



NIKO RESOURCES (BANGLADESH) LTD.

V.

**BANGLADESH PETROLEUM EXPLORATION & PRODUCTION COMPANY LIMITED (“BAPEX”)
AND BANGLADESH OIL & GAS MINERAL CORPORATION (“PETROBANGLA”)
(ICISD CASE NOS. ARB/10/11 AND ARB/10/18)**

**Procedural Order No 20
(Post-Hearing Organisation)**

During the course of the hearing on the Corruption Claim, held in Paris from 24-29 April 2017, a number of issues were raised concerning the final stage of the procedure on the Corruption Claim, including in particular the post-hearing submissions. Some procedural issues were addressed in subsequent correspondence from the Parties to the Tribunals.

Further to the consultation with the Parties on the last hearing day and having considered the pending procedural issues, including those raised in post-hearing correspondence, the Tribunals now make the following

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1. Further to the testimony of ██████████, to the Respondents’ requests at the hearing and in their letter of 11 May 2017, and considering the Claimant’s argument at the hearing with respect to the claim of privilege, the Claimant shall forthwith, but no later than three days following the receipt of this Procedural Order:
 - 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 ██████████ referred in his oral testimony (the Deloitte Audit List) and
 - (b) documents derived from these documents, such as the PowerPoint presentation mentioned by ██████████ 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.

2. Within five days following the date of receipt of the Deloitte Audit List and the Claimant’s Submission on Privilege, the Respondents may comment on the reasons provided by the Claimant.
3. The Respondents shall, forthwith, but no later than five days following the date of receipt of this Procedural Order: 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. The Respondents shall forthwith, but not later than five days following the date of receipt of this Procedural Order:
 - 4.1. produce the proposal from Petrobangla to the Minister, which in the opinion of [REDACTED] 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. The Tribunals note that the Respondents had announced during the hearing that they would produce such regulation within one week of the conclusion of the hearing but did not include it in their communication to the Secretariat on 10 May 2017.
5. If the Claimant has comments or rebuttal evidence concerning the identity and origin of the document produced by the Respondents on 15 May 2017 as Annex E to the 2003 draft

JVA, it is invited to produce them within five days as from the date of receipt of this Procedural Order. Subject to such comments and rebuttal evidence the document is admitted in the record as Exhibit R-306a.

6. At the hearing, the Tribunals announced their intention to submit to the Parties questions on issues which may be relevant for the Tribunals’ Decision on the Corruption Claim, without thereby prejudging this decision or intending to restrict the scope of issues which the Parties wish to address in these submissions. These questions are attached to this Procedural Order as Annex A.
7. Further to the preferences expressed by the Parties, the Tribunals fix the following post-hearing steps:
 - 7.1. Eight weeks following the receipt of the Tribunals’ questions, i.e., by Wednesday, 12 July 2017, the Parties shall submit their First Post-Hearing Submission.
 - 7.2. Three weeks following the filing of this submission, i.e., by Wednesday, 2 August 2017, the Parties shall submit their Second Post-Hearing Submission, limited to responding to points addressed in the First Post-Hearing Submission.
 - 7.3. The number of pages of both rounds of submissions shall be limited. This number shall be agreed by the Parties. The Parties are invited to inform the Tribunals of any agreement they were able to reach in this regard by no later than Wednesday, 24 May 2017.
8. Except for the documents listed in the present Procedural Order 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 on the proceedings on the Corruption Claim is closed.

On behalf of the two Arbitral Tribunals

[signed]

Michael E. Schneider

President

17 May 2017

Annex A
Questions to the Parties Concerning the Corruption Claim

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 prejudice 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 ([REDACTED] and, directly or indirectly, [REDACTED]).
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 [REDACTED] accounts of [REDACTED] ([REDACTED]) and [REDACTED] ([REDACTED]); (b) outgoing from these accounts, and have identified which of the latter they consider as suspect. The Respondents are invited:

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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 ██████████ to ██████████ and ██████████, 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 ██████████ ██████████ 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.” 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?

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?