INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceedings between

NIKO RESOURCES (BANGLADESH) LTD.
(Claimant)

and

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

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

(jointly referred to as Respondents)

ICSID Case No. ARB/10/18

AWARD

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

Secretary of the Tribunal
Ms Frauke Nitschke

Date of Dispatch of the Award to the Parties: 24 September 2021

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GLOSSARY

2005 Injunction	Injunction issued on 12 September 2005 by the Supreme Court of Bangladesh, High Court Division, further to Writ Petition no 6911 by BELA against ten respondents, including BAPEX and Niko, extended subsequently and confirmed in the Judgment of 16 and 17 November 2009
2016 Injunction	Order issued on 12 May 2016 by the Supreme Court of Bangladesh, High Court Division, further to Writ Petition N. 5673 of 2016 by Professor M. Shamsul Alam against the Government of Bangladesh, Petrobangla, BAPEX, Niko and Niko, Canada
BAPEX	Bangladesh Petroleum Exploration & Production Company Limited, the Second Respondent
BDT	Bangladeshi taka
BELA	The Bangladesh Environmental Lawyers Association
BELA proceedings	Proceedings initiated by BELA on 12 September 2005 in the Supreme Court of Bangladesh, High Court Division against the Government of Bangladesh, Petrobangla, BAPEX, Niko and others (see paragraph 32).
CAD	Canadian Dollar
Centre or ICSID	International Centre for Settlement of Investment Disputes
Chattak Field	One of the two gas fields to which the JVA related, in which drilling started after production from the Feni Field had commenced, and two blowouts occurred in January and June 2005
Compensation Claims	Claims for compensation brought by the First and Third Respondents in the Court of District Judge, Dhaka, against the Claimant and others for damages alleged to arise from the blowout of two wells in the Chattak field (subject matter of ICSID Case No. ARB/10/11)
Compensation Declaration	The declaration requested by the Claimant concerning the Compensation Claims

Feni Field	One of the gas fields to which the JVA relates; gas from that field was the subject of the GPSA
First Decision on the Payment Claim	The Decision of 11 September 2014 concerning the Claimant's Payment Claim
GPSA	Gas Purchase and Sale Agreement, 27 December 2006
Government of Bangladesh	The Government of the People's Republic of Bangladesh, the First Respondent until the Decision on Jurisdiction
JVA	Joint Venture Agreement between BAPEX and Niko, dated 16 October 2003
Mcf	One thousand cubic feet, unit for measuring the volume of natural gas
Merits Phase	The part of the proceedings in ICSID Case Nos ARB10/11 and ARB10/18 dealing with the merits of the Payment Claim
Money Suit	Proceedings brought by Bangladesh and Petrobangla in the Court of the District Judge in Dhaka against Niko and others (see Decision on Jurisdiction, paragraph 102)
Niko	Niko Resources (Bangladesh) Ltd., the Claimant
Payment Claim	Claims to payment under the GPSA for gas delivered (subject matter of ICSID Case No. ARB/10/18)
Petrobangla	Bangladesh Oil Gas and Mineral Corporation, the Third Respondent
RfA I	The Claimant's Request for Arbitration of 1 April 2010 concerning the Compensation Declaration, recorded as ICSID Case No ARB/10/11
RfA II	The Claimant's Request for Arbitration of 16 June 2010 concerning the Payment Claim, recorded as ICSID Case No ARB/10/18
Second Decision on the Payment Claim	Decision on Implementation of the Decision on the Payment Claim, 14 September 2015 (revised version sent on 14 October 2015)
Tribunals	Collectively, the two Arbitral Tribunals constituted in ICSID Case No ARB/10/11 and ICSID Case No ARB/10/18, see below paragraphs 4 to 6 and 44 to 46.

1. INTRODUCTION

1. This Award completes the proceedings in ICSID Case No ARB/10/18, relating to the Gas Purchase and Sale Agreement of 27 December 2006 (**GPSA**) concluded between Bangladesh Oil Gas and Mineral Corporation (**Petrobangla**) and the Joint Venture formed by the Bangladesh Petroleum Exploration & Production Company (**BAPEX**) and Niko Resources (Bangladesh) Limited (**Niko**). This Award concerns Niko's claim for payment for its share of the price for the gas from the **Feni field** sold and delivered to Petrobangla pursuant to the GPSA and related matters (the **Payment Claim**).

2. The arbitration was commenced by a Request for Arbitration filed with ICSID on 16 June 2010 (**RfA II**) by Niko (the **Claimant**) against the People's Republic of Bangladesh, Energy and Mineral Resources Division, Ministry of Power, Energy and Mineral Resources Bangladesh (the **State, the Government** or the **First Respondent**), the Bangladesh Petroleum Exploration & Production Company Limited (**BAPEX** or the **Second Respondent**) and Petrobangla (the **Third Respondent**).

3. RfA II had been preceded by a request for ICSID Convention arbitration filed with ICSID on 1st April 2010 (**RfA I**) by the same Claimant against the same Respondents and registered as ICSID Case No. ARB/10/11. That request related to a Joint Venture Agreement of 16 October 2003 between Niko and BAPEX (the **JVA**). In RfA I Niko relied on the JVA and requested a declaration of non-liability with respect to claims for loss and damage caused by two blowouts of wells drilled in the **Chattak field** (the **Compensation Declaration)**.

4. Identical tribunals were formed in the two cases. With the agreement of the parties, the First Session of the two arbitrations was held jointly on 14 February 2011. On that occasion it was agreed that the two cases were to proceed concurrently and that the two Tribunals could render their decisions in the two cases in a single instrument.

5. The proceedings before the two Tribunals addressed issues that were common to both cases and others that were specific to only one of the two. To date, the Tribunals have issued eight decisions.

Some of these decisions concerned both cases together, others either the Payment Claim or the Compensation Declaration.

6. The present decision deals with the Claimant's request to complete the proceedings on the Payment Clam and to issue an award on this claim. The proceedings on this claim, like all other proceedings, were conducted by the two Tribunals and the decisions on the Payment Claim were issued by the Tribunals jointly. The present decision, however, by which the proceedings in ICSID Case No ARB/10/18 are completed, is issued by the Tribunal in that case alone. The Tribunal, therefore, refers to the prior Decisions, issued jointly with the Tribunal in ICSID Case No ARB/10/11, and to the related proceedings, as those of "the Tribunal" unless the plural is required by the context.

7. During the course of the proceedings the Tribunals issued a Decision on Jurisdiction on 19 August 2013 and, dealing with requests relating to proceedings before the courts of Bangladesh, a decision confirming the exclusivity of the Tribunals' jurisdiction on 19 July 2016.[1] The Tribunals decided allegations of corruption in the Decision on Jurisdiction and, when these allegations were raised again in an expanded form, in the Decision on the Corruption Claim of 25 February 2019. Specifically on the Payment Claim, the Tribunal issued a First Decision on 11 September 2014, followed by two other Decisions on 14 September 2015 and 26 May 2016. The proceedings, insofar as they concern the Payment Claim, and the resulting Decisions, are described in Section 4 below. The Decisions are attached to the present Award on the Payment Claim and are confirmed by it. The issues concerning the Claimant's request for an award on the Payment Claim only and separate from the award on the Compensation Declaration are addressed in Section 5 below.

8. The proceedings on the Compensation Declaration have been subject to two decisions. Those proceedings continue and will be completed separately.

[1] Decision Pertaining to the Exclusivity of the Tribunals' Jurisdiction, 19 July 2016.

2. THE PARTIES AND THE ARBITRAL TRIBUNAL

2.1 The Claimant

9. The Claimant in this case is Niko Resources (Bangladesh) Ltd. It is a company incorporated under the laws of Barbados. The Claimant and its nationality were discussed in Section 5 of the Decision on Jurisdiction.

10. Since August 2013, the Claimant is represented in this arbitration by

Mr Barton Legum
Dentons Europe LLP
5, boulevard Malesherbes
75008 Paris, France

and

Mr Gordon L. Tarnowsky, QC, Ms Rachel Howie, Mr David Konkin, and Mr Anthony Cole
Dentons Canada LLP
850 – 2nd Street SW
15th Floor, Bankers Court
Calgary, Alberta
Canada T2P 0R8

and

Mr Rokanuddin Mahmud and
Mr Mustafizur Rahman Khan
Delta Dahlia (level 8)
36, Kamal Ataturk Avenue
Banani, Dhaka 1213
People's Republic of Bangladesh

11. During the initial phase of the proceedings up to the Decision on Jurisdiction, the Claimant was represented by

Mr Kenneth J. Warren QC, Mr James T. Eamon QC,
Mr John R. Cusano and Ms Erin Runnalls
Gowlings
1400,700 - 2nd Street S.W.
Calgary, Alberta
Canada T2P 4V5

and

Mr Ajmalul Hossain QC
A. Hossain & Associates
3B Outer Circular Road
Maghbazar, Dhaka 1217
People's Republic of Bangladesh

2.2 The Respondents

12. Following the Decision on Jurisdiction, the Respondents in this arbitration are

    (a) Bangladesh Petroleum Exploration & Production Company Limited (**BAPEX**), the Second Respondent
    and
    (b) Bangladesh Oil Gas and Mineral Corporation (**Petrobangla**), the Third Respondent.

13. Petrobangla is a statutory corporation created by the Bangladesh Oil, Gas and Mineral Corporation Ordinance 1985.[2]

14. BAPEX is a wholly owned subsidiary of Petrobangla incorporated under the Bangladesh Companies Act 1994.[3] By Notification issued on 8 June 2003 the Ministry of Power, Energy and Mineral Resources granted to BAPEX "*complete administrative and financial freedom by the Government*".[4]

15. The legal status of these two corporations and their relationship with the Government of Bangladesh was discussed in Sections 6 and 7 of the Decision on Jurisdiction.

16. The Respondents are represented in this arbitration by:

    Mr A B M Abdul Fattah and Mr Syed Ashfaquzzaman
    Petrobangla
    Petrocentre
    3 Kawran Bazar C/A
    Dhaka 1215, GPO Box 849
    People's Republic of Bangladesh

    and

    Mr Mohammad Ali BAPEX

[2] RfA II, Attachment G.
[3] Hearing on Jurisdiction, HT 2011.10.13, p. 42.
[4] Exhibit 2, Appendix B to R-CMJ.1.

Level-6, BAPEX Bhabon
4 Kawran Bazar C/A
Dhaka 1215
People's Republic of Bangladesh

and

Mr Paul S. Reichler and Mr Derek C. Smith
Foley Hoag LLP
1717 K Street NW
Washington, DC 20036
United States of America

and

Ms Christina Hioureas
Foley Hoag LLP
1301 Avenue of the Americas
New York, NY 10019
United States of America

and

Ms Alejandra Torres Camprubí
Foley Hoag AARPI
153, rue du Faubourg Saint-Honoré
75008 Paris
France

and

Mr Moin Ghani
Barrister-at-law
Alliance Laws
Suite 6A (Level 5), Paradise Lake View Nibash
Ba-73/1 Gulshan-Hatirjheel Lake Drive Road
Dhaka 1212
People's Republic of Bangladesh

and

Mr Imtiaz U Ahmad Asif
Aequitas Chambers
Suite 5B House 1 Road 27
Banani Block K
Dhaka 1212
People's Republic of Bangladesh

17. Between June and July 2015, the Respondents were represented in these proceedings by

Mr Kay Kian Tan
Watson Farley & Williams (Thailand) Limited
Unit 902, 9th Floor
GPF Witthayu Tower B
93/1 Wireless Road
Patumwan,
10330 Bangkok
Thailand

18. Between 2011 and June 2015, the Respondents were represented in these proceedings by

Mr Luis Gonzalez Garcia and Ms Alison Macdonald
Matrix Chambers, Griffin Building, Gray's Inn
London WC1R 5LN
United Kingdom

19. Between 2011 and December 2014, the Respondents were also represented in these proceedings by

Mr Tawfique Nawaz, Senior Advocate,
and Mr Mohammad Imtiaz Farooq, Juris Counsel
59/C, Road #4
Banani, Dhaka 12 13
People's Republic of Bangladesh

2.3 The Arbitral Tribunal

20. The Arbitral Tribunal, constituted on 20 December 2010, is composed of:

Professor Jan Paulsson
Bahrain World Trade Centre East Tower, 37th Floor P.O. Box 20184
Manama, Bahrain
National of Sweden and France
appointed by the Claimant

Professor Campbell McLachlan QC
Victoria University of Wellington Law School
Old Government Buildings 55 Lambton Quay PO Box 600
Wellington New Zealand
National of New Zealand,
appointed by the Respondents

Mr Michael E. Schneider
LALIVE
35 rue de la Mairie P.O. Box 6569
1211 Geneva Switzerland
National of Germany,
appointed as President of the Arbitral Tribunal upon agreement by the Parties

3. SUMMARY OF THE RELEVANT FACTS

21. After initial contacts with the Government in 1997 and long-drawn-out negotiations, the Claimant and BAPEX concluded on 16 October 2003 the JVA. These negotiations have been described in detail in the Decision on Jurisdiction and in the Decision on the Corruption Claim.

