INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

NIKO RESOURCES (BANGLADESH) LTD.

(Respondent on Annulment)

v.

BANGLADESH OIL GAS AND MINERAL CORPORATION (PETROBANGLA) AND BANGLADESH PETROLEUM EXPLORATION AND PRODUCTION COMPANY LIMITED (BAPEX)

(Applicants on Annulment)

ICSID Case No. ARB/10/18
Annulment Proceeding

DECISION ON ANNULMENT

Members of the *ad hoc* Committee
Mr. Eduardo Zuleta, President of the *ad hoc* Committee
Dr. Claudia Annacker, Member of the *ad hoc* Committee
Mr. Makhdoom Ali Khan, Member of the *ad hoc* Committee

Secretary of the *ad hoc* Committee
Ms. Jara Mínguez Almeida

Assistant to the President
Ms. María Marulanda Mürrle

Date of dispatch to the Parties: 12 October 2023

REPRESENTATION OF THE PARTIES

Representing Niko Resources (Bangladesh) Ltd.:

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Ms. Rachel Howie
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and

Mr. Barton Legum
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Representing Bangladesh Oil, Gas & Mineral Corporation (Petrobangla) and Bangladesh Petroleum Exploration and Production Company Limited (BAPEX):

Mr. Zanendra Nath Sarker, Chairman, Petrobangla
Ms. Ruchira Islam, Secretary, Petrobangla
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and

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and

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DEFINED TERMS

Applicants	BAPEX AND Petrobangla
Application	Applicants' Application for annulment dated 21 January 2022
Award	Award rendered on 24 September 2021 in the arbitration proceeding between Niko Resources (Bangladesh) Ltd., and Bangladesh Oil Gas and Mineral Corporation and Bangladesh Petroleum Exploration and Production Company Limited (ICSID Case No. ARB/10/18)
BAPEX	Bangladesh Petroleum Exploration and Production Company Limited
C-[#]	Respondent on Annulment's Exhibit
CLA-[#]	Respondent on Annulment's Legal Authority
Committee	*Ad hoc c*ommittee composed of Mr. Eduardo Zuleta, Mr. Makhdoom Ali Khan and Dr. Claudia Annacker
Compensation Claim	Refers to a concurrent and still pending arbitration in *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ('BAPEX')* (ICSID Case No. ARB/10/11) that deals with a dispute arising from two gas blowouts at the Chattak field where Niko was drilling for gas
Corruption Claim	Claim brought by the Respondents (the Applicants) on 25 March 2016 in ICSID Case No. ARB/10/11 and ICSID Case No. ARB/10/18
Counter-Memorial	Respondent on Annulment's Counter-Memorial on Annulment dated 9 September 2022

Decision on Corruption	Decision on the Corruption Claim of 25 February 2019
Decision on Exclusivity	Decision pertaining to the Exclusivity of the Tribunals' Jurisdiction of 19 July 2016
Decision on Jurisdiction	Decision on Jurisdiction of 19 August 2013
GPSA	Gas Purchase and Sale Agreement dated 27 December 2006 between Niko and its joint venture partner BAPEX, as the seller, and Petrobangla, as the buyer
Hearing	Hearing on Annulment held from 23 to 24 March 2023
ICSID Arbitration Rules	2006 Rules of Procedure for Arbitration Proceedings of ICSID
ICSID Convention or Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965
ICSID or Centre	International Centre for Settlement of Investment Disputes
JVA	Joint Venture Agreement dated 16 October 2003 between Niko and BAPEX
Memorial	Applicants' Memorial on Annulment dates 30 June 2022
Niko or Respondent on Annulment	Niko Resources (Bangladesh) Ltd.
Niko's Amended Request for Provisional Measures	Niko's Amended Request for Provisional Measures of 1 June 2016
Parties	Jointly, Applicants and Respondent on Annulment
Payment Claim	Refers to the arbitration in *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ('BAPEX') and Bangladesh Oil Gas and Mineral Corporation ('Petrobangla')* (ICSID Case No. ARB/10/18) that deals with a claim for payment of gas produced by Niko in the

	Feni gas field and purchased by Petrobangla under the GPSA
Payment Decision	First Decision on the Payment Claim of 11 September 2014
Petrobangla	Bangladesh Oil Gas and Mineral Corporation
R-[#]	Applicants' Exhibit
Rejoinder	Respondent on Annulment's Rejoinder on Annulment dated 3 February 2023
Reply	Applicants' Reply on Annulment dated 18 November 2022
Request for Stay	Applicants' Request for the Stay of Enforcement of the Award dated 9 May 2022
RLA-[#]	Applicants' Legal Authority
Second Payment Decision	Decision on Implementation of the Decision on the Payment Claim of 14 September 2015
Third Payment Decision	Third Decision on the Payment Claim of 26 May 2016
Tr. Day [#], [page:line]	Transcript of the Hearing
Tribunal	Arbitral Tribunal composed of Mr. Michael E. Schneider, Prof. Jan Paulsson and Prof. Campbell McLachlan KC

I. INTRODUCTION AND PARTIES

1. This annulment proceeding concerns an application for annulment (the "**Application**") of the award rendered on 24 September 2021 (the "**Award**") in the arbitration proceeding between Niko Resources (Bangladesh) Ltd. ("**Niko**" or the "**Respondent on Annulment**"), a company incorporated under the laws of Barbados, and Bangladesh Oil Gas and Mineral Corporation ("**Petrobangla**") and Bangladesh Petroleum Exploration and Production Company Limited ("**BAPEX**") (together the "**Applicants**") (ICSID Case No. ARB/10/18), by a tribunal composed of Mr. Michael E. Schneider, Prof. Jan Paulsson, and Prof. Campbell McLachlan KC (the "**Tribunal**"). The Applicants and the Respondent on Annulment are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (ii).

2. The Award decided a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of a Gas Purchase and Sale Agreement dated 27 December 2006 between Niko and its joint venture partner BAPEX, as the seller, and Petrobangla, as the buyer (the "**GPSA**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force between Bangladesh and Barbados on 1 December 1983 (the "**ICSID Convention**" or the "**Convention**").

3. The dispute in the underlying arbitration related to a claim for payment of gas produced by Niko in the Feni gas field and purchased by Petrobangla under the GPSA ("**Payment Claim**"). Niko entered into a Joint Venture Agreement (the "**JVA**" and, together with the GPSA, the "**Agreements**") with BAPEX to produce the gas that was to be purchased by Petrobangla. Niko requested the Tribunal to issue an award for its share of the price (under the JVA) for the gas sold to Petrobangla.

4. A concurrent and still pending arbitration in *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ('BAPEX')* (ICSID Case No. ARB/10/11), before a tribunal also composed of Mr. Michael E. Schneider, Prof. Jan Paulsson, and Prof. Campbell McLachlan KC, deals with a dispute arising from two gas blowouts at the Chattak field where Niko was drilling for gas. In the pending arbitration, Niko requested the Tribunal to declare that it had no liability for the blowouts and, in the event liability were found, an award determining the amount of compensation due (the "**Compensation Claim**").

5. The Compensation Claim and the Payment Claim proceeded concurrently before identical tribunals, and the tribunals rendered several joint decisions on issues common to both claims. For the avoidance of doubt, this Decision on Annulment is limited to the decisions and the Award in ICSID Case No. ARB/10/18 (i.e., the Payment Claim).

6. In the Award, the Tribunal found that it had jurisdiction to decide Niko's Payment Claim against Petrobangla; that the GPSA was not procured by corruption and was valid and binding; ordered Petrobangla to pay Niko for the gas delivered, plus interest, and set out terms of payment; and dismissed all other claims in relation to the Payment Claim. As part of its Award, the Tribunal confirmed the following decisions previously issued at different stages in the arbitration:

   (a) the Decision on Jurisdiction of 19 August 2013 (the "**Decision on Jurisdiction**");

   (b) the First Decision on the Payment Claim of 11 September 2014 (the "**Payment Decision**");

   (c) the Decision on Implementation of the Decision on the Payment Claim (of 14 September 2015 (revised version) (the "**Second Payment Decision**");

   (d) the Third Decision on the Payment Claim of 26 May 2016 (the "**Third Payment Decision**");

   (e) the Decision pertaining to the Exclusivity of the Tribunals' Jurisdiction of 19 July 2016 (the "**Decision on Exclusivity**"); and

   (f) the Decision on the Corruption Claim of 25 February 2019 ("**Decision on Corruption**").

7. The Applicants seek annulment of the Award pursuant to Article 52(1) of the ICSID Convention on the grounds that (i) the Tribunal manifestly exceeded its powers (Article 52(1)(b)); and (ii) there was a serious departure from a fundamental rule of procedure (Article 52(1)(d)).

II. PROCEDURAL HISTORY

8. On 21 January 2022, Petrobangla and BAPEX filed the Application. The Application contained a request under Article 52(5) of the ICSID Convention and Rule 54(1) of the 2006 ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**") for the stay of enforcement of the Award until the Application was decided. The Applicants also reserved the right to present arguments regarding their request, "including the reasons such a stay should be continued until a decision is rendered on the Application for Annulment, in the event [Niko] requests that the stay be lifted."[1]

[1] Application, para. 58.

9. On 3 February 2022, pursuant to Rule 50(2) of the ICSID Arbitration Rules, the Secretary-General of ICSID registered the Application. On the same date, in accordance with Arbitration Rule 54(2), the Secretary-General informed the Parties that the enforcement of the Award had been provisionally stayed.

10. By letter dated 9 March 2022, in accordance with Rules 6 and 53 of the ICSID Arbitration Rules, the Parties were notified that an *ad hoc* Committee composed of Mr. Eduardo Zuleta, a national of Colombia, appointed to the Panel by Colombia, and designated as President of the Committee, Mr. Makhdoom Ali Khan, a national of Pakistan, appointed to the Panel by Pakistan, and Dr. Claudia Annacker, a national of Austria, appointed to the Panel by Austria, had been constituted (the "**Committee**"). On the same date, the Parties were notified that Ms. Jara Mínguez Almeida, Legal Counsel, ICSID, would serve as Secretary of the *ad hoc* Committee.

11. On 19 April 2022, Niko submitted comments on the Applicants' request for stay of the Award, together with the Witness Statement of Mr. Imam Hossain filed in the underlying arbitration, Legal Authority CLA-0074, and Exhibit C-0002. That same day, the Applicants requested leave to provide a response by 25 April 2022 to the Respondent on Annulment's submission regarding the stay of enforcement of the Award, and that the issue of the stay of enforcement be held in abeyance until a separate hearing on the matter was scheduled.

12. In accordance with ICSID Arbitration Rules 53 and 13(1), on 20 April 2022, the Committee held a first session with the Parties by video conference. The following persons attended the session:

Committee:	
Mr. Eduardo Zuleta	President
Dr. Claudia Annacker	Member of the Committee
Mr. Makhdoom Ali Khan	Member of the Committee
ICSID Secretariat:	
Ms. Jara Mínguez Almeida	Secretary of the Committee
For the Respondent on Annulment:	
Mr. Gordon Tarnowsky	Dentons Canada LLP
Ms. Rachel Howie	Dentons Canada LLP
Mr. Barton Legum	Honlet Legum Arbitration
For the Applicants:	
Dr. Derek Smith	Foley Hoag LLP
Ms. Christina Hioureas	Foley Hoag LLP
Mr. Sudhanshu Roy	Foley Hoag LLP
Mr. Richard Maidman	Foley Hoag LLP

Mr. Daniel Zaleznik	Foley Hoag LLP
Mr. Moin Ghani	Supreme Court of Bangladesh
Mr. Mohammad Saiful Islam	Additional Secretary (Budget-3), Finance Division, Petrobangla
Mr. A K M Benjamin Riazi	Director (Finance), Petrobangla
Mr. Md. Khorshed Alam	Joint Secretary (PTC), Planning Division
Ms. Shaheena Khatun	Joint Secretary (Development) Energy & Mineral Resources Division
Mr. Mohammad Elius Hossain	Joint Secretary (Administration), Energy and Mineral Resources Division
Mr. Md. Altaf Hossain	Director (Administration), Petrobangla
Mst. Moursheda Ferdous	Deputy Secretary (Development-3) Energy & Mineral Resources Division
Mr. Md. Shaheenur Islam	Director (PSC), Petrobangla
Mr. Engr. Ali Mohd. Al-Mamun	Director (Operation and Mines), Petrobangla
Mr. Mohammad Ali	Managing Director, Bapex
Ms. Farhana Shaon	General Manager, Exploration Division, Petrobangla
Mr. Howlader Ohidul Islam	General Manager (Laboratory), Bapex
Mr. Md. Shariful Islam	Manager, Exploration Division, Petrobangla
Mr. Mohammed Adnan Sayed	Assistant Manager, Petrobangla

13. On 20 April 2022, the Parties notified the Committee that they had agreed on a briefing schedule for the Applicants' request for the stay of enforcement of the Award.

14. Following the first session, on 22 April 2022, the Committee issued Procedural Order No. 1. The Parties agreed, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be Washington, D.C. Procedural Order No. 1 also sets out the agreed procedural calendar for the proceeding.

15. On 26 April 2022, Ms. María Marulanda Mürrle was appointed as Assistant to the President of the Committee with the Parties' agreement.

16. On 9 May 2022, in accordance with the established briefing schedule, the Applicants filed a request for the stay of enforcement of the Award (the "**Request for Stay**"). The request was accompanied by Exhibits R-0476 to R-0487 and R-0490 to R-0500; and Legal Authorities RLA-0491 to RLA-0498.

17. On 10 May 2022, the Committee reminded the Parties of Section 15.4 of Procedural Order No. 1 and invited the Applicants to confirm that all the exhibits submitted with

their Request for Stay (except for R-0498) were part of the record in the underlying arbitration.

18. That same day, the Applicants filed a request for leave to submit new factual exhibits (i.e., R-0489 to R-0497 and R-0499) in support of their Request for Stay. They stated that they understood that Section 15 of Procedural Order No. 1 applied only to the pleadings on the merits of the annulment, not the Request for Stay, which involves issues of fact, such as Niko's current and past financial status, that were not at issue in the underlying arbitration. The Applicants confirmed that the new evidence would not be used for purposes of their pleadings on the merits of the Application.

19. On 12 May 2022, the Committee invited the Respondent on Annulment's comments on the Applicants' request of 10 May 2022.

20. On 13 May 2022, Niko filed its opposition to the Applicants' request of 10 May 2022 stating that there were no special circumstances warranting the introduction of R-0488 and R-0489 as new evidence into the record. It argued that the two exhibits bore no relevance to the Request for Stay and invited the Applicants to withdraw the new exhibits or, in the alternative, requested the Committee to exclude them.

21. On 16 May 2022, the Committee decided to admit into the record the new evidence submitted by the Applicants except Exhibits R-0488 and R-0489, stating that it found no "special circumstances that would warrant their admission in support of the Request for Stay of Enforcement."

22. On 24 May 2022, Niko filed observations on the Request for Stay, together with Legal Authorities CLA-0074 to CLA-0088.

23. On 29 May 2022, the Committee reminded the Parties that it did not have access to the record of the underlying arbitration and requested that any documents referenced by the Parties in their briefs be submitted to the Committee.

24. On 3 June 2022, pursuant to the Committee's request, the Applicants submitted two additional exhibits from the underlying arbitration into the record (Exhibits R-0446 and R-0447).

25. On 9 June 2022, the Committee held a hearing on the Applicants' Request for Stay. The following persons attended:

Committee:[2]

Mr. Eduardo Zuleta	President
Dr. Claudia Annacker	Member of the Committee

ICSID Secretariat:

Ms. Jara Mínguez Almeida	Secretary of the Committee

Assistant to the President

Ms. María Marulanda Mürrle	Assistant to the President

For the Respondent-on-Annulment:

Mr. Barton Legum	Honlet Legum Arbitration
Mr. Rachel Howie	Dentons Canada LLP
Ms. Clara Motin	Honlet Legum Arbitration
Mr. William Hornaday	Niko Resources Ltd
Mr. Glen Valk	Niko Resources Ltd

For the Applicants:

Dr. Derek Smith	Foley Hoag LLP
Ms. Christina Hioureas	Foley Hoag LLP
Mr. Richard Maidman	Foley Hoag LLP
Mr. Daniel Zaleznik	Foley Hoag LLP
Mr. Moin Ghani	Supreme Court of Bangladesh
Ms. Amanda Gialil	Foley Hoag
Ms. Andreamarie Efthymiou	Foley Hoag
Mr. Nazmul Ahsan	Chairman, Petrobangla
Mr. Md. Zakir Hossain	Company Secretary, BAPEX
Mr. Howlader Ohidul Islam	General Manager (Laboratory), BAPEX
Mr. S. A. M. Merajul Alam	DGM, Geological Division, BAPEX
Ms. Farhana Shaon	General Manager, Exploration Division, Petrobangla
Mr. Md. Shariful Islam	Manager, Exploration Division, Petrobangla
Mr. Mohammed Adnan Sayed	Assistant Manager, Petrobangla

Court Reporter:

Ms. Dawn Larson	WW Reporting

Technical Support Staff:

Ms. Natalija Dimovska	World Bank

[2] Mr. Makhdoom Ali Khan was not able to attend the Hearing for reasons beyond his control. The Parties were informed of this circumstance, and both agreed to proceed on the understanding that Mr. Khan would watch the recording of the Hearing and have the opportunity to pose questions to the Parties thereafter. On 17 June 2022, after Mr. Khan had watched the recording, the Committee conferred and informed the Parties that it had no further questions on the Parties' presentations concerning the Request for Stay.

