Mineral Resources, and the various relevant GOB agencies".*
>
> *b. Regular meetings between the parties' key personnel would take place a minimum of twice a month. …*
>
> *… Mr. Ohlson also advised Mr. Bhuiyan that Niko would be expecting him to meet with Niko regularly, and he requested that Mr. Bhuiyan apply for a long-term visa.…*
>
> *The record thus demonstrates that Nationwide indeed provided the services stipulated in the Nationwide Consultancy Agreement, and also that it would be providing and did provide such services following execution of the JVA. Nationwide was, as such, clearly not a mere conduit for bribes, as the Respondents allege.…*
>
> *Moreover, the evidence indicates that Nationwide, through Mr. Bhuiyan in particular, was still actively trying to assist Niko in obtaining a GPSA almost two years after the JVA was signed.*[1292]

1759. The Respondents then contrast these assertions with the testimony of Mr Adolph and Mr Hornaday at the Hearing. Mr Adolph said he was "*not sure*" about assistance by Mr Bhuiyan in obtaining the GPSA and in setting up meetings; he did not recall Mr Bhuiyan being mentioned in any of the correspondence; and did not know anything about what Mr Bhuiyan did and about the payments to him, whether promised or made. Mr Hornaday met Mr Bhuiyan only twice: the first time when he travelled with the State Minister to Calgary in June 2005; and the second time some years later "*in a hotel. It was just social*". He was not aware of the

[1292] C-CMC, paragraphs 233, 238-240, 243, quoted at R-PHB1 (CONFIDENTIAL), paragraph 48.

arrangements with Mr Bhuiyan and what he did with the money that Stratum paid him.[1293]

1760. After the Hearing, the Tribunals invited the Claimant, in one of the questions in Annex A attached to Procedural Order No 20, to "*specify which concrete services it expected from […] Mr Bhuiyan/Nationwide Co Ltd and under their respective contracts in consideration of the payments that the Claimant agreed to make to those consultants, and what services they actually provided, identifying any documents on record which are evidence for such services*".[1294]

1761. The Claimant responded by arguing:

> *… the evidentiary record emerging from the hearing provides strong evidence that Nationwide performed legitimate and valuable services in connection with the JVA, and was appropriately remunerated at a level that was in line with industry practice.*[1295]

1762. [redacted]

[redacted][1296]

1763. The Claimant also refers to the non-compete clause in the Nationwide Consultancy Agreement and Mr Moyes' explanations concerning the usefulness of local consultants.

1764. The Tribunals are not impressed by the description in the Nationwide Consultancy Agreement; the question they must address is whether these were truly the services he was expected to deliver.

[1293] Statements made at various times during the Hearing: Tr. Day 5 (CONFIDENTIAL), pp. 45, 55, 149, 152, 153.
[1294] Procedural Order No 20 (CONFIDENTIAL), Annex A, paragraph 5.
[1295] C-PHB1 (CONFIDENTIAL), paragraph 53.
[1296] [redacted]

1765. Mr Moyes had stated in his opinion that Mr Bhuiyan was a "*well-established and respected member of the Bangladesh community …*".[1297] Questioned by the Tribunals, he had to accept that he did not know Mr Bhuiyan and the statement was an assumption.[1298] His statements concerning the usefulness of lobbying services in general and specifically in Bangladesh have been considered above. The Tribunals agree with Mr Moyes' statements in principle; but their task is to determine whether in reality such were indeed the services for which Mr Bhuiyan was engaged, and not for making payments to Government officials as alleged by the Respondents.

1766. The Claimant asserts that the services for which Nationwide was retained were legitimate and were in fact performed. With respect to testimony by witnesses from the Claimant's organisation, the Claimant points to the evidentiary difficulties which have been discussed above.[1299] It points to the testimony of Mr Adolph about a meeting with the State Minister in 2005, attended by Mr Bhuiyan as part of the Niko delegation;[1300] and to the testimony of Mr Hornaday, about his meeting with Mr Bhuiyan during his visit to Calgary in 2005.[1301]

1767. The activities of Mr Bhuiyan were confirmed by one of the Respondents' witnesses, Mr Chowdhury. In his witness statement he stated:

> *An associate of the Minister, Mr. Selim Bhuiyan, was very frequently in the Ministry. It was well-known that he was the Minister's money man. He came to my office one day and tried to impress upon me his connection with my State Minister. I did not appreciate his gesture and did not continue the conversation. He was very often in the Minister's office when I went in to discuss business and on one occasion I had to insist firmly with the Minister that it was inappropriate to discuss government matters in the presence of Mr. Bhuiyan.*[1302]

[1297] Moyes Expert Report, paragraph 51(c).
[1298] Tr. Day 6 (CONFIDENTIAL), p. 73, l. 7 to p. 74, l. 7; questioned by Professor Paulsson; quoted at R-PHB1 (CONFIDENTIAL), paragraph 187.
[1299] See Section 8.
[1300] Adolph Witness Statement on Corruption Claim, paragraphs 11-14, oral testimony Tr. Day 5 (CONFIDENTIAL), p. 45, l. 12 to p. 47, l. 6, referred to in C-PHB1 (CONFIDENTIAL), paragraph 61.
[1301] Tr. Day 5 (CONFIDENTIAL), p. 149, l. 1 top. 150, l. 2, referred to in C-PHB1 (CONFIDENTIAL), paragraph 61.
[1302] Chowdhury Witness Statement, paragraph 12.

1768. At the Hearing, Mr Chowdhury confirmed that "*Mr Bhuiyan was frequently in the Ministry*";[1303] and:

> *I visited the Minister's office a number of times, and on most of the occasions, I found him sitting beside the Minister.*[1304]

1769. Mr Chowdhury does however not know what Mr Bhuiyan was discussing with the State Minister: "*They did not discuss in my presence anything.*"[1305] Mr Chowdhury also testified that Mr Bhuiyan approached his colleagues at the Ministry, the Joint Secretary and Mr Chowdhury's Assistant Secretary. When asked whether Mr Bhuiyan ever talked to him, Mr Chowdhury replied "*He could not get a chance*".[1306]

1770. The Claimant also refers to Mr Chowdhury's testimony concerning the role of Mr Bhuiyan. When asked whether Mr Bhuiyan "*was acting as an agent for Niko with the Minister to get this process done*", he answered "*Yes*", and explained that he was told by his "*colleagues in the Ministry*".[1307]

1771. These statements find confirmation in Mr Bhuiyan's Confession. There he states that after the visit to the State Minister's house:

> *I used to contact with Mr Mosharraf regularly on this subject and he used to say that the work is in progress.*[1308]

1772. As a confirmation of the testimony of a witness who appeared before them, the Tribunals consider this statement to be of interest, despite the limitations on the evidentiary weight of this Confession that have been discussed elsewhere in this Decision.

1773. The Tribunals conclude from the evidence before them that **at least some of the services which Nationwide agreed to perform under the Consultancy Agreement were not a mere façade for a "*consultant*"** serving as conduit for bribes. They were a **lobbying activity which was actually performed**. Insofar as it consisted in ordinary lobbying services,

[1303] Tr. Day 3 (CONFIDENTIAL), p. 113, ll. 6-10.
[1304] Tr. Day 3 (CONFIDENTIAL), p. 115, ll. 7-10.
[1305] Tr. Day 3 (CONFIDENTIAL), p. 115, ll. 16-17.
[1306] Tr. Day 3 (CONFIDENTIAL), p 118, ll. 1-2.
[1307] Tr. Day 3 (CONFIDENTIAL), p. 117, ll. 5-16.
[1308] Bhuiyan Confession Statement, Exhibit R-324, p. 6.

the activity was legitimate and cannot be taken as layering in the sense described in the *Siemens* case.

1774. This conclusion does not affect the question whether, as part of the activity for which Mr Bhuiyan was engaged, he was expected to pay bribes and did so in fact; this question will be examined in the following section.

1775. Nor does this conclusion deal with the Respondents' assertion that Niko "*engaged Mr Bhuiyan to exercise personal influence over State Minister AKM Mosharraf Hossain to gain his favour and obtain the JVA*".[1309] They also argue that Niko agreed "*to paying Selim Bhuiyan to use his personal influence to obtain favorable treatment from the State Minister, including Government approval of the Agreements*".[1310] Later in the same submission, the Respondents speak of Mr Bhuiyan's "*personal influence over the State Minister*".[1311]

1776. The Tribunals have examined the Respondents' statements concerning the alleged "*personal influence*" of Mr Bhuiyan over the State Minister. When asserting that Mr Bhuiyan was paid to use "*personal influence*", the Respondents do not explain what this personal influence was. At some stage they state that Mr Bhuiyan "*was a travel company owner making hidden deals with his friend, the State Minister, in Bangladesh*".[1312]

1777. The Respondents have not explained the personal relationship on which they base the assertion that Mr Bhuiyan was engaged to exercise personal influence on the State Minister. Ms LaPrevotte provided some information about Mr Bhuiyan's background and position. She stated:

> *Selim Bhuiyan, is a businessman in Dhaka, who, at the time was the President of an upscale social club in Bangladesh called the Dhaka Club. His position as the President of this club put him in contact with all of the social elite of Dhaka. Selim Bhuiyan was an old family friend of the Energy Minister Hossain. Hossain introduced Bhuiyan to Mamoon and as Mamoon was a close friend of Tarique Rahman, Bhuiyan enjoyed access to the inner circle of the BNP-led government.*

[1309] R-PHB2 (CONFIDENTIAL), paragraph 119.
[1310] R-PHB2 (CONFIDENTIAL), paragraph 117; similarly at paragraph 150.
[1311] R-PHB2 (CONFIDENTIAL), paragraph 150.
[1312] R-PHB2 (CONFIDENTIAL), paragraph 33.

Mamoon was often at the Dhaka Club and Mamoon and Bhuiyan would play golf together.[1313]

1778. There has been no allegation that Mr Bhuiyan played a political role like that attributed to Mr Tarique Rahman and to Mr Mamoon and that, on this basis, he could exercise personal influence on the State Minister. The Respondents have not explained how social relations as those described by Ms LaPrevotte, or the family friendship mentioned in Mr Bhuiyan's Confession, must be considered of a nature that would make the activity of Mr Bhuiyan no longer that of a lobbyist but one who exercised personal influence.

1779. Mr Bhuiyan's interventions may have helped Niko to get access to the State Minister and an occasion to present its case to him.[1314] The clearance of the road to the JVA, however, was not made by the State Minister. **There is no indication that the position of the "*bureaucrats*" was modified in any way by the State Minister**. As explained above, it was BAPEX which proposed to submit the matter to the Law Ministry and the opinion provided by that Ministry which changed the "*bureaucrats*" position and brought about the finalisation of the JVA. As to the GPSA, the State Minister had no role in its adoption, since he had resigned long before it was agreed and executed.

1780. Concerning the reasonableness of **the compensation** agreed with Bhuiyan/Nationwide and paid to them, the Respondents deny that Mr Bhuiyan provided any legitimate services and thus maintain that no compensation was justified.

1781. The Claimant argues that

> *…the record establishes that the remuneration paid to Nationwide was in line with industry practice, and commensurate with the level of risk in accepting a purely success-based fee (which was amply demonstrated by the subsequent failure to obtain a GPSA so as to unlock the second tranche of compensation).*[1315]

[1313] LaPrevotte First Witness Statement, paragraph 35.
[1314] The issue is discussed in C-CMC, paragraph 236 and R-RC, paragraph 146.
[1315] C-PHB1 (CONFIDENTIAL), paragraph 102.

1782. When examining the compensation agreed with Bhuiyan/Nationwide, the Tribunals have considered that the initial consultancy fee of Stratum/Sharif was in substance US$4 million,[1316] payable at the conclusion of the JVA. As stated above in the context of the discussion about the compensation of Sharif/Stratum, the Claimant saw in Mr Bhuiyan's engagement the expectation that he could *"deliver the one aspect of Stratum's mandate that it had been struggling to perform effectively: specifically, providing lobbying and logistical support in relation to engagement with the government*".[1317] Mr Sharif decided that out of the overall amount of US$4 million at the conclusion of the JVA, he would pay US$500,000 to Bhuiyan/Nationwide. From this perspective, the amount agreed and paid to Bhuiyan/Nationwide does not appear as necessarily excessive. In itself it is not a sign of layering. Again, this conclusion does not exclude that some of this amount was used as bribe, a question that will be examined next below.

1783. The **Tribunals conclude** that Mr Bhuiyan was engaged by Mr Sharif to assist him in the contacts with the Respondents and the Government with the objective of obtaining the JVA and the GPSA; and Mr Bhuiyan did indeed provide such assistance, intervening in particular with the Minister and his staff. In the view of the Tribunals, **such services are legitimate**. **They are different from** those which the Respondents and the Investigators have observed with other companies and described as **"layering"**.

1784. This conclusion does not exclude that, when engaging Mr Bhuiyan, Mr Sharif also expected him to make illegitimate payments to the Minister and that such payments were indeed made. The Tribunals, here as with respect to the other consultants, must therefore examine whether such payments were in fact made and caused BAPEX and Petrobangla to enter into the JVA and the GPSA.

10.3.4.9 Conclusion on "layering"

1785. The Tribunals have carefully examined the Respondents' assertion that the conclusion of Niko's consultancy agreements, in themselves, were evidence for bad faith and corruption and that, from the time Niko

[1316] The possible increases based on future production did not become effective.
[1317] C-PHB1 (CONFIDENTIAL), paragraph 102; see above Section 10.3.4.7.

entered Bangladesh, it set up a network of consultants to promise and pay bribes and that these consultancy agreements were concluded to channel bribes to Government officials.

1786. The Tribunals have found no evidence to support the alleged set up of a network of consultants for corruption. The evidence shows that it was not unreasonable in the circumstances for Niko to engage consultants to provide assistance in the negotiations for the Agreements. There are in sum no evidentiary grounds, nor any warranted inferences, for concluding that any of the four consultants, Sharfudding Ahmed (Four Feathers), Qasim Sharif (Stratum), Giasudding Al Mamoon and Salim Bhuiyan (Nationwide), was engaged for illegitimate purposes.

1787. The Tribunals are **not persuaded that any of them was engaged for the purpose of "layering"** in the sense of passing bribes from Niko to public officials. The Respondents' argument in this respect, apparently inspired by the Investigators' experience with other companies and their *modus operandi*, is **not supported by the evidence** in the record in these Arbitrations. The Tribunals have **not seen persuasive evidence** that, with the possible exception of Mr Mamoon, any of the consultants was **engaged to exercise "personal influence" in the sense of Section 163** of the Bangladesh Penal Code or did in fact exercise such illegal influence.

1788. The evidence before them does not lead the Tribunals to conclude that, by concluding the consultancy agreements, Niko acted unfairly or obtained the Agreements by corruption or by committing other breaches of international or Bangladeshi law.

1789. This does not exclude that the consultants so engaged, in the performance of their tasks, did pay bribes to Government officials and thereby procured the Agreements. Therefore, the true question which must be examined is whether the consultants actually engaged in corruption and whether it was such corruption that procured the conclusion of the Agreements. This requires that the Tribunals examine specifically the payments which the Respondents present as suspect to determine whether it has been established that they have actually been made and whether they procured the conclusion of the Agreements.

11 SPECIFIC SUSPECT PAYMENTS

11.1 The identification of Suspect Payments and the Tribunals' questions relating to them

1790. In their submissions and at the Hearing, the Respondents and the Investigators referred to a number of payments which, in their view, were intended, directly or indirectly, to corrupt decision makers with the objective of procuring the JVA and the GPSA (the "**Suspect Payments**"). Payments made by Niko Canada to Bangladesh were identified on a chart prepared by the Investigators and produced as Exhibit R-320. Mr Khan explained:

> *MR KHAN: We make, the investigators -- particularly at FBI, RCMP, and I -- together sat down in Washington with all our evidence package and we tried to draw out a map up to certain level in 2008, and there is a chart exist. I presume Debra [LaPrevotte] will introduce that to you.*[1318]

1791. The chart was discussed extensively at the Hearing, frequently referred to as the "*Spider Web*". Marked versions were produced in the course of this discussion.[1319] The chart shows the payments made by Niko Canada to Niko Bangladesh and from there to two accounts at UBP, one the account of Mr Sharif, the other that of Stratum. The records assembled in the course of the Joint Investigation were said to show that, from these two accounts, a large number of payments was made to various beneficiaries. Some of these payments are simply transfers from one account of Mr Sharif to another. Other entries on the chart identify third party addressees other than civil servants. The Claimant, having described the activities of Mr Sharif as consultant for Niko, states with respect to these payments:

> *As one would expect given this background, […] the local bank statements of Mr. Sharif reflect multiple payments associated with the ordinary expenses of maintaining an office and fulfilling Stratum's role.*[1320]

1792. A third group of payments identified by the Investigators is asserted to consist of conduits for payments to a Government official. This latter

[1318] Tr. Day 2, p. 209, ll. 13-18, referring to Exhibit R-320.
[1319] In particular Flow Chart, Exhibit CH-19, showing the Claimant's annotations, reproduced above in the Introduction.
[1320] C-PHB1 (CONFIDENTIAL), paragraph 24, also FN 26.

group of payments is referred to as Suspect Payments. These payments are also understood to include payments for which there are no banking or other records but which the Respondents assert were indeed made and had corrupt purposes.