22. The JVA reflects these negotiations and their context by highlighting the role of the Government and Petrobangla and by stating expressly in the Preamble that "BAPEX warrants that it has acquired from Petrobangla and the Government the requisite approvals to execute the JVA. The responsibilities and obligations of Petrobangla and the Government in all relevant Articles, annexes and amendments under this JVA had been assign[ed] to BAPEX". The JVA was approved by the Government and BAPEX was instructed through Petrobangla to execute it.

23. The JVA identified two gas fields that had been abandoned after earlier production and were to be put back into production by Niko as the Operator under the JVA: the Feni field and the Chattak field.

24. Niko started with the Feni field and was successful in early 2004. The Procedure for Development of Marginal/Abandoned Gas Fields, adopted by the Government in 2001 and attached to the JVA, provided that Petrobangla would identify the market outlet for the gas produced and the JVA itself provided that the buyer of the gas had to be Petrobangla or a designee.

25. On 19 May 2004, Niko announced to Petrobangla that production from the Feni field could start in July 2004. It proposed the start of negotiations for a GPSA.

26. After some correspondence, Petrobangla wrote to Niko on 1 November 2004, thanking it "for successful development of Feni gas" and declaring:

> *Petrobangla undertakes to buy gas from Bapex-Niko Joint Venture Feni marginal gas field.*

Price of gas will be paid as per agreed and signed GPSA when finalised.[5]

27. Gas delivery started on the following day, 2 November 2004, without an agreement having been reached on the price and without a contract having been executed.

28. Niko moved the drilling equipment to the other identified field and, on 31 December 2004, started drilling the Chattak 2 well. These drilling operations caused a blowout on 7 January 2005. The relief operation, which consisted in drilling relief well Chattak 2A, led to another blowout on 24 June 2005. Niko stated that further relief operations by relief well Chattak 2B were successfully completed on 9 October 2005.

29. The blowouts caused loss of gas from the Chattak field and damage to the local population and the environment. The Government set up a number of committees that assessed this loss and damage. Some of the damage was compensated by Niko. Other loss and damage is the subject of the proceedings on the Compensation Declaration.

30. On 12 September 2005, the Bangladesh Environmental Lawyers Association (**BELA**) and others filed a petition in the Supreme Court of Bangladesh, High Court Division, against the Government of Bangladesh, Petrobangla, BAPEX, Niko and others, seeking *inter alia* a determination that the JVA was invalid, and that payments made in respect of Feni gas purchases by Petrobangla were without lawful authority; BELA sought an injunction restraining payments to Niko in respect to the Feni gas field or on any other account (the **BELA Proceedings**).

31. On the same day, 12 September 2005, the High Court Division issued the requested injunction, "pending disposal of the Rule", which contained *inter alia* an interim order restraining the respondents, including Petrobangla, from making any payment to Niko "in respect of Feni Field or any other account" (the **2005 Injunction**). The injunction was repeatedly extended. Some aspects were modified in the subsequent proceedings; but the injunction against payments to Niko remained in force.

32. Eventually, the High Court Division rendered its judgement in the BELA Proceedings on 16 and 17 November 2009 (**2009**

[5] Payment Claim Exhibit C-003, also produced as Payment Claim Exhibit R-001.

Judgment).[6] It held that the "JVA was not obtained by flawed process by resorting to fraudulent means".[7] It nevertheless upheld the injunction against payment to Niko:

> *… Niko is directed to pay the compensation money as per the decision to be taken in the money suit now pending in the Court of the Joint District or as per the mutual agreement among the parties. The respondents are restrained by an order of injunction form making any payment to respondent No 10 [i.e., Niko]. This order of injunction shall remain in force till disposal of the money suit or till amicable settlement amongst the parties, whichever is earlier.*[8]

33. The court proceedings concerning the "compensation money" to which the Judgement refers had been brought on 15 June 2008 by the Government and Petrobangla against Niko (the **Money Suit**[9]).[10] In the Decision Relating to the Exclusivity of the Tribunals' Jurisdiction of 19 July 2016,[11] the Tribunals instructed BAPEX and Petrobangla to take steps to terminate proceedings and orders in the courts in Bangladesh which are in conflict with the decision on exclusivity. Upon enquiry from the Tribunals, the Respondents informed the Tribunals on 7 December 2016 that the court was "prevented from addressing the matter" since the court's file in the BELA proceedings and relating to the **2005 Injunction** had been transferred to a filing facility and could not be found. No further information about the status of the 2005 Injunction has been provided to the Tribunal to date.[12]

34. While the BELA proceedings were ongoing, the negotiations concerning the GSPA continued. In March 2005, Petrobangla made a payment of USD 2 million as a "lump sum interim payment against gas supplied from November 2004 to January 2005 without prejudice to the rate to be agreed". A further payment of USD 2 million was made to Niko on 5 May 2005. With

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[6] Payment Claim Exhibit C-021; for details with references, see First Decision on the Payment Claim, paragraphs 173 – 175.
[7] Payment Claim Exhibit C-021, page 40.
[8] Payment Claim Exhibit C-021, p. 42.
[9] Merits Phase Exhibit C-006.
[10] These proceedings are discussed in further detail in the First Decision on the Payment Claim, Section 7.2.
[11] See below Section 4.5.
[12] The BELA proceedings and the 2005 Injunction have been discussed in further detail in the First Decision on the Payment Claim and in Section 2.6.1 of the Decision on the Corruption Claim.

short interruptions, Niko continued deliveries of Feni gas to Petrobangla, but did not receive any further payment.

35. The main point of contention in the negotiations was the price of the gas. Petrobangla and Government representatives in the Gas Pricing Committee insisted on a price of USD1.75/Mcf, while Niko requested USD 2.75/Mcf. Niko eventually accepted the price requested by Petrobangla. The **Gas Purchase and Sale Agreement (GPSA)** was concluded on 31 December 2006 by Petrobangla as the Buyer and the Joint Venture Partners BAPEX and Niko, as the Seller.[13]

36. After the GPSA had been executed, Niko invoiced Petrobangla on 10 January 2007 for the gas produced from the inception of gas production in November 2004 to December 2006. These and subsequent invoices remain unpaid.

37. After several reminders, on 30 September 2007 Niko sent a Notice of Default to Petrobangla, claiming payment of the outstanding amounts.[14]

38. At the Joint Management Committee Meeting No 8 on 25 March 2008, Niko and BAPEX reviewed the payments outstanding from Petrobangla. Niko requested that arbitration be commenced immediately against Petrobangla under the GPSA; BAPEX did not agree.[15]

39. On 8 January 2010, Niko served Notice of Arbitration on Petrobangla under the GPSA.[16] By a separate Notice of the same date, Niko joined BAPEX to the arbitration commenced against Petrobangla.[17] This was followed by the two requests for arbitration on 1 April and 16 June 2010, the latter of which concerned the outstanding payments under the GPSA.

40. While this arbitration was proceeding and after the Respondents had filed on 25 March 2016 the Corruption Claim, new proceedings were initiated in the courts of Bangladesh: on 9 May 2016 Professor M. Shamsul Alam, described by the Respondents as a "public interest litigant", filed in the High Court Division of the Supreme Court a petition against the Government,

[13] For details of the negotiations see First Decision on the Payment Claim, Section 3.1.
[14] Notice of Default, 30 September 2007, Payment Claim Exhibit C-15.
[15] See letter of Niko to BAPEX, dated 17 April 2008, Payment Claim Exhibit C-24.
[16] RfA II, Attachment P.
[17] RfA II, Attachment Q.

Petrobangla, BAPEX, Niko and Niko Canada requesting that the JVA and the GPSA be declared as "being without lawful authority and of no legal effect and thus void *ab initio* as a result of procurement through bribery, fraud and corruption" and the violation of various provisions of Bangladeshi law (the **Alam proceedings**).

41. On 12 May 2016 the High Court Division issued an injunction ordering *inter alia* the stay of performance of the two agreements and directing the Respondents and the Government "not to give any kind of benefit [...] and not to make any kind of payments" to Niko and Niko Canada (the **2016 Injunction**).

42. On 19 November 2017, the High Court Division rendered its **judgement in the Alam proceedings**, orally on 26 August 2017 and in writing on 19 November 2017. It decided *inter alia* that the GPSA was "without lawful authority and of no legal effect and thus void *ab initio*"; the assets of Niko and Niko Canada were attached. The Tribunal is not informed about the status of any appeal proceedings in this case. The proceedings and their implication for the present arbitration were discussed in the Decision on the Corruption Claim[18] and are addressed below in Sections 4.5 and 4.7.

[18] Decision on the Corruption Claim, Sections 2.5 and 6.4.

4. PRIOR DECISIONS AND THE RELATED PROCEDURE

43. The procedure up to the Third Decision on the Payment Claim of 26 May 2016 and other decisions related to the Payment Claim have been described in several of the attached Decisions of the Tribunal. The main elements of this procedure are summarised below. The procedure following these decisions, leading to the present Award, will be described in Section 5.1.

4.1 The Decision on Jurisdiction and the Procedure Leading up to it

44. As mentioned above, Niko filed two requests for arbitration, RfA I and RfA II. RfA II was registered by the Secretary-General on 28 July 2010 and assigned ICSID Case No. ARB/10/18.

45. As also mentioned above, the Tribunals in both arbitrations were constituted on 20 December 2010 in accordance with Article 37(2)(b) of the ICSID Convention. At the agreement of the Parties, the composition of both Tribunals was identical, consisting of Professor Jan Paulsson, a national of Sweden and France, appointed by the Claimant, Professor Campbell McLachlan, a national of New Zealand, appointed by the Respondents, and Mr Michael E. Schneider, a national of Germany, appointed as President of each Tribunal pursuant to the Parties' agreement.

46. The **First Session** in the two arbitrations was held jointly on 14 February 2011. During this Joint First Session the conduct of the two arbitrations was examined. The conclusion was recorded as follows:

> *The parties agree that the two cases proceed in a concurrent manner as reflected in these minutes and in the procedural order concerning the procedural calendar. The Tribunals may therefore issue a single instrument (procedural order, decision or award) in relation to both cases, and may discuss the two cases jointly except where circumstances distinct to one case necessitate separate treatment.*[19]

47. The Parties also agreed that the applicable arbitration rules would be the ICSID Arbitration Rules in force as of 10 April 2006,

[19] Summary Minutes of the Joint First Session of the Two Arbitral Tribunals, 4 April 2011, Section 20.

that the place of proceedings would be London, United Kingdom, and that the language of the arbitration would be English. They confirmed that the Tribunal was properly constituted in the two cases and that they had no objection to the appointment of any Member of the Tribunal.