Mr. Pedro Magariño Paralegal, ICSID

26. In accordance with Procedural Order No. 1, on 30 June 2022, the Applicants filed their Memorial on Annulment, together with the Witness Statement of Ferdous Ahmed Khan as well as the first and second Witness Statements of Debra LaPrevotte Griffith, each submitted in the underlying arbitration; Exhibits R-0501 to R-0505; and Legal Authorities RLA-0499 to RLA-0503 (the "**Memorial**"). The Applicants also sought leave to introduce a new exhibit into the record.

27. On 4 July 2022, Niko opposed the Applicants' request to submit new evidence stating that the proposed exhibit post-dated the Award and, therefore, the Tribunal could not have failed to take that evidence into account when reaching its decision. Additionally, the new evidence had no probative value for any issue on annulment.

28. On 5 July 2022, the Applicants requested leave to respond to Niko's comments of 4 July 2022.

29. On 6 July 2022, the Committee informed the Parties that it did not wish to receive further comments on the Applicants' request to admit new evidence. On the same date, the Committee denied the Applicants' request of 30 June 2022 stating that there were no special circumstances to justify the submission of this new piece of evidence.

30. On 19 July 2022, the Committee issued its Decision on the Request for Stay. It ordered a stay of enforcement of the Award unless and until the Respondent on Annulment provides an undertaking, to be approved by the Committee, evidencing that its lenders agree that (a) Niko may retain the amounts collected under the Award and not distribute those amounts to the lenders pending disposition of the Annulment Application, and (b) any amount collected will be deposited in an escrow account pending the decision on annulment.

31. On 9 September 2022, the Respondent on Annulment filed its Counter-Memorial on Annulment, together with Exhibits C-0113, C-0118 and C-0325 to C-0332; and Legal Authorities CLA-0017, CLA-0063, CLA-0089 to CLA-0097 and CLA-0161, RLA-0052, RLA-0094, RLA-0121, RLA-0156, RLA-0157, RLA-0188, RLA-0460 and RLA-0463 (the "**Counter-Memorial**").

32. On 18 November 2022, the Applicants filed their Reply on Annulment, together with Exhibits R-0506 to R-0508; and Legal Authorities RLA-0030(bis), RLA-0158 and RLA-0160, RLA-0193, RLA-0197, RLA-0460, and RLA-0504 to RLA-0525 (the "**Reply**").

33. On 3 February 2023, the Respondent on Annulment filed its Rejoinder on Annulment, together with Legal Authorities CLA-0016, CLA-039, CLA-0098 to CLA-0116, CLA-0193, CLA-0295, RLA-0202, and RLA-0286 (the "**Rejoinder**").

34. On 7 February 2023, the Committee submitted a draft Procedural Order on the organization of the hearing to the Parties inviting them to discuss the draft in advance of the pre-hearing conference scheduled to take place on 16 February 2023. On 14 February 2023, the Parties confirmed that they had reached agreement on their joint proposed edits to the draft. On 15 February 2023, the Committee accepted the Parties' revisions to the draft, and with the Parties' approval, vacated the pre-hearing conference.

35. On 22 February 2023, the Committee issued Procedural Order No. 2 on the organization of the hearing.

36. On 22 March 2023, the Applicants submitted Legal Authorities CLA-0161bis, CLA-0082bis and RLA-0526 into the record, noting that the Respondent on Annulment agreed to the submission of these authorities.

37. A hearing on annulment was held in Washington, D.C., from 23 to 24 March 2023 (the "**Hearing**"). The following persons were present at the Hearing:

Committee:	
Mr. Eduardo Zuleta	President
Dr. Claudia Annacker	Member of the Committee
Mr. Makhdoom Ali Khan	Member of the Committee
ICSID Secretariat:	
Ms. Jara Mínguez Almeida	Secretary of the Committee
Assistant to the President	
Ms. María Marulanda Mürrle	Assistant to the President.
For the Respondent on Annulment:	
Counsel:	
Mr. Barton Legum	Honlet Legum Arbitration
Ms. Rachel Howie	Dentons Canada LLP
Mr. Gordon Tarnowsky	Dentons Canada LLP
Ms. Clara Motin	Honlet Legum Arbitration
Ms. Midred Erhard	Honlet Legum Arbitration
Party Representatives:	
Mr. William Hornaday	Niko Resources Ltd
Mr. Glen Valk	Niko Resources Ltd

For the Applicants:

Counsel:

Dr. Derek Smith	Foley Hoag LLP
Ms. Christina Hioureas	Foley Hoag LLP
Mr. Moin Ghani	Alliance Laws
Ms. Alejandra Torres Camprubi	Foley Hoag LLP
Mr. Sudhanshu Roy	Foley Hoag LLP
Mr. Richard Maidman	Foley Hoag LLP
Ms. Jennifer Schoppmann	Foley Hoag LLP
Ms. Samanta Kolenovic	Foley Hoag LLP
Mr. Moin Ghani	Supreme Court of Bangladesh

Party Representatives:

Mr. Md. Shaheenur Islam	Petrobangla
Mr. Zanendra Nath Sarker	Petrobangla
Ms. Farhana Shaon	Petrobangla
Md. Shariful Islam	Petrobangla
Mr. Howlader Ohidul Islam	BAPEX
Mr. Md. Monzurul Haque	BAPEX
S. A. M. Merajul Alam	BAPEX
Mr. Mohammed Adnan Sayed	Assistant Manager, Petrobangla

Court Reporter:

Mr. David Kasdan

Technical Support Staff:

Ms. Ekaterina Minina	Paralegal, ICSID
Ms. Izabela Chabinska	Consultant, ICSID
Mr. Petar Tsenkov	WBG Technician

38. During the Hearing the Applicants' submitted Exhibits R-0509, R-0510, and Legal Authorities RLA-0527 through RLA-0530 into the record with the Committee's permission.

39. On 31 March 2023, Niko confirmed that it would not file any application with regard to the new documents submitted by the Applicants.

40. On 24 April 2023, the Applicants submitted a request for leave to file new Legal Authorities in response to Committee Member Khan's questions at the end of the Hearing. On 25 April 2023, Niko filed its observations on the Applicants' request advancing no formal objection.

41. On 26 April 2023, the Committee granted leave to the Applicants to introduce the new Legal Authorities into the record but without accompanying comments or submissions.

In accordance with the Committee's decision, the Applicants filed, on the same day, Legal Authorities RLA-0531 through RLA-0534.

42. The Parties filed their submissions on costs on 26 May 2023.

43. On 23 June 2023, the Applicants requested leave to file a decision by the Appellate Division of the Bangladesh Supreme Court on the *Alam* Judgment (as defined below) dated 18 June 2023 once the decision will be released.

44. By letter dated 30 June 2023, the Respondent on Annulment opposed the Applicants' request.

45. On 10 July 2023, the Committee denied the Applicants' request to file the decision, citing its lack of relevance and the absence of special circumstances as required under Section 15.2 of Procedural Order No. 1 that would justify its admission at this late stage of the proceeding, especially considering that the document had yet to become available.

46. The proceeding was closed on 27 July 2023.

III. REQUESTS FOR RELIEF

A. THE APPLICANTS ON ANNULMENT

47. The Applicants request the following relief:

> "In view of the foregoing, Applicants respectfully request that the *ad hoc* Committee:
>
> 1. annul the Award in full or in part, as appropriate, on the grounds set forth in Article 52(1)(b) and (d) of the ICSID Convention;
>
> 2. order Niko to pay all legal and arbitration costs and expenses of this proceeding, with interest at a rate to be determined; and
>
> 3. order any other relief it deems appropriate in the circumstances.
>
> Applicants reserve all of their rights, including, without limitation, the right to modify, expand or complete its request for relief, as they deem appropriate."[3]

[3] Memorial, para. 63; Reply, para. 104.

B. THE RESPONDENT ON ANNULMENT

48. Respondent on Annulment requests the following relief:

> "For the reasons stated above, respondent on annulment Niko Resources (Bangladesh) Ltd. therefore respectfully requests that the *Ad Hoc* Committee:
>
> a. Dismiss the Application for Annulment in its entirety;
>
> b. Decide, in accordance with Article 61(2) of the ICSID Convention, that applicants on annulment Bangladesh Petroleum Exploration & Production Company Limited (BAPEX) and Bangladesh Oil Gas and Mineral Corporation (Petrobangla) shall jointly and severally pay the expenses incurred by Niko Resources (Bangladesh) Ltd., the fees and expenses of the Members of the Ad Hoc Committee and the charges for the use of the facilities of the International Centre for Settlement of Investment Disputes;
>
> c. Order that the amounts assessed in accordance with subparagraph b above must be paid within 45 days of the date of the Decision, failing which the applicants on annulment shall pay interest on any outstanding amount until complete settlement at the rate of the 180-day average Secured Overnight Financing Rate (SOFR) plus 2%; and
>
> d. Order, in accordance with Article 61(2) of the ICSID Convention, that the decision and order stated in subparagraphs b and c above shall form part of the Award."[4]

IV. GROUNDS FOR ANNULMENT

49. The Applicants assert five grounds for annulment. According to them, each of these grounds, taken independently, is sufficient to annul the Award in its entirety.[5] All grounds invoke manifest excess of powers (Article 52(1)(b) of the ICSID Convention), while one ground also relies on a serious departure from a fundamental rule of procedure (Article 52(1)(d) of the ICSID Convention).[6]

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[4] Counter-Memorial, para. 147; Rejoinder, para. 106.

[5] Hearing Tr. Day 1, 11:8-9.

[6] The Committee notes that in their written pleadings, the Applicants argued that the second and fourth grounds were based on the serious departure from a fundamental rule of procedure standard. However, at the hearing, the Applicants argued that only the fourth ground for annulment was also based on the latter standard. (*See*, Hearing Tr. Day 1, 21:22-23:7).

50. The five grounds for annulment asserted by the Applicants are as follows:

(a) The Tribunal manifestly exceeded its powers by retaining jurisdiction despite Niko's admitted corruption;[7]

(b) The Tribunal manifestly exceeded its powers by failing to apply a Bangladesh Supreme Court judgment on the laws of Bangladesh on corruption;[8]

(c) The Tribunal manifestly exceeded its powers by extending its jurisdiction to non-parties to the arbitration;[9]

(d) The Tribunal manifestly exceeded its powers and departed from fundamental rules of procedure by subverting the nature of the relief requested in Niko's amended request for provisional measures of 1 June 2016 ("**Niko's Amended Request for Provisional Measures**") and depriving the Applicants of their right to be heard regarding the relief ordered in the Decision on Exclusivity;[10] and

(e) The Tribunal manifestly exceeded its powers by exercising jurisdiction over entities not designated to ICSID by Bangladesh.[11]

51. The Respondent on Annulment argues that the grounds for annulment invoked by the Applicants are peripheral. Two of these grounds relate to a decision on a request for provisional measures, which is not included in the dispositive part of the Award. Two other grounds pertain to a decision on a claim for contract avoidance, which was raised long after the Payment Decision had been issued.[12] The Applicants' grounds for annulment are in any event without merit.[13]

A. THE APPLICABLE STANDARD

1. The Applicants' Position

52. The Applicants request that the Award be annulled on the grounds that the Tribunal manifestly exceeded its powers (Article 52(1)(b) of the ICSID Convention), and that there

[7] Memorial, § V.B.1; Reply, § III.B.

[8] Memorial, § V.B.2; Reply, § III.C.

[9] Memorial, § V.B.3; Reply, § III.D.

[10] Memorial, § V.B.4; Reply, § III.E.

[11] Memorial, § V.B.5; Reply, § III.F.

[12] Hearing Tr. Day 1, 118:21 – 119:7.

[13] Counter-Memorial, para. 14; Rejoinder, para. 9.

has been a serious departure from fundamental rules of procedure (Article 52(1)(d) of the ICSID Convention).

53. The Applicants assert that a tribunal "exceeds its powers when it goes beyond the scope of the parties' arbitration agreement, decides issues which had not been submitted to it, or fails to apply the law agreed to by the parties."[14] In either case, the excess of powers must be manifest, i.e., obvious, clear, or self-evident.[15]

54. The Applicants argue that a "serious departure from a fundamental rule of procedure" refers to a tribunal's failure to secure the integrity and fairness in the arbitral process.[16] To annul an award on this ground, three requirements must be satisfied: (i) the committee must determine that the tribunal breached or ignored a fundamental rule of procedure; (ii) the departure from this rule must be serious, i.e., it must have deprived the party of the benefit or protection that the rule was intended to provide, and (iii) the party requesting annulment must have objected to the tribunal's departure from the rule in question.[17]

55. Finally, the Applicants emphasize that *ad hoc* committees have a dual responsibility of safeguarding the applicants' fundamental rights and preserving the integrity of the ICSID system.[18] This overarching role of preserving the integrity of the ICSID system informs the applicable legal standard for each ground of annulment invoked in this case.[19]

2. <u>The Respondent on Annulment's Position</u>

56. The Respondent on Annulment agrees that a tribunal exceeds its powers by going beyond the scope of the parties' arbitration agreement, deciding issues that had not been submitted to it, or failing to apply the law agreed to by the parties.[20] It further contends that a tribunal only exceeds its jurisdiction when it acts inconsistently with the requirements in Article 25 of the ICSID Convention and in the instrument in which the parties consented to arbitration.[21] As to an alleged failure to apply the law agreed to by the parties, annulment is only permitted if the tribunal completely disregarded the applicable law or based its award on a different law. A misinterpretation or misapplication

[14] Memorial, para. 30.

[15] Hearing Tr. Day 1, 22:14-18.

[16] Hearing Tr. Day 1, 23:14-16.

[17] Hearing Tr. Day 1, 23:17 – 24:18.

[18] Hearing Tr. Day 1, 19:14-17.

[19] Reply, para. 15; Hearing Tr. Day 1, 21:14-19.

[20] Counter-Memorial, para. 30.

[21] Counter-Memorial, para. 32.

of the applicable law, even if serious, does not justify annulment.[22] The Respondent on Annulment asserts that in either case, the excess of powers must be manifest, i.e., "obvious, clear or self-evident, and … [] discernable without the need for an elaborate analysis of the award."[23]

57. The Respondent on Annulment concurs with the Applicants that a "serious departure from a fundamental rule of procedure" refers to a tribunal's failure to secure the integrity and fairness of the arbitral process.[24] However, the Respondent on Annulment argues that an applicant must establish that the violation of a fundamental rule caused the tribunal to reach a substantially different result.[25]

58. Finally, the Respondent on Annulment asserts that the role of *ad hoc* committees is not to review *de novo* the merits of the case, but "merely to pass judgment on whether the manner in which the Tribunal carried out its functions met the requirements of the ICSID Convention."[26]

3. The Committee's Analysis

59. The Parties generally agree on the role of *ad hoc* committees and the definition of the grounds for annulment invoked in this case. However, they disagree on certain points that must be considered by the Committee. Consequently, the Committee will first highlight some of the basic principles related to ICSID annulment and then address the applicable standards, focusing on the points of disagreement between the Parties.

60. As a starting point, the Committee emphasizes that assuring the finality of awards is a fundamental principle underlying the ICSID system.[27] This is confirmed by Article 53(1) of the ICSID Convention, which states that "[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in the Convention." As explained in ICSID's Updated Background Paper on Annulment, "[t]he choice of remedies offered by the ICSID Convention [i.e., rectification, supplementary decision, interpretation, revision, and annulment] reflects a deliberate

[22] Counter-Memorial, para. 33.

[23] Counter-Memorial, para. 34, citing to Exhibit RLA-502, ICSID, Updated Background Paper on Annulment for the Administration Council of ICSID, 5 May 2016, para. 83.

[24] Counter-Memorial, paras. 34-35.

[25] Counter-Memorial, para. 36.

[26] Counter-Memorial, para. 39, citing exhibit RLA-463, *Industria Nacional de Alimentos, S.A. and Indalsa Peru, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Peru, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, para. 97.