1793. In their Memorial on Corruption, the Respondents specifically focused on the amount of US$2.93 million, which Niko paid to Sharif/Stratum in October 2003 upon the completion of the JVA. Of this amount, as discussed above, US$500,000 were paid to Bhuiyan/Nationwide. The Respondents provided the following account for the remining US$2.43 million, stating that the Stratum UBP account

> *…shows outgoing payments to Mr. Sharif ($73,000 and $280,000), Mr. Sharif's counsel who formed Stratum ($319,000), Mr. Sharif's wife ($413,000), a Houston auto importer ($69,000), Mr. Sharif's company with his brother ($200,000), and to individuals Mr. Sharif claims not to know—Jabbar Abdul Majid ($57,000), Fazle Akber Siddique ($20,000), and Jamal Ahmed Shamsi ($180,000 to "DBTCO Americas New York"). It is impossible to know how much of this movement was done to distance Niko from the ultimate destination of the money. These types of movements, or "layering", are often used to make the payments to officials untraceable.*[1321]

1794. At the Hearing the Respondents also produced

(i) A table showing the payments referenced in the chart of Exhibit R-320, both incoming and outgoing to and from the two UBP accounts.[1322] The table contained the note that "*[p]ayments beyond the accounts shown, many of which could be in cash, would not be reflected here*".

(ii) A table showing Payments Reflected in Financial Records; in this table the Respondents highlighted those payments which they considered as bribes or Suspicious Payments.[1323] All payments are recorded in US Dollars, the Taka payments being converted at the rate of 52 Taka to the Dollar.

[1321] R-MC, paragraph 108.
[1322] Table of Payments, Exhibit RH-14.
[1323] Respondents' Table of Payments Reflected in Financial Records, Exhibit RH-17.

1795. The questions which the Tribunals addressed to the Parties after the Hearing included the following ones for the Respondents concerning specifically Suspect Payments:

> *3. The Respondents have shown on their Exhibits R-320 (referred to at the hearing as the "Spider web") and RH-17 payments (a) by Niko to the UBP accounts of Mr Sharif (6207285) and Stratum (6262120); (b) outgoing from these accounts, and have identified which of the latter they consider as suspect. The Respondents are invited:*
>
> *3.1 to identify for each of the suspect payments its ultimate addressee, the chain of payments (in the alleged "layered approach") leading to him/her and the supporting evidence.*

1796. The Tribunals addressed a number of specific questions to the Respondents concerning the payments by Mr Bhuiyan:

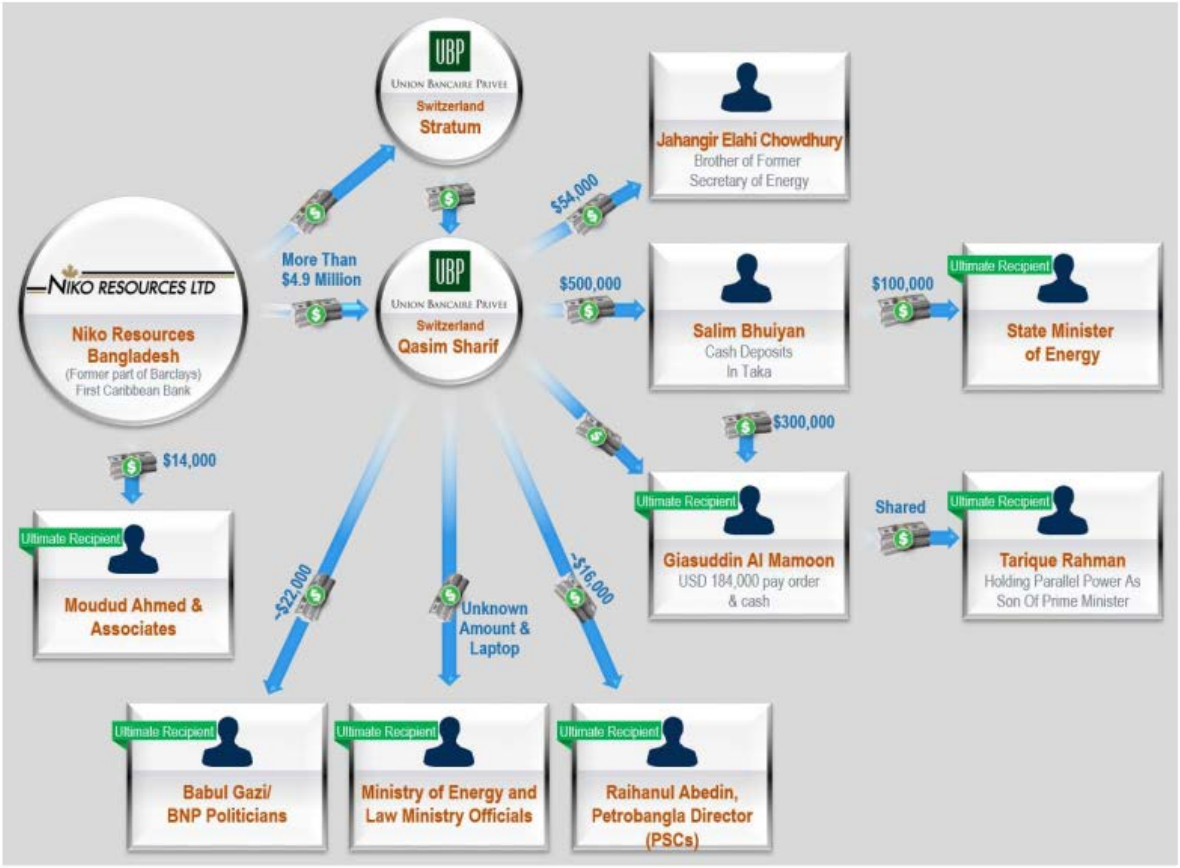
> *4. Specifically in relation to the payments that Respondents allege were made by Mr Bhuiyan to Mr Mamoon and Minister Hossain, and without restricting the generality of question 3, the Respondents are invited to identify the evidence that they rely upon as establishing that:*
>
> *4.1. the payments were made;*
>
> *4.2. they were derived from funds emanating from the Claimant;*
>
> *4.3. they provided funds or a benefit in kind to a State official;*
>
> *4.4. were made for the purpose of inducing BAPEX to conclude the JVA and Petrobangla to conclude the GPSA; and*
>
> *4.5. the Claimant knew or ought to have known that the payments were made for this purpose and on its behalf.*

1797. The Respondents dealt with the questions of the Tribunals at length in their Post-Hearing Briefs, developing the argument they had presented in the previous submissions. At one stage, they summarised their position:

> *In sum, the evidence shows that Niko paid almost US$ 5 million to Stratum and Qasim Sharif, at least half a million of that went to Mr. Bhuiyan (and then on to Mr. Mamoon and the State Minister), and hundreds of thousands of dollars were distributed to others who were either connected to decision makers (like Jahangir Chowdhury and Babul Gazi) or could influence decisions (like Raihanul Abedin and*

officials at the Law Ministry and Ministry of Energy). And much of the almost $5 million is untraceable, and Claimant provided no explanation, much less evidence, of its purpose.[1324]

1798. The statement was followed by a chart[1325] showing these payments:



1799. The Respondents also provided, at pp. 29 to 32 of their First Post-Hearing Brief, a table of Suspect Payments in which further particular information about the payments shown in the chart and some other payments are provided.

1800. The Tribunals will examine the Respondents' explanations concerning these Suspect Payments to determine whether they were indeed made, and, if made, were corrupt payments or must otherwise be taken as support for the Respondents' allegation of corruption, justifying the

[1324] R-PHB1 (CONFIDENTIAL), paragraph 56.
[1325] R-PHB1 (CONFIDENTIAL), chart at p. 34.

Respondents' assertion that the Agreements were procured by corruption.

1801. Some of the payments in the chart and the table are payments to Niko's consultants which the Respondents describe as "*layering of payments/concealing bribe payments*".[1326] The Tribunals have discussed above in Section 10 the Respondents' argument concerning "*layering*". They were not persuaded that any of Niko's consultants were engaged for the purpose of "*layering*" in the sense used by the Respondents.

1802. The Tribunals reserved, however, their position concerning the question whether the consultants engaged by Niko used some of the funds paid by Niko to make corrupt payments. This point will be addressed in the present section, in light of the Tribunals' conclusions concerning Government Acts and the Related Corrupt Act(s) identified by the Respondents at pp. 2 and 3 of their First Post-Hearing Brief and discussed above in Section 9.

1803. Before describing the Tribunals' examination of specific allegedly corrupt payments, it should be pointed out that this is the Respondents'

> *… main allegation of corruption: that Niko obtained Government approval for the JVA and GPSA by bribing an agent of the Prime Minister's office (Giasuddin al Mamoon) and the State Minister for Energy (Mosharraf Hossain).*[1327]

1804. The Respondents' corruption allegations focus on what they described as the corrupt regime of the Government during the BNP reign; a focus which is also shared by the Investigators. The Respondents wrote:

> *Thus, under the new BNP Government, Niko used corruption for two purposes: 1) to get the new Government to hear and consider its proposal, and 2) to obtain what it wanted with regard to Chattak East and avoid competition with other companies through the Swiss Challenge process.*[1328]

[1326] R-PHB1 (CONFIDENTIAL), p. 29, right column of the table.
[1327] R-RC, paragraph 184, emphasis in the original.
[1328] R-MC, paragraph 44.

1805. With respect to the period of the Awami League Government, the Respondents' allegations focus more on what they describe as "*layering*" and as Niko's "*network of so-called 'consultants' to promise and pay bribes.*"[1329] These allegations of layering have been examined above and were found unsupported by the evidence. The allegations of specific corrupt payments which shall be considered at present must be seen against the background and the Tribunals' findings in the above sections of this decision.

11.2 Payments to Tawfiq Elahi Chowdhury through his brother Jahangir

1806. **The Respondents** allege that during the period from December 1999 to November 2000 Mr Sharif made nine payments of US$6,000, a total of US$54,000 to Jahangir Elahi Chowdhury.[1330]

1807. Mr Jahangir E. Chowdhury is Mr Sharif's uncle and the brother of the then-Secretary of Energy,[1331] Tawfiq Elahi Chowdhury.[1332]

1808. The Respondents assert that the payments were intended for the Secretary of Energy and describe the assistance which Niko drew from it as:

> *Support for Niko's unilateral proposal to develop marginal fields and the FoU.*[1333]

and

> *… to push Niko's proposal through;*[1334]

1809. The Respondents assert that this alleged payment "*constitutes conspiracy to cause, and the aiding and abetting of, violations of Sections 162, 163 and 165 of the Penal Code*".[1335]

[1329] R-MC, paragraph 184.
[1330] R-PHB1 (CONFIDENTIAL), p. 30.
[1331] R-PHB2 (CONFIDENTIAL), paragraph 46.
[1332] R-PHB1 (CONFIDENTIAL), p. 30.
[1333] R-PHB1 (CONFIDENTIAL), p. 30, second box.
[1334] R-PHB2 (CONFIDENTIAL), 117, p. 60, 5th bullet point.
[1335] R-PHB2 (CONFIDENTIAL), 117, p. 60, 5th bullet point.

1810. Elsewhere, the Respondents include the Marginal Fields Procedure in the Governmental Acts related to the alleged payments to Mr Tawfiq Elahi Chowdhury.[1336]

1811. In support of their allegations, the Respondents rely on the Joint Investigation and specifically the conclusions of Ms LaPrevotte. They explain:

> *These payments are on Agent LaPrevotte's spider web, Flow Chart of Payments from Niko Resources Limited (R-320). The payments are outside the targeted period so they are not in the UBP statements of Qasim Sharif's account on the record (2001-2006), but they are in the additional pages provided to Claimant.*[1337]

1812. Mr Sharif's payments on these documents are directed to Mr Jahangir Elahi Chowdhury, the uncle of Mr Sharif and the brother of the Secretary of Energy. In order to establish the link to the Secretary, the Respondents rely on the analysis of Ms LaPrevotte. In R-PHB1, they quote from her witness statement:

> *The nine payments are important because I had [Mr Sharif] interviewed by FBI in Texas and I had Mr Chowdhury's brother in Australia interviewed and when interviewed they gave two different answers. So we asked [Mr Sharif], 'You sent nine $6,000 payments to Mr Jahangir Chowdhury. What was the purpose behind these payments?' When asked he is like, 'Oh, my mother, he would lend money to my mother and I had to pay him back […]. However, I sent a lead to Australia asking the Australian Federal Police to interview Mr Jahangir Chowdhury. When he was interviewed regarding those same payments he is like, 'Oh, I am a contractor for Stratum Development and those payments were reimbursements to me for the work that I did as a contractor to Stratum Development and for my travel expenses'. […] So one of the two -- either or both are providing false statements during their interviews. That added to the preponderance of evidence that indicated that $54,000 given to the brother at the Ministry of Energy was likely bribe payments in compensation for his favourable consideration."*[1338]

[1336] R-PHB1 (CONFIDENTIAL), p. 2, first box.
[1337] R-PHB1 (CONFIDENTIAL), p. 30, Footnote 93.
[1338] R-PHB1 (CONFIDENTIAL), p. 30; as source for the statement, the Respondents indicate "*LaPrevotte testimony; R-327*"; the latter reference is an FBI document of two reports by an "*interviewing agent*" about

1813. In response, **the Claimant** first points out that there is no direct evidence for the payments themselves. All that was produced is a "*working table*" from a team member at the Bangladesh ACC and/or a "*flowchart*" drafted at a meeting of the investigating agencies; for the Claimant this is merely hearsay.[1339]

1814. The Claimant also points out that the Respondents have failed to show that the payments had a purpose of corruption. If the Ultimate Addressee of the payments, as alleged by the Respondents, was

> *… Tawfique Elahi Chowdhury, a former Secretary within the Energy Ministry then, as noted in Niko's Rejoinder, it is critical to note that Tawfique Elahi Chowdhury is* ***currently*** *the most senior official with the Energy Ministry sitting as the Honourable Advisor to the Prime Minister.*[1340]

1815. The Claimant also notes "*that the Respondents failed to make [Mr Tawfique Elahi Chowdhury] available as witness in these proceedings (notwithstanding the presence of other officials from the Ministry at the hearing)*".[1341]

1816. More generally, the Claimant asserts that there is

> *no coherent case set out in the Respondents' pleadings as to the allegedly corrupt nature of the alleged payments to Jahagir Elahi Chowdhury, much less is there any credible evidence to establish that such alleged payments had anything to do with Niko or its procurement of the JVA.*[1342]

1817. **The Tribunals** note that the Respondents have previously disputed that any bribes were received by senior officials during the Awami League Administration, an assertion which had led the Tribunals to fix the start of the Targeted Period in 2001. At the hearing, the Respondents shifted their approach. While accepting that they cannot prove that the FOU was obtained by corruption, they made a global allegation, saying that all

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explanations provided by two persons on 10 April and 15 May 2008, elsewhere identified as Mr Sharif and his mother; practically all names in this document are redacted.

[1339] C-PHB1 (CONFIDENTIAL), paragraph 45.

[1340] C-PHB1 (CONFIDENTIAL), paragraph 46, emphasis in the original; with references to the sources.

[1341] C-PHB2 (CONFIDENTIAL), p. 17, last paragraph.