48. At the Joint First Session, the Tribunal and the Parties also considered the procedural timetable. It was decided *inter alia* that the Respondents' objections to jurisdiction against the Payment Claim would be dealt with as a preliminary matter, reserving for the Respondents the possibility of relying on claims for losses caused by the blowouts. As the Respondents did not avail themselves of this possibility, the Parties' subsequent written submissions addressed the Respondents' objections to jurisdiction on both claims. A hearing on jurisdiction was held on 13 and 14 October 2011 in London.

49. In the **proceedings on jurisdiction** the Respondents and the Government raised objections concerning the Claimant's identity and nationality. They objected that the People's Republic of Bangladesh had not agreed to arbitration and that Petrobangla and BAPEX had not been "designated to the Centre" by Bangladesh, as required by Article 25(1) of the ICSID Convention. In its submissions, the Claimant also sought a declaration that BAPEX was obligated under the JVA to cooperate with Niko for commencing arbitration against Petrobangla (**Cooperation Claim**).

50. The Respondents and the Government also invoked illegal acts, violation of good faith, and unclean hands. In particular, they argued that the Claimant had "violated principles of good faith and international public policy" by acts of corruption and that, therefore, the Tribunal should dismiss the claim in order "to protect the integrity of the ICSID dispute settlement mechanism". The Respondents did "not intend to argue that the contract is void or voidable by reason of corruption or otherwise" but reserved their position in case of further disclosures. At that stage the Respondents invoked the corruption as grounds for denying jurisdiction.

51. On 19 August 2013, the Tribunal issued its **Decision on Jurisdiction**, deciding *inter alia* that the Tribunal:

(i) has jurisdiction under the JVA and between the Claimant and BAPEX to decide:

(a) the Claimant's request for a Compensation Declaration and
(b) the Claimant's Cooperation Claim;

(ii) has jurisdiction to decide the Claimant's claim against Petrobangla for payment under the GPSA;

(iii) reserves the questions related to the necessary role (or otherwise) of BAPEX in relation thereto;

(iv) will give by separate order directions for the continuation of the proceedings pursuant to Arbitration Rule 41(4).

52. The Tribunal held that **the State of Bangladesh**, acting through the Government, had chosen to implement the project by the means of agreements which it did not conclude directly. Instead it delegated the necessary powers to Petrobangla and BAPEX. The Tribunal concluded that it did not have jurisdiction over the State of Bangladesh and released the State from the arbitration. With respect to the Claimant, Petrobangla and BAPEX, the Tribunal dismissed all objections and ruled as quoted above.

53. With respect to the **corruption allegation**, the Tribunal noted that that allegation was based on a Canadian conviction of Niko Canada on account of bribes to the Bangladeshi Minister of Energy in 2005. The Agreed Statement of Facts, which completed the Canadian proceedings, made mention of the conviction while also observing that "the Crown was unable to prove that any influence was obtained as a result of providing the benefit to the Minister". Indeed, the Minister resigned shortly after the benefits had been provided, some eighteen months before the GPSA was signed. Investigations in the United States were discontinued on the grounds that "prosecution is not necessary at this time in light of Niko's guilty plea in Canada".[20] The Tribunal had no reason to believe that corruption had any influence in the conclusion or the content of the JVA or the GPSA. Having examined also other allegations made by the Respondents, the Tribunal concluded that it had no reason to believe that there

[20] Quoted in the Decision on Jurisdiction, paragraph 390; more generally, Section 9.2 of that decision.

were any other acts of corruption by the Claimant or the Niko Group.

4.2 The First Decision on the Payment Claim

54. Further to its Decision on Jurisdiction, the Tribunal consulted the Parties about the conduct of the proceedings on the Compensation Declaration as well as those on the Payment Claim; the dispute about the latter also concerned the Cooperation Claim (deemed to be encompassed in the reference to the "Payment Claim"). It gave directions and set the procedural timetable for the proceedings both on the Compensation Declaration and on the Payment Claim on 19 September 2013 and in Procedural Order No 3 of 15 November 2013.

55. In accordance with the Tribunal's directions, the Claimant filed on 27 September 2013 its Memorial concerning the Payment Claim (**C-PC.1**), together with exhibits, legal authorities, and a witness statement of Mr Amit Goyal, as well as its Memorial concerning the Compensation Declaration (**C-CD.1**).

56. From then on, the proceedings on the Payment Claim followed a track separate from that of the Compensation Declaration which will not be reported here. BAPEX and Petrobangla each filed on 28 November 2013 a Counter-Memorial concerning the Payment Claim (**B-PC.1** and **P-PC.1**); Petrobangla's Counter-Memorial was accompanied by exhibits and legal authorities as well as a witness statement of Mr Imam Hossain.

57. In its Counter-Memorial of 28 November 2013, Petrobangla, relying on the Witness Statement of **Mr Hossain, Secretary of Petrobangla, quantified "the total amount owed for gas supplied by Niko" at USD 25'312'747 and BDT 139'988'337.91**. Invoking the 2005 Injunction, it nevertheless submitted that this injunction "excused [it] from performance of its contractual obligation to pay for invoices".[21] It also argued that the GPSA "has been frustrated by the Court's Order in the BELA proceedings and is therefore terminated".[22]

58. The Claimant filed its Reply concerning the Payment Claim on 30 January 2014 (**C-PC.2**), together with exhibits, legal authorities

[21] P-PC.1, paragraph 56.
[22] P-PC.1, paragraph 78(2).

and a second witness statement of Mr Goyal. The Claimant recognised that Petrobangla's quantification of the amount owed for gas delivered was below its own quantification but that the difference was small. The Claimant concluded that the "differences between the parties are sufficiently minor that it is not worthwhile to debate them." **It therefore adopted the amounts that Petrobangla had stated as owing to Niko**. The Claimant denied that Petrobangla could use *force majeure* to excuse its non-payment.

59. On 27 March 2014, Petrobangla filed its Rejoinder concerning the Payment Claim (**P-PC.2**), together with exhibits, legal authorities and a second witness statement of Mr Hossain.

60. In the meantime, the Claimant had filed on 23 December 2013 a **request for provisional measures**, requesting the Tribunal to order Petrobangla to withdraw an attachment application filed on 17 November 2013 in the Money Suit No. 224/2008 before the 2nd Court of the Joint District Judge, Dhaka. Through this attachment application Petrobangla had sought to attach approximately USD 27 million, as invoiced by Niko to Petrobangla under the GPSA.

61. Further to a request from the Respondents, the Tribunal decided on 16 February 2014 that a hearing on the Claimant's provisional measures request be held in conjunction with the hearing on the Payment Claim, which had been scheduled to commence on 28 April 2014. The Tribunal also fixed deadlines for a further round of written submissions on the Claimant's request for provisional measures.

62. With its Rejoinder of 28 February 2014, Petrobangla introduced a **conditional request for provisional measures**, stating: "if the Tribunal orders Niko's proposed provisional measures and adopts the legal theory advanced by Niko in order to grant the measures sought, it would only be fair, proportionate and reasonable to order Niko to withdraw its petition for stay of the Money Suit litigation".

63. After further submissions regarding the preservation of the *status quo* on provisional measures, the Tribunal issued **Procedural Order No 5** on 6 March 2014 by which the Tribunal instructed Petrobangla to request the 2nd Court of the Joint District Judge in Dhaka to adjourn the hearing on the Attachment Application

until a date after 31 May 2014. The Tribunal further ordered the Claimant to support this request if and when invited by Petrobangla to do so.

64. On 14 April 2014, the Claimant informed the Tribunal that it had on 13 March 2014 requested an adjournment of the hearing on the Attachment Application and that the Court had granted the request and issued the order on the same day, postponing the hearing in the Money Suit until 12 June 2014.

65. In accordance with the directions set out by the Tribunal, **a hearing on the Payment Claimant and on Provisional Measures** was held from 28 to 30 April 2014 in London. Prior to the hearing, the Tribunal had communicated to the Parties some factual and legal considerations possibly relevant for its decision and a proposed tentative agenda for the hearing.

66. The hearing was attended by the three Members of the Tribunal and the Secretary and the following persons:

> For the Claimant:
> Mr Barton Legum, Ms Anne-Sophie Dufêtre, Ms Brittany Gordon, and Mr Matthew Smith of Dentons, Paris; Messrs Rokanuddin Mahmud and Mustafizur Rahman Khan of Rokanuddin Mahmud & Associates, Dhaka; and Mr Amit Goyal, Mr Tim Henry, and Mr Brian J. Adolph of Niko Resources Ltd.
>
> For the Respondents:
> Mr Tawfique Nawaz, Mr Imtiaz Farooq and Dr Dipu Moni of Juris Counsel, Dhaka; Mr Luis González García of Matrix Chambers, London, and Mr Md. Imam Hossain of Petrobangla, Dhaka.

67. During the course of the hearing the Parties set forth their case orally and responded to questions from the Tribunal. Mr Amit Goyal, Controller of Niko Resources Ltd., and Mr Md. Imam Hossain, Secretary of Petrobangla, testified as witnesses and responded to the questions from the Tribunal and the Parties. The Parties submitted further documentary evidence and legal authorities. On the last day of the hearing the Claimant produced a new version of the relief requested, presenting several

alternatives, including two requests that provided that the amount owed by Petrobangla be paid into escrow.[23]

68. The hearing was recorded, and a transcript was prepared and distributed to the Parties. The Tribunal further prepared Summary Minutes of the hearing.

69. At the hearing the Parties informed the Tribunal that they had reached an understanding with regard to their respective requests for provisional measures, which the Parties also provided to the Tribunal in written form. The Parties' understanding was embodied in the Tribunal's **Procedural Order No 6**, issued on 1 May 2014.

70. Further to the programme agreed at the end of the hearing, the Parties filed further submissions with respect to the question of interest concerning the Payment Claim. Following these submissions the proceedings on the Payment Claim were closed.

71. After deliberations the Tribunal issued on 11 September 2014 the **First Decision on the Payment Claim**, in which it held that:

> *(1) Petrobangla owes Niko USD 25'312'747 plus BDT 139'988'337 as per Niko's invoices for gas delivered from November 2004 to April 2010;*
>
> *(2) Petrobangla must pay simple interest on Niko's invoices at the rate of six month LIBOR +2% for the US Dollar amounts and at 5% for the amounts in BDT; interest is due on the amount of each invoice as from 45 days after delivery of the invoice but not before 14 May 2007 and until it is placed at Niko's unrestricted disposition;*
>
> *(3) The claim for compound interest on the amount awarded under above item (1) and (2) is reserved;*
>
> *(4) The entitlement of BAPEX to payments under the GPSA is not affected by the present decision;*
>
> *(5) The Parties are invited to seek an amicable settlement with respect to the modalities for implementing the [11 September 2014] decision and to report by no later than 30 September 2014;*

[23] The various versions of the relief requested by the Claimant are set out in paragraph 132 of the First Decision on the Payment Claim.

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

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

72. In the reasons for this decision, the Tribunal denied Petrobangla's defence of *force majeure*. The Tribunal noted that Petrobangla's commitment to make payment was effected in the GPSA of 27 December 2006, long after the 2005 Injunction. Petrobangla had made the commitment in full knowledge of this injunction and thus could not rely on it as an excuse for performing the payment obligations under the GPSA.