[27] *See*, Exhibit R-498/RLA-502, ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para. 71.

election by the drafters of the Convention to ensure the finality of awards."[28] Annulment, in the view of this Committee, is thus a remedy confined within the limits of Article 52(1) of the ICSID Convention, designed to safeguard the fundamental fairness and integrity of the underlying arbitration.[29]

61. The principles described below are grounded in the binding and final nature of awards, as well as in the need to protect the integrity of the arbitration proceedings. They are derived from the ICSID Convention and have been reaffirmed in various annulment decisions summarized in ICSID's Updated Background Paper on Annulment. These principles guide the Committee in interpreting and applying the grounds for annulment in the case at hand.

62. The first principle is that annulment of an award is limited to the five grounds listed in Article 52(1) of the ICSID Convention.[30] That list is exhaustive and the authority of *ad hoc* committees to annul an award is therefore limited to these grounds.[31] This principle derives from the interpretation of Article 52(1) in accordance with the ordinary meaning of its terms in their context and in light of the object and purpose of the ICSID Convention.[32]

63. The second principle is that "annulment is an exceptional and narrowly circumscribed remedy and the role of an *ad hoc* [c]ommittee is limited."[33] This principle, which is closely related to the first one, has been affirmed by several annulment committees.[34] It also derives from the need to protect the binding and final nature of ICSID awards, and therefore the stability of the system.

64. The third principle is that "*ad hoc* [c]ommittees are not courts of appeal, annulment is not a remedy against an incorrect decision, and an *ad hoc* [c]ommittee cannot substitute the

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[28] Exhibit R-498, ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para. 4.

[29] Exhibit CLA-86, *Perenco Ecuador Limited v. Republic of Ecuador,* ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, para. 59; Exhibit CLA-92, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, 5 June 2007, para. 20.

[30] Exhibit R-498, ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para. 74; Exhibit CLA-63, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, 5 February 2002; CLA-81, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, 2 November 2015, para. 47.

[31] Exhibit CLA-86, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, para. 58.

[32] Exhibit CLA-86, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, para. 58.

[33] Exhibit R-498/RLA-502, ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para. 74.

[34] *See*, Exhibit R-498/RLA-502, ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, pp. 35-38.

[t]ribunal's determination on the merits for its own."[35] Annulment is not a remedy to correct any and all errors in an award. It is not an appeal or substitute for or equivalent to an appeal, and an annulment committee is not a forum of first appeal. Any doubt in this regard is dispelled by Article 53(1) which clearly provides that the award "shall not be subject to **any appeal or any other remedy**" (emphasis added). This key principle has been stressed by several *ad hoc* committees[36] and is recognized by both Parties in this case.[37]

65. For instance, the *Amco I* committee asserted that "[a]nnulment is not a remedy against an incorrect decision. An Ad Hoc Committee may not in fact review or reverse an ICSID award on the merits under the guise of annulment under Article 52."[38] Similarly, the *Duke Energy* committee underscored that "[a]n *ad hoc* committee, which is not an appellate body, is not called upon to substitute its own analysis of law and fact to that of the arbitral tribunal."[39] The *Total* committee referred to this principle as follows: "the annulment proceeding is not an appeal and therefore is not a mechanism to correct alleged errors of fact or law that the tribunal may have committed."[40] Many other *ad hoc* committees cited by the Parties have consistently emphasized this principle.[41]

66. The fourth principle is the general principle *onus probandi incumbit ei qui agit non qui negat*, which also applies in annulment proceedings.[42] Accordingly, the Applicants have the burden of proving that the Award, or any part thereof, should be annulled based on one or more of the grounds listed in Article 52(1) of the ICSID Convention.

67. The Committee will now turn to the two grounds for annulment raised in this case.

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[35] Exhibit R-498/RLA-502, ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para. 74.

[36] *See*, Exhibit R-498/RLA-502, ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, pp. 38-47.

[37] Counter-Memorial, para. 37; Reply, para. 12.

[38] Exhibit RLA-517, *Amco Asia Corporation and others v. Republic of Indonesia (Amco I)*, ICSID Case No. ARB/81/1, Decision on the Applications by Indonesia and Amco Respectively for Annulment and Partial Annulment, 17 December 1992, para. 1.17.

[39] Exhibit RLA-509, *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the *ad hoc* Committee, 1 March 2011, para. 144.

[40] Exhibit CLA-95, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, 1 February 2016, para. 179.

[41] *See, e.g.,* Exhibit CLA-63, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, 5 February 2002, para. 18; Exhibit CLA-92, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, 5 June 2007, para. 24; Exhibit RLA-507, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para. 73.

[42] Exhibit CLA-86, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, para. 61.

a. Manifest Excess of Powers

68. Pursuant to Article 52(1)(b) of the ICSID Convention, an award may be annulled if "the Tribunal has manifestly exceeded its powers." The Parties agree that to meet the threshold of Article 52(1)(b), two requirements must be satisfied: (i) the tribunal exceeded the scope of its powers, and (ii) such excess of powers was manifest, i.e., obvious, clear, or self-evident.[43]

69. An excess of powers occurs, for example, when a tribunal goes beyond the scope of the parties' arbitration agreement, decides issues not submitted to it, or fails to apply the law agreed upon by the parties.[44] In the present case, the Parties have primarily focused on the Tribunal's alleged "excess of jurisdiction" and its purported failure to apply the applicable law.

70. Regarding the scope of the arbitration agreement, *ad hoc* committees have held that there may be an excess of powers when a tribunal assumes jurisdiction it does not have, or when it exceeds the scope of its jurisdiction.[45] Similarly, rejecting jurisdiction when it exists also amounts to an excess of powers.[46]

71. Under the competence-competence principle, a tribunal has the authority to determine its own jurisdiction under the parties' arbitration agreement. ICSID annulment proceedings do not permit a *de novo* review of jurisdiction, as that would be tantamount to an appeal.[47] Indeed, allowing an *ad hoc* committee to simply substitute its views on jurisdiction for those of the tribunal would jeopardize the stability of the ICISD system.[48]

72. Regarding failure to apply the law agreed upon by the parties, the Parties differ on the applicable standard for annulment. The Applicants contend that "the application of a law different from that purportedly applied by the Tribunal could be considered a manifest excess of power."[49] The Respondent on Annulment, on the other hand, maintains that

[43] Memorial, para. 30; Counter-Memorial, paras. 30, 34; Reply, para. 30.

[44] Exhibit R-498, ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para. 81.

[45] Exhibit R-498, ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para. 87.

[46] Exhibit R-498, ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para. 87.

[47] Exhibit CLA-86, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, para. 94.

[48] Exhibit RLA-504, Schreuer et al., The ICSID Convention: A Commentary, (2nd ed., Cambridge University Press, 2014), pp. 805-1282, pp. 941-942, para. 148.

[49] Hearing Tr., Day 1, 40:12-16.

annulment under this ground is only warranted in cases where there is a complete disregard of the applicable law or when a different law is applied.[50]

73. Considering the limited scope of Article 52(1)(b), the Committee is of the view that it cannot annul an award solely because the Committee has a different understanding of the facts, interpretation of the law, or appreciation of the evidence than the Tribunal.[51] To do so would effectively transform the Committee into a court of appeals, as it would be reviewing the substance of the Award. An assessment whether there was a misapplication or misinterpretation of the law applicable on the merits, or a determination of the degree of any such misapplication or misinterpretation, also falls outside the purview of *ad hoc* committees.[52] Moreover, an ICSID tribunal may consider that a particular court decision does not constitute a binding precedent under the applicable law or disagree with the standards applied by the court. It is not for an *ad hoc* committee to second-guess the decision of a tribunal merely because the applicant on annulment characterizes the tribunal's decision as an invention of a law. Accordingly, the Committee finds that the applicable standard for review is whether the Tribunal correctly identified and endeavored to apply the law agreed by the Parties.[53]

b. Serious Departure from a Fundamental Rule of Procedure

74. Article 52(1)(d) of the ICSID Convention provides for annulment when "there has been a serious departure from a fundamental rule of procedure." The Parties agree that annulment based on this ground requires that (i) the departure from a rule of procedure be serious, and (ii) the rule be fundamental.[54]

75. Fundamental rules of procedure include the equal treatment of the parties; the right to be heard; an independent and impartial tribunal; the treatment of evidence and burden of proof; and deliberations among members of the Tribunal.[55] The Applicants primarily claim that the Tribunal deprived them of their right to be heard regarding the relief ordered in the Decision on Exclusivity.

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[50] Hearing Tr., Day 1, 151:21 – 152:3.

[51] Exhibit CLA-86, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, para. 96; Exhibit CLA-95, *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01 Decision on Annulment, 1 February 2016, para. 175.

[52] Exhibit CLA-86, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, para. 96.

[53] Exhibit CLA-86, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, para. 96; Exhibit CLA-91, *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, 29 June 2005, para. 45.

[54] Counter-Memorial, para. 36; Hearing Tr., Day 1, 23:17 – 24:10.

[55] Exhibit R-498, ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para. 99.

76. As regards the right to be heard, the *Wena* committee specified that this right encompasses the parties' right to present their claims or defenses and to provide all relevant arguments and evidence to support them.[56] Additionally, it stressed that such right must be guaranteed equally to all parties, "allow[ing] each party to respond adequately to the arguments and evidence presented by the other."[57]

77. The Parties discussed to what extent a tribunal may adopt its own solution and reasoning without providing the parties an opportunity to submit their observations beforehand.[58] The Committee considers that the parties' right to be heard is not violated if the tribunal bases its decision on legal reasoning that was not specifically argued by the parties, as long as its reasoning can be aligned with the legal framework established by the parties. However, if the tribunal chooses a different legal framework, it shall give the parties an opportunity to comment. These views have also been expressed by other *ad hoc* committees.[59]

78. Another point of contention between the Parties involves the standard for assessing the "seriousness" of a departure from a fundamental rule of procedure. The Respondent on Annulment argues that a departure is "serious" when it produces a material impact on the award.[60] It further claims that "[a]n applicant is thus required to prove that the violation would have caused the tribunal to reach a substantially different result."[61] The Applicants, on the other hand, contend that "while the applicant must show how the breach had an impact on the award, it is not required to prove that the outcome of the case would have been different had the rule been respected."[62]

79. In the Committee's view, a departure from a fundamental rule of procedure is serious when it is substantial and deprives the party of a benefit or protection the rule was intending to provide.[63] It need not be outcome determinative, i.e., the applicant is not required to prove that the tribunal's decision would have been different if the rule had

[56] Exhibit CLA-63, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, 5 February 2002, para. 57.

[57] Exhibit CLA-63, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, 5 February 2002, para. 57.

[58] *See, e.g*., Counter-Memorial, paras. 113-114; Reply, paras. 33-35.

[59] *See, e.g.,* Exhibit CLA-86, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, para. 126; Exhibit RLA-513, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, 21 February 2014, para. 94; Exhibit RLA-512, *Venoklim Holding B.V. v. República Bolivariana de Venezuela*, ICSID Case No. ARB/12/22, Decisión sobre la Solicitud de Anulación, 2 February 2018, para. 218.

[60] Counter-Memorial, para. 36.

[61] Counter-Memorial, para. 36.

[62] Reply, para. 37.

[63] Exhibit RLA-460, *Maritime International Nominees Establishment (MINE) v. Government of Guinea,* ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award, 14 December 1989, para. 5.05.

been followed. However, the applicant must show that it may have made a difference on a critical issue of the award. A similar position has been adopted by several annulment committees, including the *Occidental*,[64] *Tulip*,[65] *TECO*,[66] and *Perenco*[67] committees.

B. WHETHER THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS BY RETAINING JURISDICTION DESPITE NIKO CANADA'S ADMITTED CORRUPTION

1. The Applicants' Position

80. The Applicants claim that the Tribunal manifestly exceeded its powers by retaining jurisdiction despite Niko Canada's guilty plea to corruption in procuring the GPSA.[68] They argue that the principle of good faith and the international public policy against corruption restrict the jurisdiction of a tribunal under Article 25 of the ICSID Convention.[69] Several ICSID tribunals have confirmed that investors who violated the laws of the host State, acted in bad faith, or breached the international public policy against corruption are not eligible for protection under the ICSID Convention.[70] The Tribunal thus "ignored the fundamental tenets of ICSID jurisdiction by exercising authority to grant Niko relief in the Payment Claim in the face of Niko Canada's conviction for corruption aimed directly at procuring the GPSA and the admissions that Niko directly engaged in this corruption."[71]

81. Additionally, the Applicants claim that the Tribunal "exceeded its authority by creating its own highly restrictive standard of causation requiring proof that the corruption would have been 'instrumental to the conclusion of the GPSA.'"[72] Such standard does not derive from either the ICSID Convention or Bangladesh law.[73] Contrary to the Respondent on Annulment's argument, ICSID tribunals have not articulated a causation requirement

[64] Exhibit CLA-81, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Decision on the Annulment of the Award, 2 November 2015, para. 62.

[65] Exhibit RLA-506, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey,* ICSID Case No. ARB/11/28, Decision on Annulment, 30 December 2015, para. 78.

[66] Exhibit RLA-507, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para. 85.

[67] Exhibit CLA-86, *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment, 28 May 2021, para. 137.

[68] Memorial, para. 32.

[69] *See,* Memorial, paras. 34-36.

[70] Memorial, para. 34; Reply, paras. 41-46.

[71] Memorial, para. 36.

[72] Memorial, para. 37.

[73] *See*, Memorial, paras. 36-40.

either.[74] The Applicants submit that the key question is whether there is an "evident relationship" between the investor's illegal conduct and the investment, and whether the violations "go to the essence of the Investment such that it must be considered illegal."[75] Both requirements are met in this case.[76]

82. Finally, the Applicants contend that Niko's assertion that the bribe that Niko Canada admittedly paid to the State Minister for Energy and Mineral Resources "had no impact on consent to ICSID arbitration" is wrong for two reasons: first, access to the ICSID arbitration requires the State to give consent to the ICSID Convention itself, not just consent in an investment treaty or contract, and consent to the ICSID Convention does not cover investments made in violation of fundamental international public policy.[77] Second, "the Tribunal manifestly exceeded its powers in concluding that Niko's conviction for corruption did not void the GPSA and vitiate consent of the Parties in the Arbitration Clause under Article 25(1)."[78]

2. The Respondent on Annulment's Position

83. The Respondent on Annulment disputes the extent of the guilty plea of Niko Canada and maintains that the relevant issue is whether the Tribunal manifestly exceeded its authority in finding that the Applicants consented to ICSID jurisdiction in the GPSA.[79] According to the Respondent on Annulment, the Applicants' first ground for annulment must fail for at least four reasons.

84. First, neither Article 25 of the ICSID Convention, nor the arbitration agreement in the GPSA, impose a requirement that the investment be made in accordance with the host State's laws or in good faith, or include public policy as an element of jurisdiction.[80] Illegality or public policy arguments not specific to the parties' consent to arbitration go to the merits in ICSID arbitration, not to jurisdiction or the scope of the tribunal's authority.[81] Indeed, in neither of the two contract-based ICSID cases (*SIREXM v. Burkina Faso* and *World Duty Free v. Kenya*) where the tribunals concluded that there was a

[74] Reply, paras. 49-52.

[75] Hearing Tr. Day 1, 36:13-18.

[76] Hearing Tr. Day 1, 33:22 – 37:4.

[77] Hearing Tr. Day 1, 32:18 – 35:4.

[78] Hearing Tr. Day 1, 35:5-10.

[79] *See*, Hearing Tr. Day 1, 137:3-21.

[80] Counter-Memorial, paras. 52-54; Rejoinder, para. 14.

[81] Hearing Tr. Day 1, 142:4-7. *See also*, Counter-Memorial, paras. 55-56.

violation of international public policy in the conclusion of the contract, did the respective tribunals find that they lacked jurisdiction.[82]

85. Second, international law does not bar an investor who has committed a fault from initiating ICSID arbitration when the fault did not induce the investment in relation to which ICSID arbitration is commenced.[83] In all decisions cited by the Applicants, the tribunals consistently emphasized the need for a causal link between the corrupt or illegal act and the investment itself in the form of the investor obtaining, creating, furthering, procuring, or making the investment through the corrupt or illegal act.[84]

86. Third, the Tribunal's factual finding that the GPSA was not procured by corruption is amply supported by the record of the arbitration and, in any event, is not subject to review on annulment, as explained by the *Total* and *Lemire* committees.[85]

87. Finally, the integrity of the ICSID system is protected through the five grounds for annulment stated in Article 52 of the ICSID Convention, which do not include public policy.[86] Corruption is specifically addressed in Article 52 but constitutes a basis for annulment only when it relates to corruption by a tribunal member.[87] The public policy ground for annulment that the Applicants advance does not exist.[88]

3. The Committee's Analysis

88. The Applicants claim that the Tribunal manifestly exceeded its powers by retaining jurisdiction over Niko's claims despite the fact that Niko's parent company pled guilty to corruption in bribing a Bangladesh minister to procure the GPSA.[89] The Applicants argue that an investor whose investment is "tainted" by corruption is not entitled to resort to ICSID arbitration concerning that investment, regardless of whether consent to arbitration is given in an investment treaty or in a contract.[90] They also assert that a causal link between the corrupt act and the investment is not required. Instead, a clear relationship between the investor's illegal conduct and the investment suffices.[91]

[82] Hearing Tr. Day 1, 142:7 – 143:8.

