

**Niko Resources (Bangladesh) Ltd.**

**v.**

**Bangladesh Petroleum Exploration & Production Company Limited (“Bapex”), and  
Bangladesh Oil Gas and Mineral Corporation (“Petrobangla”)**

**(ICSID Case Nos. ARB/10/11 and ARB/10/18)**

**Procedural Order No 17**

**(Concerning Confidentiality – Protective Measures)**

## **1. Background**

1. In the Provisional Measures Request of 19 May 2016, the Claimant addressed the Writ Petition filed on 9 May 2016 by Professor M. Shamsul Alam in the Supreme Court of Bangladesh, High Court Division under Article 102 of the Bangladesh Constitution, arguing *inter alia* that the JVA and GPSA were procured by fraud and are void *ab inito*. The Claimant pointed out that Professor Alam’s petition relied on certain documents which had been filed in these arbitration proceedings, without providing any explanation as to how he had obtained these documents.<sup>1</sup>
2. In their letter of 8 August 2016 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. Such measures should include restrictions barring counsel for the Respondents from disclosing, directly or indirectly, the documents to the Respondents or any third parties. Niko does not make this suggestion lightly, but respectfully submits that the circumstances it faces with regard to proceedings in Bangladesh are, to say the least, both exceptional and prejudicial.*
3. During the 10 August 2016 procedural consultation, the question of “leakages” to persons not participating in these arbitrations was addressed. The Respondents stated that they were prepared to make commitments with the objective of preventing in the future such leakages and that they would submit a proposal to the Claimant to this effect.<sup>2</sup>
4. During the 1 September 2016 procedural consultation, the Parties stated that they had reached an agreement in principle regarding restrictions concerning the access to the record of these arbitrations.<sup>3</sup>

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<sup>1</sup> Niko’s Request for Provisional Measures, 19 May 2016, paras. 13-14.

<sup>2</sup> Summary Minutes, paragraph 36.

<sup>3</sup> Summary Minutes, paragraph 5.

Procedural Order No 17

5. The Tribunals issued Procedural Order No. 15 on 7 October 2016, which ordered the disclosure of certain documents by each of the Parties. The Order notes that the issue of confidentiality was raised in the August and September 2016 procedural consultations, and invited the Parties to "*report forthwith on the progress achieved*" concerning confidentiality restrictions. The Order stated that "*[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*".<sup>4</sup>
6. 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.<sup>5</sup>
7. On 23 November 2016, the Respondents filed their Memorial on Corruption. The Respondents filed two electronic versions of the Memorial – a version in which footnote 153 was redacted and an un-redacted version. The redacted version of the Memorial on Corruption was provided to the Tribunals, ICSID and the Claimant. The un-redacted version of the Memorial on Corruption, together with two of the supporting exhibits (Exhibits R-374 and 375), were provided only to ICSID, and to two of the legal representatives of the Claimant. On the same date, counsel for the Respondents transmitted a letter regarding the Claimant's document production and the use of the documents produced by the Claimant to ICSID and the two legal representatives of the Claimant.
8. Following consultation with the President of the Tribunals, the Secretariat invited the Parties on 28 November 2016 to provide instructions regarding the treatment and distribution of the un-redacted version of the Respondents' memorial, the two accompanying exhibits and the letter of 23 November 2016.
9. By emails of 1 December 2016, each Party confirmed that the un-redacted version of the Memorial on Corruption and the two supporting exhibits should be transmitted to the Tribunals, as well as the 23 November 2016 letter from the Respondents. The Parties however disagreed whether these documents are to be shared with the entire distribution list "*until the appropriate form of confidentiality order has been issued by the Tribunals*".
10. The Claimant further stated that it "*does not consider that the Respondents' letter of November 23, 2016 fully and accurately describes the events surrounding the*

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<sup>4</sup> Procedural Order No 15, Paragraph 69.

<sup>5</sup> Produced as Appendix A to the Claimant's letter to the Tribunals of 9 December 2016.

Procedural Order No 17

*parties’ attempts to reach agreement on the terms of a confidentiality order”* and requested the opportunity to respond to the letter.