73. The Tribunal nevertheless considered the injunction, the duration of which in its latest version had been extended until the decision in the Money Suit "or till amicable settlement amongst the parties, whichever is earlier". It added:

> *Now that the Tribunal has resolved the central point of disagreement between the Parties and decided that Petrobangla may not rely on a force majeure defence, the Tribunal does not exclude that the Parties reach the amicable settlement referred to in the order of the BELA Court. The Tribunal is encouraged in this belief by the fact that, at the April 2014 hearing, the Parties were able to resolve their difference with respect to their respective requests for provisional measures and made a joint application which the Tribunal transformed into Procedural Order No. 6 of 1 May 2014.*

74. The Tribunal considered the alternative versions of the relief the Claimant had requested at the hearing, and indicated possible elements of an arrangement which the parties might agree or, in the absence of such agreement, the Tribunal might order. The Tribunal made reference to the Compensation Declaration sought by the Claimant and the possibility that Niko were found liable for some or all of the damage caused by the blowouts. As one of the Claimant's alternative reliefs expressly had referred to the possibility of setting off claims for compensation of such damage against the amounts owed under the Payment Claim, the Tribunal mentioned the possibility of payment into an escrow account.

75. Confident that the First Decision on the Payment Claim settled the dispute of the Parties concerning the Payment Claim, the Tribunal nevertheless recalled its powers in case further decisions were necessary. It referred to its Decision on Jurisdiction and held that, with respect to the merits of the dispute validly brought before it, the Tribunal's jurisdiction was exclusive. "By virtue of its ratification, the People's Republic of Bangladesh and all of its organs, including the courts, are bound by the ICSID Convention and must give effect to awards rendered in ICSID arbitration".[24] Since the 2005 Injunction had been issued before the commencement of the arbitration, the Tribunal added that it had "no reason to believe that, when this exclusive jurisdiction, founded on the ICSID Convention, is brought to the attention of the courts in Bangladesh, in particular the High Court Division having issued the injunction, these courts would disregard the international obligations assumed by Bangladesh when adhering to that Convention".[25]

4.3 The Decision on Implementation of the Decision on the Payment Claim (Second Decision on the Payment Claim)

76. Subsequent to the First Decision on the Payment Claim, the Parties reported to the Tribunal several times, indicating that they had conferred with a view to finding a solution along the lines indicated by the Tribunal; but no agreement was reached.

77. On 25 November 2014 the Claimant made an application, expanded by a clarification on 5 December 2014, for what it described as a provisional measure regarding the implementation of the First Decision on the Payment Claim. The Claimant proposed several alternatives for the implementation of the Tribunal's Decision, including payment into an escrow account. The Claimant also claimed post-award interest at five percent per annum, compounded monthly.

78. The Tribunal invited Petrobangla to provide a response to the Claimant's application, including matters addressed in the Claimant's 5 December 2014 clarification. In particular the Tribunal invited Petrobangla to address the following issues:

[24] First Decision on the Payment Claim, paragraph 287.
[25] First Decision on the Payment Claim, paragraph 290.

a. *the question whether the Request should be granted as a matter of principle;*

b. *the specific measures requested by the Claimant; and, if Petrobangla does not agree with the measures requested by the Claimant,*

c. *identify any other measures which Petrobangla would find appropriate, reserving, if it wishes to do so, any objections in principle;*

d. *the interest calculation attached to the Request; if it sees the need for any corrections, Petrobangla must provide a corrected calculation by the same date; and*

e. *present its position on the Claimant's request for post-award compound interest.*[26]

79. The Parties agreed on repeated occasions to extend the time for Petrobangla's response as fixed by the Tribunal. When the latest of these extensions expired on 19 May 2015 without a response from Petrobangla, the Claimant requested on 27 May 2015 a decision from the Tribunal in accordance with ICSID Arbitration Rule 26. The Tribunal granted a final extension to Petrobangla to 11 June 2015, giving notice that it would rule on the Claimant's 25 November 2014 application, including the Claimant's clarification of 5 December 2014, even in the absence of a response from Petrobangla. On 23 June 2015, the Tribunal denied a request by Petrobangla for a further extension of the deadline for its response.

80. Starting with a communication on 17 December 2014, the Respondents informed the Tribunal on repeated occasions of changes in their representation. Eventually, Petrobangla informed the Tribunal on 9 July 2015 that Foley Hoag LLP had been appointed to represent both Petrobangla and BAPEX in the arbitrations and that all previous authorisations for other external counsel were withdrawn.

81. Petrobangla's new counsel wrote on 6 August 2015 with respect to the Compensation Declaration and possible liability of Niko for the blowouts. They quoted from the opinion of one of the Tribunals' experts who had concluded "the expert appointed by

[26] Procedural Order No 9.

the Tribunals indicates that Niko's failure to operate within the applicable standards caused the blowouts". Concerning the Payment Claim, they wrote:

> *In its Clarification on its Request for Provisional Measures, Niko recognized that its request includes an alternative for which "the final relief depends upon the outcome of the Compensation Declaration". Indeed, with regard to this alternative, Claimant asserted that it "would be able to access the funds" owed according to the Payment Claim Decision "only in the event that it demonstrates that it has no liability for the blowouts or that its liability is less than the amount of the payment claim." Claimant also referred to the combined results of these two arbitrations as reflecting "an amicable settlement within the meaning of the operative part of the 2009 [Judgment in the BELA proceeding].*

82. The Respondents made no proposals concerning the use of the funds or the implementation of the First Payment Claim Decision but requested that a decision on the outstanding funds be made "only after all issues regarding Niko's liability are resolved".

83. The Tribunal concluded that no agreement between the Parties about the implementation of the First Decision could be expected. It saw "no justification for Petrobangla to further withhold the funds owed to Niko". The Tribunal nevertheless considered the possibility of preserving the funds owed to Niko in case Niko were found liable for damages concerning the blowouts. In this perspective, it examined the different proposals which the Claimant had made with the objective of preserving "the funds for possible payments in the event Niko were liable for damage caused by the blow-outs" and retained the one which provided for payment into an escrow account.

84. On 14 September 2015, the Tribunal ruled as follows in the **Decision on the Implementation of the Decision on the Payment Claim** (the **Second Decision on the Payment Claim**), with a slightly revised version, correcting minor typographical errors, sent on 14 October 2015:

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

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

(iii) *Petrobangla shall ensure that the USD amounts paid into the Escrow Account are freely available to Niko without any restrictions if and when payment to Niko is ordered by the present Arbitral Tribunals;*

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

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

85. The Tribunal also considered the question of compound interest that had been reserved in its previous decision. Having heard the Parties on this issue, the Tribunal determined in the Second Decision on the Payment Claim that compound interest was admissible in ICSID proceedings, that it was justified in the circumstances of the present case, and that the interval (or "rest") be annual.

4.4 The Third Decision on the Payment Claim

86. Upon receipt of the Second Decision on the Payment Claim, Petrobangla confirmed to the Tribunals on 23 September 2015

that it "intends to comply with the Tribunals' decision as expeditiously as possible."

87. By the same letter, Petrobangla referred to the 2005 Injunction, expressing concern that payment by Petrobangla pursuant to the First Decision on the Payment Claim would be considered "a violation of the injunction", and that "any official who authorizes a payment into the escrow account without seeking a modification of the order would be subjected to contempt of court proceedings and be exposed to a risk of penal sanctions". Petrobangla announced its intention to "seek a modification of the injunction order to permit the payment into the escrow account as directed by the Tribunal[s]." It stated that "Petrobangla will file its request on 30 October 2015 and inform the Tribunal as soon as it has been filed".

88. The Claimant objected on 28 September 2015 to Petrobangla's position to the effect that payment made into an escrow account would constitute a violation of the 2005 Injunction (as confirmed by the November 2009 BELA Judgement), submitting that "Petrobangla's suggested application to a Bangladesh national court can be viewed only as a delaying tactic to avoid payment of the money it has owed for a decade." The Claimant went on to say that

> *Payment to the account of an independent third party who under no circumstances can take instructions from Niko can in no way be seen as 'making any payment to [Niko]' within the meaning of the BELA injunction. Nor can the ultimate disposition of the escrow funds as contemplated by the [Second Decision on the Payment Claim Decision] be seen to contravene the BELA injunction. The Decision orders two alternative conditions to the release of the funds: '(a) as instructed by the present Arbitral Tribunals or (b) by joint instructions of Niko and Petrobangla'.*

89. In the letter the Claimant also requested "that the Tribunals rule that Petrobangla is indeed obligated to make the payment ordered by that Decision immediately upon establishment of the escrow account." The Tribunal responded on 10 October 2015:

> *The Tribunals consider that the matter is sufficiently clear given their rulings in paragraph 167 of the [Second Decision on the Payment Claim] and confirm that payment is to be made by Petrobangla immediately upon establishment of the Escrow Account.*

90. Concerning the escrow account documentation, the Claimant filed on 8 October 2015 a Draft Escrow Agreement and accompanying documentation, requesting that the Tribunals "confirm that the draft escrow agreement secured by Niko meets the requirements" of the Second Decision on the Payment Claim. The Respondents commented on 16 October 2015 and requested changes to the draft agreement. The Claimant submitted on 23 October 2015 a revised version of the draft escrow agreement in which the changes requested by the Respondents had been made. The Claimant "reiterated its request that the Tribunals decide whether these escrow arrangements accord with the Decision on Implementation".

91. Despite an invitation from the Tribunal and a reminder from the Claimant, no further comments were received from the Respondents.

92. At the **2 – 7 November 2015 hearing**, dealing primarily with the Compensation Declaration, the Tribunal noted the absence of further comments from the Respondents and concluded "that therefore there were no objections to the Tribunals now approving the arrangements as amended by the Claimant following the Respondents' initial observations. These arrangements were thus accepted for implementation".[27]

93. On 1 December 2015, the Claimant informed the Tribunal about the events following this approval as follows:

> *On 13 November [2015], Petrobangla and BAPEX communicated to Niko the details (contact information, etc.) required for the completion of the Escrow Agreement. On 16 November, Niko circulated a new draft of the USD Escrow Agreement, including the details (contact information, etc.) communicated by Petrobangla and BAPEX. On 18 November [2015], Respondents indicated that they had one editorial change they wished to make to the new draft of the USD Escrow Agreement. Niko consented to the proposed change on 19 November.*
>
> *On 23 November, Niko emailed to Petrobangla and BAPEX a PDF of the counterpart of the USD Escrow Agreement executed by Niko which Niko had delivered to Madison Pacific by courier.*

[27] Summary Minutes of the Hearing of 2 to 7 November 2015, Section 7.

94. The Claimant then requested that the Tribunal order the finalisation of the escrow account documentation and payment by the Respondents. In their observations of 10 December 2015, the Respondents wrote:

> *… execution of the Escrow Agreement may be determined by the Supreme Court of Bangladesh to be a violation of its injunction order in Writ Petition No. 6911 of 2005 (Bangladesh Environmental Lawyers Association (BELA) v. Bangladesh and others) against payments in favor of Niko referred to in paragraph 277 of the Tribunals' Decision on the Payment Claim. Respondents' officials would therefore risk contempt of court and criminal proceedings against them in Bangladesh if they execute the Escrow Agreement.*

95. Referring to their letter of 23 September 2015, the Respondents further explained that Petrobangla had presented a petition to the Supreme Court to review the judgement imposing the 2005 Injunction so as to permit Petrobangla to make the payment ordered by the Tribunal. The petition was attached to the letter. It was dated 10 December 2015.