[1342] C-PHB1 (CONFIDENTIAL), paragraph 48.

favourable treatment of Niko was obtained "*by promises and payment of bribes*":

> *THE PRESIDENT: Is it your case that FoU also was obtained by bribery?*
>
> *MS ARGUETA: It is our case that there are indications of that, that there are suspicious payments, that Niko was involving agents from very early on and making those payments to lay the groundwork that eventually made it possible for them to get the JVA.*
>
> *THE PRESIDENT: No, sorry, you have to tell us what we should conclude from these suspicious payments. Is it your case that the FoU was obtained by bribery?*
>
> *MS ARGUETA: We cannot prove that the FoU was obtained by bribery. It seems to be tainted by bribery. My case is that all of the favourable treatment of Niko from this early date and through 2006 was obtained by promises and payment of bribes.*[1343]

1818. In their post-hearing submissions, the Respondents rely on the payments to Mr Jahangir Elahi Chowdhury as Suspect Payments. The Tribunals therefore have pursued their examination of this contention.

1819. The Tribunals have noted the Claimant's observation that, apart from the entries in the Investigators' tables, there is no evidence that the payments were actually made. Assuming that the payments were indeed made to Mr Jahangir Elahi Chowdhury, the Respondents assert that they were intended for his brother Tawfiq, the then Secretary of Energy. The Claimant has repeatedly asserted that Mr Tawfiq Elahi Chowdhury continues to be employed in Government, occupying a high position, and this has not been denied by the Respondents. Neither Mr LaPrevotte, nor the ACC or Mr Khan, nor the Respondents nor anyone at the Ministry seem to have questioned Mr Tawfiq Elahi Chowdhury about the alleged payments to him through his brother; at least no information about such questioning has been provided to the Tribunals.

1820. Instead of directly enquiring with Mr Tawfiq Elahi Chowdhury about the alleged payments, the Respondents rely on Ms LaPrevotte's indirect approach and provide hearsay twice removed from direct evidence. As shown in the above quotation on which the Respondents rely, Ms

[1343] Tr. Day 1 (CONFIDENTIAL), p. 76, l. 18 to p. 77, l. 4.

LaPrevotte testifies not on what she heard from the alleged payor and from the alleged payment recipient but on two interviews not conducted by herself but rather by two unnamed persons. From what she heard from these anonymous interviewers, Ms LaPrevotte understood that the two persons gave conflicting answers about the purpose of the payments. She concludes that "*the preponderance of evidence*" indicated that the payments were a bribe.

1821. In the absence of any attempt to clarify the matter directly or explanations why such an attempt was unsuccessful or unavailable to the Investigators and the Respondents, the Tribunals consider reliance on such an indirect approach to be insufficient.

1822. Assuming the Respondents had established that the payments were intended for and actually made to Mr Tawfiq Elahi Chowdhury, the Respondents would have to establish that they were related to the Niko project and procured the FOU, as alleged.

1823. In this respect, too, the Respondents rely on Ms LaPrevotte. In her first witness statement she referred to the payments to the brother of Mr Tawfiq Elahi Chowdhury and observed:

> *These payments coincided with actions taken on behalf of Niko Resources to approve, among other things, the Framework of Understanding for the study for development and production of hydrocarbon from the non-producing marginal gas fields of Chattak, Feni and Kamta. There was probable cause to believe that these payments were bribe/kickback payments in exchange for favorable rulings for Niko.*[1344]

1824. At the hearing, Ms LaPrevotte developed her view on the "*probable cause*". She presented her assumption that "*in many ways the Niko tender or bid was very similar to Siemens*"[1345] and explained:

> *Initially both companies to do a certain project within country were deemed unqualified. So at that point I am just saying that was a similarity I found in the two cases that I was investigating.*
>
> *Then Niko takes a proposal to the State Energy Secretary, Mr Chowdhury. From there, the similarities were that we saw on the*

[1344] LaPrevotte Witness Statement, paragraph 26.
[1345] Tr. Day 3 (CONFIDENTIAL), pp. 166 to 169.

ground consultants hired, some who had experience in the field, some who had no experience in gas oil exploration and in the one I am comparing it to, Siemens, they hired three on the ground consultants who had no background in telecoms.

Then as I continued to investigate the Niko investigation I found out that Mr Chowdhury was providing influence. He was participating in meetings over which he was working on the framework of understanding.

There was a meeting in January 1999 over which Mr Chowdhury was participating. There was a meeting in May 1999 over which Mr Chowdhury was officiating. There was -- the FoU was signed I believe in August 1999 and then my investigation showed that beginning in November 1999 [Mr Sharif] starting making nine $6,000 payments into a bank account in Singapore belonging to the brother of the official.[1346]

1825. Ms LaPrevotte also stated

Yes. In other words, Mr Chowdhury exerted influence at the January '99, May '99 meetings where the framework of understanding was being discussed and developed and was we think directly responsible or one of the participants in that the FoU was approved the August '99. Then in December his brother starts receiving nine payments.[1347]

1826. The Tribunals note first of all that these explanations are inconsistent with the facts as the Tribunals have ascertained from the record and explained above. The Niko project differs substantially from the Siemens case, as it has been described in these Arbitrations; so do the Niko consultants compared to the Siemens consultants, as described by the Respondents and the Investigators.

1827. There is no evidence that the FOU was discussed at the meetings in January and May 1999 to which Ms LaPrevotte refers. Indeed, as late as 25 May 1999, the letter in which the Ministry informs Petrobangla that it may proceed with the Niko Proposal stated that a JVA must be executed before a MOU may be signed. There is no indication of a shift from the MOU approach to the requirement of an FOU and the Study.

[1346] Tr. Day 3 (CONFIDENTIAL), p. 170, l. 6 to p. 171, l. 11
[1347] Tr. Day 3 (CONFIDENTIAL), p. 171, l. 20 to p. 172, l. 2.

1828. As explained above in Section 9.2, the shift occurred only in May 1999. The Niko representatives accepted BAPEX's invitation and arrived in Dhaka to sign the MOU; but BAPEX did not want to sign the MOU and requested Niko instead first to conduct the Joint Study and only thereafter to conclude the JVA.

1829. In these circumstances it is difficult for the Tribunals to accept that Niko would pay US$54,000 for being required, before proceeding with the project, to conduct a technical study the costs of which it quantified in the order of US$1.5 million.

1830. The Tribunals conclude that the evidence produced does **not justify assuming that Niko paid US$54,000 to Mr Tawfiq Elahi Chowdhury** indirectly through his brother; in any event, even if such a payment had been made, it **did not procure the conclusion of the FOU by Niko.**

11.3 Payments to lower level officials at the Ministry of Energy

1831. In their "*broad overview of government acts necessary for the conclusion of the Agreements that were procured by corruption*", the Respondents include

> *Mr Sharif's payments to lower level officials at Ministry of Energy.*

1832. They relate these "*corrupt acts*" to the "*Approval of Niko's proposal to be considered to develop marginal fields, FOU, and draft Procedure for Development of Marginal/Abandoned Gas Fields*".[1348]

1833. The Claimant responds:

> *The allegation is hopelessly vague, and does not identify the amount of the payments alleged to have been made, the date of such payments, the recipients of such payment, or the alleged act induced or procured from such recipients.*[1349]

[1348] R-PHB1 (CONFIDENTIAL), p. 2, first box.
[1349] C-PHB2 (CONFIDENTIAL), p. 17.

1834. The Respondents provide more detail elsewhere in their Post-Hearing Brief. In particular, they state:

> *At the FOU stage, payments to lower level officials gave Niko access to information about marginal fields, government policies, and its proposal's movement through the system, and provided Niko the opportunity to promote itself as pre-qualified to negotiate the JVA.*[1350]

1835. In support of their allegation about Mr Sharif's payment to lower level officials at the Ministry, the Respondents present a long extract from the "*deposition*" of Mr Shafikul Islam, the former accountant of Mr Sharif:

> *Shafikul Islam helped Mr. Sharif with all his accounts. He told the ACC: "Mr Qasim used to visit the country and then I used to visit BAPEX, Petrobangla, and the Ministry to deliver Niko's letters on his behalf. Mr. Aslam of the Energy and Mineral Resources Division would arrange the pass for me to enter the Secretariat. From before my employment, Mr. Aslam was paid 5 thousand or sometimes 10 thousand takas per month. These payments were made several times after my joining as well. [...] At the end of 2003, during the Eid period, Mr Sayed Kabir in consultation with Qasim Sharif paid Taka three and half lac to different staff and officers of the Ministry, BAPEX, and Petrobangla. At that time Mr. Aslam was paid Taka 1 (one) lac. [...] Around 2002 Mr. Sayed Kabir [...] started to communicate with Mr. Qasim Sharif and used to take Mr. Sharif to BAPEX, Petrobangla, Energy Ministry, Prime Minister's Office etc. on behalf of the Canadian High Commission. Mr. Sayed Kabir introduced Mr. Sharif to various people at various places regarding the Niko agreement and advised him to give cash and valuable gifts to various individuals. Accordingly, Mr. Qasim Sharif [...] gave cash and gifts to those individuals. ... [R-392]*[1351]

1836. The Claimant had already responded to some of Mr Islam's allegations in a previous submission: relying on the accounting records disclosed by the Claimant in these Arbitrations, the Claimant asserts that

> *in November 2003, at the time of the Eid period, four representatives of BAPEX, Petrobangla and the Ministry of Energy, all of whom attended the Second Joint Management Committee (JMC) Meeting in Calgary, Canada, were paid in cash by Qasim Sharif on behalf of Niko for their per diem allotment (of US$170 per day) for*

[1350] R-PHB1 (CONFIDENTIAL), paragraph 58, last bullet.
[1351] R-PHB1 (CONFIDENTIAL), p. 29.

transportation and lodging expenses in connection with attending the JMC meeting.

1837. The Claimant produced vouchers and allowances for the period form 20 November to 7 December 2003.[1352]

1838. More generally, the Claimant questions the reliability of Mr Islam's "*deposition*", pointing to the circumstances of his interrogation and the impossibility of testing his declarations, which the Claimant describes as "*hearsay*".[1353]

1839. **The Tribunals** note first of all that Mr Islam's statements could not be tested in the Arbitrations. Even if one discounts the Claimant's explanations about the pressure exercised on Mr Islam, his statements must therefore be considered with caution. The Tribunals also note that some of the payments mentioned in the transcript of what is described as Mr Islam's "*deposition*" have been explained by the Claimant without being contradicted by the Respondents; they cannot be characterised as bribes.

1840. The other group of payments with respect to which Mr Islam provides specific statements concerns the "*pass for [Mr Islam] to enter the Secretariat*". The Tribunals cannot see how these payments could have influenced the persons in the Ministry in charge of considering Niko's proposal.

1841. As to the Respondents' allegation that Mr Sharif made payments which "*gave Niko access to information about marginal fields, government policies, and its proposal's movement through the system*",[1354] this statement is not only vague and unsupported by reliable evidence, but it also concerns information to which Niko must have had access as part of the cooperation with BAPEX under the FOU or, more generally, in the course of the JVA negotiations.

1842. In any event, the Niko project and the terms of the JVA were subject to a broad process of analysis and were examined over many years and considered in various committees by many high-ranking officials in the

[1352] C-RC, paragraph 148 with reference to Niko Vouchers and Allowances, Exhibit C-208 (CONFIDENTIAL).
[1353] C-RC, paragraphs 134 – 136.
[1354] R-PHB1 (CONFIDENTIAL), paragraph 58, last bullet.

Ministry, in Petrobangla and in BAPEX. **The Tribunals do not consider that the mostly unidentified "*low level officials*" in the Ministry made any effective contribution to the conclusion of the JVA. Payment to any of them, if it were proven, has not been shown to have procured that Agreement**.

11.4 Payment to the Law Minister and the Law Ministry

11.4.1 The evolution of the Respondents' position

1843. In their submissions before the Hearing, the criticism raised by the Respondents against the Law Minister and the Law Ministry focused primarily on the relationship of the Law Minister's (former) law firm with Niko and the conflict of interest in that context. In their Reply on Corruption the Respondents also raised a corruption allegation to the effect that

> *There is also evidence that Niko gave Mr. Noren Das, the Senior Assistant Secretary at the Law Ministry a laptop worth about $1,200.*[1355]

and

> *Niko also bribed the Senior Assistant Secretary at the Law Ministry with an expensive laptop worth more than five times the average monthly salary of government officers at the time.*[1356]

1844. At the hearing, the Respondents then clarified that the Law Ministry's opinion was not obtained by corruption:

> *There is no claim made by the Respondents about this opinion having been obtained as a result of corruption. The only thing that the Respondents have advanced with respect to this opinion is that it was obtained when the Minister had a conflict of interest.*[1357]

1845. In their Post-Hearing submissions, the Respondents, nevertheless, make allegations of corruption. The Respondents identify as bribes the gift of a laptop to an official at the Law Ministry and the relations between Niko

[1355] R-RC, paragraph 163, in support reference is made to the Shafikul Islam statement, Exhibit R-392, p.5.
[1356] R-RC, paragraph 344.
[1357] Tr. Day 2 (CONFIDENTIAL), p. 28, ll. 5-10 (Dufetre).

and the law firm of the Minister, before and during the time he held the office as Law Minister.

1846. On the chart at p. 34 of the Respondents' First Post-Hearing Brief, the Respondents identify as corrupt payments: "*unknown amount & Laptop*" to "*Ministry of Energy and Law Ministry*". It appears from the table at p. 29 that the laptop relates to the Law Ministry: "*Niko […] presented the Law Ministry officer, Mr Noren Das, with a laptop worth BDT 75 thousand*".[1358] Reference is made to the statement of Mr Shafikul Islam of 12 March 2018.[1359]

1847. The Respondents also assert that

> *payment to the Law Minister's law firm contributed to the Law Minister adopting Niko's views on Chattak East and Swiss Challenge with no analysis and no consideration of norms and procedures requiring competitive bidding;*[1360]

1848. In their Second Post-Hearing Submission the Respondents assert that "*[t]he Law Minister's opinion was tainted by corruption*"[1361] and "*[c]orruption is the only explanation for the Law Minister's disregard of the considered views of other officials and his unreasonable and extreme position favouring Niko*".[1362]

1849. The alleged acts of corruption consist in the gift of the laptop and the engagement of the Moudoud Ahmed law firm.

> *After ending its engagement with Moudud Ahmed's law firm in 2000 and failing to pay outstanding invoices for over a year, suddenly rehiring his law firm and paying his outstanding fees when he was appointed Law Minister and then procuring a legal opinion from the Law Minister's firm that the Government was prohibited from subjecting Niko's proposed JVA to competitive bidding.*[1363]

1850. The Respondents identify what they consider

[1358] R-PHB1 (CONFIDENTIAL), p. 29.
[1359] Shafikul Islam Statement recorded under section 164 of the Code of Criminal Procedure, Tejgaon P.S. Case No. 20(12)2007, 12 March 2008, Exhibit R-392.
[1360] R-PHB1 (CONFIDENTIAL), paragraph 58, second bullet.
[1361] R-PHB2 (CONFIDENTIAL), title before paragraph 38.
[1362] R-PHB2 (CONFIDENTIAL), paragraph 43.
[1363] R-PHB2 (CONFIDENTIAL), paragraph 115, fourth bullet.

acts in contravention of the Bangladesh Penal Code, the Prevention of Corruption Act, and the 2002 Anti-Money Laundering Act:

[…]

Bribing various other Government officials […] as well as the purchase of a laptop for the Law Ministry. This constitutes conspiracy to cause, and the aiding and abetting of violations of Sections 161 and 165 by the various Government officials and violations of Sections 162 and 163 by Mr. Sharif.

Engaging the private law firm of Law Minister Moudud Ahmed, and seeking to influence him by, inter alia, paying a long-overdue balance constitutes conspiracy to cause, and the aiding and abetting of violations of Sections 161 and 165 by the Law Minister. It is also aiding and abetting Sections 162 and 163 violations by the Law Minister's law firm and partners as it relates to their exercise of influence over him.[1364]

1851. The Tribunals have examined the conflict of interest aspect of these allegations above in Section 9.7.3. They pointed out the systematic confusion of the Respondents between the Law Ministry and the Minister and saw no basis for assuming that the Ministry's opinions were affected by irregularity with respect to professional ethics obligations or by a conflict of interest. The Tribunals now examine the Respondents' bribery allegations, treating separately the laptop allegedly provided to Mr Das and Niko engaging and paying the Minister's law firm.