11. Further to the Parties’ agreement as reflected in their emails of 1 December 2016, ICSID transmitted the un-redacted version of the Memorial on Corruption, the two additional exhibits and the Respondents’ letter of 23 November 2016 to the Tribunals.
12. On 5 December 2016, the Tribunals granted the Claimant’s request to respond to the Respondents’ 23 November 2016 letter. The Tribunals requested the Claimant to include in the response *“a proposal of the kind of confidentiality provisions the Claimant considers essential, taking into account the limited agreement of November 4, 2016, and any subsequent discussions and submissions between the parties”*. The Respondents were also invited to file by 15 December 2016 their observations on the Claimant’s response. The Tribunals informed the Parties that *“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”*.
13. On 9 December 2016 the Claimant responded to the 23 November 2016 letter from the Respondent, providing a further description of the Parties’ attempt to reach an agreement on the terms of a confidentiality order.<sup>6</sup> The Claimant proposed a draft of Procedural Order No. 17, setting out a comprehensive confidentiality arrangement.
14. On 15 December 2016 the Respondents provided their observations on the Claimant’s proposal, suggesting amendments to the draft Procedural Order No. 17 proposed by the Claimant.

## **2. The Tribunals’ Analysis**

15. In its letter of 9 December 2016 the Claimant noted that the Respondents had been invited to comment on the Claimant’s proposal and requested an opportunity to respond to such comments. In their letter of 15 December 2016 the Respondents requested that they be given opportunity to respond in case the Claimant were afforded the opportunity it had requested.
16. The Tribunals have considered these request and concluded that they have been informed about the Parties’ views concerning appropriate confidentiality

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<sup>6</sup> Appendix B to the Claimant’s letter of 9 December 2016.

Procedural Order No 17

arrangements. They have examined these views and deliberated about them. In view of the conclusions which they reached in their deliberations and which are set out in this Procedural Order, the Tribunals concluded that, with respect to the order they are now making, they are sufficiently briefed and do not need to receive any further information at this stage.

17. The Tribunals have considered the definitions of Confidential Information and Derivative Materials, as proposed by the Claimant and the amendments to them, as proposed by the Respondents. They consider these amendments as minor and reasonable. They adopt the definitions, adapted as follows:

*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.*

18. When examining the need for the requested protective measure in the form of confidentiality arrangements as requested by the Claimant, the Tribunals considered that confidential documents produced by the Claimant in these arbitrations found their way into the hands of a third person, Professor Alam, who used them in proceedings which he commenced in the courts of Bangladesh against the Claimant.

Procedural Order No 17

19. According to the Respondents, Professor Alam acted independently of them. The Respondents denied that they had provided the documents to Professor Alam but did not offer any explanation as to how the documents came into his possession.
20. It has not been contested that such use of Confidential Information produced in these arbitration proceedings to support claims by other unrelated persons in court proceedings against the party having produced the documents is undesirable and disruptive to the present proceedings. The Respondents themselves, as they stated at the Procedural Consultation of 1 August 2016, were prepared to make commitments with the objective of preventing such leakages in the future; and they participated in the work on arrangements to this effect in the form of the proposed drafts for Procedural Order No. 17.
21. No means have been proposed of how to prevent transmission of documents and information to third parties other than by instituting in these arbitrations a specific regime for regulating access to the confidential documents.
22. The Tribunals therefore accepted that protection by regulating access to Confidential Information must be provided in some form. In Procedural Order No. 15, issued on 7 October 2016, the Tribunals ordered that, subject to broader access agreed by the Parties or authorised by the Tribunals, access to Confidential Information produced by the Claimant is restricted to the Respondents’ counsel. The Parties agreed that the Tribunals and the Secretariat also be granted access to such documents.
23. The Tribunals took note that the Parties were able to reach agreement concerning the transmission of Confidential Information to the Respondents’ expert with the protection of a Confidentiality Undertaking. 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.*
24. In a document entitled “Memo”, dated 22 November 2016, Mr Jenkins reported on his conclusions with respect to the Confidential Information made available to him. He stated:



Procedural Order No 17

*Given the small volume of documents provided by Niko, it is clear, from even a cursory review, that the evidence provided to date is inadequate and incomplete.*

25. Mr Jenkins did not, however, complain that the Confidentiality Undertaking prevented him from performing his task.
26. Encouraged by the Tribunals, the Parties had started, some time before the execution of the specific Confidentiality Undertaking, attempts to reach agreement on a more general confidentiality regime in the form of an agreed text to be adopted as a procedural order by the Tribunals. They were unable to reach such an agreement.
27. The Tribunals have examined the drafts of the proposed procedural order and the differences between the Parties concerning the provisions which this order should contain. They noted that these differences are numerous and at times substantial.
28. The Tribunals also noted that the limited arrangement which the Parties were able to put in place were sufficient for the Confidential Information to be made available to the Respondents' expert who provided comments on them. Having examined this information, the Respondents and their expert argued that the information disclosed by the Claimant was insufficient for a "*thorough corruption examination of the issues in this case*".<sup>7</sup> Eventually the Respondents relied only on two of the confidential documents produce by the Claimant and referred to them only in a footnote to their Memorial on Corruption. Respondents have referred to two confidential documents in Footnote 153.
29. 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.
30. 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

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<sup>7</sup> Duff & Phelps (Carl Jenkins) Memorandum of 22 November 2016, p. 6.