96. Thereupon the Claimant wrote on 15 December 2015: "Petrobangla and BAPEX refuse to sign the Escrow Agreement and, as a result, the Escrow Account cannot be opened, much less operated or funds paid". It concluded that a "difficulty has occurred that prevents the operation of the Escrow Account as intended". Relying on item (v) of the Second Decision on the Payment Claim, the Claimant made the following **application** on **15 December 2015**, invoking that difficulty and requesting:

> *… an award in the Payment Claim ordering Petrobangla unconditionally to make payment to Niko of the amounts the Tribunals found to be due and owed.*

97. In its 15 December 2015 application the Claimant also requested that

> *the Tribunals fix a prompt schedule for costs submissions in order to place the Tribunals in a position to render a final and unconditional award in the Payment Claim as soon as possible.*

98. In support of the application, the Claimant submitted that Petrobangla had not in fact filed a petition for modification of the November 2009 BELA Judgment, but had filed an "application for review of the judgment and order" which in the Claimant's

estimate would take "a minimum of two years, if not more" to be decided upon. The Claimant further reiterated its view that "the Respondents are not prepared to comply with the Decision" and that Petrobangla was "attempting to delay indefinitely the date when it makes the payment to Niko". The letter concluded the explanations on the escrow arrangements as follows:

> *Finally, it bears noting that the link between the Compensation Declaration and the Payment Claim implied by the escrow arrangements ordered by the Tribunals is one that benefits the Respondents only. The Payment Claim debt is independent from Niko's potential liability in the Compensation Declaration. Connecting one to another provides additional security for the Respondents in the event that the Tribunals were to find some liability in the Compensation Declaration. Petrobangla and BAPEX have expressed their disinterest in putting into place the security contemplated. Given that that is the case, there is no reason to wait further before the issuance of a final award in Niko's favour in the Payment Claim.*

99. The Respondents replied on 6 January 2016, asking the Tribunals to reject the Claimant's request. They confirmed that in their view "[t]here is no difficulty preventing operation of the Escrow Account", adding that "[t]he Respondents have not refused to sign the Escrow Agreement. They simply seek the opportunity to do so in conditions that do not create a risk of their officials being held in contempt of court."

100. In their letter of 6 January 2016, the **Respondents** confirmed Petrobangla's undertaking that they "**committed to making payment into the escrow account as soon as the injunction is modified or lifted**." With regard to the type of application filed with the Supreme Court, Petrobangla indicated that it

> *… chose the procedural mechanism its lawyers recommended as the most effective means of achieving its goal of being able to comply with the Tribunals' order without being subject to contempt of court proceedings in Bangladesh*

and that

> *based upon Petrobangla's Bangladeshi Supreme Court litigation counsel's extensive experience with the Bangladeshi judicial system, Petrobangla anticipates that*

> *the petition for revision of the injunction should be resolved in approximately three months.*

Petrobangla added that

> *[a]s they have previously committed, upon lifting or modification of the injunction, Respondents will sign the escrow agreement and Petrobangla will pay the amount owed into the escrow account.*

101. The Respondents joined to their observations a letter from their counsel in the court proceedings dated 5 January 2016 which contained the following passage:

> *Based on my experience as a practising Barrister before the Supreme Court of Bangladesh, I anticipate that this petition will be resolved within the next 3 (three) months.*

102. The matter was discussed with the Parties during the **28 January 2016 pre-hearing telephone conference**, during which the Respondents confirmed that they would provide the Tribunal with a status update regarding their application before the Supreme Court.

103. By letter of 17 February 2016, the Respondents stated that their petition for a modification of the 2005 Injunction was before the Chief Justice of the Supreme Court awaiting allocation of the bench that will hear that petition. No further information was provided to the Tribunal about the Respondents' petition concerning the 2005 Injunction.

104. On 25 March 2016 the Respondents introduced the Corruption Claim. BAPEX did so as part of its Memorial on Damages concerning the Compensation Declaration and Petrobangla followed suit in a separate letter which relied on the arguments and evidence filed by BAPEX. In these submissions the Respondents asserted that the JVA and the GPSA were procured by corruption and were void or voidable. They **requested accordingly that the Tribunal vacate the First and Second Decisions on the Payment Claim**.

105. The Tribunal invited comments on the Respondents' request. Specifically, with respect to the GPSA, the Tribunal invited the Respondents to comment on the consequences of its avoidance with respect to the particular element of past performance, and to address

> *… the question of payments which Petrobangla may owe, in case of a rescission, for the gas received (explaining whether Petrobangla considers owing no payment at all or payment valued for instance at the price agreed in the GPSA or at its commercial value, taking into account the price at which Petrobangla purchases gas from other suppliers).*

106. The Respondents submitted on 29 April 2016 Revised Conclusions of BAPEX and Submissions for the Memorial on Damages and, in a separate document, replies to the Tribunal's questions. They argued that Niko was barred from seeking any remedy from the Tribunal and that the JVA and the GPSA were null and void; alternatively, they confirmed that "BAPEX and Petrobangla exercise their rights to rescind the JVA and the GPSA respectively". They argued that Petrobangla did not owe anything under the GPSA; if Niko made a claim for unjust enrichment, they would have to compensate for the value of the gas; but the compensation could not be more than the price agreed under the GPSA.

107. On the same day the Claimant made submissions with respect to both the JVA and GSPA. The Claimant argued that the documents produced with the BAPEX Memorial did not contain any new evidence and that the earlier charges had been considered by Tribunals and rejected. Any avoidance of a contract for corruption had to be made "unequivocally and timeously". The Claimant argued that "Petrobangla offers neither argument nor authority to suggest that the Tribunals' Decision was incorrect – even if that Decision could be reopened, which it cannot." It declared Petrobangla's application as frivolous and that it "should summarily be rejected."

108. On 12 May 2016 the Respondents submitted to the Tribunal an injunction of the same date by the High Court Division of the Supreme Court, directing the Respondents and the Government of Bangladesh "not to give any kind of benefit" and "not to make any kind of payment" to the Claimant and its mother company (as indicated above, this is referred to as the **2016 Injunction**).

109. The Claimant then **requested on 19 May 2016** the Tribunal to order **provisional measures**:

> *(a) Declaring that these Tribunals have exclusive jurisdiction over the questions of: (i) the validity of the JVA and GPSA as concerns Niko, BAPEX and Petrobangla, and their*

successors, predecessors, assignors and assignees; (ii) whether Petrobangla must pay Niko for gas delivered under the GPSA; and (iii) whether Niko is liable to BAPEX or any of its successors, predecessors, assignors and assignees and if so, what compensation is due;

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

110. On 26 May 2016, the Tribunals issued **Procedural Order No 13** in which they decided *inter alia* that they would, "as a matter of priority examine whether the JVA and/or the GPSA were procured by corruption". The Tribunals gave directions for the proceedings on the Corruption Claim and decided:

The proceedings on all issues other than the Corruption Issue and the Claimant's Request for Interim Measures of 19 May 2016 are suspended.

111. On the same day, 26 May 2016, the Tribunal addressed the Claimant's Request for Interim Measures of 19 May 2016 and the Claimant's application of 15 December 2015. The Tribunal issued the **Third Decision on the Payment Claim**:

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

2. *This payment must be made immediately and is not subject to any contrary orders from the Courts in Bangladesh;*

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

112. In the reasons for this decision, the Tribunal noted that the documentation for the escrow account had been approved by the Tribunal at the November 2015 Hearing. Following this approval,

the Respondents "provided all of the information necessary to complete the Escrow Agreement".[28] On the basis of this information the escrow agreement was completed and signed by the Claimant.

113. The Tribunal concluded that, given the Parties' complete agreement on its text, the escrow agreement could have been executed by both Parties, thus enabling the opening of the escrow account and Petrobangla's payment into the account.

114. By the time of the Claimant's 19 May 2016 request, the escrow agreement still had not been executed by Petrobangla and no payment had been made. The Tribunal concluded that difficulties had indeed impeded the operation of the escrow account and the Claimant had been justified in addressing the Tribunal, as envisaged in the Second Decision on the Payment Claim.

115. Addressing the Respondents' defence related to the 2005 Injunction, the Tribunal recalled its exclusive jurisdiction, as confirmed in the Decision on Jurisdiction and the First Decision on the Payment Claim. It noted that the Respondents had failed despite the passage of a year to bring the Tribunal's decisions to the attention of the court in Bangladesh. When they did so on 10 December 2015, making an application for a modification of the 2005 Injunction, they announced that "a petition for revision of the injunction should be resolved in approximately three months". The Tribunal clarified, however, that "an injunction by a court in Bangladesh may not be invoked as justification for a failure to comply with a decision from these Tribunals." The Respondents' failure to execute the escrow agreement, the terms of which had been agreed, and to make payment into the escrow account was therefore unjustified.[29]

116. These considerations also applied to the 2016 Injunction of 12 May 2016, which enjoined the Respondents and the Government to make no payments to Niko; the Tribunals had decided that it has exclusive jurisdiction concerning the claims for payment under the GPSA. It held that the injunction was therefore of no effect on the Respondents' payment obligation. If the Respondents had believed that the injunction caused difficulties in complying with the Tribunal's decision, it was for them to

[28] *See* Letter of 10 December 2015.
[29] Third Decision on the Payment Claim, Section 5.2.

overcome these difficulties. The Tribunal had made this clear at previous occasions and needed to give no further instructions by way of interim measures.[30]

117. Concerning the Corruption Claim newly raised by the Respondents in 2016, the Tribunals decided on the same day in Procedural Order No 13 to examine this claim with priority and to suspend the proceedings on the Compensation Declaration. In the context of the Corruption Claim, the Respondents requested, *inter alia*, that the GPSA be declared void *ab initio* and the Tribunal's decision ordering payment be vacated. The Tribunal examined whether, pending the examination of the Corruption Claim, Petrobangla's payment obligation be suspended.

118. In the Decision on Jurisdiction the Tribunal had noted that there is no illegality in the content of the JVA or GPSA or in their performance. In the context of the Corruption Claim, the Respondents did not allege that the content or performance of the GPSA were illegal. The Tribunal saw no indication in the material presented with the Corruption Claim that would suggest any such illegality.

119. The Tribunal concluded in the Third Decision on the Payment Claim that there was thus no risk that, by requiring Petrobangla to make immediate payment, the Respondents would be required to perform any illegal act.

120. The Tribunal also considered in the Third Decision on the Payment Claim the possibility that it would find that corruption did occur and that the Respondents' claims were justified. The Tribunal examined whether the possibility of such a finding required suspending the Respondents' payment obligation until the Corruption Claim had been decided.

121. In addressing this question, the Tribunal noted in the Third Decision on the Payment Claim on the one hand that the gas for which the Claimant seeks payment had been delivered between November 2004 and December 2006. The gas still had not been paid for even though the Tribunal had found that there was no justification for Petrobangla to withhold the payment.

122. On the other hand, the acts of corruption, which the Respondents raised in the Corruption Claim were said to have occurred in

[30] Third Decision on the Payment Claim, Section 7.

relation to the JVA and the GPSA in 2003 and 2006, respectively. Some of these acts had been raised and were dealt with in the Decision on Jurisdiction of 19 August 2013. The Tribunal found it difficult to understand why the claim based on other acts had not been raised earlier.

123. If, however, the Corruption Claim succeeded and the GPSA would be avoided, the Respondents accepted that the Claimant could be entitled to payment on other grounds, in particular restitution for "unjust enrichment". The Tribunal noted that, according to information provided by the Respondents and their experts, Petrobangla paid during the period from 2004 to 2015 to other suppliers of gas between USD 2.31 USD 2.92 per Mcf; the average price over this period being USD 2.69 per Mcf; while the price agreed under the GPSA was only USD 1.75 per Mcf. The Respondents had nevertheless argued that Petrobangla's enrichment should be determined not by reference to the price it paid to other suppliers but as the price agreed under the GPSA.

124. The Tribunal concluded that the Respondents would suffer no loss if they now made payment for the gas on the basis of the agreed contract price and later prevailed with their Corruption Claim. As they themselves had explained, they would then have to compensate Niko for their enrichment, valued on the basis of the contract price.