[83] Counter-Memorial, paras. 58-59.

[84] Counter-Memorial, para. 60.

[85] Counter-Memorial, paras. 64-66; Hearing Tr. Day 1, 137:14-17.

[86] Rejoinder, para. 31; Hearing Tr. Day 1, 139:2-9.

[87] Hearing Tr. Day 1, 139:9-15.

[88] *See*, Rejoinder, para. 31.

[89] Memorial, para. 12.

[90] Reply, paras. 43 and 48.

[91] Hearing Tr., Day 1, 36:7-21.

89. The Respondent on Annulment argues that the jurisdictional limitation asserted by the Applicants does not exist, and therefore, the Tribunal did not exceed its authority.[92] It further claims that the Applicants' contentions lack support in the ICSID Convention and ICSID jurisprudence.[93] Moreover, the Tribunal's determination that the GPSA was not obtained through corruption is a factual finding that cannot be reviewed in annulment proceedings.[94]

90. As a starting point, the Committee notes that the issues now raised by the Applicants under their first ground for annulment were extensively discussed by the Parties in the underlying arbitration and resolved by the Tribunal after due consideration.

91. Indeed, the Applicants raised several objections to the Tribunal's jurisdiction over the Payment Claim that were dealt with as a preliminary matter, including the objection that Niko had "'violated principles of good faith and international public policy' by acts of corruption and that, therefore, the Tribunal should dismiss its claims in order 'to protect the integrity of the ICSID dispute settlement mechanism.'"[95]

92. On 19 August 2013, the Tribunal issued its Decision on Jurisdiction, *inter alia*, rejecting the Applicants' jurisdictional objection based on corruption. The Tribunal accepted that the prohibition of bribery forms part of international public policy, and that contracts in conflict with international public policy cannot be given effect by arbitrators.[96] It then made a distinction between "contracts of corruption" — i.e., those that have corruption as their object — and contracts obtained by corruption, and concluded that (i) there was no allegation that there was anything illegal about the object and content of the GPSA;[97] (ii) contracts obtained by corruption may be avoided, but the Applicants had not sought to avoid the GPSA, nor did they argue that it was void *ab initio*;[98] and (iii) there was no causal link between the established acts of corruption and the conclusion of the GPSA, and it was not alleged that there was such a link.[99] Consequently, the Tribunal held that the GPSA and its arbitration clause remained valid and binding.[100]

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[92] Counter-Memorial, paras. 3 and 58.

[93] Rejoinder, paras. 12 and 19.

[94] Rejoinder, para. 27.

[95] Exhibit R-487, *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation,* ICSID Case No. ARB/10/18, Award, 24 September 2011, ("Award"), paras. 48-50.

[96] Exhibit R-481, *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation*, ICSID Cases Nos. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, 19 August 2013, ("Decision on Jurisdiction"), paras. 433-434.

[97] Exhibit R-481, Decision on Jurisdiction, para. 438.

[98] Exhibit R-481, Decision on Jurisdiction, paras. 440-464.

[99] Exhibit R-481, Decision on Jurisdiction, paras. 453-455.

[100] Exhibit R-481, Decision on Jurisdiction, paras. 462-464.

93. The Tribunal then considered the Applicants' argument that "because of the act of bribery linked to the investment and for which Niko Canada has been convicted, ICSID jurisdiction should be denied to the Claimant,"[101] including their allegation that the offer of ICSID arbitration only applies to investments made in good faith.[102] The Tribunal recalled that jurisdiction in this case was based on a contractual arbitration clause, not an offer to arbitrate subject to conditions, and the validity of the GPSA and its arbitration clause was uncontested.[103] Consequently, the Tribunal concluded that lack of good faith in the investment, whether alleged or proven, would not justify the denial of jurisdiction, but should instead be considered as part of the merits of the dispute.[104] Additionally, the Tribunal dismissed the Applicants' position that upholding jurisdiction over the claims submitted to it would undermine the integrity of the ICSID system, as well as their unclean hands objection.[105]

94. Approximately two and a half years after the Decision on Jurisdiction, the Applicants challenged the Tribunal's jurisdiction on the basis that (i) 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;"[106] and (ii) the arbitration agreement of the GPSA is void *ab initio*, as part of an agreement that never came into existence (the "**Corruption Claim**").[107]

95. Regarding the first line of argument, the Tribunal observed that:

> "[…] 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.
>
> 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*". 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

[101] Exhibit R-481, Decision on Jurisdiction, para. 465.

[102] Exhibit R-481, Decision on Jurisdiction, para. 466.

[103] Exhibit R-481, Decision on Jurisdiction, para. 470.

[104] Exhibit R-481, Decision on Jurisdiction, paras. 467-472.

[105] *See*, Exhibit R-481, Decision on Jurisdiction, paras. 473-485.

[106] Exhibit R-503, *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation*, ICSID Case Nos. ARB/10/11 and ARB/10/18, Decision on the Corruption Claim, 25 February 2019, ("Decision on Corruption"), para. 566, citing Respondents' First Post-Hearing Brief (CONFIDENTIAL) of 12 July 2017, title before para. 242.

[107] Exhibit R-503, Decision on Corruption, para. 566.

> 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."[108]

96. In the Decision on Jurisdiction, the Tribunal had held that (i) the arbitration clause was not obtained through corruption and (ii) the GPSA was not illegal.[109] The Tribunal reassessed and confirmed these conclusions in the Decision on Corruption.

97. Concerning the first point, the Tribunal stated as follows:

> "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*;" 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.
>
> 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."[110]

98. The Applicants argued that the principle of severability was inapplicable in cases where the underlying agreement was void *ab initio*, as they contended was the case for the GPSA.[111] After considering the Applicants' argument, the Tribunal observed that "this line in the Respondents' objection can be decided only by an examination by the Tribunals of the validity of the Agreements,"[112] and concluded that it "**must examine the argument and evidence** presented by the Respondents to support their defence

[108] Exhibit R-503, Decision on Corruption, paras. 570-571 (footnotes omitted; emphasis added).

[109] Exhibit R-503, Decision on Corruption, para. 572.

[110] Exhibit R-503, Decision on Corruption, paras. 575-576 (footnotes omitted; emphasis in the original).

[111] Exhibit R-503, Decision on Corruption, para. 593.

[112] Exhibit R-503, Decision on Corruption, para. 596.

according to which the Agreements are void *ab initio*. They have the jurisdiction to do so."[113]

99. The Tribunal undertook this examination and determined that causation is necessary to declare a contract void *ab initio* under Article 102 of the Bangladesh Constitution,[114] or to avoid a contract under the Contract Act.[115] Then, after considering the evidence before it, the Tribunal found that "[t]he evidence does not establish that the Agreements or Governmental acts in their preparation were procured by corruption."[116] The Tribunal, accordingly, rejected the Respondents' (i.e., the Applicants') jurisdictional objections[117] and confirmed in the Award that it had jurisdiction to decide Niko's Payment Claim against Petrobangla.[118]

100. The aforementioned overview shows that, after examining the relevant arguments, evidence, and legal authorities put forth by the Parties, the Tribunal determined that: (i) in ICSID arbitrations based on contractual arbitration clauses, allegations of bad faith and violations of international public policy or local law should be considered as part of the merits of the case; (ii) under the applicable law (i.e., Bangladesh law), the avoidance of a contract and its arbitration clause requires a causal link between the act of corruption and the conclusion of the contract; and (iii) the evidence presented did not establish that the GPSA, including its arbitration clause, was obtained through corruption.

101. To grant the annulment requested by the Applicants, the Committee would need to reassess the legal and factual matters analyzed and decided by the Tribunal and reach different conclusions. However, such *de novo* review falls outside the purview of an *ad hoc* committee as it would be equivalent to an appeal.[119] As previously established, *ad hoc* committees cannot simply substitute their views on jurisdiction or their determinations on the merits for those of the tribunal.[120] Rather, to annul the Award under Article 52(1)(b) of the Convention, the Committee would have to be satisfied that the Tribunal committed a manifest — i.e., an obvious, clear or self-evident — excess of powers.

102. The Committee is of the view that the Applicants have not demonstrated that the Tribunal committed a self-evident error when it assumed jurisdiction over the Payment Claim despite Niko Canada's corruption guilty plea. The Tribunal's determination that, unless

[113] Exhibit R-503, Decision on Corruption, para. 597 (emphasis in the original).

[114] Exhibit R-503, Decision on Corruption, paras. 733-734.

[115] Exhibit R-503, Decision on Corruption, para. 783.

[116] Exhibit R-503, Decision on Corruption, Section 12.4.

[117] Exhibit R-503, Decision on Corruption, para. 2010(ii).

[118] Exhibit R-487, Award, para. 375(2).

[119] Decision on Annulment, para. 71 above.

[120] Decision on Annulment, para. 71 above.

the arbitration agreement itself was procured through corruption (which the Applicants never alleged), claims of corruption in contract-based ICSID arbitrations pertain to the merits of the case is certainly not untenable. In fact, the Tribunal's approach accords with that taken by other contract-based ICSID tribunals.[121] Even if the Committee disagreed with the reasoning and conclusions of the Tribunal (or other ICSID tribunals) on this point, the Tribunal's ruling that its determinations on the causation requirement pertain to the merits does not involve an annullable error. Consequently, the Committee rejects the request for annulment under the ground for annulment invoked in this section, as these determinations fall outside its purview. The Committee will turn to the Applicants' allegation that, in making these determinations, the Tribunal failed to apply the law applicable on the merits, i.e., Bangladesh law, in Section IV.C. below

C. WHETHER THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS BY FAILING TO APPLY A BANGLADESH SUPREME COURT JUDGMENT ON THE LAWS OF BANGLADESH ON CORRUPTION

1. The Applicants' Position

103. The Applicants claim that the Tribunal manifestly exceeded its powers by failing to apply the law chosen by the Parties (i.e., Bangladesh law) as it demanded proof of specific causation to void a contract even when one of the contracting parties made a bribe to procure it.[122] The Applicants contend that, under Bangladesh law, as authoritatively declared by the Bangladesh Supreme Court in a judgment issued on 24 August 2017 in connection with the JVA and the GPSA (the "***Alam* Judgment**"), "all that must be shown to establish that a contract is void *ab initio* is that a bribe was paid to obtain influence."[123] The Tribunal ignored the law set forth in the *Alam* Judgment and instead based its decision on its own criteria.

[121] Exhibit RLA-121, *World Duty Free v. Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, paras. 130-188; Exhibit CLA-104, *SIREXM v. Burkina Faso*, ICSID Case No. ARB/97/1, 19 January 2000, paras. 4.13, 5.39, 5.41, 6.09 *et seq*.; Exhibit CLA-115, Schreuer et al., Schreuer's Commentary on the ICSID Convention (3rd ed., Cambridge, 2022), pp. 247-248, para. 439 ("In contract-based cases, ICSID tribunals have consistently considered that both the investment's and the investor's compliance with domestic law do not, in principle, constitute obstacles to the Tribunal's jurisdiction, but rather concern the merits of the claims. They also agree that the legality of the investment is not an element of the definition of the investment in the sense of Art. 25(1) of the ICSID Convention.")

[122] Memorial, para. 46.

[123] Memorial, para. 43.

104. Furthermore, and in direct contradiction of the law declared by the Bangladesh Supreme Court, the Tribunal concluded that Section 23 of the Contract Act was inapplicable and the GPSA was only voidable, not void *ab initio*.[124]

105. The Applicants disagree with the Respondent on Annulment's position that only a complete disregard of the applicable law or the tribunal grounding its award on a different law constitutes a manifest excess of powers. They refer to *MTD v. Chile* and argue that an award should be annulled if while purporting to apply the applicable law, the tribunal applies a different law, which is what happened in the present case.[125]

106. The Applicants further maintain that pursuant to Article 111 of the Bangladesh Constitution, the law declared by both the High Court and the Appellate Divisions of the Bangladesh Supreme Court is the law of Bangladesh and thus is not merely persuasive, but must be followed.[126] The Applicants do not claim that the Tribunal is subordinate to the Bangladesh Supreme Court, but rather that the Tribunal had to apply the law of Bangladesh, which includes the decisions of the Bangladesh Supreme Court, whether the Tribunal agrees with them or not.[127]

107. The Applicants also note that none of the circumstances described by the Tribunal in its Decision on Corruption concerning the *Alam* Judgment — namely, that the judgment was rendered in violation of the Tribunal's exclusive jurisdiction; that the Tribunal disagreed with the Supreme Court's representation and characterization of the facts; that the Court had apparently gone beyond the scope of Article 102 of the Bangladesh Constitution and what the Court had decided in other cases, and that the judgment was subject to appeal — limit the force of the Court's declaration of Bangladesh law.[128] Moreover, the Tribunal did not find that the *Alam* Judgment was invalid or that it violated Niko's rights.[129] The *Alam* Judgment was and remains valid and binding, and the Tribunal was bound to apply it as the law of the land.[130]

108. Finally, the Applicants submit that the Tribunal's failure to apply Bangladesh law began with its 2013 Decision on Jurisdiction, where the Tribunal said specifically that it did not apply Bangladesh law in its analysis of corruption, including causation. Then, in its 2019 Decision on Corruption, the Tribunal discussed Bangladesh law, but continued to apply

[124] Hearing Tr. Day 1, 57:3-9.

[125] Hearing Tr. Day 1, 40:17 – 41:8.

[126] Hearing Tr. Day 1, 45:12-14.

[127] Hearing Tr. Day 1, 61:5-19.

[128] *See*, Hearing Tr. Day 1, 58:5 – 59:1.

[129] Hearing Tr. Day 1, 57:18 – 58:4.

[130] Hearing Tr. Day 2, 254:11 – 255:4.

the rules set out in its Decision on Jurisdiction, even though they were contrary to Bangladesh law.[131]

2. The Respondent on Annulment's Position

109. The Respondent on Annulment argues that the Applicants' second ground for annulment fails because their arguments relate to the Tribunal's application of Bangladesh law and do not implicate any failure to apply the applicable law.[132]

110. The Respondent on Annulment asserts that the Applicants' claim that the Tribunal failed to adhere to a judgment of the Bangladesh Supreme Court, High Court Division, in the *Alam* proceedings does not meet the standard for annulment, as the application of the parties' chosen law does not require the Tribunal to adhere to any one local court decision.[133] The standard for annulment requires a complete disregard of the law or the application of a different law, rather than a mere misapplication or wrong interpretation.[134] There is no complete disregard of the law or application of a different law in this case, only a disagreement by the Applicants with the Tribunal's application of Bangladesh law.[135]

111. The Applicants further err in stating that decisions of the Bangladesh Supreme Court, High Court Division, and specifically the *Alam* Judgment, are to be considered "the law of Bangladesh."[136] According to Article 111 of the Bangladesh Constitution, judgments of the High Court Division may be binding on subordinate courts (of which the Tribunal was not one), but not on other panels of the same division or the Appellate Division.[137] In any event, the Tribunal thoroughly considered the *Alam* Judgment and its relevance, and concluded that it was unpersuasive.[138] Similarly, the Tribunal carefully considered the points raised by the Applicants in their submissions, specifically those pertaining to the Bangladesh Penal Code and the Bangladesh Contract Act, and rendered a well-reasoned decision on Bangladesh law.[139]

[131] Hearing Tr. Day 1, 49:9-13.

[132] Counter-Memorial, para. 79.

[133] Counter-Memorial, paras. 68, 71; Hearing Tr. Day 1, 148:6-8.

[134] Hearing Tr. Day 1, 146:10-17.

[135] *See*, Counter-Memorial, para. 68.

[136] Rejoinder, para. 45.

[137] Rejoinder, paras. 45-46.

[138] Counter-Memorial, para. 70; Hearing Tr. Day 1, 149:9 – 150:7.

[139] *See*, Counter-Memorial, paras. 72-77.

3. The Committee's Analysis

112. The Applicants argue that the Tribunal failed to apply Bangladesh law in relation to their claim that the GPSA, including its arbitration clause, was void *ab initio*. Specifically, their objection centers on the Tribunal's failure to adhere to the *Alam* Judgment of the Supreme Court of Bangladesh, High Court Division, which held that causation is not required to avoid a contract for corruption under Article 102 of the Bangladesh Constitution and that the GPSA was void *ab initio* under Section 23 of the Bangladesh Contract Act.

113. On the other hand, the Respondent on Annulment contends that the Tribunal did not commit an annullable error in its application of Bangladesh law. It emphasizes that the Tribunal conducted a careful analysis of Bangladesh law, including Article 102 of the Constitution, the Contract Act, and relevant case law.