11.4.2 The laptop to Mr Das

1852. Mr Naren Das was Deputy Secretary at the Ministry of Law. **The Respondents**' assertion concerning the gift of a laptop to him relies on a statement by Mr Shafikul Islam. His "*deposition*" on 12 March 2008 in the ACC investigation states that "*the then Commercial Executive of Niko, Mr. Masudur Rahman, presented the Law Ministry officer, Mr. Noren Das, with a laptop worth BDT 75 thousand*".[1365]

1853. As pointed out above, the Respondents view this gift as a "*bribe*".

[1364] R-PHB2 (CONFIDENTIAL), paragraph 117, second and third bullet.
[1365] Shafikul Islam Statement recorded under section 164 of the Code of Criminal Procedure, Tejgaon P.S. Case No. 20(12)2007, 12 March 2008, Exhibit R-392, pp. 4-5.

1854. **The Claimant** pointed out that the matter had been investigated by the ACC. The Claimant produced correspondence with the ACC concerning the purchase of a laptop at the price of BDT 75,000, invoiced at 11 December 2003.[1366] The Claimant points out that the case of Mr Das and the laptop is dealt with in the ACC Charge Sheet. The ACC determined that there was no evidence of a link with the conclusion of the JVA and treated the matter as a "*contravention of service rules*":

> *It is noticed in this case that the Deputy Secretary of the Ministry of Law, Justice and Parliamentary Affairs Mr Naren Das received a laptop […] from Mr Quashem Sharif who was Vice-President of the beneficiary Company (Niko Resources Ltd). Although no evidence was obtained to indicate that their influence has worked behind the conclusion of the said JVA, accepting laptop […] as gift is considered to be in contravention of service rules.*[1367]

1855. The Claimant disputes that the gift of the laptop was somehow corrupt. It points out that it took place in December 2003. It denies any connection between the gift to Mr Das and the conclusion of the JVA in October 2003.[1368]

1856. **The Tribunals** note that the conclusion of the ACC with respect to Mr Das suggest that the gift of the laptop was not considered by them as a case of bribery.

1857. In any event, there is no indication that Mr Das was involved in any manner in the opinions of the Law Ministry or that the gift was related to these opinions. The Tribunals see no reason to doubt the conclusion of the ACC when it saw no evidence for a link between the laptop and the conclusion of the JVA.

1858. The Tribunals conclude that there is **no basis for assuming** that the delivery of the laptop to Mr Das constitutes **a "*conspiracy*"** or that it justifies **doubts as to the regularity of the opinions of the Law Ministry** and had **any impact on the conclusion of the JVA**.

[1366] Letter from Niko to ACC, 26 February 2008, Exhibit C-212; the Claimant also produced the record of the seizure of the invoice on 4 March 2008 in Niko's office in Bangladesh, Exhibit C-213.
[1367] ACC Charge Sheet, Exhibit R-211, pp. 19-20.
[1368] C-RC, paragraphs 142 – 146.

11.4.3 Niko engaging and paying the Law Minister's (former) law firm

1859. The Respondents' criticism concerning relations between Niko and the law firm of Moudud Ahmed and Associates is summarised in the Respondents' First Post-Hearing Brief:

> *Niko's use of and payment to the then-Law Minister's law firm for arguments in support of Niko's position on Chattak East and Swiss Challenge, which Niko delivered to the State Minister, who then sought he opinion of the Law Ministry.*[1369]

1860. The Claimant responded:

> *Niko's use of the Law Minister's former firm was a pre-existing solicitor-client relationship conducted in a wholly transparent manner, and there is no evidence of any financial benefit passing to the Law Minister, or even any involvement on the Law Minister's part in the legal opinions rendered to the Government by the Law Ministry (which legal opinions have not been disclosed or put into the record by the Respondents in any event).*[1370]

1861. The Claimant refers to earlier explanations where it asserted that "*Niko had absolutely no input into the decision of the Government to seek an opinion from the Law Ministry*"; it pointed out that the suggestion to seek such an opinion emanated from BAPEX.[1371] It added that "*Niko made no secret of its use of a barrister from Moudud Ahmed and Associates; indeed, it disclosed and explicitly relied on those opinions in its dealings with BAPEX, Petrobangla and the Ministry*".[1372]

1862. The Respondents also refer to two payments by Niko to the Moudud Ahmed and Associates law firm in 2002, one for US$6,000 the other for US$8,250, after Mr Ahmed had become Minister.[1373]

1863. The Claimant explains that the first payment was the retainer for the second semester in the year 2000; the allegation concerning this matter was not pursued later in the Arbitrations.

[1369] R-PHB1 (CONFIDENTIAL), p. 2, second box.
[1370] C-PHB2 (CONFIDENTIAL), p. 18.
[1371] C-CMC, paragraph 166 (c).
[1372] C-CMC, paragraph 166 (e).
[1373] R-RC, paragraph 165.

1864. The Claimant further explain that the second payment concerned an invoice from December 2000. As its payment had been delayed, "*Mr Azizul Haq of Moudud Ahmed & Co followed up with Niko in January 2002 to obtain payment of the overdue account. Following this reminder of the outstanding account, Niko promptly paid the full amount on or around 14 January 2002*".[1374]

1865. The Respondents rely on this second payment and assert that Niko "*suddenly rehir[ed] and pay[ed] his outstanding fees*".[1375] On this basis they argue that Niko *"seeking to influence him by, inter alia, paying a long-overdue balance constitutes conspiracy".*[1376]

1866. More generally the Respondents argue that

> *payment to the Law Minister's law firm contributed to the Law Minister adopting Niko's views on Chattak East and Swiss Challenge with no analysis and no consideration of norms and procedures requiring competitive bidding;*[1377]

1867. The Tribunals have examined as far as they could the circumstances of the payment of what seems to have been an overdue invoice. They note that this payment was made immediately upon a reminder from the law firm. The Tribunals find it difficult to see a "*conspiracy*" in such a payment upon a reminder of an overdue invoice. If by that time Mr Ahmad was still following the affairs of his (former) law firm, which has not been established or even alleged by the Respondents, he may have been pleased that this outstanding invoice of US$8,250 was paid. From there to treating this payment of the outstanding invoice as a conspiracy to exercise influence over the Law Minister requires a leap of imagination for which the Tribunals see no basis in the record. This all the less since in January 2002, when the invoice was paid, there was no suggestion of submitting the controversial issues to the Law Ministry.

1868. Concerning the legal opinion which Niko obtained from the Moudud Ahmad and Associates law firm in August 2002 and February 2003 (see above Section 9.7.3), the Respondents' argument does not appear clear.

[1374] C-RC, paragraph 71, referring to Letter from Moudud Ahmed and Associates to Qasim Sharif, 9 January 2002, Exhibit R-399 (CONFIDENTIAL) and Letter from Moudud Ahmed and Associates to Qasim Sharif, 9 March 2003, Exhibit R-400 (CONFIDENTIAL).
[1375] R-PHB2 (CONFIDENTIAL), paragraph 115, fourth bullet.
[1376] R-PHB2 (CONFIDENTIAL), paragraph 117, first bullet.
[1377] R-PHB1 (CONFIDENTIAL), paragraph 58, second bullet

The firm had been engaged with a retainer for the entire year 2000, during the rule of the Awami League Government, in which Mr Ahmad was not a Minister. Niko engaged the law firm again for two legal opinions on the two critical issues for its project. It did so openly and produced these opinions to the Minister who forwarded them to Petrobangla and BAPEX.

1869. The Respondents assert that *payment to the Law Minister's law firm* [presumably for the opinions] *contributed to the Law Minister adopting Niko's views*. The opinions were prepared in August 2002 and in February 2003, before the Law Ministry (not the Law Minister) was consulted about the Chattak issue in March 2003. If the opinions presented by Niko contributed to the formation of the opinion of the Law Ministry, this was not Niko's doing.

1870. Indeed, as explained above, the Chattak issue was referred to the Law Ministry not at the suggestion of Niko nor upon "*pressure from the State Minister*" but at the suggestion of BAPEX, with the support of Petrobangla and the Energy Ministry (see above Section 9.7.2).

1871. This suggestion was made shortly after Niko had submitted the opinion which the Mouodud Ahmed and Associates law firm had prepared for it. In other words, in March 2003, when the matter was referred to the Law Ministry, at the suggestion of BAPEX and with the agreement of Petrobangla, the Respondents knew that the Moudud Ahmed and Associates law firm had been engaged by Niko. There is no trace of any evidence that this had caused any hesitations or concern to the Respondents.

1872. The Tribunals, indeed see **no irregularity or ground for concern in Niko's payments to Moudud Ahmed and Associates law firm in connection with the JVA and in the use by Niko of the legal opinions prepared by this firm**.

1873. It is significant for the Respondents' Corruption Claim brought in these Arbitrations that the relationship between the Moudud Ahmed and Associates law firm and Niko, which was no cause for concern of the Respondents at the time, now is relied upon to accuse Niko of criminal offenses and conspiracy and as a major ground for seeking the avoidance of the JVA.

11.5 Payments to the State Minister

1874. In their overview of the "*government acts necessary for the conclusion of the Agreements that were procured by corruption*", **the Respondents** identify the

> *State Minister's grant of access to Niko, efforts and instructions to Petrobangla to finalise the JVA with Chattak East and to avoid Swiss Challenge and approval of the JVA.*

1875. As the corresponding corrupt act the Respondents identify

> *Niko's promise to pay (and eventual payment to) the State Minister through deals with Mr Mamoon and Mr Bhuiyan.*

1876. They also mention the opinions which Niko obtained from the "*then-Law Minister's law firm*" which "*Niko delivered to the State Minister who then sought the opinion of the Law Minister*".[1378]

1877. In the chart at p. 34 of the Respondents' First Post-Hearing Brief, the Respondents show a payment from Mr Sharif to Mr Bhuiyan in the amount of US$500,000 and from Mr Bhuiyan to the State Minister of Energy in the amount of US$100,000; the State Minister is identified as "*Ultimate Recipient*".

1878. The Respondents go on to identify acts related to the JVA that were procured by Niko's allegedly corrupt payments, and include in that list the following:

> *the promise of payments to the State Minister (which were eventually made) caused him to give his approval to the JVA and seek the Prime Minister's approval without doing Swiss Challenge and take up Niko's cause and push Petrobangla and BAPEX to accept Niko's terms (including Chattak East), to seek legal opinions from Niko's former lawyer, the Law Minister, that would go against the views of BAPEX and Petrobangla;*[1379]

[1378] R-PHB1 (CONFIDENTIAL), paragraph 4, second box.
[1379] R-PHB1 (CONFIDENTIAL), paragraph 58, first bullet.

1879. **The Claimant's** direct response to the Respondents' identification of government acts procured by corruption is that:

> *There is no credible evidence of such promise or payment to the State Minister and the allegation depends purely on an alleged "confession" that has no evidentiary weight.*[1380]

1880. The payment in issue here amounts, as shown in the chart, to some US$100,000, which Mr Bhuiyan is said to have paid to the State Minister after the conclusion of the JVA in BDT "*at different times in different amounts*" in a total of 60 lakh.

1881. The Parties have repeatedly and thoroughly debated these payments and their circumstances in their submissions. Their differences relate essentially to (i) the value that can be attributed to the Bhuiyan Confession and, related thereto, (ii) the question whether a promise of payment was made to the State Minister, (iii) whether the payments were actually made and were in relation to the JVA and (iv) whether the payments, if promised and made, procured the governmental acts, as alleged by the Respondents. The Tribunals will examine these issues in turn in the following section.

11.5.1 The Bhuiyan Confession and its retraction

1882. A central role in the Respondents' case is played by a document entitled "*Sworn Statement*" by Mr Bhuiyan, dated 15 January 2008 and recording what is described as his confession. The Tribunals refer to this document as the Bhuiyan Confession, without thereby expressing an opinion on the nature of the document and the circumstances in which the statements recorded in it were obtained. Given its importance for the Respondents' case, the Tribunals start by quoting this statement in full. The document records that the statement was made before a Magistrate and describes the circumstances under which the statement was made, including Mr Bhuiyan's prior arrest and the explanations given by the Magistrate. It then records the Sworn Statement:

> *Ex Energy Minister A.K. M. Mosharraf is our family friend for a long time. I studied with his brother-in-law Mr. Irfan at the same time at Dhaka University. I came to know Mr. Mosharraf through him. In 2001*

[1380] C-PHB2 (CONFIDENTIAL), p. 18.

after becoming State Minister, Mr. Mosharraf introduced me to Mr. Gias Uddin Al Mamoon telling me that he is a special friend of Tarique Rahman. I have been associated with Dhaka Club for a long time.

Mr. Mamoon was also a member of Dhaka Club and he used to play golf with me.

Sometime in 2002 Mr. Mamun asked me to go to his office during mid day. When I reached there I saw someone already present in his office. Mr. Mamun introduced me to him telling that he is Quashem Sharif; Vice President of NIKO, Bangladesh. Mr. Quashem said NIKO was trying to enter into agreements with Bangladesh Government, with BAPEX to explore gas from three gas fields. Mr. Quashem said that he has had an understanding with Mr. Mamoon on the matter. I then proposed to Mr. Quashem that if NIKO gets the work for gas exploration, then they can give some sub contract to our organization such as Gas Pipe Line, Gas Station etc. On the basis of my proposal Mr. Quashem asked me to cooperate with NIKO to get the work. Then he explained the understanding with Mr. Mamoon on the works and they are as follows:

1) Assistance for completion of one Joint Venture Agreement (JVA) for Kamta, Chatok, Feni- Gasfields and help to get various Government approvals at different stages Mr. Mamun will help NIKO.

2) After commercial production of Feni gasfield Mr. Mamoon will help NIKO to get approval for gas purchase and sales agreement (GPSA)

3) After commercial production of Chatok gasfield Mr. Mamoon will help NIKO to get approval for GPSA.

Mr. Mamoon and Mr. Quashem requested me to help and assist them to make above things successful. Mr. Quashem Sharif said if we are successful in completing above things then we will be commercially in profit. He said that if above work is completely successful NIKO will give Mr. Mamun six (6) crore Taka and 240 thousand US Dollar at three stages.

Three crore Taka after completion of Joint Venture agreement; just after signing of GPSA for Feni Gasfield 10 thousand US Dollar per month for 24 months totaling 240 thousand US Dollar, and after commercial exploration of Chatok Gasfield and signing of GPSA 3 (three) crore Taka. On the above proposal, as a businessman on commercial point of view I agreed to assist. After one week of this event, Mr. Mamoon and I went to the ex-Energy State Minister Mr. Mosharraf's House, and Mr. Mamun explained full subject to State

minister and sought help from him. Ex-State Minister after listening assured his help to his best abilities. Thereafter I used to contact with Mr. Mosharraf regularly on this subject and he used to say that the work is in the process. Mr. Mamoon also used to keep in touch with him regularly, and follow up with him. In 2003, the Joint Venture Agreement was signed after long negotiation, and after negotiation between BAPEX and NIKO. After that as per promise from NIKO, they deposited 3 crore Taka in my account at Standard Chartered Bank in Gulshan branch at different times. At different times in various amounts Mr. Quashem Sharif deposited total of 3 crore Taka in my account. From that money I gave Mr. Mamoon 80 lac Taka by one pay order and at different times in different sums paid by cash cheque 1 crore Taka. I gave Mr. Mamun total 180 lac Taka. ***From the money deposited in my account, I paid the Ex-State Minister Mr. Mosharraf, at different times in different amounts, total 60 lac in cash.*** *The balance of 60 lac Taka I kept for my work. It is worth mentioning here that Mr. Mammon had said to me that he is keeping the majority portion of the taka because Tarique Rahman is also with him.*[1381]

1883. Following some explanations about the travel arrangements to Canada with the State Minister which relate to the Canadian conviction, his Confession states:

> *In June 2005, Mr. Mosharraf resigned from the Ministership. Up to then GPSA for Feni Gasfield and GPSA for Chatok Gasfield was not signed and commercial exploration of Chatok Gasfield was not commenced. So, NIKO refused to give the rest of the promised amount of 240,000 US Dollars and 3 (three) crore Taka. Meaning, they did not give more than 3 crore Taka.*
>
> *All the above mentioned transactions were done as per direction and management of Mr. Mamoon. As a businessman for business reasons in the hope of getting business, I was involved with the above business. In this case, I had no other involvement other than business. This is my sworn statement.*[1382]

1884. The Tribunals have highlighted in this statement the passage about the payment to the State Minister which is particularly relevant here.