125. In these circumstances, the Tribunal saw no justification for deferring its Third Decision on the Payment Claim or to suspend its effect until the Corruption Claim had been decided. It ordered that Petrobangla must pay the outstanding amounts forthwith, as stated in the decision quoted above.

126. As to the form of its decision, the Claimant had requested in their 15 December 2015 application that the Tribunal issue "an award in the Payment Claim ordering Petrobangla unconditionally to make payment to Niko" of the amounts the Tribunals found to be due and owed.

127. The Tribunal considered that in the First Decision on the Payment Claim it had determined the amount owed by Petrobangla. In the Second Decision it had invited the Parties to agree on modalities for the implementation of this decision; it then had imposed restrictions on the Claimant by requiring

payment into an escrow account. The Tribunal concluded in its Third Decision on the Payment Claim:

> *Since the Parties were unable to agree on these modalities and since the creation of an Escrow Account has been frustrated by the Respondents, the Tribunals see no other manner of implementing these decisions but by requiring Petrobangla to make direct payment to Niko. It is thus neither possible nor justified to maintain the restriction imposed on the use of the funds by Niko. Unrestricted payment to Niko must thus be ordered.*

128. As the examination of the Corruption Claim was pending and concerned not only the JVA but also the GPSA, the proceedings in the two arbitrations had not been completed. The Tribunal therefore refrained from making its decision on the Payment Claim in the form of an award. It pointed out, however, that its decisions, "whether in the form of an award or otherwise, must be complied with in good faith by the Parties".[31]

129. The Tribunal concluded its Third Decision of the Payment Claim by stating that it remained seized of the matter until final settlement of the outstanding payment:

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

4.5 The Decision pertaining to the Exclusivity of the Tribunals' Jurisdiction

130. Following the notification of the Third Decision on the Payment Claim and in consideration of that Decision, the Claimant wrote on 1 June 2016 to withdraw "its request for a declaration as concerns Petrobangla's obligation to make payments to Niko" and amended its request of 19 May 2016.

131. In its version of 1 June 2020, the request took the following form:

> *(a) Declaring that these Tribunals have exclusive jurisdiction over the questions of: (i) the validity of the JVA and GPSA as concerns Niko, BAPEX and Petrobangla, and their successors, predecessors, assignors and assignees; (ii)*

[31] Third Decision on the Payment Claim, Section 5.3.

whether Niko is liable to BAPEX or any of its successors, predecessors, assignors and assignees and if so, what compensation is due; and (iii) any requests for interim or provisional measures concerning any matter within the exclusive jurisdiction of these Tribunals, including any injunction, stay of payment, attachment or other relief.

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

132. In the letter communicating this request, the Claimant explained that, in the circumstances, it "would be useful for the Tribunals to state in unequivocal terms" that its jurisdiction over the identified issues was exclusive. With respect to the injunction in the *Alam* proceedings, the Claimant maintained "its request for an order requiring specific action by the Respondents as concerns the Stay Order and the Writ Petition". It requested

> *… the Tribunals to declare that no court is competent to order provisional measures of any kind concerning matters within the exclusive jurisdiction of these Tribunals. As ICSID Arbitration Rule 39(6) recognizes, a national court may address provisional measures only in the event that the parties have in the agreement recording their consent provided for such a thing. Neither the JVA nor the GPSA here provides for such intervention by a court.*

133. On the same day, 1 June 2016, the Respondents replied to the Claimant's request in its previous version. They argued that Niko misrepresented the Writ Petition to the Supreme Court and failed to demonstrate that the measures requested by the Claimant were "necessary and urgent to protect its rights in these proceedings". They added:

> *The petitioner in the Writ Petition proceeding is a legitimate public interest litigant seeking redress under Article 102 of the Constitution of Bangladesh. As noted below, Respondents had no contact, direct or indirect, with the petitioner and did not "spoon feed" him documents.*
>
> *[…]*
>
> *… Niko wrongly states the scope of the jurisdiction of the Tribunals in these arbitrations. Niko seeks to end the*

proceedings before the Supreme Court of Bangladesh, but the existence of this arbitration does not deprive the Supreme Court of jurisdiction to hear a petition from a citizen of Bangladesh who is not a party to these proceedings. The State of Bangladesh is not a party to these ICSID proceedings and has not consented to this arbitration. The Tribunals do not have jurisdiction over the State, including its courts. The overlap of subject matter and the fact that the parties in these proceedings are among the defendants in the Writ Petition proceeding do not deprive the Supreme Court of jurisdiction.

134. Commenting on the Claimant's revised request on 15 June 2016, the Respondents confirmed the position they had expressed in written submission on 1 June 2016, contesting that the proceedings before the High Court Division were in violation of Article 26 of the ICSID Convention. They argued:

> *The State of Bangladesh is not a party to these proceedings. The jurisdiction of the Tribunals does not preempt the jurisdiction of the Supreme Court of Bangladesh to order the measures it deems appropriate in proceedings under the Constitution instituted by a citizen of Bangladesh who is not a party to the ICSID proceedings for the purpose of protecting the rights of the people of Bangladesh. Nothing in the ICSID Convention creates an obligation on the courts of a State to abstain from exercising their constitutional jurisdiction when seized by a non-party to the arbitration, especially where the State is not a party to the ICSID arbitration in question.*

135. The Parties developed their positions in further submissions, the Respondents on 7 and 12 July; the Claimant confirmed its request for provisional measures on 23 June 2016 and made further submissions on 11 and 13 July 2016.

136. The Tribunals then issued on **19 July 2016 their Decision Pertaining to the Exclusivity of the Tribunals' Jurisdiction**. The Tribunals confirmed their "exclusive jurisdiction to determine the issues that are validly brought before [it]" and added:

> *12. 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. This means, for instance, that it is for these Tribunals, and the Tribunals alone, to decide whether the JVA and the GPSA were procured by corruption, whether the blow-outs were caused by Niko's breach of the standards it had to observe under the JVA and the amount of the damage caused by such a breach. When seized by a claim of a party not subject to the jurisdiction of the Tribunals, a court in Bangladesh may entertain that claim but it must conform in its decision to those of the Tribunals.

13. If it were otherwise, the international commitments of the State of Bangladesh, bound by its adherence to the ICSID Convention and its decision to delegate the Chattak and Feni investments to Petrobangla and BAPEX, could be rendered ineffective by the simple expedient of any third parties claiming to be affected in their rights by the actions and occurrences over which the Tribunals have jurisdiction, bringing claims before the courts of Bangladesh and having these courts render decisions which conflict materially with the decisions of the Tribunals operating under the ICSID Convention and thereby also conflicting with Bangladesh's obligations as a party to that Convention. This is particularly striking in a case in which the plaintiff does not seek to vindicate his own rights, but acts by way of a derivative action invoking rights of public bodies which the plaintiff, in his vision of the public interest, prefers to be pursued in national courts rather than before the international tribunal whose jurisdiction have been accepted by those public bodies, including delegation of the State as a signatory to the ICSID Convention.

137. The Tribunals applied these considerations to the specific situation that gave rise to the Claimant's request as follows:

14. Such a conflicting position is indeed now taken by the Respondents when they argue that a court in Bangladesh may order measures in conflict with the decisions of the Tribunals, simply because the application is made by a person not party to the Convention and the Arbitrations. On the basis of this position the Respondents argue that, for instance a payment ordered by these Tribunals under the ICSID Convention could be prevented by the order of a court in Bangladesh simply because the order is made at the request of a person not party to these proceeding.

15. Accepting this position would subvert the international obligations assumed by Bangladesh by virtue of its decision to become a party to the ICSID Convention.

The Tribunals are not prepared to give effect to such a position.

138. The Tribunals concluded that the argument raised in the Respondents' submissions showed a fundamental misunderstanding of the scope and implication of the Tribunals' jurisdiction and required a further clarification. The Tribunals therefore provided this clarification, granting the Claimant's request in substance in the following terms:

> *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 [them], notably*
>
> *(a) The validity of the JVA and the GSPA, including all questions relating to the avoidance of these agreements on grounds of corruption;*
>
> *(b) The liability of Niko under the JVA for the blow-outs that occurred in the course of its activity in the Chattak field and the quantum of the damage for which it may be responsible in case such liability were found to exist;*
>
> *(c) The payment obligations of Petrobangla towards Niko under the GSPA for gas delivered, the jurisdiction for injunctions seeking to prevent such payments and to retract such injunctions;*
>
> *2. Order BAPEX and Petrobangla*
>
> *(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.*

139. The Respondents subsequently informed the Tribunals that they had informed the courts of the Tribunals' Decision. The Claimant denied that any meaningful action in compliance with that decision had been taken by the Respondents. The matter was raised repeatedly during the course of the arbitration, and dealt

with in Sections 2.5 and 2.6 of the Decision on the Corruption Claim.

140. As indicated above in Section 3, the judgement in the ***Alam* proceedings**, issued in writing on 19 November 2017, held that the GPSA, like the JVA, was "without lawful authority and of no legal effect and thus void ab initio".

141. As also mentioned in Section 3, action in the BELA proceedings with respect to the **2005 Injunction** was prevented because "the court's file in the BELA suit was transferred to a filing facility and could not be located", which has prevented the court from addressing the matter". The Respondents explained on 7 December 2016 that their Bangladeshi counsel complained with the Registrar but "the file could not be traced and the court has not taken up the review position".[32]

4.6 The Respondents' 30 June 2016 Application for Reconsideration

142. On 23 June 2016 **the Claimant** wrote to the Tribunal, informing it that, despite the Tribunal's order in the Third Decision on the Payment Claim, no payment had been received from Petrobangla and that requests for an update on any action to effect payment had received no response. The Claimant wrote:

> *From Niko's perspective, the present situation is intolerable. Petrobangla is using the Stay Order to cut off a critical source of cash that Niko's indirect parent company and Niko need to survive. Petrobangla flaunts the Tribunals' unequivocal order to make immediate payment in the Third Decision on the Payment Claim. The proceedings on the Compensation Declaration that would otherwise lead to timely awards resolving these arbitrations have been indefinitely suspended, on the basis of stale allegations that these Tribunals have already considered and rejected and which the Respondents unjustifiably reiterated immediately before the Decision on Liability in the Compensation Declaration was to be rendered. The result is that Niko faces a severe reduction in working capital with no visible prospect of an award in the Payment Claim that would allow it to seize*

[32] The BELA proceedings and the 2005 Injunction have been discussed in further detail in the First Decision on the Payment Claim and in Section 2.6.1 of the Decision on the Corruption Claim.

assets under the ICSID Convention and satisfy the debt that Petrobangla has owed as from 2005 but never paid.

143. The Claimant accordingly applied for the provisional measures addressed by the Tribunal in the Decision Pertaining to the Exclusivity of the Tribunals' Jurisdiction of 19 July 2016, as just described. Referring to the final paragraph in the Tribunal's Third Decision on the Payment Claim, the Claimant requested that the Tribunal

> *Exercise the supervisory authority implied by their "remain[ing] seized of the matter [of payment for Feni gas supplied without payment] until final settlement of this payment"; failing which*
>
> *Fix early dates for costs submissions in the Payment Claim with a view toward putting the Tribunals in a position to issue an award in that arbitration forthwith.*

144. Referring to this letter from the Claimant, **the Respondents applied for reconsideration of the Third Decision of the Payment Claim on 30 June 2016**, requesting

> *… that the Tribunals reconsider their order of immediate payment and suspend any payment obligation until a final award is issued in these arbitrations.*

145. The Respondents presented three lines of argument to support this request.

146. **First**, the Respondents argued that the payment obligation depended on the Tribunals' findings on the Corruption Claim; in this respect the Respondents denied that they had recognised a right of Niko to restitution based on unjust enrichment or otherwise.