114. The Committee notes that the main point of contention between the Parties in relation to the second ground for annulment concerns the binding nature of the *Alam* Judgment. The Applicants argue that the law declared by the High Court Division of the Bangladesh Supreme Court in the *Alam* Judgment is the law of Bangladesh and had to be followed by the Tribunal,[140] while the Respondent on Annulment contends that the *Alam* Judgment was not binding on the Tribunal and is not mandatory authority in Bangladesh.[141]

115. The Committee further notes that the relevance and substance of the Supreme Court's jurisprudence on Article 102 of the Bangladesh Constitution were also a matter of discussion between the Parties in their submissions on the Corruption Claim in the underlying arbitration.[142]

116. Before assessing whether the Tribunal committed an annullable error under Article 52(1)(b) of the ICSID Convention, the Committee finds it necessary to briefly outline the relevant chronology.

117. As described in Section IV.B. above, the Applicants objected to the Tribunal's jurisdiction based on allegations of corruption, among others. The Tribunal addressed these allegations in its Decision on Jurisdiction of 19 August 2013, upholding its jurisdiction. It is important to note that, at that time, the Applicants did not argue that contracts concluded under the influence of bribery were invalid under Bangladesh law.[143]

[140] *See*, Hearing Tr., Day 1, 42:10 – 43:4; 45:12-18; and 57:10-15.

[141] *See*, Hearing Tr., Day 1, 148:9 – 149:6.

[142] *See*, Exhibit R-503, Decision on Corruption, para. 607, *et seq*.

[143] Exhibit R-481, Decision on Jurisdiction, para. 452.

The Applicants challenged the validity of the GPSA for the first time when they brought the Corruption Claim in March 2016.[144]

118. This account of the events is enough to dismiss the Applicants' assertion during the Hearing that the Tribunal failed to apply Bangladesh law to determine the validity of the GPSA and its arbitration clause in its Decision on Jurisdiction.[145] The Tribunal repeatedly stated that, during the proceedings on jurisdiction, the Applicants did not claim that the GPSA, or its arbitration clause, was void or voidable by reason of corruption.[146] The Applicants do not dispute those assertions.

119. Continuing with the timeline, on 9 May 2016, Professor Alam filed a writ petition under Article 102 of the Bangladesh Constitution.[147] Subsequently, on 24 August 2017, the High Court Division of the Bangladesh Supreme Court issued the *Alam* Judgment, declaring the Agreements void *ab initio*.[148]

120. By the time the *Alam* Judgment was issued, the proceedings on the Corruption Claim were already closed. However, upon the Applicants' request, the Tribunal admitted the judgment into the record and allowed the Parties to provide their comments on its scope and relevance.[149]

121. The Tribunal also conducted its own analysis of the *Alam* Judgment, examining its content and relevance to the matter at hand. A review of Section 6 of the Decision on Corruption shows that the Tribunal did, indeed, endeavor to apply Bangladesh law to the question of the validity of the GPSA.

122. The Tribunal explained that "[t]he principal legal basis for the Respondents' claim that the Agreements are void is Article 102 of the Bangladesh Constitution."[150] The Tribunal thus proceeded to address the question of whether the Supreme Court's jurisprudence on Article 102 writ petitions was applicable in the arbitration, and concluded 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, [the Tribunals] have regard to the principles developed by the Supreme Court in applying Article 102."[151]

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[144] Exhibit R-503, Decision on Corruption, para. 557.

[145] Hearing Tr., Day 1, 49:4-8.

[146] *See*, Exhibit R-481, Decision on Jurisdiction, paras. 456-457; Exhibit R-503, Decision on Corruption, paras. 554-557; Exhibit R-487, Award, para. 50.

[147] Exhibit R-503, Decision on Corruption, para. 666.

[148] Exhibit R-503, Decision on Corruption, para. 666.

[149] Exhibit R-503, Decision on Corruption, paras. 668-670.

[150] Exhibit R-503, Decision on Corruption, para. 605.

[151] Exhibit R-503, Decision on Corruption, para. 621.

123. Then, the Tribunal identified two Supreme Court cases discussed by the Parties with respect to Article 102 of the Bangladesh Constitution, which it deemed of particular importance.[152] Both of these cases were brought before the Appellate Division of the Supreme Court.[153] The Tribunal proceeded to extract "[t]he principles of the Article 102 jurisprudence relevant for the present decision"[154] and finally considered "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."[155]

124. Regarding the *Alam* case, the Applicants argued that the High Court Division of the Supreme Court had reached "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."[156] The Applicants further asserted that "judgments of the Supreme Court of Bangladesh create binding precedent establishing and explaining Bangladeshi law."[157]

125. In this regard, the Tribunal stated as follows:

> "**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*". As shown above in Section 6.2, the Tribunals have carefully analysed the relevant jurisprudence of this court.
>
> 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

[152] Exhibit R-503, Decision on Corruption, para. 622. *See generally*, Exhibit R-503, Decision on Corruption, Section 6.2.2.

[153] Exhibit R-503, Decision on Corruption, para. 622.

[154] Exhibit R-503, Decision on Corruption, section 6.2.3.

[155] Exhibit R-503, Decision on Corruption, para. 655. *See generally*, Exhibit R-503, Decision on Corruption, Sections 6.3 and 6.4.

[156] Exhibit R-503, Decision on Corruption, para. 716, citing Respondents' letter of 21 November 2017, p. 2.

[157] Exhibit R-503, Decision on Corruption, para. 716, citing Respondents' letter of 21 November 2017, p. 1.

> assertions which are plainly contradicted by the record; and it is subject to appeal."[158]

126. The Tribunal further observed that "the *Alam* Judgment seems to differ from earlier jurisprudence of the Supreme Court on at least three points."[159] With respect to the first two points, the Tribunal determined that the judgment of the High Court Division in the *Alam* case was nonetheless justified and in line with previous rulings of the Appellate Division.[160] However, regarding the third point — causation — the Tribunal concluded that the High Court Division's assertion that there is no need to demonstrate that the bribes paid to the Energy Minister actually influenced his decision to act in favor of Niko conflicted with prior Supreme Court jurisprudence on Article 102.[161]

127. Having noted that the High Court Division's assertion that no actual influence was required to declare a governmental act void due to corruption was based on the definition of bribery in Section 161 of the Bangladesh Penal Code, the Tribunal observed that "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."[162] Additionally, the Tribunal observed that elsewhere in the *Alam* Judgment, the High Court Division used language that contradicted its prior assertion and instead confirmed that a causal link must exist.[163] Such language was consistent with "the understanding of Article 102 that the Tribunals had found when examining the jurisprudence of the Supreme Court," which "clearly require[d] causation."[164]

128. In conclusion, the Tribunal carefully considered the *Alam* Judgment and its relevance. In doing so, the Tribunal also considered and applied two judgments of the Appellate Division of the Bangladesh Supreme Court, to which the High Court Division is subordinate. The Tribunal justified its decision not to consider the *Alam* Judgment as binding on the causation requirement and it is not for this Committee to review the appropriateness of this decision when the Tribunal clearly endeavored to apply Bangladesh law to determine the validity of the GPSA, including its arbitration clause.

129. The Tribunal also examined the relevant provisions of the Bangladesh Contract Act and concluded that the allegations of corruption in the procurement of the GPSA had to be

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[158] Exhibit R-503, Decision on Corruption, paras. 718-719.

[159] Exhibit R-503, Decision on Corruption, para. 720.

[160] *See*, Exhibit R-503, Decision on Corruption, paras. 721-726.

[161] *See*, Exhibit R-503, Decision on Corruption, paras. 727-734.

[162] Exhibit R-503, Decision on Corruption, paras. 728-730.

[163] Exhibit R-503, Decision on Corruption, para. 731.

[164] Exhibit R-503, Decision on Corruption, paras. 733-734.

considered under Sections 19 and 15 of the Contract Act and not under Section 23, as asserted by the Applicants.[165]

130. The correctness of the Tribunal's interpretation and application of these provisions is not a matter for review in annulment proceedings. It is evident from the Decision on Corruption that the Tribunal examined the provisions of Bangladesh law referenced by the Parties and endeavored to apply them to the issue at hand. Therefore, the Committee does not find any ground to annul the Award based on the Tribunal's alleged failure to apply the law chosen by the Parties.

131. Lastly, the Committee notes that the Applicants claimed in their written submissions that the Tribunal seriously departed from fundamental rules of procedure by engaging in unfair treatment of evidence and the burden of proof in failing to apply the standard for corruption under Bangladeshi law.[166] However, the Applicants did not elaborate on this allegation in their written pleadings and did not address it during the Hearing.

132. In any event, the Committee agrees with the Respondent on Annulment that the Applicants' argument goes to the standard of proof under Bangladesh law, not the burden of proof in proceedings before an ICSID tribunal, and is thus an extension of their allegation that the Tribunal failed to apply that law.[167] Since the Committee has already dismissed the Applicants' claim that the Tribunal failed to apply the law chosen by the Parties, this ground for annulment must also be dismissed.

D. WHETHER THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS BY EXTENDING ITS JURISDICTION TO NON-PARTIES TO THE ARBITRATION

1. The Applicants' Position

133. The Applicants argue that the Tribunal manifestly exceeded its powers by intervening in Bangladesh court proceedings in its Decision on Exclusivity. Specifically, the Applicants submit the following:

(a) The Tribunal's ruling that it had "sole and exclusive subject matter jurisdiction with respect to all matters which have validly been brought before it," including whether

[165] Exhibit R-503, Decision on Corruption, para. 756.

[166] Memorial, para. 33.

[167] Counter-Memorial, para. 78; Hearing Tr. Day 1, 151:3-17.

the GPSA was procured by corruption, usurped the Bangladesh courts' authority to interpret their own laws, without any legal basis.[168]

(b) The Tribunal went beyond the scope of the arbitration agreement by extending its jurisdiction to non-parties to the arbitration.[169]

(c) The Tribunal improperly invoked the "international commitments of the State of Bangladesh" to find that Bangladesh courts are bound by its decisions, but the ICSID Convention does not impose on Contracting States the obligation to terminate or truncate domestic court proceedings on matters that overlap with an ICSID arbitration to which they are not a party.[170]

(d) The Tribunal's orders in paragraph 20(2) of the Decision on Exclusivity have no basis in the ICSID Convention. Nothing in the Convention imposes an obligation on the courts of a State that is not party to an arbitration to issue orders interpreting its own laws in compliance with an ICSID tribunal's preferences, nor is there anything in the Convention that authorizes a tribunal to force a party to the arbitration to take action in a separate proceeding to which it is not a party.[171]

134. The Applicants disagree with the Respondent on Annulment's position that this ground for annulment only relates to paragraphs 375(ii) and (v) of the Award. On the contrary, accepting this ground should result in the annulment of the Award in its entirety, given the cascading effect of the Decision on Exclusivity.[172] According to the Applicants, the Decision on Exclusivity forced them to choose between complying with their own domestic law or with the decision of an ICSID tribunal and facing criminal penalties for non-compliance with their domestic law.[173] The Applicants submit that "by choosing to comply with their domestic court judgment, that changed the view of the Party in the eyes of the Tribunal. It tainted the view of the Party before the Tribunal with the result that the entire award was tainted."[174]

[168] Memorial para. 48.

[169] Memorial para. 49.

[170] Memorial para. 50.

[171] Memorial para. 51.

[172] Hearing Tr. Day 1, 64:9-15.

[173] Hearing Tr. Day 1, 64:16 – 65:3.

[174] Hearing Tr. Day 1, 65:3-8.

2. The Respondent on Annulment's Position

135. The Respondent on Annulment contends that the Applicants' fourth ground for annulment is baseless.[175]

136. First, the Applicants are barred from challenging the measures adopted by the Tribunal in its Decision on Exclusivity by virtue of Rule 27 of the ICSID Arbitration Rules, as they did not timely object to the Tribunal's power to order the relief Niko requested.[176]

137. Second, contrary to the Applicants' contentions, "[t]he Tribunal was not only within its authority, but also absolutely right to confirm that its jurisdiction was exclusive."[177] According to Article 41(1) of the ICSID Convention, the Tribunal had the authority to determine its own competence.[178] Once the Tribunal found that it had jurisdiction, Article 26 of the ICSID Convention establishes the Tribunal's jurisdiction "to the exclusion of any other remedy," including national courts.[179] Furthermore, Article 27 of the ICSID Convention makes clear that consent to ICSID arbitration precludes claims in other forums not only by the investor who consented to arbitration but also by the investor's home State, which did not consent to ICSID arbitration.[180] Similarly, ICSID Arbitration Rule 39 prohibits national courts from ordering provisional measures at any time unless the parties have provided otherwise in their agreement recording consent to ICSID arbitration.[181] Moreover, in their legislation implementing the ICSID Convention, Contracting States have interpreted the Convention as requiring their courts to abstain from adjudicating matters subject to ICSID arbitration agreements, as exemplified by Canada's implementing legislation.[182] The Tribunal's determination regarding its exclusive jurisdiction is therefore correct, but, in any event, the correctness of the Tribunal's interpretation is not a subject of inquiry under the "manifest excess of authority" standard.[183]

138. Third, the Applicants' contention that the Tribunal went beyond the scope of the arbitration agreement by extending its jurisdiction to non-parties of the arbitration is wrong.[184] The Tribunal did not declare having jurisdiction over Bangladesh, its courts or

[175] Counter-Memorial, para. 105.
[176] Rejoinder, para. 54.
[177] Hearing Tr. Day 1, 154:16-18.
[178] Counter-Memorial, para. 99.
[179] Counter-Memorial, para. 99.
[180] Hearing Tr. Day 1, 153:14-22.
[181] Hearing Tr. Day 1, 153:19 – 154:4.
[182] Hearing Tr. Day 1, 154:5-15
[183] Counter-Memorial, para. 99.
[184] Counter-Memorial, para. 100.

any third party.[185] Moreover, it made clear in its reasoning that its exclusive jurisdiction did not prevent third parties from suing in a court in Bangladesh or elsewhere.[186]

139. Fourth, the Applicants also err in asserting that "the Tribunal improperly invoked the 'international commitments of the State of Bangladesh' as a basis for its exclusivity decision."[187] This argument again challenges the Tribunal's reasoning. However, "[w]hether the Tribunal correctly interpreted the Convention in its findings on exclusive jurisdiction is not a matter that the Committee can review."[188]

140. Finally, the Applicants' argument that the Tribunal's order in paragraph 20(2) of the Decision on Exclusivity exceeded its authority is also wrong. Contrary to the Applicants' suggestion, the Tribunal did not purport to make orders to the courts of Bangladesh, but rather directed the Parties themselves to take steps to ensure compliance with the Tribunal's exclusive jurisdiction.[189] It is uncontested that ICSID tribunals have jurisdiction to order that the parties take actions in court proceedings, and there is no rule prohibiting tribunals to take actions that may involve third parties.[190]

3. The Committee's Analysis

141. The Applicants' main claim under the third ground for annulment is that "the Tribunal manifestly exceeded its powers by extending its jurisdiction to non-parties to the Arbitration, thereby depriving them of due process and infringing on their rights."[191]

142. According to the Applicants, the Tribunal manifestly exceeded its powers by (i) declaring that it had "sole and exclusive subject matter jurisdiction with respect to all matters which have validly been brought before it;" (ii) finding that "[i]n making their decision involving other parties, the courts of Bangladesh [] are bound to conform to and implement the decision rendered by these Tribunals that are within the competence of these Tribunals;" and (iii) ordering the Applicants to take specific actions vis-à-vis certain courts and authorities in Bangladesh.[192]

[185] Counter-Memorial, para. 101.

[186] *See*, Hearing Tr. Day 1, 155:7-13.

[187] Counter-Memorial, para. 102.

[188] Counter-Memorial, para. 102.

[189] Counter-Memorial, para. 104.

[190] Counter-Memorial, para. 104.

[191] Hearing Tr., Day 1, 10:13-15. *See also*, Hearing Tr., Day 1, 63:6-20, and 72:14 – 73:6.

[192] Reply, paras. 60-61, citing to Exhibit R-504, *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation*, ICSID Case Nos. ARB/10/11 and ARB/10/18, Decision Pertaining to the Exclusivity of the Tribunals' Jurisdiction, 19 July 2016 ("Decision on Exclusivity"), paras. 20(1), 12, 17, and 20(2)(a).