1885. In June 2008, Mr Bhuiyan wrote a letter to the court, referenced as "*Withdrawal of confessionary statement under Section 164 given against*

[1381] Bhuiyan Statement, 15 January 2008, Exhibit R-324, pp. 3-6 (emphasis added).
[1382] Bhuiyan Statement, 15 January 2008, Exhibit R-324, p. 7

my will on 15.01.2008". The letter describes the circumstances of Mr Bhuiyan's arrest and of his declaration before the Magistrate. He explained that he was promised release from arrest if he made a statement that had been drafted for him and continued

> *… I was taken before the magistrate in a fully devastated and mentally imbalanced condition following the torture at the Cantonment police station. In the office of the honorable magistrate, I could see the same typed statement on the table of the honorable magistrate that I was given earlier to memorise. Then, I recited the false and concocted memorised statement to save my life, but later it was found that they breached their promise by making the prayer in handwriting on the prayer for record of statement under Section 164 dated 15.01.2008 for sending me to jail custody and accordingly I was sent to jail.*
>
> *Immediately after giving this forced false self-confessionary statement, I expressed my desire to withdraw this statement. Members of the joint forces team subsequently met and threatened me in different manners in the jail and the hospital during my treatment for a total three days. They threatened me saying they would sue members of my family. For this reason, I could not withdraw earlier.*
>
> *Today, I hereby withdraw the false confessionary statement obtained by force on 15.01.2008 before this honorable Court.*[1383]

11.5.2 The credibility of Mr Bhuiyan's confession

1886. **The Claimant** discusses in detail the circumstances of Mr Bhuiyan's interrogation, his prior arrest, and his allegations of torture. It refers to the circumstances recited in Mr Bhuiyan's retraction and presents another letter which Mr Bhuiyan wrote on 19 April 2009 to the Deputy Commissioner, District of Dhaka, repeating the charges of torture.[1384] The Claimant also recites the incident of one of Niko's local employees who "*was also seized by the Bangladesh authorities and subjected to torture, in an effort to procure a 'confession' of corruption from him*". And it quotes from reports by Human Rights Watch and the U.S. State Department "*of unlawful detention and torture by the Joint Task Forces in Bangladesh during the same period*".[1385]

[1383] Bhuiyan Retraction, 8 June 2008, Exhibit C-120, produced again as C-215 with medical records.
[1384] Letter from Mr. Bhuiyan to Deputy Commissioner, District of Dhaka, 19 April 2009, Exhibit C-217.
[1385] C-CMC, paragraphs 253 and 254.

1887. The Claimant concludes:

> *As Mr. Bhuiyan did not testify in these proceedings, the Tribunals have no means to weigh the relative credibility of the conflicting (hearsay) accounts in his "confession" and his retraction. That said, in Niko's respectful submission, the Tribunal has more reason to discount the "confession" based on the significant evidence of torture and unlawful detention surrounding its preparation.*[1386]

1888. **The Respondents** refer to another document, presented as "*Bangladeshi Investigators' Notes on Selim Bhuiyan Interview*".[1387] The author of the notes is not identified and the surrounding circumstances of the interview are not revealed. In any event, with respect to the payment by Mr Bhuiyan to the State Minister its recital is practically identical to the Confession.

1889. The Respondents rely on the testimony of Ms LaPrevotte as confirmation of Mr Bhuiyan's confession:

> *FBI Special Agent LaPrevotte and two U.S. Department of Justice attorneys interviewed Mr. Bhuyian and he told them the same information as relayed in his confession voluntarily and with no duress; Special Agent LaPrevotte determined that the statements of Mr. Mamoon and others as well as the movement of money confirm Mr. Bhuyian's confession.*[1388]

1890. In her second witness statement, Ms LaPrevotte did indeed explain that in September 2008 she and an attorney of the U.S. Department of Justice interviewed Mr Bhuiyan in Bangladesh, at a time when he was not detained. She informed him that the interview was voluntary and he could leave at any time. She added:

> *In our interview, Bhuiyan confirmed that he received approximately $500,000 USD from Niko and from those funds paid Mamoon (who he believed would share with people close to Prime Minister Khaleda Zia, and her son Tarique Rahman) and State Minister Mosharraf. The information Mr. Bhuiyan provided to us in that interview was consistent with the statement he gave before a Bangladeshi judge, fit*

[1386] C-PHB1 (CONFIDENTIAL), paragraph 92.
[1387] Bangladeshi Investigators' Notes on Selim Bhuiyan Interview, undated, Exhibit R-317.
[1388] R-RC, p. 8, as one of the Uncontested Allegations Related to Corruption.

with what we were told in other interviews, and was supported by the financial transactions.[1389]

1891. **The Claimant** questions the reliability of this evidence of Ms LaPrevotte, in particular by reference to her testimony at the hearing. It describes the statements as hearsay and points out that, when declaring that Mr Bhuiyan's statement were "*exactly similar*" to those of his confession, Ms LaPrevotte was working solely from her memory. She testified that notes had been taken of her interview, but the notes could not be found. The Claimant points out, "*these were the only interview notes that the FBI had been unable to find*".[1390]

1892. The Claimant also points out that, at the hearing, Ms LaPrevotte on two occasions described the points on which the confession coincided with Mr Bhuiyan's explanations in the interview;[1391] this description mentioned a number of aspects of the confession but "*notably, she did not assert at any point during the account she gave in her testimony that Mr Bhuiyan had admitted to her that he had made any payments to Mosharraf Hossein …*"[1392]

1893. Finally, the Claimant points out that during the FBI interview "*officers from the Bangladesh Joint Task Force*" were present. In his retraction Mr Bhuiyan had identified officers from the Joint Task Force as having detained and tortured him.[1393]

1894. Ms LaPrevotte accepted at the Hearing that "*a confession procured after five days of interrogation in the face of a subsequent claim of torture [was] worthy of further investigation*", and that she "*did do a full investigation*".[1394] The Tribunals find it therefore all the more regrettable that the record of the interview of Mr Bhuiyan she conducted is unavailable.

1895. When at the Hearing she gave the account of the points on which the Bhuiyan Confession in her view coincided with what Mr Bhuiyan told her in the interview, the payment to the State Minister was not mentioned. It

[1389] LaPrevotte Witness Statement, paragraph 9.
[1390] C-PHB1 (CONFIDENTIAL), paragraph 94(b), referring to Tr. Day 3, p. 237, ll. 11-17.
[1391] C-PHB1 (CONFIDENTIAL), paragraph 95, referring to Tr Day 3, pp. 254, l. 4 to 255, l. 23 and 259, l. 6 to 260, l. 3.
[1392] C-PHB1 (CONFIDENTIAL), paragraph 95.
[1393] C-PHB1 (CONFIDENTIAL), paragraph 96.
[1394] Tr. Day 3 (CONFIDENTIAL), p. 254, l. 3.

is true that she was not asked specifically about this point; nevertheless, the fact that she did not mention this critically important matter as part of the account she volunteered is not without significance. The account that Ms LaPrevotte gave in her oral testimony is rather carefully confined to facts that the Tribunals have already found to be correct, that is to say:

- Mr Bhuiyan shared his profits with Mr Mamoon;[1395]
- Mr Bhuiyan was working with the Niko agent (Mr Sharif) and Mr Mamoon;[1396]
- "*[H]e was paid to try to get favourable treatment for Niko and he took them to Minister Hossain's office.*"[1397]

1896. These are the matters that Ms LaPrevotte deposes were stated in Mr Bhuiyan's statement and were 'validated by additional evidence.'[1398] They do not include the claim made in her witness statement that Mr Bhuyian made a payment to Mr Mosharraf Hossein, the State Minister.

1897. Finally, the Tribunals note that the Respondents have not produced any records of the interrogations of the State Minister. Mr Mosharraf Hossein is among the persons listed in the ACC Charge Sheet and he must have been interrogated. The Respondents have produced "*Bangladeshi Investigators' Notes on Selim Bhuiyan Interview*"; they have not produced a similar document of the alleged recipient of the payments mentioned in Mr Bhuiyan's confession.

1898. The Tribunals have found that the allegations about the corrupt apparatus through a network of consultants set up by Niko since it entered Bangladesh were unsupported by the evidence; they also found that none of the specifically alleged corrupt payments supported the claim of a corrupt procurement of the JVA. The statement in the Bhuiyan Confession about the payment to the State Minister thus remains as a central piece of the Respondents' Corruption Claim.

[1395] Tr. Day 3 (CONFIDENTIAL), p. 255, ll.11-16.
[1396] Tr. Day 3 (CONFIDENTIAL), p.259, ll.18-20.
[1397] Tr. Day 3 (CONFIDENTIAL), p.259, ll. 21-24.
[1398] Tr. Day 3 (CONFIDENTIAL), p.260, ll. 2-3.

1899. In the Confession, the relevant statement consists in a single sentence, declaring that Mr Bhuiyan used the money received from Mr Sharif to make several payments to the State Minister. Neither the Parties nor the Tribunals had the possibility in these Arbitrations to seek clarification about the circumstances of these alleged payments. The Confession states that several payments in a total of 60 lac were made, in amounts and at times unspecified. There is no information about the relation of these payments with other financial transactions which, according to Mr Chowdhury, Mr Bhuiyan carried out for Mr Hossain.[1399]

1900. The Claimant points out that the Confession was not written in Mr Bhuiyan's hand but, as stated in his retraction, he had been presented with a pre-prepared statement by the Joint Task Force officers and instructed to memorise it.[1400]

1901. The Claimant points to the testimony of Mr Chowdhury who "*saw no other instances of corrupt activity or even attempted corrupt activity within the Energy Ministry under Mosharraf Hossain during his tenure*".[1401] Indeed, at the Hearing, Mr Chowdhury asserted that Mr Hossain's alleged corrupt activity occurred "*Before. It all occurred before he became Minister.*"[1402]

1902. There is no indication in the Bhuiyan Confession or elsewhere that Niko and/or Mr Sharif engaged Mr Bhuiyan to make any payments to the State Minister; and there is no indication that Mr Bhuiyan made any promises to the State Minister. The account in the Bhuiyan Confession about the initial meeting with the State Minister about the Niko project and about other contacts prior to the conclusion of the JVA make no mention of any promises nor of a "*deal*" as alleged by the Respondents.

1903. For all these reasons, **the Tribunals have serious doubts about the reliability of the Bhuiyan Confession**. Despite these concerns and doubts the Tribunals have considered the Bhuiyan Confession and

[1399] Mr Chowdhury said that it was well known that Mr Bhuiyan "*was the Minister's money man*"; Witness Statement, paragraph 12.
[1400] C-PHB1 (CONFIDENTIAL), paragraph 89, referring to the retraction, Exhibit C-215.
[1401] C-PHB1 (CONFIDENTIAL), paragraph 62, referring to Tr. Day 3 (CONFIDENTIAL), pp. 129 – 130 and 139-140.
[1402] Tr. Day 3 (CONFIDENTIAL), p. 139.

examined the consequences for JVA if the statement about this payment were true.

11.5.3 Causation

1904. For the reasons already explained above, it is, for the purposes of the Tribunals' task in these Arbitrations in any event necessary to consider whether, on the assumption for this purpose, that a payment was made to the State Minister, it caused the conclusion of the JVA.

1905. The Tribunals have examined the steps that led to the conclusion of the JVA. They noted that the Niko project was supported by BAPEX and Petrobangla, essential aspects were agreed in the FOU and the regulatory basis laid in the Marginal Fields Procedure in June 2001. The obstacle that remained at the time when the State Minister came into power and the agreements with Mr Bhuiyan were concluded was the Chattak issue, and, if it had remained a serious concern,[1403] possibly the requirement of applying the Swiss Challenge method.

1906. It may be that the State Minister made attempts to overcome these obstacles. Mr Chowdhury testified in this sense. If the State Minister did so, he was not successful. Indeed, BAPEX and Petrobangla remained firm on Chattak East and possibly also on the requirement of Swiss Challenge until the joint meeting in March 2003. By that time the solution came from the Law Ministry. The Respondents present this as a principal corrupt act.

> *Niko's use of and payment to the then-Law Minister's law firm for arguments in support of Niko's position on Chattak East and Swiss Challenge, which Niko delivered to the State Minister, who then sought the opinion of the Law Minister.*[1404]

1907. This is inaccurate or at least misleading. The recourse to the Law Ministry, as shown above, came at the suggestion of BAPEX. Both the Chattak issue and the Swiss Challenge issue were resolved by the opinions of the Law Ministry; and the consequenct adaptation of the contract terms was achieved in negotiations between BAPEX and Petrobangla with Niko (and in terms favourable to the former). The terms

[1403] The Tribunals have concluded that this does not appear to have been the case, see above Section 9.6.6.
[1404] R-PHB1 (CONFIDENTIAL), paragraph 4.

of the JVA, including their adaptation during the final negotiations after the resolution of the Chattak issue, were determined by BAPEX and Niko, not by the State Minister. The proposal to conclude the JVA submitted to the Prime Minister came from Petrobangla. Passing this proposal on, with a summary of preparatory steps, was a formality which cannot be taken as causal for the conclusion of the JVA.

1908. In light of these circumstances the Tribunals are unable to accept the Respondents' allegation in relation to payments to the State Minister. **The Tribunals conclude that the JVA was not procured by corrupt payments to the State Minister.**

11.6 Tarique Rahman and the Prime Minister

1909. In the chart at p. 34 of the Respondents' First Post-Hearing Brief, the **Respondents** show a payment from Mr Sharif to Mr Bhuiyan in the amount of US$500,000 and one from Mr Bhuiyan to Mr Giasuddin Al Mamoon in the amount of US$300,000. In addition, the chart shows a payment in an unspecified amount directly from Mr Sharif to Mr Mamoon. Mr Tarique Rahman appears with a link between Mr Mamoon and him, identified as "*shared*". Both Mr Mamoon and Mr Rahman are marked as "*Ultimate Recipient*". No link is shown on the chart to the Prime Minister.

1910. The Respondents' table showing the government acts procured by corruption identifies the "*Prime Minister's approval of the JVA*" as being procured by

> *Niko's deal with Mr Mamoon, the friend and business partner of Tarique Rahman, when the two were collecting "consultancy fees" in exchange for favorable treatment from the Prime Minister's office.*[1405]

1911. Later in their First Post-Hearing Brief, the Respondents identify this act, related to the JVA, as being procured by Niko's corrupt payments in the following terms:

> *payments and the promise of additional payment to Mr. Mamoon caused him to tell Tarique Rahman and others that the project should go forward, causing the Prime Minister's Office to "approve" the JVA*

[1405] R-PHB1 (CONFIDENTIAL), paragraph 4.

before the final draft was agreed and the need for Swiss Challenge had been overcome, outside the normal procedures described by Mr. Chowdhury;[1406]

1912. **The Claimant** contests the allegation. It points out:

> *In short, the Respondents have failed to prove any material involvement of Giasuddin Al-Mamoon in connection with the JVA. But even if they had proven such involvement, it would not have advanced their case, because there is no evidence that he engaged Tarique Rahman in relation to Niko's affairs, much less that Mr. Rahman in turn exercised improper influence over any government official to secure approval of the JVA.*[1407]

1913. The Tribunals note that the Respondents indeed did not offer any direct evidence for a payment by or on behalf of Niko to Mr Rahman, or to the Prime Minister. The Respondents rely on explanations concerning the central role of Mr Rahman in the political system of Bangladesh at the time and on close relations of Mr Mamoon with Tarique Rahman and their business cooperation. The Respondents conclude that any payment to Mr Mamoon would have to be shared by him with Mr Rahman.

1914. **The Respondents** cite statements about Mr Rahman's role and importance, like that of Ms LaPrevotte:

> *Front-men, like Giasuddin al Mamoon […] serve as intermediaries to channel money from companies to the sons of people in power, like Tarique Rahman and other adult children of government ministers who then exercise political influence to ensure contracts are awarded to the paying company. Companies seeking contracts in Bangladesh hire these intermediaries as "consultants" even though they often have no expertise in the relevant field (such as telecommunications, hydropower, or oil and gas) and use them as the conduits for bribes because of their well-known connections to family members of public officials.*[1408]

[1406] R-PHB1 (CONFIDENTIAL), paragraph 58, third bullet.
[1407] C-PHB2 (CONFIDENTIAL), paragraph 46.
[1408] R-PHB1 (CONFIDENTIAL), paragraph 46, quoting from LaPrevotte First Witness Statement, paragraph 14.