147. **Second**, the Respondents affirmed that "Petrobangla remains under orders from the Supreme Court of Bangladesh not to make any payment to Niko". They denied that the Tribunal's decisions were binding on the courts of Bangladesh and argued: "the Decisions on the Payment Claim are not awards", since they did not addressed "every question submitted to the Tribunal", as required by Article 48 of the ICSID Convention. They added:

> *If there is an award issued finding that Petrobangla owes money to Niko and if Petrobangla remains under an order not to make payments to Niko, Niko will have a right to seek*

> *enforcement against Petrobangla in the courts of Bangladesh. At that time the courts will have to comply with Article 54. […] there is no reason to assume that the courts of Bangladesh would breach their obligation under the Convention.*

148. The **third** line of the Respondents' argument again relied on the difference between the Decisions made by the Tribunals and an "award" under the ICSID Convention. They referred to the part of the Third Decision on the Payment Claim which provided that the Tribunal "will remain seized of the matter until final settlement of the payment". The Respondents submitted

> *… that this is manifestly beyond the powers of the Tribunals. The ICSID Convention does not permit final decisions on the merits of a claim with immediate payment obligations to be issued in any form other than an award and makes awards subject to annulment in accordance with Article 52. The ICSID Convention provides for a tribunal to pronounce on all issues of the dispute presented to it in its final award. Thus, the Convention provides for an all-inclusive award, in which the tribunal can resolve the entire dispute, balancing all considerations and equities between the parties. This is what Niko requested: in the Request for Arbitration under the GPSA, Niko joined all the issues, asking the Tribunals to determine "any set off on account of the Compensation Claim" and "the net amount owed by Petrobangla to Niko […]."*[33]

149. The Respondents refer to the "parties' rights to seek the Convention's post-award remedies", triggered by the final award and add:

> *If the decision to order immediate payment without issuing an award is maintained, Petrobangla will be deprived of its fundamental procedural rights established in the Convention to seek annulment and to seek a stay of enforcement of the award during the annulment proceedings.*

150. The Respondents concluded that the "questions Niko presented for arbitration have not been definitively resolved" and that there was "no reason to believe that Bangladesh will not comply with Article 54 of the Convention when there is a final award or that Petrobangla will not comply with the corresponding decisions". They stated that the Parties "initially agreed that the two

[33] The quoted passage is from RfA II, paragraphs 6.29 (d) and (e).

arbitrations would proceed concurrently and the Tribunals will issue one final award resolving all questions presented to them".

151. **The Claimant** requested to be allowed to respond and did so on 8 August 2016. It contested the corruption claim, insisting on the absence of any link between the established or even alleged acts of corruption and the GPSA. With respect to the Respondents' argument relying on the court injunction, the Claimant referred to the Tribunals' Decision Pertaining to the Exclusivity of the Tribunals' Jurisdiction. The Claimant also argued that "ICSID tribunals routinely issue decisions finally deciding specific questions before rendering the award" and that "it is settled that a Decision of an ICSID tribunal imposes a binding international obligation". The Claimant concluded that the request for reconsideration should be summarily dismissed.

152. Further to a request made at the Procedural Consultation on 10 August 2016, **the Respondents** wrote on 17 August 2016, responding to the Claimant's submission of 8 August 2016. They argued that Niko had "used bribes, or the offer of bribes, as a part of its effort to obtain its investment, and therefore cannot use the ICSID dispute settlement system for protection"; under Bangladesh law, "if the JVA was procured by corruption, the GPSA is void *ab initio*". Claims for gas delivered therefore had to be rejected. They denied that Niko could claim for Petrobangla's enrichment and that they had accepted that such a claim was admissible under the law of Bangladesh.

153. The Respondents also insisted on the difference between decisions of tribunals in the course of proceedings from decisions that "grant all the relief sought in the request for arbitration and orders payment of money for that relief". The latter decision "must be issued in an award so that the respondent can exercise its procedural rights to seek annulment and suspension of enforcement". Because of Niko's "financial trouble for many years", compliance with a payment obligation by Petrobangla now would be irreversible.

154. The Respondents confirmed their request for reconsideration, asserting: "Any payment owed to Niko can only be finally resolved after the Corruption Issue and Niko's liability for the blowouts are resolved in a final award".

155. While the Tribunals proceeded with examination of the Corruption Claim and addressed the procedural issues raised by the Parties in this context, the Parties also addressed in their correspondence the Respondents' action before the courts in Bangladesh, to which reference has been made in the preceding section.

156. **The Tribunal** then addressed the Respondents' request for reconsideration of the Tribunal's Third Decision on the Payment Claim and issued **Procedural Order No 16 on 14 November 2016**.

157. The Tribunal recalled the prior procedure concerning the Payment Claim, in particular the three Decisions on that claim. Reserving its position on the question whether, as a matter of principle, an application for reconsideration of a decision on the substance of a dispute, as made by the Respondents, is admissible in ICSID proceedings, the Tribunal examined the three lines of argument on which the Respondents had based their application.

158. With respect to the Respondents' first line of argument, the Tribunal pointed out that Petrobangla had received the gas for which it had agreed to pay and that the resulting obligation had been confirmed by the First Decision on the Payment Claim. In view of the findings in the Canadian proceedings and in the BELA proceedings before the Supreme Court of Bangladesh (which had found that "the JVA was not obtained by flawed process by resorting to fraudulent means") and the price for the gas, advantageous to Petrobangla, the Tribunal concluded, without prejudging the outcome of the examination of the additional evidence produced with the Corruption Claim that, at that stage, the avoidance of the payment obligation was not firmly established.

159. The Tribunal nevertheless assumed, for the purpose of its examination of the Respondents' request, that the Respondents' Corruption Claim was well founded and the GPSA avoidable on grounds of corruption. In that hypothesis, it would not be established that Petrobangla would be relieved of any obligation to compensate Niko for the benefit received by the gas delivered. In the circumstances, Niko's alleged financial difficulties, and the risk that Petrobangla could not recover any payments made, were no justification "for depriving Niko now of the funds on the

assumption that the Respondents' claim of avoidance of the GPSA might prevail and that, despite its enrichment [...] Petrobangla might have a claim for reimbursement".

160. With respect to the Respondents' second line of argument, the Tribunal referred to its previous decisions, in particular the Decision Pertaining to the Exclusivity of the Tribunals' Jurisdiction of 19 July 2016. The Respondents' arguments had been considered in these decisions and the Tribunal saw no justification for reconsidering its conclusions.

161. Addressing the Respondents' third argument, the Tribunal accepted that the ICSID Convention and the ICSID Arbitration Rules provide for only one award in an arbitration, and that it completes the proceedings. This does not, however, preclude ICSID tribunals from making binding separate decisions on certain issues. As the Claimant rightly pointed out in its letter of 8 August 2016, "ICSID Tribunals routinely issue decisions finally deciding specific questions before rendering the award". In its Procedural Order, the Tribunal added that "such decisions are current practice in international arbitration generally and nothing in the Convention, the Rules or ICSID practice prohibits the Tribunals from issuing a decision finally deciding Petrobangla's obligation to make payment". Referring to decisions in other ICSID cases, the Tribunal concluded that decisions made by a tribunal prior to the rendering of its award impose binding international obligations.

162. Concerning the Respondents' reliance on the agreement on a concurrent conduct of the two cases, the Tribunal pointed out that that agreement reserved the possibility for rendering the decision "as a single instrument in relation to both cases" but does not require the Tribunals to do so. The Tribunal recalled that it had issued several decisions settling certain aspects of the dispute without the Parties raising any objections or arguing that these decisions were not binding. The Tribunal mentioned in particular its Decision on Jurisdiction to which the Respondents referred repeatedly insofar as it excluded the Government of Bangladesh from the Arbitrations; the Respondents did not take the position that this decision was not final and binding.

163. The Tribunal concluded by issuing the following Order:

(i) For the reasons set out in this Procedural Order, the Tribunals decide, without determining its admissibility in principle, that the Respondents' Application of 30 June 2016 requesting reconsideration of the Third Decision on the Payment Claim, if it were admissible, would have to be denied.

(ii) They confirm that the Third Decision on the Payment Claim must be complied with according to its terms.

(iii) The Respondents are invited to report within one week of this Order on their compliance with the Third Decision on the Payment Claim.

164. On the following day (15 November 2016) the Claimant wrote to the Respondents, with copy to the Tribunal Secretary, stating that, as of 15 November 2016, the total amount owed on account of the Tribunal's decision was USD 33'129'166 and BDT 211'160'325.

165. On 22 November 2016, the Respondents informed the Tribunal that they were reviewing the Tribunal's order and had "no further information to report at this time". The Respondents did not report at any later time that they complied with the Order.

4.7 The Decision on the Corruption Claim

166. On 25 March 2016 BAPEX filed its Memorial on Damages in the proceedings on the Compensation Declaration. As part of this memorial, BAPEX alleged that the JVA had been procured by corruption. Relying on the argument and evidence presented by BAPEX, Petrobangla, in a separate letter of the same date, requested that

> *… the Tribunal find that the GPSA was procured by corruption and is thus voidable. It further informs the Tribunal of its decision to rescind the GPSA.*
>
> *[…]*
>
> *… the Tribunal vacate its Decision on the Payment Claim of 11 September 2014 as well as its Decision on Implementation of that prior decision, and enter an award dismissing Niko's claims. Petrobangla further requests that the Tribunal order Niko to bear all the costs of these proceedings and reimburse Petrobangla for all its legal fees and expenses."*

167. In their submission of 29 April 2016, the Respondents argued that

> *Niko is not entitled to any payment or credit for past performance. As a result of Niko's corruption, the Tribunal should reject all of Niko's claims and any attempt by Niko to have the Tribunal give it a benefit for its corrupt acts. In addition, in accordance with the above, the Respondents would like to modify their requests to the Tribunal. Respondents first ask that the Tribunal recognise that the JVA and GPSA are void under Bangladesh law and without legal effect. In the alternative, Respondents maintain their request to void the agreements.*

168. As explained above in Section 4.4, the Tribunals ordered that the Corruption Claim be examined with priority and suspended proceedings on the Compensation Declaration. With respect to the Payment Claim, however, the Tribunal saw no justification for deferring the Third Decision on the Payment Claim or to suspend its effect until the Corruption Claim had been decided.

169. The examination of the Corruption Claim concerned essentially the events leading to the conclusion of the JVA. After several procedural incidents, a hearing was held on the merits of the Corruption Claim from 24 to 29 April 2017.

170. The Tribunals examined the evidence and argument presented by the Respondents and issued the Decision on the Corruption Claim on 29 February 2019. The Tribunals concluded that the JVA had not been procured by corruption and remained valid and binding.

171. With respect to the GPSA, the Tribunal examined the evidence on which the Respondents relied. The Tribunal noted that the GPSA was concluded at a price which was favourable to Petrobangla and substantially below that which Petrobangla paid to other gas providers. It was the price that Petrobangla had proposed from the very beginning of the negotiations and on which it persisted, despite Niko's repeated requests for an increase.

172. The Tribunals confirmed the conclusion in the Decision on Jurisdiction to the effect that the acts examined in relation to the Canadian conviction were not instrumental in procuring the GPSA. As to other acts on which the Respondents relied, the Tribunals concluded that they had not been proved to be illegal, nor to contribute to the conclusion of the GPSA or its terms.