143. The Applicants' claims pertain to the Tribunal's Decision on Exclusivity, which was confirmed in paragraph 375(1)(v) of the operative part of the Award. Additionally, the operative part of the Award provides as follows:

> "The Tribunal has jurisdiction to decide Niko's Payment Claim against Petrobangla and it has exclusive subject matter jurisdiction with respect to all matters concerning Niko's claim to payment for gas delivered to Petrobangla under the GPSA (the Payment Claim)."[193]

144. The Respondent on Annulment objects to the third ground for annulment. It emphasizes that the primary basis of the Applicants' grievances relates to the Tribunal's reasoning and considers that the Applicants' invocation of this ground for annulment should be dismissed for the following reasons: (i) "the Tribunal's reasoning is well-founded and accords with the approach of Contracting States to what the ICSID Convention requires;" (ii) "reasons cannot, by themselves, exceed authority. Only an order or declaration can do that;" and (iii) "the Award, in fact, only ordered relief with respect to Parties before the Tribunal."[194]

145. In the view of the Committee, a cursory reading of the operative part of the Decision on Exclusivity undoubtedly leads to the conclusion that such decision, as well as the Award, only ordered relief with respect to parties before the Tribunal and that the Tribunal did not extend its jurisdiction to non-parties to the arbitration:

> "20. For the reasons set out above the Tribunals now grant in substance the relief requested but do so in the form not of a provisional measure but in the following decision. The Tribunals:
>
> 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 […]
>
> 2. Order BAPEX and Petrobangla
>
> (a) 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
>
> (b) to take all steps necessary to terminate any proceedings and orders by the courts in Bangladesh which are in conflict with this order."[195]

[193] Exhibit R-487, Award, para. 375(2).

[194] Hearing Tr., Day 1, 122:10-20.

[195] Exhibit R-504, Decision on Exclusivity, para. 20.

146. First, the Committee finds that the Tribunal's declaration regarding its exclusive jurisdiction, as explained by the Tribunal itself, does not impact the personal jurisdiction of the courts in Bangladesh:

> "Concerning the scope of jurisdiction, the Tribunals have taken throughout these proceedings the following consistent position:
>
> In the Decision on Jurisdiction, the Tribunals have described the process by which the Government of Bangladesh had delegated to Petrobangla and to BAPEX the exercise of its rights and powers in the field of the JVA and the GPSA, as recorded in the Preamble of the JVA and referred to in the GPSA. The Tribunals concluded that they did not have jurisdiction *ratione personae* over the Government. They do, however, have exclusive jurisdiction over the subject matter of these two agreements, including provisional measures. On the basis of the ICSID Convention, this exclusive jurisdiction *ratione materiae* binds the People's Republic of Bangladesh and all its organs, including the courts. The Tribunals have stated expressly that
>
> … *the Tribunals' exclusive jurisdiction also extends to provisional measures*.
>
> It follows from this decision that the Tribunals have exclusive jurisdiction to determine the issues that are validly brought before them.
>
> This 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."[196]

147. Additionally, the Tribunal explained:

> "The Tribunals observe, however, that the Respondents' submissions show a fundamental misunderstanding of the scope and implication of the Tribunals' jurisdiction. In particular, they note the Respondents' statements such as that denying "*the exclusive subject matter jurisdiction posited by the Claimant that would preclude proceedings instituted by a non-party to the ICSID proceedings*". The position so expressed fails to distinguish between the two aspects of jurisdiction. Exclusive subject matter jurisdiction does not prevent a court in Bangladesh to be seized by a party not party to the ICSID proceedings; it does, however, bind the court in Bangladesh, when deciding the claim

[196] Exhibit R-504, Decision on Exclusivity, paras. 11-12 (footnotes omitted).

> of such a party, to conform its decision to that of the ICSID Tribunals in all those matters for which the ICSID Tribunals have exclusive jurisdiction."[197]

148. Second, the Committee notes that the text of the operative part of the Decision on Exclusivity, as quoted in paragraph 145 above, clearly indicates that the orders given by the Tribunal in paragraph 20(2) are specifically directed at the Applicants for them to: (a) bring to the attention of the courts and other authorities in Bangladesh the exclusive jurisdiction of the Tribunal in respect of specific issues identified in paragraph 20(1) and the international obligations of the State of Bangladesh resulting therefrom under the ICSID Convention; and (b) to take all steps necessary to terminate any proceedings and orders by the courts in Bangladesh which are in conflict with the Tribunal's orders. It is evident that these orders are explicitly confined to the sphere of action of the Applicants. The fact that the Decision on Exclusivity orders the Applicants to take certain actions before the courts and other authorities in Bangladesh does not mean, as the Applicants claim, that these orders are addressed directly to the State of Bangladesh, its courts, or other authorities.

149. Third, the orders issued by the Tribunal in paragraph 20(2) of its Decision on Exclusivity solely aim to enforce its jurisdiction. Additionally, the Committee notes that the orders themselves are not reproduced in the operative part of the Award.

150. For these reasons, the Committee finds that the Tribunal did not manifestly exceed its powers by declaring its sole and exclusive subject matter jurisdiction with respect to all matters validly brought before it and by ordering the Applicants to take specific actions to enforce said jurisdiction. The Applicants' third ground for annulment is thus rejected.

E. WHETHER THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS AND DEPARTED FROM FUNDAMENTAL RULES OF PROCEDURE BY SUBVERTING THE NATURE OF THE RELIEF REQUESTED IN NIKO'S AMENDED REQUEST FOR PROVISIONAL MEASURES AND DEPRIVING THE APPLICANTS OF THEIR RIGHT TO BE HEARD REGARDING THE RELIEF ORDERED IN THE DECISION ON EXCLUSIVITY

1. The Applicants' Position

151. The Applicants claim that by issuing the Decision on Exclusivity, the Tribunal manifestly exceeded its powers and seriously departed from fundamental rules of procedure. Specifically, they submit that the Tribunal (i) granted relief that was not requested by

[197] Exhibit R-504, Decision on Exclusivity, para. 17 (footnotes omitted).

Niko's Amended Request for Provisional Measures; (ii) changed the very nature of the requested measures by making them final; (iii) exceeded its personal jurisdiction by extending the measures ordered to non-parties to the arbitration; and (iv) ordered the unrequested measures without giving the Applicants an opportunity to address the subject matter in the context of a final decision.[198] The allegation under (iii) — application of the measures ordered to third parties — has already been discussed and decided by the Committee when addressing the third ground for annulment.

152. The Applicants reject the Respondent on Annulment's view that the Tribunal ordered in substance the relief requested because that relief was in fact not provisional as it did not require any further decision from the Tribunal. According to the Applicants, this misrepresents the purpose of provisional measures, which are temporary remedies granted under special circumstances to safeguard the parties' rights during the proceeding, without prejudging the outcome of the case or making a final determination on any arguments underlying the dispute.[199]

153. Additionally, the Respondent on Annulment's reliance on ICSID Arbitration Rule 39(3) is inappropriate. First, tribunals have interpreted a tribunal's authority under this Rule to deviate from the requested measures very narrowly.[200] Second, Rule 39(3) applies solely to provisional measures and does not justify the adoption of final measures.[201] Third, the Tribunal did not invoke Article 47 of the ICSID Convention and ICSID Arbitration Rule 39 as the basis for its decision.[202]

154. The Applicants argue that a party's right to be heard can be violated not only when one party has the opportunity to present arguments while the other does not, but also when the parties are surprised by the tribunal and denied the opportunity to present their case on a new issue.[203] Here, the Applicants were neither given the opportunity to comment on Niko's amended Request for Provisional Measures nor on the changed nature of the relief that the Tribunal granted *motu proprio*.[204] The Applicants objected to the Tribunal's conduct and reserved their right to invoke post-award remedies.[205]

155. Regarding the standard for annulment under Article 52(1)(d) of the ICSID Convention, the Applicants argue that for a departure from a fundamental rule of procedure to be serious, the applicant must show that the breach had an impact on the award, not that the

[198] Reply, para. 72; Hearing Tr. Day 1, 79:1-12.
[199] Reply, para. 73.
[200] Reply, para. 74.
[201] Reply, paras. 75-76.
[202] Reply, para. 77.
[203] Reply, para. 78.
[204] Reply, paras. 79-80.
[205] Reply, para. 79.

outcome of the case would have been different had the breach not occurred.[206] According to the Applicants, "the clearest evidence of the impact on the Award is the mere fact that the Decision on Exclusivity was directly confirmed in the dispositif of the award and annex[ed] to it."[207]

156. Finally, the Applicants argue that the Tribunal's insistence that the Applicants make payment and their repeated resistance and reliance on the Bangladesh courts to resist payment prejudiced the Tribunal against them. Therefore, if the Committee grants annulment based on this ground, the entire Award, and not just the parts of the dispositif addressing the Decision on Exclusivity, must be annulled.[208]

2. The Respondent on Annulment's Position

157. The Respondent on Annulment asserts that the Applicants' fourth ground for annulment is also baseless.[209] At the outset, the Applicants are barred from challenging the measures ordered by the Tribunal in its Decision on Exclusivity by virtue of Rule 27 of the ICSID Arbitration Rules.[210] Furthermore, the standard for annulment under Article 52(1)(b) of the ICSID Convention is not met because the Tribunal did not go beyond the scope of the arbitration agreement, did not decide points not submitted to it, or fail to apply the parties' agreed choice of law.[211] The Applicants also fail to meet the standard for annulment under Article 52(1)(d) as there was no departure from a fundamental rule of procedure, and even if there had been, it had no material impact on the Award.[212]

158. First, the claim that the Tribunal manifestly exceeded its powers is unfounded as there is no material difference between the relief requested by Niko and that granted by the Tribunal.[213] There was also no change in the temporal scope of what the Tribunal ordered.[214] Niko framed its request for relief as one for provisional measures, but the relief requested did not require any further decision from the Tribunal.[215] The Tribunal, in turn, granted relief to protect its jurisdiction, which came to an end once it issued the Award.[216] The Decision on Exclusivity is thus provisional in the sense that it only pertains

[206] Hearing Tr. Day 1, 87:6 – 88:5.
[207] Hearing Tr. Day 1, 89:20 – 90:8.
[208] Hearing Tr. Day 1, 91:1-14.
[209] Hearing Tr. Day 1, 157:6-18.
[210] Counter-Memorial, para. 94; Rejoinder, para. 54.
[211] Counter-Memorial, para. 109.
[212] Hearing Tr. Day 1, 164:6 – 165:9.
[213] Counter-Memorial, para. 108; Rejoinder, paras. 73-74; Hearing Tr. Day 1, 159:4-8; 163:3-7.
[214] Hearing Tr. Day 1, 159:16-19
[215] Hearing Tr. Day 1, 160:1-4.
[216] Hearing Tr. Day 1, 160:5–12.

to the period before the Award,[217] and it did not prejudge the outcome of the principal claim in dispute (i.e., the Payment Claim), nor could it have affected its merits, as the claim had already been decided in three previous decisions.[218]

159. Moreover, it is well established that a tribunal may adopt its own solution and reasoning without obligation to submit it to the parties beforehand, as long as it remains within the legal framework established by the parties, which the Tribunal did in this case.[219] In any event, the Tribunal was not bound by the relief requested, as ICSID Arbitration Rule 39(3) expressly grants tribunals the authority to issue provisional measures on their own motion or to "recommend measures other than those specified in a request."[220] The cases relied upon by the Applicants to limit such authority are inapposite, and the Applicants never argued before the Tribunal that Rule 39(3) constrained the Tribunal.[221]

160. Second, the Applicants' claim that the Tribunal showed lack of independence or impartiality, denied the Parties equal treatment, failed to analyze the issues before it and to afford the Applicants an opportunity to submit observations, are unsubstantiated or false.[222] The Applicants had full opportunity to offer observations in respect of the relief requested by Niko and did so in two rounds of submissions.[223]

161. Furthermore, the Applicants have never "describe[d] the arguments they would have made had they been given the right to a hearing they say they were denied, or how any argument available to them could have changed the outcome of the Tribunal's decision."[224] Most importantly, they have failed to "offer any support for how their complaints concerning the Decision on Exclusivity could possibly have affected the final operative relief in the Award on the Payment Claim,"[225] and thus to meet the standard for a serious departure from a fundamental rule of procedure.[226]

3. The Committee's Analysis

162. The fourth ground for annulment also pertains to the Tribunal's Decision on Exclusivity. The Committee observes that in the operative part of the Award, the Tribunal confirmed

[217] Hearing Tr. Day 1, 160:13-19.

[218] Hearing Tr. Day 1, 160:20 – 161:6. *See also*, Rejoinder, paras. 78-80.

[219] Rejoinder, paras. 83-84; Hearing Tr. Day 1, 163:8-19.

[220] Counter-Memorial, para. 110.

[221] Hearing Tr. Day 1, 161:20 – 162:10; 162:16 – 163:2.

[222] Counter-Memorial, paras. 111-114.

[223] Hearing Tr. Day 1, 161:7–19.

[224] Rejoinder, para. 85.

[225] Rejoinder, para. 86.

[226] Rejoinder, para. 86. *See also*, Hearing Tr. Day 1, 164:11 – 165:19.

the Decision on Exclusivity[227] and restated that it has exclusive subject matter jurisdiction with respect to all matters concerning the Payment Claim.[228] However, the Tribunal did not reproduce the orders to the Applicants set forth in paragraph 20(2) of the Decision on Exclusivity in the operative part of the Award.

163. The Applicants claim that the Tribunal manifestly exceeded its powers and departed from fundamental rules of procedure by subverting the nature of the relief requested and depriving the Applicants of their right to be heard.[229]

164. The Respondent on Annulment disputes both allegations. According to the Respondent on Annulment, there is no material difference between the relief requested by Niko and that granted by the Tribunal,[230] and the Applicants had sufficient opportunity to address Niko's Amended Request for Relief.[231] It further argues that the Applicants are barred from challenging the measures adopted in the Decision on Exclusivity since they did not timely object to such measures.[232]

165. The Committee is not persuaded that the Applicants' failed to timely object to the Tribunal's decision to the relief granted in its Decision on Exclusivity. The Applicants' case is that the Tribunal was requested to issue provisional measures and issued the measures as final. However, the determination was only made in the Decision on Exclusivity. Therefore, the Respondent on Annulment's contention that the Applicants could have objected to the Tribunal's authority to order such relief in prior submissions is unfounded. [233] Moreover, after the Tribunal issued its Decision on Exclusivity, the Applicants promptly filed a letter registering their objections and explicitly stating that they reserved all of their rights concerning post-award remedies related to this decision.[234]

166. The Respondent on Annulment also raised a point about the Applicants' failure to request reconsideration of the decision.[235] However, it did not elaborate on this in its pleadings or during the Hearing, therefore the Committee will not delve further into this issue and will instead proceed to analyze the merits of the Applicants' fourth ground for annulment.

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[227] *See*, Exhibit R-487, Award, para. 375(1)(v).

[228] *See*, Exhibit R-487, Award, para. 375(2).

[229] Reply, § III.E.

[230] Counter-Memorial, para. 108; Rejoinder, paras. 73-74; Hearing Tr. Day 1, 159:4-8; 163:3-7.

[231] Hearing Tr. Day 1, 161:7-19.

[232] Counter-Memorial, paras. 94-95; Rejoinder, para. 54.

[233] *See*, Counter-Memorial, para. 94.

[234] Exhibit R-472, *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation*, Letter from Respondents to Tribunal, 25 July 2016.

[235] Rejoinder, para. 54.

167. There is no dispute that Niko submitted its application as a request for "provisional measures" and that the Tribunal made a definitive, as opposed to provisional, decision. In fact, the introductory sentence to the operative part of the Decision on Exclusivity explicitly provides:

> "For the reasons set out above the Tribunals now grant in substance the relief requested but do so in the form not of a provisional measure but in the following decision."[236]

168. The question before the Committee is whether the Tribunal's decision to grant relief "in the form of a Declaratory Decision concerning the jurisdictional issues and an order to the Respondents indicating the action the latter are required to take,"[237] rather than in the form of a provisional measure, constitutes a manifest excess of powers that warrants annulment of the Award.

169. For the reasons stated below, the Committee finds that annulment is not justified in this case.

170. The relief ordered by the Tribunal in the Decision on Exclusivity consists of two parts which must be analyzed separately and in context.

171. In the first part, the Tribunal declared that it had "sole and exclusive subject matter jurisdiction with respect to all matters which have validly been brought before it," including the validity of the GPSA, Petrobangla's payment obligations towards Niko under the GPSA for gas delivered, and the jurisdiction for injunctions seeking to prevent such payments and to protract such injunctions.[238] It is worth noting that the Tribunal had already established its jurisdiction over these matters in its Decision on Jurisdiction of 19 August 2013.[239] Additionally, the Tribunal had previously referred to the scope of its jurisdiction in the First and Third Decisions on the Payment Claim.[240] In the Decision on Exclusivity, the Tribunal merely reaffirmed and further clarified its exclusive jurisdiction over all matters validly submitted to it.[241] In the view of the Committee, a declaration

[236] Exhibit R-504, Decision on Exclusivity, para. 20.

[237] Exhibit R-504, Decision on Exclusivity, para. 19.

[238] Exhibit R-504, Decision on Exclusivity, para. 20(1).

[239] Exhibit R-481, Decision on Jurisdiction, paras. 575(1) and (2).

[240] Exhibit R-500, *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation*, ICSID Case Nos. ARB/10/11 and ARB/10/18, Decision on the Payment Claim, 11 September 2014 ("First Decision on the Payment Claim"), paras. 285-286; Exhibit R-485, *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation*, ICSID Case Nos. ARB/10/11 and ARB/10/18, Third Decision on the Payment Claim, 26 May 2016 ("Third Decision on the Payment Claim"), paras. 77-78.