1915. The Respondents assert that Mr Mamoon and Tarique Rahman "*were the power base in Khaleda Zia's administration*"[1409] and state:

> *… any business during that political regime required permission from the Prime Minister's Secretariat, and it was not possible to get approval without the involvement of Mamoon or a family member or family friends of the then Prime Minister.*[1410]

1916. As evidence that payments to Mr Mamoon were shared with Mr Rahman, the Respondents rely on the explanations of Mr Khan and insist on the close relations between the two. They refer to the statement recorded in the transcript of his RCMP interrogation where Mr Mamoon attributed the importance of his role in business to his connection with Mr Rahman:

> *I'm the friend of Tarique RAHMAN […], he in good position in party […] So obviously because Tarique RAHMAN is a powerful law so I'm his best friend. […] My power is say, my power is fifty percent, […] I'm fifty, because of, I'm the friend of Tarique RAHMAN.*[1411]

1917. The Respondents also write:

> *Niko approached and paid Mr. Mamoon, understanding such money would reach Tarique Rahman. As Mr. Khan explained, investigators found that Mr. Mamoon "was sharing" all the bribes he received with Tarique Rahman; he was "<u>the banker front for Tarique Rahman.</u>"*[1412]

1918. The link from Mr Rahman to the Prime Minister is assumed on the basis of the family ties and of Mr Rahman's overall powerful position. Thus, the Respondents assert:

> *That money reached the Minister with authority to approve Niko's contracts and, through Mr. Mamoon, certainly reached the son of the Prime Minister, who held the power to withhold or grant the Prime Minister's approval for Niko's agreements.*[1413]

1919. The Respondents quote in particular Mr Khan's testimony at the hearing:

[1409] R-MC, paragraph 72.
[1410] R-MC, paragraph 124, quoting from Bhuiyan Statement, Exhibit R-317, page 10.
[1411] R-PHB1 (CONFIDENTIAL), p. 43 quoting from the Mamoon RCMP interrogation transcript, Exhibit R-316, pp. 27 and 56.
[1412] R-PHB1 (CONFIDENTIAL), paragraph 45, quoting from Tr. Day 3 (CONFIDENTIAL), p. 171, ll. 12-22, the emphasis is added by the Respondents.
[1413] R-MC, paragraph 145.

Mamoon is the front man. He is saying here, clearly, 'My power is 50 per cent Tarique Rahman. […]' Naturally, if two persons have been in business together, one goes in politics, their businesses continue, the other one is collecting money in this form who does not have any expertise other than exercising influence. He gets paid, influence gets exercised. Contract gets done. Payment gets made.[1414]

1920. **The Claimant** deny that these conclusions are supported by the evidence before these Tribunals. It disputes the reliability of Mr Bhuiyan's statement of Mr Mamoon sharing with Mr Rahman the payments received; and the Claimant points out the strong denials by Mr Mamoon himself. The Claimant argues:

> *The Respondents have, largely by using repetition as a substitute for evidence, sought to make Mr. Mamoon synonymous with Tarique Rahman, the son of Prime Minister Khaleda Zia. Yet, as detailed at paragraph 100 of Niko's Post-Hearing Brief, one of the very few aspects that is clear from the Giasuddin Al-Mamoon interrogation transcripts is that he repeatedly confirmed that Tarique Rahman had no involvement whatsoever with Niko or the JVA.*[1415]

1921. The Claimant adds:

> *… [D]espite the Respondents' heavy reliance on the garbled and frequently incomprehensible RCMP interrogation record of Mr. Mamoon, one of the few aspects of that record that is clear is Mr. Mamoon's absolute denial of any involvement of Tarique Rahman in relation to Niko. As Niko cited in its Opening Statement at the hearing, the transcript of Mr. Mamoon's interrogation by the RCMP and others reveals he was frequently prompted by the interviewers to admit that Mr. Rahman was involved in the Niko matter, but he unequivocally and repeatedly rejected the notion:*
>
> *VOICE: you tell us freely and friendly that ah, for getting through the project of this Niko yes, is there any influence of Mr. Tarique RAMAN the Prime minister or not with you and Mr. Qasim SHARIF? Or Salim BHUIYAN?*
>
> *MAMOON: No, hundred percent, you can take guarantee from me. From my views and my know, there is no influence for, for this project Niko project.*[1416]

[1414] R-PHB1 (CONFIDENTIAL), p. 43, quoting Tr. Day 2 (CONFIDENTIAL), p. 289, ll. 2-12.
[1415] C-PHB2 (CONFIDENTIAL), paragraph 36.
[1416] C-PHB1 (CONFIDENTIAL), paragraph 100, quoting from Mamoon RCMP Interrogation 1,Exhibit R-316, p. 61.

1922. When considering these arguments, **the Tribunals** refer to Section 10.3.4.5 above where they examined the evidence about the payments actually made to Mr Mamoon. They noted the Respondents' assertion that "*a total of approximately US$308,000*" was paid to him by Mr Bhuiyan.[1417] As a result of their examination, the Tribunals concluded that only US$180,000 find support by evidence on the record. They have seen no evidence for the payment of the alleged balance of "*several cash cheques on several dates*" in a total 72 lakh (US$120,000).

1923. Concerning the payments from **Mr Bhuiyan to Mr Mamoon**, the Tribunals also examined their relations in respect to this project. The Tribunals noted in particular that Mr Mamoon had been contacted first by Mr Sharif. It was Mr Mamoon who then passed the project on to Mr Bhuiyan and expected some return in case Mr Bhuiyan was successful. In these circumstances, it appears plausible that Mr Bhuiyan made the payments to Mr Mamoon in relation to the Niko project.

1924. Concerning the relations between **Mr Mamoon with Mr Rahman**, the Tribunals noted in the transcript of Mr Mamoon's RCMP interrogation the explanations of his good relations with Tarique Rahman. The Tribunals also noted, however, the strong terms in which Mr Mamoon contested that Mr Rahman had a share in the Niko project. In addition to the passage quoted above, one of the other passages of the transcript reads as follows:

> *SCHOEPP: Okay, would any of that amount have gone, um was that, we're you still in partnership with Tarique RAHMAN.*
>
> *MAMOON: Sorry.*
>
> *SCHOEPP: Ah, would, would fifty percent of that gone on to Tarique just because you guys were in business together before and would share the commissions like that?*
>
> *MAMOON: No.*[1418]

1925. The Tribunals are aware that the transcript of the RCMP interrogation of Mr Mamoon, as the other transcripts, are of limited evidentiary value, since they have not been tested by witness examination in these proceedings. Mr Mamoon's just-quoted statement concerns the specific

[1417] B-MD, paragraph 35.
[1418] Mamoon Interrogation, Exhibit R-316, p. 63.

relations of the Niko project and thus has some weight. Mr Khan and Ms LaPrevotte make statements about the practice they have observed in general. They assume that Niko and its project is of the same kind as the modus operandi they have observed in the Siemens and similar cases: an assumption which is not correct. They do not assert any specific knowledge about the Mamoon/Rahman relationship in the present case. The assertions of Mr Khan and Ms LaPrevotte concerning the Mamoon/Rahman relationship, thus, are speculation.

1926. The passage in the so-called Bhuiyan Confession where he states that Mr Mamoon told him he had to share his part with Tarique Rahman is of doubtful value, not only because of the dubious nature of this Confession, discussed above, but also because the supposed information conveyed are not the words of Mr Bhuiyan but a statement which someone else had made.

1927. The Tribunals have discussed above the interrogation of Mr Bhuiyan by Ms LaPrevotte and another FBI agent at which notes were taken which disappeared thereafter. When she identified at the Hearing the points on which she considered that the statement during this interrogation coincided with his confession, she did not mention, as observed above, the payment to the State Minister; nor did she mention that Mr Bhuiyan knew or even understood that Mr Mamoon might pass funds on to Tarique Rahman, or indeed that Mr Rahman had any role at all in connection with the JVA.

1928. In view of these considerations, the Tribunals conclude on the basis of the evidence before them that **Mr Mamoon received some US$180,000** which he considered as his share in the Niko project, due to him on conclusion of the JVA. There is **no evidence that this amount was shared with Tarique Rahman and that Tarique Rahman had a role in the decisions concerning the conclusion of the JVA**.

1929. The allegations about any bribes to the Prime Minister are based solely on the role that is attributed to Tarique Rahman. There is no independent evidence or even argument concerning corrupt payments to the Prime Minister in the context of the Niko project.

1930. Since the Tribunals have concluded that there is no evidence that Tarique Rahman was involved in the Niko project and even less that he received

a share of the payments made to Mr Mamoon in relation to the Niko project, the Tribunals also conclude that the **Respondents' assertion about payments to the Prime Minister in relation to her approval of the JVA is unsupported by the evidence available to these Tribunals.**

11.7 Payments to Babul Gazi

1931. In their First Post-Hearing Brief, **the Respondents** identify payments of some US$22,000 from Mr Sharif to Babul Gazi a "*BNP politician*".[1419] They identify payments "*totaling 1,310,744 taka (~$22,000) in 2002-2005*"[1420] as the Suspect Payments; the related "*supporting evidence/circumstances*" provides the following quotations:

> *Mr. Islam, Mr. Sharif's accountant, told the ACC: "From his personal account Mr. Sharif gave Gazi Babul a private car, a mobile phone set, a Bangkok-bound ticket for his medical treatment, and monthly payments of BDT 50 thousand from April 2004 to December 2005. I think Gazi Babul helped Mr. Qasim Sharif on the Niko contract." [R-392]*
>
> *Mr. Elahi testified that Babul Gazi "used to come with the Niko team and he was introduced to me as a political leader and assigned by the PM office to expedite the process of the joint venture."*[1421]

1932. The Respondents also include among Niko's corrupt acts the following item:

> *Paying Babul Gazi, a former Parliament member and influential BNP politician, to act on Niko's behalf.*[1422]

1933. To specify the alleged bribe, the Respondents add: "*Qasim Sharif paid Babul Gazi more than US$17,000 between February 2004 and August 2005*", and they quote part of the same passage from the statement of Mr Islam. The advantage which the Respondents see as result of these payments is described as

[1419] R-PHB1 (CONFIDENTIAL), p. 46.
[1420] R-PHB1 (CONFIDENTIAL), p. 32.
[1421] R-PHB1 (CONFIDENTIAL), p. 32.
[1422] R-PHB1 (CONFIDENTIAL), p. 46

Support of influential BNP politician.

Mr. Elahi explained that Babul Gazi "used to come with the Niko team and he was introduced to me as a political leader and assigned by the PM office to expedite the process of the joint venture." Mr. Sharif's accountant: "I think Gazi Babul helped Mr. Qasim Sharif on the Niko contract." (R-392).[1423]

1934. The Respondents' allegations concerning the payments to Mr Gazi have evolved. The charge concerning Mr Gazi was first made in the Respondents' Memorial on Corruption, where they alleged that Mr Sharif "*paid Tk.19,200 every month from October 2002 through December 2004, and Tk. 250,000 on 14 February 2004 to Babul Gazi, a member of Parliament and a good friend of Kamal Siddiqui*".[1424]

1935. The Claimant asserted in its Counter-Memorial that the Respondents "*have not identified a single trace of payment to a government official*".[1425] Thereupon the Respondents wrote in their Reply:

> *… Niko ignores payments to Gazi Nuruzzaman Babul ("Babul Gazi"), a member of parliament from the BNP. According to Mr. Sharif's accountant, "Mr Sharif gave Babul Gazi a private car, a mobile phone set, a Bangkok bound air ticket for his medical treatment, and paid BDT 50 thousand per month from April 2004 to December 2005. I think Babul Gazi helped Mr. Qasim Sharif on the Niko deal." Correspondence submitted by Claimant notes that Babul Gazi attended meetings with BAPEX officials regarding the JVA on behalf of Niko in Mr. Sharif's stead.*[1426]

1936. In Annex A to their Reply on Corruption, the Respondents included the following "*criminal act*": "*[a]rrangement with Babul Gazi by which the Parliament member received payment from Niko and acted on its behalf in meetings*" and identify as the purpose of this act "*Procuring the JVA and the GPSA*".[1427]

1937. The Claimant have countered by pointing out the circumstances of Mr Islam's interrogation and addressing specifically the Respondents'

[1423] R-PHB1 (CONFIDENTIAL), p. 46, referring to Tr. Day 4 (CONFIDENTIAL), p. 64.
[1424] R-MC, paragraph 70.
[1425] C-CMC, paragraph 217.
[1426] R-RC, paragraph 126.
[1427] R-RC, Annex A

description of Mr Babul Gazi as "*a member of parliament for the BNP*". It stated:

> *The record shows that Mr. Babul was indeed a member of Bangladesh's 6th Parliament, which existed for a period totalling 12 days, in 1996. He was not a member of parliament during the Targeted Period or any period remotely close to it. There is no basis for suggesting that payment for services provided by Mr. Babul constituted payment to a government official.*[1428]

1938. In support for this statement, the Claimant produced documents from the Bangladeshi Parliament. The statement of Mr Babul Gazi's tenure as member of Parliament and the timing of this tenure has not been contested.

1939. Thereafter, the Respondents presented him as "*former member of Parliament and influential BNP politician*".[1429] The Claimant responded to the Respondents' statement in their First Post-Hearing Brief, by pointing out:

> *Babul Gazi was not a government official in late 2002 – in fact, his tenure as a government official lasted a grand total of 12 days in 1996. He did, however, apparently perform some work for Stratum, which serves as an explanation as to why payments were being made to him (to the extent that such an explanation is even necessary).*[1430]

1940. With respect to Mr Babul Gazi's work for Stratum, the Claimant states that he attended meetings and relies on the following passages:

> *The committee examined and elaborated changes to be made to the JVA in light of the inclusion of Chattak East. In a letter of 24 April 2003.*[1431]

> *Mr Elahi reported to Petrobangla the work of the committee and its consultations. He explained that discussions had taken place in which Niko was represented by Mr Nuruzzaman Babul as advisor of Niko, since Mr Qasem Sharif, Vice President of Niko, had been out of the country.*[1432]

[1428] C-RC, paragraph 12 (footnotes omitted).
[1429] R-PHB1 (CONFIDENTIAL), p.46.
[1430] C-PHB2 (CONFIDENTIAL), p. 19.
[1431] Letter from BAPEX to Petrobangla, 24 April 2003, Exhibit C-154.
[1432] Letter from BAPEX to Petrobangla, 24 April 2003, Exhibit C-154 and Letter from BAPEX to Niko, 26 April 2003, C-155.

1941. It is undisputed that Mr Babul Gazi was not a member of Parliament since 1996 and it is not alleged that he occupied any other governmental function during the time since Niko first arrived in Bangladesh. It also is undisputed that Mr Babul Gazi performed work for Niko.

1942. The Tribunals conclude that **the payments made to Mr Babul Gazi cannot be described as bribes**. The amount indicated as monthly payments to him appear as modest and do not give rise to the suspicion that they were intended to include bribes for others. The payments do not affect the validity of the JVA.

11.8 Corruption in the procurement of the GPSA

1943. The Respondents argue that the GPSA is void *ab initio* both because it was obtained by corruption directly and because it is the tainted fruit of the corruptly-obtained JVA.[1433]

1944. The second of these arguments has become moot since the Tribunals have found that the JVA has not been procured by corruption.

11.8.1 The alleged acts of corruption

1945. Concerning the first argument, according to which the GPSA was obtained by corruption directly, the Respondents list the following corrupt acts:

- *Niko's outstanding promise of US$ 500,000 to Mr. Bhuiyan, Mr. Mamoon, and the State Minister for the GPSAs*
- *Niko's gift of a car to the State Minister*
- *Mr. Sharif's continued payments to Babul Gazi*
- *Niko's continued payments to Stratum, even after Qasim Sharif left*
- *Niko's payments to Petrobangla Director (PSCs)*

[1433] R-PHB1 (CONFIDENTIAL), paragraph 70.