Procedural Order No 17

they may arise and following the approach in the partial agreement actually reached by the Parties.

31. In the present stage of the proceedings on the Corruption Claim to which the confidential documents relate, the Respondents have produced their Memorial and made their choice as to the Confidential Information which they considered necessary for the presentation of their case. At present it is not known whether, beyond the two exhibits and the information in footnote 153, any other Confidential Information will have to be relied upon in the next steps of the arbitration. If and when this question arises, the Tribunals intend to deal with it in the following manner:
- a. If the Respondents see the need for their counsel making any Confidential Information available to a person other than Mr Jenkins, they are invited to seek agreement with the Claimant on the conditions of such release. In the absence of such agreement, the Tribunals will decide whether the release of the identified information is justified and, if so, the terms of the Confidentiality Undertaking that must be executed prior to the release. Failing contrary agreement by the Parties on these terms, the Tribunals will seek guidance on the terms of the agreed Confidentiality Undertaking by Mr Jenkins.
  - b. When applying for such a decision from the Tribunals, the Respondents shall specify
    - (i) The document(s) concerned;
    - (ii) The person(s) to whom these documents should be released; and
    - (iii) The reasons why the release to the identified person(s) is necessary for the Respondents' case on the Corruption Claim.
32. Having noted that, acting through counsel and without themselves knowing the content of the Confidential Information, the Respondents were able to negotiate and agree on the terms of the Confidentiality Undertaking with Mr Jenkins, the Tribunals are confident that the prescribed procedure concerning the release of such information to any other person can be conducted without the Respondents' counsel releasing the Confidential Information to their client.
33. The Tribunals will decide on a case by case basis. A general confidentiality regime does not appear necessary at this stage. The Tribunals may reconsider their position if they consider an evolution of events so requires.
34. In their exchange about the terms of a general Confidentiality Order the Parties disagreed about the manner in which the authorised recipients of Confidential

Procedural Order No 17

Information had to proceed in case they were ordered to reveal this information on instruction “*by a court, legislative or administrative body*”. If the Respondents seek to make Confidential Information available to persons in Bangladesh, they are invited to explain how they propose to ensure that the information will not be seized in this manner and used in proceedings other than the present arbitrations.

35. As to the Confidential Information referred to in the Respondents’ Memorial on Corruption dated 23 November 2016, the Tribunals noted that Respondents’ counsel have not released these the two confidential documents produced as Exhibits R-374 and R-375 to the Respondents’ personnel nor to any other person.
36. In response to the enquiry as to how the un-redacted version of the Memorial and the two exhibits were to be treated, both Parties agreed to their immediate release to the Tribunals and the limited distribution of the submissions to Respondents’ counsel only.
37. Subject to any different agreement between the Parties or order by the Tribunals, the same procedure is to be followed in the future should Confidential Information be filed with a written submission. The Secretariat is instructed to proceed accordingly.
38. As to a broader release, the Claimant submitted in its letter of 1 December 2016 that the “*un-redacted Respondents’ Memorial, and the corresponding additional Exhibits, should not be distributed more widely until the appropriate form of confidentiality order has been issued by the Tribunals*”. The Respondents’ counsel stated in their message to the Secretariat of 2 December 2016 that they had “*no objection to these materials being treated as all other submissions and shared with the distribution list for these cases*”. The Respondents’ counsel did not state that they requested such treatment.
39. If the Respondents’ counsel wish to make the content of footnote 153 and Exhibits R-374 and R-375 available to other persons, they are invited to identify the persons to whom they wish to provide access and why such release is necessary for the Respondents’ defence in the proceedings on the Corruption Claim.



Procedural Order No 17


40. In view of the considerations set out above, the Tribunals now make 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.

On behalf of the two ~~Arbitral~~ Arbitral Tribunals

[signed]

 Michael E. Schneider  
*President*

11 January 2017