[241] *See*, Exhibit R-504, Decision on Exclusivity, para. 18.

which merely restates and provides further clarification on a previous determination, does not qualify as a provisional measure.

172. The second part of the relief ordered is as follows:

> "[…] The Tribunals:
>
> […]
>
> 2. Order BAPEX and Petrobangla
>
> (a) 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
>
> (b) to take all steps necessary to terminate any proceedings and orders by the courts in Bangladesh which are in conflict with this order."[242]

173. The specific terms of the relief ordered may seem broader than those of the relief sought to the extent that the Tribunal's orders were not limited to the Writ Petition No. 5673 before the High Court Division of the Supreme Court of Bangladesh. Moreover, the relief ordered was not made in the form of a provisional measure. Nevertheless, the orders simply aim to enforce the jurisdiction of the Tribunal, which had been confirmed since the Decision on Jurisdiction.

174. The Applicants are correct in that the terms and form of the relief ordered do not completely align with those of the relief requested and that such misalignment may be seen as *ultra petita.* However, the question is whether this warrants annulment of the Award. In the Committee's view, it does not.

175. Article 52 of the ICSID Convention provides for annulment of awards, not of interim decisions. Accordingly, the grounds for annulment must be examined with respect to the Award. In this context, to be deemed "manifest," the excess of powers attributed to an interim decision need not only be textually obvious in the interim decision, but it must also be demonstrable and have serious consequences in the award.[243] The Committee is

[242] Exhibit R-504, Decision on Exclusivity, para. 20(2).

[243] Some *ad hoc* committees have indeed interpreted the term "manifest" to imply that the excess of powers must be serious or material to the outcome of the case. (Exhibit R-498/RLA-502, ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para. 83. *See, e.g.,* Exhibit CLA-92, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment on Annulment, 5 June 2007, para. 40 ("It seems to this Committee that a manifest excess of power implies that the excess of power should at once be textually obvious and substantively serious."); Exhibit CLA-79, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Annulment (Excerpts), 22 May 2013, para. 102 ("The Committee

not persuaded that the excess of powers attributed to the Tribunal in the context of the Decision on Exclusivity had any such consequences in the Award.

176. As stated above, the orders made in paragraph 20(2) of the Decision on Exclusivity are not reproduced in the operative part of the Award.[244] The fact that the decision was confirmed in the Award does not in itself prove that it had a substantial impact on the Tribunal's decisions on jurisdiction or the merits of the Payment Claim.

177. Furthermore, the Applicants' allegation that the Decision on Exclusivity prejudged the issues before the Tribunal[245] are unfounded. Before issuing this decision, the Tribunal had already decided on its jurisdiction and had made three decisions upholding the Payment Claim.

178. The Applicants' claim that the Decision on Exclusivity introduced bias on the part of the Tribunal, which affected the entire Award,[246] is also unfounded. The Committee has found no evidence of bias or partiality resulting from this decision.

179. In conclusion, the Committee does not find that the Tribunal exceeded its powers to an extent that would warrant annulment of the Award.

180. Regarding the second ground for annulment invoked by the Applicants under this section, the Committee also finds no reason to annul the Award.

181. The Applicants claim that the Tribunal violated their right to be heard because they were not given an opportunity to provide comments on Niko's Amended Request for Provisional Measures or on the Decision on Exclusivity after its issuance.[247]

182. The first part of the Applicants' claim is unsupported. The Applicants submitted their comments on Niko's Request for Provisional Measures on 1 June 2016, and on Niko's Amended Request for Provisional Measures on 15 June 2016.[248] Thereafter, "[t]he Parties developed their positions in further submissions, the [Applicants] on 7 and 12 July;

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concurs with the *Soufraki* annulment decision in understanding Article 52(1)(b) to mean that annulment should not occur unless a tribunal has exceeded its power in a clear manner and with serious consequences. While the term "manifest" would in itself seem to correspond to "obvious" or "evident," it follows from the very nature of annulment as an exceptional measure that it should not be resorted to unless the tribunal's act or its failure to act has had, or at least may have had, serious consequences for a party.").

[244] *See also*, Exhibit R-487, Award, para. 375, which incorporates the First, Second, and Third Decisions on the Payment Claim, but not the Decision on Exclusivity, into the Award.

[245] *See*, Reply, para. 73.

[246] *See*, Hearing Tr. Day 1, 64:9-15; 90:16 – 91:14.

[247] Reply, para. 80.

[248] Exhibit R-487, Award, paras. 133-134.

[Niko] confirmed its request for provisional measures on 23 June 2016 and made further submissions on 11 and 13 July 2016."[249]

183. The Applicants' assertion that "the last submission on the request for provisional measures before the Tribunal rendered its decision was filed by Niko (the party requesting the provisional measures), not by BAPEX and Petrobangla,"[250] does not show that the Tribunal failed to afford the Applicants an opportunity to "present their claims or defenses and to provide all relevant arguments and evidence to support them."[251] The sequence of pleadings suggests that Niko's last submission of 13 July 2016 was made in response to BAPEX's and Petrobangla's submission of the day before. In any event, the Applicants do not claim that, in its last submission, Niko introduced new allegations or evidence that merited further submissions from them.

184. The second part of the Applicants' claim raises the question of whether the Tribunal deviated from the legal framework defined by the Parties by granting relief through a declaratory decision and orders for specific actions, rather than in the form of provisional measures, and was thus required to provide the Parties an opportunity to comment before or after issuing its decision in order to uphold their right to be heard.

185. Regardless of how this question is answered, for there to be an annullable error, the departure from a fundamental rule of procedure must be "serious." The Committee has already held that the Applicants are not required to prove that the alleged departure was outcome-determinative.[252] However, they must show that the alleged departure may have made a difference on a critical issue of the tribunal's decision in the Award.[253] The Committee does not find that the Applicants have made such a demonstration.

186. For the reasons set forth above, the Committee rejects the Applicants' fourth ground for annulment.

[249] Exhibit R-487, Award, para. 135.

[250] Reply, para. 80.

[251] *See*, Decision on Annulment, para. 76 above.

[252] Decision on Annulment, para. 79 above.

[253] Decision on Annulment, para. 79 above.

F. WHETHER THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS BY EXERCISING JURISDICTION OVER ENTITIES NOT DESIGNATED TO ICSID BY BANGLADESH

1. The Applicants' Position

187. The Applicants claim that the Tribunal manifestly exceeded its authority under Article 25 of the ICSID Convention by exercising jurisdiction over entities that were not designated to the Centre by Bangladesh.

188. The Applicants highlight that Article 25 encompasses two separate requirements pertaining to ICSID jurisdiction over constituent subdivisions or agencies of ICSID Contracting States. First, under Article 25(1), an ICSID tribunal only has jurisdiction over a constituent subdivision or agency of a Contracting State if that subdivision or agency is "designated to the Centre by that State." Second, under Article 25(3), consent to ICSID arbitration by the subdivision or agency requires approval by the Contracting State.[254] The Applicants do not dispute the satisfaction of the second requirement; rather, they claim that BAPEX and Petrobangla were not designated to the Centre by Bangladesh under Article 25(1) of the Convention.[255]

189. The Applicants argue that the Tribunal's analysis of the designation requirement is contrary to Article 25(1) of the ICSID Convention in four key aspects. First, the Tribunal erred by concluding that the term "designation" in Article 25(1) does not require an act of communication, solely based on the absence of the word "notification." The Applicants assert that there can be no designation without communication under Article 25(1). The Tribunal's interpretation is not only incorrect, but also contradicts decisions of previous tribunals that confirmed that communication is inherent in the notion of designation.[256]

190. Second, the Tribunal's conclusion that the intervention of the State is required for designation but not necessarily for the communication of the designation to the Centre goes against Article 25(1), which requires that the communication come from the ICSID Contracting State. The Tribunal's rewriting of Article 25 amounts to an excess of its jurisdictional powers.[257]

191. Third, the Tribunal's conclusion that a Contracting State's approval of consent under Article 25(3) may imply designation is flawed, as designation and approval of consent

[254] Hearing Tr. Day 1, 94:1-10.

[255] Hearing Tr. Day 1, 94:15 – 96:14.

[256] Hearing Tr. Day 1, 96:15 – 99:19.

[257] Hearing Tr. Day 1, 99:20 – 102:8.

are separate requirements under Article 25 of the ICSID Convention, as confirmed by Schreuer's Commentary on the ICSID Convention.[258]

192. Fourth, the Applicants argue that the Tribunal's acceptance of the concept of implied designation disregards the clear wording of Article 25(1) of the Convention.[259] They assert that the State's ability to choose the form of designation does not negate the need for an actual act of designation.[260] The Tribunal's conclusion that the approval of consent alone eliminates the need for any additional act of designation would "make the jurisdictional clause in Article 25(1) purposeless and go against the essence of the ICSID Convention."[261]

193. Additionally, the arbitration clause in the GPSA does not even refer to Article 25 of the ICSID Convention, let alone mention designation.[262] On the contrary, the arbitration clause explicitly recognizes that an ICSID tribunal may refuse jurisdiction, in which case the dispute will be submitted to the International Chamber of Commerce.[263] According to the Applicants, this further confirms that the settlement of disputes through ICSID arbitration under the GPSA was "purely hypothetical."[264]

194. The Applicants draw an analogy from bilateral investment treaties that contain the Contracting State's consent to ICSID arbitration even though one of the Contracting States is not a party to the ICSID Convention, to explain that States may approve consent to ICSID arbitration by an agency in a commercial contract in anticipation of that agency's future designation to ICSID without the need to renegotiate the contract, which is what Bangladesh did in this case.[265]

195. Finally, the Applicants acknowledge that "there can be no manifest excess of powers when several decisions have arrived at the same conclusion based on the same reasoning."[266] However, they assert that the Tribunal was the first to find that (i) there can be a designation without notice to ICSID; (ii) an investor, not the State, can communicate designation; and (iii) the requirements of approval of consent and designation are the same.[267]

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[258] Hearing Tr, Day 1, 102:9 – 103:16.

[259] Hearing Tr. Day 1, 107:2-19.

[260] Hearing Tr. Day 1, 107:7-11.

[261] Hearing Tr. Day 1, 107:13-19.

[262] Hearing Tr. Day 1, 105:10-17

[263] Hearing Tr. Day 1, 105:19 – 106:14.

[264] Hearing Tr. Day 1, 106:2-7.

[265] Hearing Tr. Day 1, 103:17 – 104:20.

[266] Hearing Tr. Day 1, 108:13-16.

[267] Hearing Tr. Day 1, 108:17 – 109:12.

196. According to the Applicants, there are three relevant cases on this issue that came before the Tribunal's Decision on Jurisdiction. Two of them (*Cambodia Power Company v. Kingdom of Thailand* (ICSID Case No. ARB/09/18) and *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. The Federation of St. Kitts and Nevis* (ICSID Case No. ARB/95/2)) support the Applicants' position that designation requires a communication by the State.[268] Niko's and the Tribunal's attempt to distinguish *Cable Television* is misguided.[269] The third case (*Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others* (ICSID Case No. ARB/07/3)) mistakenly concluded that no communication is necessary for a State to designate a subdivision or agency to the Centre. This conclusion was based on a misreading of Schreuer's Commentary on the ICSID Convention, which was corrected by the *Cambodia Power* tribunal.[270] The fourth decision invoked by Niko *(NEPC Consortium Power Limited v. the Bangladesh Power Development Board* (ICSID Case No. ARB/18/15) has little value in determining whether the Tribunal's analysis under Article 25(1) of the Convention constitutes an annullable error, as it is unpublished, not on the record, and was rendered seven years after the Decision on Jurisdiction.[271]

2. The Respondent on Annulment's Position

197. The Respondent on Annulment asserts that the Applicants' fifth ground for annulment has no merit.[272] The Tribunal's finding that Petrobangla and BAPEX were validly designated to ICSID by Bangladesh is fully supported by ICSID jurisprudence and scholars and cannot be reviewed by the Committee.[273]

198. First, the Respondent on Annulment argues that there can be no manifest excess of powers where several previous tribunals unanimously adopted the same reasoning and conclusion as the Tribunal did.[274] The Tribunal's decision on the issue of designation in this case aligns with decisions issued by ICSID tribunals faced with similar facts, namely those in *East Kalimantan* and *NEPC*.[275] The decisions in *Cable Television of Nevis* and *Cambodia Power Company* relied upon by the Applicants do not support a different proposition.[276]

[268] Hearing Tr. Day 1, 109:13-21.

[269] Hearing Tr. Day 1, 109:22 – 110:11.

[270] Hearing Tr. Day 1, 110:12 – 111:8.

[271] Hearing Tr. Day 1, 111:9-18.

[272] Counter-Memorial, para. 128.

[273] Counter-Memorial, para. 146; Rejoinder, para. 105.

[274] Counter-Memorial, para. 130, referencing Exhibit CLA-97, *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on Annulment, 10 June 2022, para. 504.

[275] Counter-Memorial, paras. 130-133.

[276] Counter-Memorial, paras. 134-136.

199. Additionally, the Tribunal's determination that Petrobangla and BAPEX had been validly designated to ICSID by Bangladesh resulted from its assessment of the evidentiary record, which falls outside the scope of this Committee's review.[277]

200. Second, the Applicants' contentions that the Tribunal conflated "designation" of subdivision or agency under Article 25(1) of the Convention with "approval" of consent of the subdivision or agency under Article 25(3), ignored that designation requires communication, and improperly distinguished "designation" from "notification", are incorrect.[278] Contrary to the Applicants' allegation, the second edition of Schreuer's Commentary on the ICSID Convention offers support to the Tribunal's analysis on the issue of implied designation,[279] and the recently released third edition endorses the Tribunal's approach to the issues of implied designation and communication of designation.[280]

201. Lastly, the Respondent on Annulment recalls that "the Tribunal's interpretation of the law is not a matter that the Committee can review."[281]

3. The Majority of the Committee's Analysis

202. The Applicants claim that the Tribunal manifestly exceeded its powers by exercising jurisdiction over entities that were not designated to the Centre by Bangladesh as required by Article 25(1) of the ICSID Convention. They specifically take issue with the Tribunal's ruling on two points: first, that Article 25(1) recognizes implicit designation,[282] and second, that "designation of an agency under Article 25 can be achieved by bringing the ICSID arbitration agreement in a private contract to the attention of the Centre with an investor's request for arbitration."[283]

203. The Respondent on Annulment disputes the assertions of the Applicants. It argues that the Tribunal's findings on implicit designation and communication to ICSID under Article 25 of the Convention are amply supported by ICSID jurisprudence and relevant academic literature.[284] Additionally, the Respondent on Annulment asserts that the Tribunal conducted a comprehensive analysis of the text of the ICSID Convention and the evidence before it to reach its conclusion that BAPEX and Petrobangla had been

[277] Counter-Memorial, para. 138.

[278] Counter-Memorial, paras. 139-144.

[279] Counter-Memorial, para. 140.

[280] *See*, Hearing Tr. Day 1, 166:19 – 167:6.

[281] Counter-Memorial, para. 145.

[282] Reply, paras. 81 and 91.

[283] Reply, para. 81.

[284] *See*, Counter-Memorial, paras. 130-137, and 140; Rejoinder, para. 94.

validly designated by Bangladesh to ICSID, stressing that the Tribunal's interpretation of the law and its application to the facts cannot be reviewed on annulment.[285]

204. For the reasons set forth below, the majority of the Committee finds that the Tribunal did not manifestly exceed its powers by exercising jurisdiction over the Applicants. The Applicants' claim that the Tribunal "failed to apply Article 25 of the Convention to its analysis of whether Bangladesh had designated Petrobangla and BAPEX to ICSID,"[286] is contradicted by the Decision on Jurisdiction, which clearly demonstrates that the Tribunal engaged in a comprehensive analysis of the meaning of the phrase "designated to the Centre by that State" in Article 25(1),[287] and subsequently applied its legal conclusions to the facts of the case to determine whether the requirement was fulfilled.[288]

205. Nor did the Tribunal commit a manifest excess of powers through its interpretation of the designation requirement in Article 25(1) of the ICSID Convention, as the Applicants contend. As noted, annulment is not an appeal mechanism.[289] Accordingly, *ad hoc* committees are not called upon to review *de novo* the legal and factual conclusions of a tribunal, nor can they correct alleged errors in the tribunal's interpretation or application of the law.[290] The Applicants' arguments criticize the Tribunal's interpretation of Article 25 of the ICSID Convention. However, as indicated above,[291] any excess of powers must be "manifest," i.e., obvious, clear, or self-evident. Where an alleged excess of powers is not self-evident, but the product of an elaborate process of interpretation, or where more than one interpretation is possible, the alleged excess of powers does not satisfy the threshold for annulment under Article 52(1)(b) of the ICSID Convention.[292] Otherwise, the annulment procedure would expand into an appeal mechanism, in contravention of the clear wording of the Convention.