- *Niko's hiring of Canadian Senator Mac Harb to influence Bangladeshi officials in efforts to get the GPSA.*[1434]

1946. These points are developed in a table at pp. 46 and 47 of the Respondents' First Post-Hearing Brief where the following alleged "*corrupt acts*" are presented:

- *Agreement with Messrs Bhuiyan and Mamoon to get Government approval of the GPSA (R374)*
- *Paying Babul Gazi, a former Parliament member and influential BNP politician, to act on Niko's behalf*
- *Purchase of a CAD 190,000 vehicle for the State Minister (R215)*
- *Payment for the State Minister's international trip (R-215)*
- *Paying a Canadian Senator to act in his personal capacity to visit Bangladesh officials and influence them on behalf of Niko*
- *Payment to Raihanul Abedin, Petrobangla Director (PSC) (R-392).*

11.8.2 Payment to Mr Raihanul Abedin, Director (PSC) Petrobangla

1947. **The Respondents** assert that Mr Sharif made two cash payments of US$8,000 each to Mr Raihanul Abedin in 2005; according to Mr Syed Rezwamul Kabir these occurred probably after the second blow-out. The Respondents' assertion is based on statements by Mr Kabir in a RCMP interrogation and by Mr Shafikul Islam in an interrogation under Section 164 of the Code of Civil Procedure.[1435]

1948. Concerning the role of Mr Abedin, the Respondents explain:

> *Raihanul Abedin, the recipient of the bribes, was an important figure in the JVA and the GPSA approval process. He was at Petrobangla since 2001 and served as Director (PSC) from January 2003 until June 2006. During that time, he communicated with BAPEX and Niko, and Petrobangla's legal advisor. For example, he wrote on 8 April*

[1434] R-PHB1 (CONFIDENTIAL), p. 3.
[1435] Syed Kabir Transcript of RCMP Interview, 23 October 2008, Exhibit R-369.

2003 directing BAPEX to finalize the JVA with Niko. He wrote again on 19 April rejecting UNOCAL's claim that its rights could be affected by the JVA and insisting that the JVA should be finalized "as soon as possible." Mr. Abedin was also involved in the final approval of the GPSA.[1436]

1949. The Respondents include the alleged payments to Mr Abedin in the list of acts allegedly in contravention of the Bangladeshi Penal Code, the Prevention of Corruption Act and the 2002 Anti-Money Laundering Act; the Respondents mention:

> *Bribing various other Government officials, including Raihanul Abedin, through Mr. Sharif […]. This constitutes conspiracy to cause, and the aiding and abetting of violations of Sections 161 and 165 by the various Government officials and violations of Sections 162 and 163 by Mr. Sharif.*[1437]

1950. Mr Islam stated:

> *Around mid-February 2004, after withdrawing BDT 5 lac from Mr Qasim Sharif's bank account, Sayed Kabir and I visited the then Petrobangla Director (PSC) Raihanul Abedin at his Baridhara Residence and gave him the cash. Around June 2004, after withdrawing another BDT 5 lac from Mr. Qasim Sharif's bank account, Syed Kabir and I went to Mr. Raihanul's office at Petrobangla. There Mr. Raihanul gave My. Sayed BDT 150,000 cash. Later Mr. Sayed and I went to a bank situated at the ground floor of Rajuk building and deposited BDT 650,000 to Mr. Raihanul's bank.*[1438]

1951. *Mr Kabir describes t*he delivery of the envelope containing the two payments to Mr Abedin. The Respondents summarise: "*[a]s directed by Mr. Sharif, he delivered cash to Mr. Abedin, once at his house and once at another location. Mr Kabir states that each payment was for Tk. 300,000-500,000 (approximately $5,000-8,000)*".[1439]

[1436] R-MC, paragraph 133. The Respondents identify International Finance Corporation, Environmental, Health, and Safety Guidelines: Onshore Oil and Gas Development, Exhibit R-70 and E&P Forum/UNEP Industry, Environmental Management in Oil and Gas Exploration and Production, Exhibit R-71, respectively, as the reference for the two letters.
[1437] R-PHB2 (CONFIDENTIAL), paragraph 117, second bullet.
[1438] Islam Statement, 12 March 2008, Exhibit R-392, p. 5.
[1439] R-MC, paragraph 132, relying on Transcript of RCMP Interview - Syed Rezwamul Kabir, 23 Oct. 2008, Exhibit R-369, pp. 40-44.

1952. **The Claimant** raises concerns about the reliability of the statements both of Mr Kabir and Mr Islam, on grounds of the circumstances in which the statements were obtained. It also points out that "*there is no means for either Niko or the Tribunals to further explore the substance of the Shafique Islam 'statement' nor to test its authenticity, veracity and reliability*";[1440] and it makes a similar observation concerning the statement of Mr Kabir.

1953. As to the substance of the statements, the Claimant points out the difference between the two statements, as concerns the date of transaction. It also observes that:

> *… there is no evidence of Mr. Abedin having any role in the approval of the JVA or the GPSA. Third, there is nothing to suggest the transaction has anything to do with Niko. Fourth, as with the purported "statement" of Shafique Islam, Mr. Kabir appears to refer to the purported payments as having related to a land transaction in Rajuk. As with the alleged Islam "statement", Mr. Kabir provides no further information as to the purported nature or purpose of the transaction, let alone identifying any corrupt purpose relating to the business of Niko.*[1441]

1954. The Claimant also argues:

> *… Niko was unable to secure a GPSA until several years after execution of the JVA, and at a very disadvantageous price, wholly undermines the notion that there was a corrupt fee sharing arrangement in place with the State Minister …*[1442]

1955. **The Tribunals** have examined the history of the GPSA negotiations from May 2004 until its execution on 27 December 2006, as it emerges from the evidence on record. They described it in great detail in the Decision on Jurisdiction,[1443] and presented above essential steps in the GPSA negotiations, as they are relevant for the present Decision on the Corruption Claim. The examination of these negotiations shows that, further to a letter from the Ministry, dated 15 July 2004, a Gas Pricing Committee was formed "*to negotiate for finalisation of gas pricing of Ex.*

[1440] C-RC, paragraph 135.
[1441] C-RC, paragraph 139.
[1442] C-CMC, paragraph 243.
[1443] Decision on Jurisdiction, paragraphs 48-85.

Feni gas field which is being developed by BAPEX-NIKO". Mr Abedin was not a member of this Committee.[1444] The documents on record show, however, that he played an important role in the GPSA negotiations, being the person with whom Niko exchanged its Petrobangla correspondence until the time when the draft had been initialled.[1445]

1956. The only basis for the alleged corruption of Mr Abedin are the statements of Mr Kabir and Mr Islam. As the Claimant has pointed out, these statements are of doubtful value. Neither Mr Kabir nor Mr Islam appeared before the Tribunals and there was no other opportunity for the Claimant and the Tribunals to test the veracity of their statement. The text of the statements does not indicate that the alleged payments were related to the GPSA or even to Niko. Indeed, according to Mr Islam, the first payment was made "*mid-February 2004*";[1446] but it was only on 19 May 2004 that the work in the Feni field had reached a stage that Niko announced possible gas production to Petrobangla and proposed to initiate discussions for the GPSA.[1447] The link of a payment in February 2004 to the GPSA negotiations is thus unclear. It is even less clear why Niko would have made payments to Mr Abedin before at a time when his role in the future gas pricing negotiations does not seem to have been determined and Petrobangla and the Ministry had not even formed the committee for these negotiations.

1957. In any event, there is no indication that the alleged payments, if they were made and if they were intended to promote Niko's interests in the GPSA negotiations, had any such effect. Quite to the contrary. As the examination of the GPSA negotiations in Section 4.2 above has shown, Niko had to conclude the GPSA at a price far below that which it wished to obtain. Niko had requested a price of US$2.75/MCF and, during the negotiations, was prepared to reduce the price to US$2.35/MCF. Petrobangla and the Government had offered US$1.75/MCF. Although they were prepared, at some time during the negotiations, to increase the price to US$2.10/MCF, they reverted to their original position and in the end insisted on the price initially offered. Despite much objection, Niko had to accept this price.

[1444] Minutes of the first and second meeting of the Gas Pricing Committee, Exhibit JD C-6, p. 485 and 486.
[1445] See above, Section 4.2.
[1446] Islam Statement, 12 March 2008, Exhibit R-392, p. 5.
[1447] Exhibit JD C-6, p.494.

1958. The correspondence with Mr Abedin, as produced in these Arbitrations, shows that he steadfastly defended the position of Petrobangla, in particular with respect to the price and with respect to the delivery requirement against Niko's requests and against its threats of suspending gas production. As revealed by the Respondents in these Arbitrations, this price is substantially below that paid during the period from 2004 to 2015 to other suppliers of gas.[1448] If there had been any payments to Mr Abedin, the Respondents have not shown that they had any effect on his position in the negotiations and on the terms of the GPSA.

1959. The Tribunals see no basis for assuming that the GPSA and its terms were procured through corruption of Mr Abedin.

11.8.3 Other alleged corrupt acts in the procurement of the GPSA

1960. In addition to the payments allegedly made to Mr Abedin, the Respondents allege a number of other "*corrupt acts*" by Niko in relation to the GPSA, as they were listed above. The Claimant points out that these acts are outside of the Targeted Period and refers to "*clear and established facts militating against any notion that the GPSA was procured by any of the alleged acts set out in the Respondents' chart*".[1449]

1961. The Claimant points out that

> *… the GPSA was signed on 27 December 2006 under a new caretaker government. The BNP Government under Khaleda Zia left office in October 2006 and State Minister Hossein had been out of office since June 2005. In short, neither the allegedly corrupt actors nor the broader alleged kleptocratic regime was in power when the GPSA was signed.*[1450]

1962. As to the specific allegedly corrupt acts, the first on the list in the Respondents' First Post-Hearing Brief, are **the Bhuiyan/Mamoon agreements**. The Respondents describe the alleged "*bribe*" as follows:

[1448] See Procedural Order No 15, paragraph 10.
[1449] C-PHB2 (CONFIDENTIAL), paragraph 50.
[1450] C-PHB2 (CONFIDENTIAL), paragraph 51 (internal citations omitted).

Mr. Sharif paid first $500,000 to Mr. Bhuiyan following the JVA, which he shared with Mr. Mamoon and the State Minister. The promise of the additional $500,000 was pending conclusion of the GPSAs, and Mr. Bhuiyan was to start receiving $10,000/month once the Feni GPSA was signed. (R-375).[1451]

1963. The Claimant accepts that payments continued to be made to Nationwide after the conclusion of the JVA and "*Nationwide continued its mandate following execution of the JVA, assisting Niko in its efforts to get a Feni GPSA*".[1452] The Claimant also explains with respect to "*the promise of future payment [under the Nationwide/Bhuiyan agreement…] that the GPSA was never executed within the time frame that would have triggered the further remuneration and the Respondents point to no evidence that any such payments were made upon the execution of the GPSA.*"[1453] It concludes that there is "*no evidence of any advantage accruing to Niko in relation to the GPSA.*"[1454]

1964. The Tribunals note that, despite the pending promise of the additional US$500,000, the GPSA was not concluded in the agreed limited period and there is no allegation that the amount was ever paid. They see no corrupt payment in this respect.

1965. The second item on the list of corrupt acts are the **payments to Mr Babul Gazi**. These payments have been discussed above in the context of the JVA. The Tribunals determined that these payments cannot be considered as bribes. This determination applies also with respect to the GPSA. In any event, the Respondents failed to make any specific allegation as to the manner in which payments to Mr Gazi contributed to the procurement of the GPSA and its terms.

1966. The Respondents then refer to **the Toyota Landcruiser for the State Minister and his travel expenses**, that have been subject to the Canadian conviction. The Tribunals have considered these acts in their Decision on Jurisdiction and noted that they did not procure the GPSA. The examination of the GPSA negotiations, as presented above, confirmed this conclusion and the Tribunals see no need to modify it.

[1451] R-PHB1 (CONFIDENTIAL), p. 46.
[1452] C-CMC, paragraph 238.
[1453] C-PHB2 (CONFIDENTIAL), paragraph 53.
[1454] C-PHB2 (CONFIDENTIAL), paragraph 54.

1967. Finally, the Respondents refer to the **visit of the Canadian Senator Harb** in Bangladesh. The Respondents assert that the senator met with the Minister of Foreign Affairs in Bangladesh. They conclude that, through this visit and the intervention in Bangladesh, Niko gained the advantage of being able indirectly to "*influence senior Government officials, including the Minister of Foreign Affairs and the Minister of Finance, to get the GPSA for Niko".*[1455]

1968. The Tribunals see no illegal act in the visit of Senator Harb in Bangladesh. There is, moreover, no evidence that it had any impact on the conclusion of the GPSA and its terms.

1969. The Tribunals conclude that the GPSA was not procured by corruption.

[1455] R-PHB1 (CONFIDENTIAL), p. 47.

12 SUMMARY AND CONCLUSIONS

1970. When the Respondents presented their new and expanded Corruption Claim, they asserted that "*Niko filtered money away from the people of Bangladesh and into the pockets of a few corrupt individuals*" and they quoted the FBI Investigator, Ms LaPrevotte:

> *Every dollar corruptly paid to obtain government contracts or paid to unfairly influence government officials removes the level playing field. Further, the money paid by government for contracts that have been inflated to accommodate the payment of bribes is money that did not go to food, infrastructure, medicine, and healthcare.*[1456]

1971. The reality of the Niko Agreements, which the Tribunals found through the detailed analysis presented in this Decision, is quite different from the situation described by the Respondents and Ms LaPrevotte. The Tribunals summarise these findings below, under the following headings: (i) At the end of the Joint Investigation, in which Ms LaPrevotte played a leading role, the United States Department of Justice determined that "*prosecution is not necessary*", the Canadian authorities found no other corrupt acts but the vehicle and the travel expenses to the State Minister who resigned long before the GPSA was agreed (and for which they, in any event, publicly sanctioned Niko); and the Respondents sought to avoid the Agreements only after these Tribunals had decided that Petrobangla had to pay for the gas that Niko had delivered; (ii) the Tribunals found that the Niko project had been welcomed by the Respondents as advantageous to Bangladesh, for which they found Niko qualified and which was funded by Niko alone, without any payments from the Respondents; (iii) no administrative irregularity had occurred, as confirmed by the Bangladesh Supreme Court, High Court Division in the *BELA* Judgment and (iv) no evidence established that the Agreements were procured by corruption.

12.1 "*Prosecution is not necessary*"

1972. The corruption allegations on which the Respondents' new claim rely in substance were contained in the Charge Sheet of the Bangladesh Anticorruption Commission (ACC) dated 9 December 2007; the delivery

[1456] R-MC, paragraph 28 quoting from LaPrevotte First Witness Statement, paragraph 4.

of the vehicle to the State Minister in June 2005 had become known even earlier. The information gathered about the alleged corruption had been shared between the law enforcement agencies in Bangladesh, Canada and the U.S. and has been available to the Government when it was party to these Arbitrations and consequently must also have been available to the Respondents long before they filed the Corruption Claim in 2016.

1973. **The FBI** took an active part the investigation because it determined "*a strong nexus to the U.S.*" since Niko's consultant (who was also President of Niko Bangladesh) was a U.S. national. In August 2011 the United States Department of Justice informed Niko Canada that it had discontinued its inquiry, explaining that "*prosecution is not necessary at this time in light of Niko's guilty plea in Canada*". The Tribunals have not been informed that this assessment changed at any time thereafter; no action seems to have been taken in the United States against Mr Sharif or Niko in relation to the project in Bangladesh (see above Section 2.7).

1974. Alerted by the gift of the vehicle to the State Minister and the payment of travel expenses for him, the **Canadian RCMP** investigated the corruption charge against Niko, jointly with the ACC and the FBI. The Canadian authorities convicted Niko of corruption on the basis of this charge in June 2011. The court noted that the "*Crown is unable to prove that any influence was obtained as a result of providing the benefits to the Minister*". The Tribunals have not been informed that Niko was pursued for any of the other acts of corruption alleged in the ACC Charge Sheet or otherwise raised in these proceedings.

1975. The **Government of Bangladesh and the Respondents** appeared in 2009 and 2010 before the Supreme Court of Bangladesh in the *BELA* case, in which the legality of the JVA was at issue. None of them took the position that the JVA was procured by corruption or even mentioned in their submissions the corruption charges.