206. The majority of the Committee does not find that the Applicants have established a self-evident error in the Tribunal's interpretation of the designation requirement in Article 25(1) of the ICSID Convention. In the view of the majority of the Committee, the Tribunal made a reasoned and complete analysis that finds support in other ICSID

[285] *See*, Counter-Memorial, paras. 138, 143, and 145-146; Rejoinder, para. 105.

[286] Memorial, para. 55.

[287] *See*, Exhibit R-481, Decision on Jurisdiction, paras. 257-329.

[288] *See*, Exhibit R-481, Decision on Jurisdiction, paras. 330-348.

[289] Decision on Annulment, para. 64 above.

[290] Decision on Annulment, paras. 64 - 65 above.

[291] Decision on Annulment, para. 68 above.

[292] *See, e.g.*, Exhibit CLA-63, *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, 5 February 2002, para. 25; Exhibit CLA-91, *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, 29 June 2005, para. 41.

decisions and has been endorsed in the latest edition of an influential academic work on which both Parties have extensively relied.

207. As regards its determination that Article 25(1) of the ICSID Convention allows for implicit designation of a subdivision or agency to ICSID by a Contracting State, the Tribunal arrived at this conclusion based on a detailed analysis of the ordinary meaning of the term "designation," i.e., "the action of choice or selection",[293] of the context in which the term "designate" is used in the Convention, including the distinction made by the Convention between "designated" and "notified",[294] of the purpose of the designation requirement, i.e., enabling a State agency to become party to an ICSID arbitration,[295] and of the lack of formal requirements for the designation in the ICSID Convention, as confirmed by the Institution Rules.[296] The Tribunal then found that "a particularly strong case of implicit designation occurs when the State expressly and formally approves in writing that one of its agencies enters into an investment agreement containing an ICSID clause. Since designation has as its purpose and objective to confer on the agency the competence or capacity to become a party to an ICSID arbitration, [] the approval necessarily must include the intention to confer this capacity on the agency by an *ad hoc* designation. Assuming the contrary would mean that the State, when granting its approval of the agency's consent, intended to leave this approval without effect."[297]

208. As the third edition of Schreuer's Commentary on the ICSID Convention states, "it is at least arguable that the concrete approval of consent that is notified to the Centre may be interpreted, under certain circumstances, as implying acceptance by the host State that a subdivision or agency has the capacity to be a party to an ICSID proceeding and hence as an *ad hoc* designation of the constituent subdivision or agency in the sense of Art. 25(1)."[298] Since the issue is at least debatable, the Award cannot be annulled on the ground that it suffers from a manifest excess of powers.

209. As regards its determination that a State's designation of an agency under Article 25(1) of the ICSID Convention may be communicated to the Centre by the investor, including by bringing the designation to the Centre's attention with the request for arbitration, the Tribunal supported its conclusion with the writings of C.F. Amerasinghe,[299] which were

[293] Exhibit R-481, Decision on Jurisdiction, para. 265.

[294] Exhibit R-481, Decision on Jurisdiction, paras. 266-275.

[295] Exhibit R-481, Decision on Jurisdiction, paras. 277-283.

[296] Exhibit R-481, Decision on Jurisdiction, paras. 284-299.

[297] Exhibit R-481, Decision on Jurisdiction, paras. 301-302.

[298] Exhibit CLA-115, C. Schreuer et al., Schreuer's Commentary on the ICSID Convention – Volume I, 3rd ed., Cambridge University Press (excerpts), p. 523, para. 1453 (2022).

[299] Exhibit R-481, Decision on Jurisdiction, paras. 308-302, quoting from C.F. Amerasinghe, The Jurisdiction of the International Centre for the Settlement of Investment Disputes, 19 Indian Journal of International Law 188 (1979) ("It is arguable that where there was a clear intention on the part of the Contracting State to file the designation with the

referenced in the second edition of Schreuer's Commentary,[300] with the *East Kalimatan* award,[301] with the absence of a requirement that the designation be notified by the State, based on the distinction made by the Convention between "designated" and "notified,"[302] with the lack of any formal requirement for the communication of the State's designation,[303] and with the argument that the principal purpose of the designation requirement, i.e., conferring limited international capacity on a particular agency, can be ensured without public notification.[304]

210. The majority of the Committee notes that the Tribunal's conclusion accords with those of at least two other ICSID tribunals.

211. The *East Kalimantan* tribunal held that "the form and channel of communication do not matter, provided that the intention to designate is clearly established."[305] The tribunal also noted that "the designation requirement may in particular be deemed fulfilled when a document that emanates from the State is filed with the request for arbitration and shows the State's intent to name a specific entity as a constituent subdivision or agency for the purposes of Article 25(1)."[306]

212. In addition, it is undisputed that the *NEPC* tribunal interpreted the designation requirement in the same manner as the Tribunal did.[307] The Applicants argue that this decision "has little value in determining whether the Tribunal's analysis of Article 25(1) constitutes an annullable error" because it was issued seven years after the Decision on Jurisdiction.[308] In the view of the majority of the Committee, the focus here is not whether the Tribunal could consider the *NEPC* decision when it issued the Decision on

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Centre at the time the designation was made but the actual communication is not made by that Sate to the Centre, it is adequate if instead of there being a formal communication of the designation to the Centre by the State it is brought to the attention of the Centre in some way whether by the State concerned or by one of the parties to the consent agreement provided this is done before the initial intention is changed.")

[300] Exhibit R-481, Decision on Jurisdiction, paras. 312-313.

[301] Exhibit R-481, Decision on Jurisdiction, para. 314, quoting from Exhibit RLA-484, *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others*, ICSID Case No. ARB/07/3, Award on Jurisdiction, 28 December 2009, paras. 192-193 ("the form and channel of communication do not matter, provided that the intention to designate is clearly established.")

[302] Exhibit R-481, Decision on Jurisdiction, paras. 315-318.

[303] Exhibit R-481, Decision on Jurisdiction, para. 327.

[304] Exhibit R-481, Decision on Jurisdiction, para. 329.

[305] Exhibit RLA-484, *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others*, ICSID Case No. ARB/07/3, Award on Jurisdiction, 28 December 2009, para. 192.

[306] Exhibit RLA-484, *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal and others*, ICSID Case No. ARB/07/3, Award on Jurisdiction, 28 December 2009, para. 193.

[307] *See*, Counter-Memorial, paras. 132-133; Reply, footnote 171; Rejoinder, para. 91; Hearing Tr., Day 1, 111:9 – 112:22. Both Parties referred to the standard applied in *NEPC v. Bangladesh Power Development Board*. The Committee notes that the award is not published and is not part of the record. Therefore, the reference made by the majority of the Committee to such award and the standards contained therein is based on the allegations submitted by the Parties.

[308] Hearing Tr., Day 1, 111:12-18.

Jurisdiction, as there is no mandatory precedent in international investment arbitration. Instead, what matters is that other tribunals interpreted the designation requirement in the same manner as the Tribunal did, as this indicates that the approach taken by the Tribunal was not untenable.

213. The *Cambodia Power Company* tribunal reached a different conclusion on the designation requirement,[309] which was criticized for being overly strict.[310] The Tribunal considered this decision, emphasizing that the *Cambodia Power Company* tribunal had dealt with materially different circumstances since the Kingdom of Cambodia was not a party to the ICSID Convention when the relevant contracts were concluded.[311]

214. As to the *Cable Television of Nevis* case, the majority of the Committee is not persuaded that the tribunal engaged in a detailed analysis of the designation requirement in Article 25(1) that contradicts the analysis of the Tribunal. The *Cable Television of Nevis* tribunal rather focused on "the meaning and significance of the words 'constituent subdivision or agency' [] in Article 25" and, ultimately concluded, based on the facts of the case, that there was neither designation nor approval by the State.[312]

215. The Tribunal's approach is also supported by the third edition of Schreuer's Commentary on the ICSID Convention. The Commentary explains that Article 25(1) does not require the State itself to communicate its designation of a subdivision or agency to the Centre; rather the phrase "designated to the Centre by that State" refers to the State making a choice in conferring on the subdivision or agency the capacity to be a party to ICSID proceedings, which may then be brought to the Centre's attention by the investor or the entity in question once a dispute ensues.[313]

216. As mentioned before, both Parties have relied on Schreuer's Commentary, especially regarding this fifth ground for annulment. In the view of the majority of the Committee, Schreuer's Commentary undermines the Applicants' argument that the Tribunal committed "manifest errors of law"[314] in its interpretation of Article 25(1) of the ICISD

[309] Exhibit RLA-483, *Cambodia Power Company v. Kingdom of Cambodia,* ICSID Case No. ARB/09/18, Decision on Jurisdiction, 22 March 2011, paras. 220-221; 249-250.

[310] Exhibit CLA-115, C. Schreuer et al., Schreuer's Commentary on the ICSID Convention – Volume I (excerpts) (3rd ed., Cambridge University Press, 2022), p. 287, para. 562.

[311] Exhibit R-481, Decision on Jurisdiction, para. 321. The Tribunal further noted its disagreement with the *Cambodia Power Company* tribunal's interpretation. (*See*, Exhibit R-481, Decision on Jurisdiction, paras. 320, 322-323.)

[312] Exhibit RLA-482, *Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v. The Federation of St. Kitts and Nevis*, ICSID Case No. ARB/95/2, Award, 13 January 1997, paras. 2.28-2.33

[313] Exhibit CLA-115, C. Schreuer et al., Schreuer's Commentary on the ICSID Convention – Volume I, 3rd ed., Cambridge University Press (excerpts), p. 287, para. 562 (2022) (footnotes omitted).

[314] Reply, footnote 171.

Convention. The Commentary in fact supports the conclusion that the Tribunal's interpretation is not untenable.

217. That the Tribunal has opted for an interpretation on a debatable point of law, which is endorsed by other tribunals and scholarly writings, does not justify annulment of the Award under Article 52(1)(b) of the Convention.

218. In these circumstances, the majority of the Committee concludes that the Tribunal did not manifestly exceed its powers by exercising jurisdiction over the Applicants. Consequently, the majority of the Committee rejects the Applicants' fifth ground for annulment.

V. COSTS

1. The Applicants' Position

219. In their submission on costs, the Applicants request that "the Committee order that the Parties shall bear their own fees and costs and Respondent-on-Annulment shall reimburse Applicants for 50% of their payments to ICSID."[315]

220. The Applicants submit that *ad hoc* committees have discretion to award costs and usually allocate ICSID costs and fees equally between the parties, with each party bearing its own legal fees and costs.[316] Some committees have ordered parties to bear their own fees and costs where an unsuccessful applicant brought a colorable annulment claim, while others have followed the "costs follow the event" approach.[317]

221. The Applicants have incurred the following costs:

Annulment Application Fee	USD 25,000
Advance Payments to ICSID	USD 400,000
Legal Fees of Foley Hoag LLP and Alliance Laws	USD 987,346
Expenses Incurred	USD 30,594
Total	**USD 1,442,940**

[315] Applicants – Submission on Costs, 26 May 2023, para. 4.

[316] Applicants – Submission on Costs, 26 May 2023, para. 2.

[317] Applicants – Submission on Costs, 26 May 2023, para. 2.

2. The Respondent on Annulment's Position

222. In its written pleadings, the Respondent on Annulment submits that the Application is without merit, and it should therefore be dismissed with costs.[318] Accordingly, the Respondent on Annulment requests that the Committee:

> "b. Decide, in accordance with Article 61(2) of the ICSID Convention, that applicants on annulment Bangladesh Petroleum Exploration & Production Company Limited (BAPEX) and Bangladesh Oil Gas and Mineral Corporation (Petrobangla) shall jointly and severally pay the expenses incurred by Niko Resources (Bangladesh) Ltd., the fees and expenses of the Members of the *Ad Hoc* Committee and the charges for the use of the facilities of the International Centre for Settlement of Investment Disputes;
>
> c. Order that the amounts assessed in accordance with subparagraph b above must be paid within 45 days of the date of the Decision, failing which the applicants on annulment shall pay interest on any outstanding amount until complete settlement at the rate of the 180-day average Secured Overnight Financing Rate (SOFR) plus 2%; and
>
> d. Order, in accordance with Article 61(2) of the ICSID Convention, that the decision and order stated in subparagraphs b and c above shall form part of the Award."[319]

223. The expenses incurred by the Respondent on Annulment amount to CAD 461,974.37.[320]

3. The Committee's Analysis

224. Article 61(2) of the ICSID Convention provides:

> "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."

225. This provision, together with ICSID Arbitration Rule 47(1)(j) applicable to annulment proceedings by virtue of Article 52(4) of the Convention and ICSID Arbitration Rule 53,

[318] Counter-Memorial, para. 10; Rejoinder, para. 9.

[319] *See*, Counter-Memorial, para. 147(b); Rejoinder, para. 106.

[320] *See*, Respondent on Annulment – Costs Submission, 26 May 2023, § A.1, p. 3.

gives the Committee discretion to allocate all costs of the proceeding, including attorneys' fees and other costs, between the Parties as it deems appropriate.

226. The Respondent on Annulment prevailed in the annulment proceedings as the Committee unanimously rejected four out of the five grounds for annulment invoked by the Applicants. The Committee by majority also rejected the fifth ground for annulment. On that basis, the Committee unanimously decides that the Applicants shall bear the entire costs of the proceeding, including the fees and expenses of the Committee members, ICSID's administrative fees and direct expenses.

227. However, the Applicants' arguments for annulment were plausible and presented in good faith, and at least one of them involved complex issues of law. Moreover, the Applicants succeeded in their Request for a Stay of Enforcement of the Award. Consequently, the Committee unanimously decides that each Party shall bear its own legal fees and expenses.

228. The costs of the annulment proceedings, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses, amount to (in USD):

Committee Members' Fees and Expenses	
Mr. Eduardo Zuleta	76,028.74
Dr. Claudia Annacker	66,217.57
Mr. Makhdoom Ali Khan	78,254.71
President's Assistant's expenses	1,364.76
ICSID's Administrative Fees	84,000.00
Direct Expenses	23,250.67
Total	**329,116.45**

229. The above costs have been paid out of the advances made by the Applicants pursuant to Administrative and Financial Regulation 15(5). The Applicants shall bear the entirety of these costs.[321]

230. The Committee's unanimous decisions on costs form part of the Decision on Annulment in accordance with Article 61(2) of the ICSID Convention and are incorporated in the *dispositif* part of the Decision. The request by the Respondent on Annulment to include

[321] The remaining balance will be reimbursed to the Applicants.

this decision in the Award[322] is unanimously rejected, as there is no legal basis for this request.

VI. DECISION

231. For the reasons set forth above, the majority of the Committee decides as follows:

    (a) The Application for Annulment is dismissed in its entirety;

232. For the reasons set forth above, the Committee unanimously decides as follows:

    (a) The Applicants shall bear the entire costs of the proceeding, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses.

    (b) Each Party shall bear its own legal fees and expenses; and

    (c) All other requests and claims of the Parties are rejected.

233. In accordance with Rule 54(3) of the ICSID Arbitration Rules, the stay of enforcement of the Award is automatically terminated on the date of this Decision on Annulment.

[322] *See*, Counter-Memorial, para. 147(d). ("For the reasons stated above, respondent on annulment Niko Resources (Bangladesh) Ltd. therefore respectfully requests that the *Ad Hoc* Committee: (…) d. Order, in accordance with Article 61(2) of the ICSID Convention, that the decision and order stated in subparagraphs b and c above shall form part of the Award.")

Dr. Claudia Annacker
Member of the *ad hoc* Committee

Date: 15 September 2023

Mr. Makhdoom Ali Khan
Member of the *ad hoc* Committee

Subject to the attached Dissenting Opinion

Date:

Mr. Eduardo Zuleta
President of the *ad hoc* Committee

Date:

Dr. Claudia Annacker
Member of the *ad hoc* Committee

Date:

Mr. Makhdoom Ali Khan
Member of the *ad hoc* Committee

Subject to the attached Dissenting Opinion

Date: 28 September 2023

Mr. Eduardo Zuleta
President of the *ad hoc* Committee

Date:

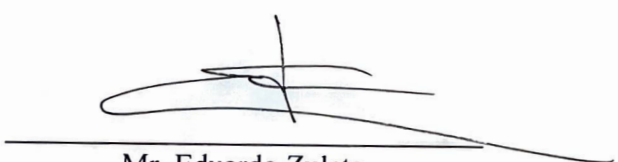
Dr. Claudia Annacker
Member of the *ad hoc* Committee

Date:

Mr. Makhdoom Ali Khan
Member of the *ad hoc* Committee

Subject to the attached Dissenting Opinion

Date:



Mr. Eduardo Zuleta
President of the *ad hoc* Committee

Date: 26 September 2023