1976. In the present Arbitrations, the Government and the Respondents raised an objection against the Tribunals' jurisdiction on the basis of alleged corruption, relying on the Canadian conviction; but they confirmed that they did not challenge the validity of the Agreements. That position was not reversed when, at the Hearing on Jurisdiction in October 2011, the Claimant made available to the Respondents a copy of the ACC Charge Sheet. The new position was presented only in March 2016.

1977. In these circumstances there must be serious doubts about the reality of the corruption charges now raised by the Respondents and the confidence which the Government and the Respondents had in them. It appears even more doubtful that an international arbitral tribunal, proceeding under the ICSID Rules, could find that the Agreements were procured by corruption and invalid, whereas Governmental authorities in the U.S. and Canada determined, on the basis of the evidence now before the present Tribunals, not to proceed with the corruption charges further; and whereas the Government of Bangladesh and the Respondents themselves did not rely on the alleged corruption to invalidate the Agreements when the validity of the JVA was challenged in the *BELA* proceedings.

1978. The Tribunals' doubts about the reality of the corruption allegations are intensified by the circumstances in which the corruption charges are now raised by the Respondents. In fact, it was only after these Tribunals, in their earlier decisions concerning the Payment Claim, had ordered Petrobangla to pay the amounts it owed Niko for the gas delivered and due under the GPSA and had given instructions for the implementation of this decision, that

- the Respondents raised in March 2016 the corruption charges which the Tribunals now have had to consider.
- In parallel to this new action in the present Arbitrations, a Bangladeshi national, Professor Samsul Alam, brought proceedings before the High Court Division of the Bangladesh Supreme Court challenging the validity of the Agreements on grounds of corruption. Although the High Court Division had found in its Judgement of May 2010 in the *BELA* case that the JVA had not been "*obtained by flawed processes by resorting to fraudulent means*", the High Court Division in the new case, relying inter alia on the ACC Charge Sheet and making factual assertions that are clearly erroneous, declared the JVA and the GPSA "*to be without lawful authority and of no legal effect and thus void ab initio*".
- The Respondents also informed the Tribunals in late 2018 that criminal proceedings against the former Prime Minister Khalida

Zia and others in relation to the Niko case investigated by the ACC had now led to a hearing.

1979. The Tribunals are mindful of their responsibility, as an international arbitral tribunal and as ICSID arbitrators, for the regularity of the proceedings before them; they are equally unwilling, as a matter of paramount principle, to give effect to corruptly obtained contracts challenged by an innocent party. Accordingly, notwithstanding the contextual doubts about the reality of the corruption allegations which the Respondents have raised at such a late hour in the present proceedings, the Tribunals therefore have examined with great care all details of the broad range of accusations brought by the Respondents in the newly raised Corruption Claim. In the course of the present Decision the Tribunals have set out this examination and the findings they reached. The conclusions and the essential steps by which they were reached can be summarised as follows.

12.2 A project which the Respondents assessed as advantageous to Bangladesh, proposed by an investor deemed qualified to implement it

1980. In their Corruption Claim, the Respondents presented Niko and its group as "*lacking technical and financial qualification*"[1457] which gained access to the gas resources of Bangladesh only through corruption, by a "*pervasive*" use of bribes which "*was an integral part of Niko's investment strategy*".[1458]

1981. In light of the evidence, the Niko project and Niko's conduct with respect to it do not fit the Respondents' harsh description. What the record in fact shows is that Niko offered to Bangladesh the opportunity of recovering gas from "*marginal/abandoned fields*", a resource that Petrobangla had not planned to recover and which, as asserted repeatedly, was even an unknown concept. As revealed by the testimony at the evidentiary hearing, Petrobangla considered Niko as technically qualified for this work. The poor rating which Niko had received in an evaluation for a different project (the PSC bidding round) was based on

[1457] R-MC, paragraph 26.
[1458] R-MC, paragraph 3.

criteria which were not relevant for Niko's qualification for the proposed project and the JVA.

1982. The terms of the JVA were examined repeatedly by several committees at various levels of BAPEX, Petrobangla and the Ministry. The Respondents have not asserted any contractual terms that were unfavourable for them or for Bangladesh, or that any such terms were imposed by the State Minister or the Prime Minister. Petrobangla and BAPEX recommended the approval of the JVA.

12.3 No administrative irregularity identified

1983. The controversial issues that arose during the JVA negotiations concerned (i) the area to which the JVA would apply, Chattak West or the entire Chattak field, and (ii) the question whether, once its terms had been agreed with Niko, the JVA had to be submitted to Swiss Challenge. The Respondents attributed the resolution of these issues to interventions from the State Minister. Having conducted a detailed examination as set out in this Decision, the Tribunals came to conclusions differing from those argued by the Respondents, considering both the regularity of the administrative procedures leading to the conclusion of the Agreements and the merits of the corruption allegations.

1984. Concerning **the issue of the Chattak Field**, the Tribunals noted that Chattak was historically identified as a single field, even though there were several faults in the field with the potential to create separate reservoirs of hydrocarbons. The Western part had been exploited but not the Eastern part where already an earlier study had proposed to drill an exploration well. In the first agreement concluded with Niko, the FOU with BAPEX, the complete Chattak field was identified by its coordinates.

1985. Once the results of the Marginal Fields Evaluation of February 2000 were known, the Respondents decided that the Chattak field should be split into a Western part which could be characterised as "*marginal/abandoned gas field*" and Chattak East that had to be treated as a "*separate unexplored geological structure*". They took the position that Chattak East had to be excluded from the JVA although, until after

the MFE had been made available, Chattak East had never been treated as an exploration target distinct from Chattak West.

1986. Although the Marginal Fields Procedure, adopted by the Awami League Government in June 2001, referred to the Chattak Field without distinction between the Eastern and the Western part, the Respondents continued to insist that only the Western part could be treated as "*marginal/abandoned*" and that the Eastern part had to be excluded from the JVA.

1987. Following a suggestion from BAPEX, the difference was submitted to the Law Ministry which concluded that the delimitation of the Chattak Field, defined by the coordinates annexed to the FOU, was binding. In the circumstances and after a detailed review, the Tribunals find that this conclusion is reasonable and does not justify the criticism which the Respondents direct against the Law Ministry's determination.

1988. When the Law Ministry had determined that Chattak East should be included in the JVA, BAPEX and Petrobangla negotiated with Niko improved financial terms for BAPEX, which moreover treated Chattak East more favourable to BAPEX than the Chattak West and Feni fields.. The Tribunals see in this additional negotiation and the improved terms for BAPEX a further indication that the concerns of Petrobangla and BAPEX were taken into account, even though the direct application of the Law Ministry's opinion would not have required this to be done.

1989. The Tribunals have therefore concluded that the inclusion of the undivided Chattak Field in the JVA was legally justified indeed advantageous to BAPEX and Petrobangla.

1990. With respect to the requirement of **competition and Swiss Challenge**, the Tribunals have noted, based on the evidence available in these Arbitrations, that a proposal for marginal gas field development, as that made by Niko, is not a transaction that was foreseen in the Bangladesh procurement regulations and for which a competitive selection process was required at the time. The Marginal Fields Procedure, adopted in June 2001, for the first time, addressed the case of unsolicited proposals; with respect to offers received prior to the adoption of the Procedure, it prescribed appraisal by a technical committee appointed by Petrobanlga and the conclusion of a JVA without any requirement for competition.

1991. It was in fact Niko that had initially proposed the application of the Swiss Challenge procedure. While the Ministry, in May 1998, in directions addressed to Petrobangla, had stated that Swiss Challenge may be applied, "*if necessary*", the Ministry never explicitly agreed with Niko on this procedure; in particular, it never committed formally to the privileged position for Niko which the application of that method would have required; nor did the Respondents make any preparations for inviting competitors to whom information available to Niko would have had to be made available.

1992. In any event, the original approach proposed by Niko was not followed and, instead of concluding the MOU, the Ministry and the Respondents required that, before a JVA could be negotiated, a feasibility study of the Chattak, Feni and Kamta fields had to be conducted jointly by BAPEX and Niko, of which Niko had to bear the full costs. Niko agreed to perform this study. It did so in the FOU, which provided for the execution of the JVA upon the satisfactory completion of the study.

1993. When the issue was submitted to it, the Law Ministry concluded that the FOU required the execution of the JVA without further competition and Swiss Challenge. The Tribunals have concluded that, in the circumstances, this conclusion was reasonable. They noted that, when negotiating the JVA, the Respondents appointed special committees that scrutinised the terms of the JVA and assured that these terms were acceptable to Petrobangla and BAPEX. In this process they also referred to the terms of a PSC that had been awarded in international competitive bidding.

1994. The Tribunals are not persuaded that, after five years of analysis and negotiation with the intervention of several committees, Petrobangla and BAPEX were unable to assess the competitive value of the JVA terms. An examination of the record shows that Niko took the risk of an investment in which BAPEX would share the revenue without having to make any financial contribution, and the gas price to be paid to Niko was well below that which Petrobangla had agreed with other suppliers of gas.

1995. The Tribunals concluded that there is no basis for the assertion that the omission of Swiss Challenge was in violation of Bangladesh procurement regulation applicable at the time or in violation of a prior agreement with

Niko; nor is there a basis for assuming that any other company would have been prepared to bid for the project, nor that better terms could have been achieved for BAPEX and Petrobangla if Swiss Challenge had been applied.

1996. The Tribunals conclude, as did the Bangladesh Supreme Court, High Court Division, in the *BELA* Judgement of May 2010, that "*the JVA was not obtained by flawed process by resorting to fraudulent means*".[1459]

1997. There are no administrative irregularities alleged with respect to the conclusion of the GPSA; in particular the Respondents do not assert that competitive procedures had to be applied in the award of this Agreement.

12.4 The evidence does not establish that the Agreements or Governmental acts in their preparation were procured by corruption

1998. In these proceedings, the Respondents asserted that "*from the moment it entered Bangladesh [Niko] used bribery and corruption to obtain favourable decisions from the Government and procure the JVA and the GPSA*".[1460] The Tribunals have examined carefully the many alleged acts of corruption and the corresponding benefits allegedly obtained. Here, too, the facts as they emerged from the record are at odds with the Respondents' allegations.

1999. A major line of the Respondents' attempts to demonstrate corruption follows the assumption of the Investigators from Bangladesh, Canada and the U.S. who asserted that the Niko project followed the same *modus operandi* as that which they associated with the Siemens bid for a telecommunications project in Bangladesh and some similar cases. The Respondents, following this view of the Investigators, described this *modus operandi* as the use of consultants for the sole purpose of channelling bribes by "*layering*".

[1459] *BELA* Judgment, CLA-143, p. 40.
[1460] R-PHB1 (CONFIDENTIAL), paragraph 4, quoting from Tr. Day 1 (CONFIDENTIAL), p. 127, l. 22 to p. 128, l. 2.

2000. Niko did use local consultants, but these consultants, in the Tribunals' view, were justified in the circumstances; they provided legitimate services in the development of the project, in presenting it to the competent authorities and in assuring that it be properly treated, dealing with the "*bureaucratic impediments*".[1461] On the evidence produced, the Tribunals concluded that on Niko's side there was no "*layering*" in the sense in which the Investigators used it.

2001. The Tribunals also examined the numerous acts which the Respondents identified as Governmental acts procured by Niko through corruption. They found that the Respondents' allegations were unsupported by the evidence, often relied on speculation or assumed links that were not shown to exist by the available evidence. When considering this evidence the Tribunals were mindful that corruption is often difficult to establish; they also considered, as they must, that they have a duty of fairness and due process to both sides and they may not accept the serious charge of corruption against a party when this charge is not adequately proven.

2002. The Respondents' allegation that **the FOU** was procured by corruption was shown not only to have been unsupported by the evidence; it was not even plausible, since the FOU was imposed by the Bangladeshi side to procure an advantage not to Niko but to BAPEX; its purpose was to require Niko to provide a technical study at its sole expense and before a JVA had been negotiated and executed.

2003. Concerning **the two opinions by the Law Ministry**, which resolved the dispute about the scope of the Chattak Field and the requirement of Swiss Challenge, the evidence on record suggests that they were not submitted by the Law Minister personally, as the Respondents assert, but by the Ministry, signed by several senior officials of the Law Ministry. In the Tribunals' view, there is evidence neither for a conflict of interest on the side of the Minister nor for corruption in the preparation of these two opinions by the Ministry.

2004. The benefits afforded to **the State Minister** in the form of a vehicle and travel expenses have been the subject of a criminal sanction in Canada. Based on the Tribunals' analysis, already set out in the Decision on Jurisdiction, they cannot be taken as having procured or contributed to

[1461] Sharif Transcript, 16 December 2010, Exhibit R-333, p. 65

the procurement of the JVA as they occurred after its conclusion and without any apparent link to it. For the reasons explained in the Decision on Jurisdiction they also did not contribute to the procurement of the GPSA.

2005. The Respondents' allegations of corruption based on payments made to the State Minister after the execution of the JVA are based on doubtful evidence; moreover, in the Tribunals' view, even if contrary to the Tribunals' finding such payments had to be accepted as proven, they were not (and could not in the circumstances have been) instrumental in the procurement of the Agreements.

2006. The Respondents' allegations of bribes paid by Niko to **the Prime Minister** for her approval of the Agreements have no evidentiary support.

2007. The Tribunals have also examined the other allegations of corruption by Niko in connection with the conclusion of **the GPSA**. They have determined that those residual allegations are equally unfounded, and that they too in any event would not have been instrumental to the conclusion of the GPSA. The Tribunals further note that the GPSA was manifestly favourable to Petrobangla, which received the gas at a price far below the price it paid to other suppliers.

2008. In sum, the Respondents' Corruption Claim is unfounded. If it had been upheld as presented by the Respondents with insufficient evidence, it would give them the unjust advantage of obtaining the gas delivered by the Niko/BAPEX Joint venture without having to pay anything for it (as indeed is the situation the Claimant finds itself in many years after having delivered significant quantities of gas for which it received nothing but two payments on account, covering only a fraction of what the Tribunals found as due). The Tribunals are of the view that granting such advantages to the alleged victims of corruption cannot be the purpose of the fight against corruption.

2009. When the Respondents brought their renewed corruption claim, the Tribunals were in the process of preparing the Decision on the Compensation Declaration, addressing the issue of liability for the two blowouts and therefore engaged in the assessment of the serious contentions pertaining to this liability. It is unfortunate that this decision has been delayed by the Respondents' unjustified Corruption Claim.

2010. In light of these considerations, **the Tribunals decide** that

(i) The declarations sought by the Respondents concerning the establishment of Niko's investment in Bangladesh and the Government's approval of the Agreements are denied;

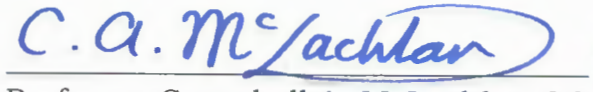
(ii) The Respondents' objections to the Tribunals' jurisdiction are rejected;

(iii) The JVA between BAPEX and Niko Resources Bangladesh was not procured by corruption and remains valid and binding;

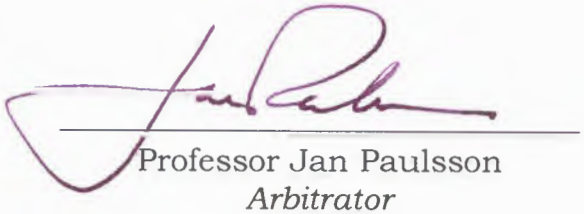
(iv) The GPSA between Petrobangla and Niko Resources Bangladesh was not procured by corruption; there is no basis for revising the Tribunals' decisions on the Payment Claim;

(v) The decisions concerning the requests relating to the liability for the blowouts and to the resulting damages are reserved;

(vi) The decision concerning the costs of the proceedings on the Corruption Claim is reserved.



Professor Campbell A. McLachlan QC
Arbitrator



Professor Jan Paulsson
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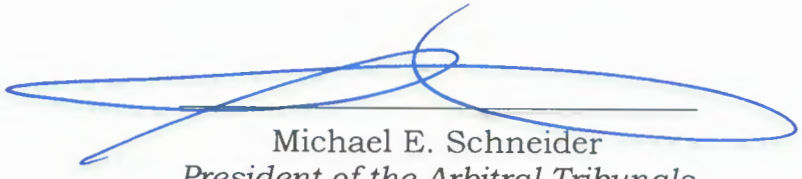

Michael E. Schneider
President of the Arbitral Tribunals