173. The Tribunals concluded:

> *The GPSA between Petrobangla and Niko Resources Bangladesh was not procured by corruption; there is no basis for revising the Tribunal'[s] decisions on the Payment Claim.*

5. THE CLAIMANT'S RENEWED REQUEST FOR AN AWARD ON THE PAYMENT CLAIM

5.1 The procedure

174. On 7 October 2020, **the Claimant** filed a request that the Tribunal

(a) decide the reserved question of costs in the Payment Claim;

(b) issue an award in the Payment claim; and

(c) provide in that award for post-award interest based on the Secured Overnight Financing Rate (SOFR) instead of LIBOR given the impending end of published LIBOR rate.

175. The Claimant referred to the history of the proceedings on the Payment Claim. It stated that, despite the Tribunal's three decisions, Petrobangla had not made any payment. It concluded:

> *In brief, six years have now elapsed since the Tribunals issued their Decision on the Payment Claim. It is now patent that Petrobangla will voluntarily comply with neither the Tribunals' orders nor its contractual obligations to pay for the gas that it took beginning in 2005 and has never paid for. Because Petrobangla will not pay voluntarily, it is time to allow Niko to make use of the mechanisms for enforcement provided in Section 6 of the ICSID Convention's arbitration chapter. No reason of arbitral efficiency at this stage of the proceedings justifies delaying the resolution of the Payment Claim until the Compensation Declaration is decided.*

176. Referring to the Joint First Session and the agreement on a concurrent proceeding of the two cases, the Claimant argued that there "remains no reason justifying holding the Payment Claim in abeyance". In the terms of the Summary Minutes of that session, the "circumstances distinct to one case necessitate separate treatment". The Claimant saw no circumstances that justified continued joint treatment of the Payment Claim and the Compensation Declaration.

177. The Claimant also explained that, contrary to what had been perceived in 2014, when the First Decision on the Payment Claim was issued, LIBOR was expected to be phased out sometime in 2021. The Claimant therefore concluded that the Tribunal

"should specify a rate that will continue to be published going forward". Relying on publications concerning the "Life after LIBOR",[34] the Claimant requested that

> *… the Tribunals order post-award interest on the basis of the 180-day average SOFR, which is widely accepted as the appropriate replacement for six-month LIBOR for US dollar transactions. On the understanding that the award will be forthcoming before 2021, Niko makes no request with respect to varying the pre-award interest rate at this time.*

178. Further to their request of 9 October 2020, the Tribunal invited the Respondents on 10 October 2020 to provide comments on the Claimant's request by 29 October 2020. It also invited the Parties' submissions on costs.[35]

179. In their response on 29 October 2020, **the Respondents** objected to the Claimant's request:

> *… in light of the interrelated and concurrent nature of the arbitrations, as well as the risk of a complete denial of BAPEX's right to compensation pursuant to the Decision on Liability and the JVA, the Tribunals should defer the issuance of an award in these arbitrations until the conclusion of both.*

180. The Respondents argued that "the two arbitrations are interconnected" and that the GPSA was "a by-product of the JVA". They denied that there were circumstances that "necessitate separate treatment" and added:

> *Indeed, the relationship between the arbitrations has only become more intricate following the Tribunals' ruling on liability on the Compensation Declaration because Niko potentially owes BAPEX compensation for causing the Chattak 2 well blowout.*

181. As a second reason for insisting on a continued joint proceeding for the two cases, the Respondents presented Niko's "precarious financial position". They asserted that Niko "has developed a record of defaulting on its debt positions" and provided a number of examples. The Respondents concluded:

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[34] Jonathan WATSON, IBA Finance Correspondent: Life after LIBOR, IBA Global Insight, June/July 2019 (Exhibit CLA-72) and Sabina SACCO, David KHACH VANI, LIBOR Phase-Out: Questions of Interest to Arbitrators, Kluwer Arbitration Blog, 24 June 2019 (Exhibit CLA-73).
[35] For the text of the invitation see below, paragraph 262.

Given the grave uncertainty as to Claimant's ability to compensate BAPEX for the harm arising out of the Chattak 2 Well blowout it caused, the premature issuance of an award on Payment Claim could unjustly deprive Respondents of their right to compensation following the Tribunals' Decision on Liability.

182. Both the Claimant and the Respondents presented their submissions on cost on 29 October 2020 and observations on their opponent's cost submission on 6 November 2020. The Tribunal deals with these cost submissions in Section 7 below.

183. In preparation of the November 2020 Hearing the Tribunal held a **pre-hearing conference on 4 November 2020** and identified the following item in the Agenda sent to the Parties on 2 November 2020:

> *3.5 The Claimant's request for a final award on the Payment Claim: the Tribunals assume that, following the Parties' replies to be filed on 6 November 2020, no argument on the costs related to the proceedings on the Payment Claim will be required at the Hearing.*

184. The Agenda Item was confirmed by Procedural Order No 25. In the list of Questions for the November 2020 Hearing, sent to the Parties in advance of that hearing, the Tribunal confirmed that it had reserved oral argument at that occasion. It added the following comment and questions:

> *The Tribunals recall that in their Decision on the Payment Claim, they had referred to the possibility of interim arrangements. They considered means to "preserve the funds owed to Niko for possible payments in the event Niko were found liable for damages caused by the blowouts and the quantum was determined". In their Second Decision on the Payment Claim of 14 September 2015, the Tribunals ordered that the funds owing to Niko be paid into an escrow account and indicated the modalities of setting up this account. Following this decision, the Claimant prepared the documentation for the escrow account, consulted the Respondents about the terms of this account, made the modifications in the documentation to take account of the Respondents' observations and signed the documentation. The Tribunals approved the documentation. The Respondents then confirmed that they were willing to implement the arrangements for the escrow account but stated that, before they could do so, they had to obtain a modification of a court injunction which had been issued in*

2005 by the Supreme Court of Bangladesh. The Respondents explained that they had applied for the modification of the injunction, but provided no information about the status of the proceedings; instead they presented on 25 March 2016 the Corruption Claim. Upon request of the Claimant, the Tribunals then issued on 26 May 2016 the Third Decision on the Payment Claim ordering that Petrobangla make payment forthwith.

Questions to the Respondents:

34. Are they prepared now to make forthwith payment into an escrow account, as ordered in the Second Decision on the Payment Claim?

35. Do they agree to the adjustment of the interest decision from LIBOR based to SOFR based? If not, what other solution do they propose?

Question to the Claimant:

36. Would it be prepared to accept an arrangement for payment into an escrow account, according to the terms set out in the Second Decision on the Payment Claim?

185. **At the Hearing**, **the Claimant** addressed the Respondents' letter of 29 October 2020. It insisted on the differences between the two cases and argued that they did not overlap and that no issues concerning the Payment Claim remained to be decided except costs and post-award interest.[36] It denied the Respondents' assertion that Niko was incapable of paying damages, pointing out that the assertion had been made at previous occasions and referred to Procedural Order No 16. The Claimant also referred to Petrobangla's failure to execute the Escrow Agreement and pay into the Escrow Account. The Claimant concluded:

> *Enough is enough. It is time for the Tribunals to issue an Award and allow Niko to begin enforcing against a Respondent who is not willing in good faith to comply with the Tribunals' Decisions.*[37]

186. The Claimant confirmed the request to replace in the interest calculation the reference to LIBOR by SOFOR. It proposed to

[36] Hearing on Heads of Recoverable Loss, HT, pages 251 – 252.
[37] Hearing on Heads of Recoverable Loss, HT, page 257.

present an updated calculation of pre-award interest in the Payment Claim.[38]

187. **The Respondents** agreed to a replacement of LIBOR by SOFOR for the interest calculation;[39] but they objected to an award on the Payment Claim in advance of a completion of both cases. They argued that the concurrent conduct of the proceedings had been agreed and should be continued until the end. In particular it was

> *likely that Niko owes money to BAPEX and the Government, and Petrobangla owes money to Niko, and that those should not go off on separate change, but they should be available to set each other off.*[40]

188. The Respondents insisted on the financial difficulties of Niko and argued that:

> *… it would be unfair and inequitable for BAPEX to be required to make any payment to Niko, either directly or to an escrow account.*
>
> *[…]*
>
> *And Respondents are not willing to take on the financial burden of making a payment into an escrow account that would end up risking making a payment to Niko, given that there is no indication that Respondents will be able to recoup any compensation that might be rightly owed them by Niko.*[41]

189. At the Hearing the Claimant had proposed to transmit to the Tribunal and the Respondents an updated calculation of pre-award interest calculated at the LIBOR rate up to the latest date available.[42]

190. On 7 December 2020, the Claimant communicated to the Tribunal with copy to the Respondents a table setting out the **calculation of interest on the Payment Claim up to 20 November 2020**.[43]

191. In the accompanying letter the Claimant wrote that the calculation, so far as USD amounts were concerned, was based

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[38] Hearing on Heads of Recoverable Loss, HT, pages 429 – 431.
[39] Hearing on Heads of Recoverable Loss, HT, page 308.
[40] Hearing on Heads of Recoverable Loss, HT, page 310.
[41] Hearing on Heads of Recoverable Loss, HT, page 311 and 312.
[42] Hearing on Heads of Recoverable Loss, HT, pages 429 – 431.
[43] Payment Claim Exhibit C-22 quintus.

on the six-month LIBOR plus 2% rate ordered in the Decision on the Payment Claim (para. 292(2)). The Claimant stated that it had transmitted this calculation to the Respondents on 23 November 2020 and that the Respondents advised on 4 December 2020 that they have no comment. The Claimant concluded:

> *In accordance with the attached and its position stated at the hearing (Transcript, Session 4, 430:21-431:8), Niko respectfully requests that the Tribunals in the award in the Payment Claim order that Petrobangla pay Niko USD 25,312,747 and BDT 139,988,337, plus interest (a) in the amounts of USD 13,195,703 and BDT 116,852,605 and (b) as from 20 November 2020 at the 180-day average Secured Overnight Financing Rate (SOFR) plus 2% for the US Dollar amounts and at 5% for the amounts in BDT, compounded annually.*

192. On 8 December 2020, the Tribunal invited the Respondents to comment on the interest calculation, adding the following:

> *The Tribunals clarify that such confirmation does not affect the Respondents' objection to the Claimant's request for a separate award in the payment claim to be rendered now, in advance of the award settling all outstanding matters in both arbitrations.*

193. The Respondents wrote on 15 December 2020:

> *On behalf of Respondents, we respectfully confirm that Claimant submitted its pre-award interest calculations in the Payment Claim to the Respondents on 23 November 2020, and that Respondents informed the Claimant on 4 December 2020 that we had no observations on the calculations as presented.*

5.2 Completing ICSID Case No ARB/10/18 separately from and in advance of ICSID Case No ARB/10/11

194. In its application of 15 December 2015, **the Claimant** had requested that the decision ordering Petrobangla to make immediate payment be issued in the form of an award, thereby completing the proceedings in ICSID Case No ARB/10/18, without awaiting the completion of the proceedings on the Compensation Declaration. In the request of 7 October 2020, it repeated this request.

195. The Claimant recited the procedure on the Payment Claim and the Tribunal's decisions that had ordered Petrobangla to make payment. Noting that none of these decisions has been complied with, the Claimant concludes, as quoted above, that Niko must be allowed "to begin enforcing" the Tribunal's decision.

196. **The Respondents** request that the Payment Claim and the claim for the Compensation Declaration be dealt with in a single award and that the award on the Payment Claim be deferred until the Compensation Declaration can be decided in a final manner in the form of an award.

197. The Respondents rely on two principal lines of argument, asserting (i) that the two cases were conducted concurrently, as agreed at the First Session held jointly for the two arbitrations, and that they must be decided together in a single award; and (ii) that the two cases concern the "same commercial relationship", that they are "financially connected" and that a separate award on the Payment Claim now "could unjustly deprive Respondents of their right to compensation following the Tribunals' Decision on Liability."

198. The Tribunal will consider these two arguments separately.

5.2.1 The agreement on a concurrent conduct of the two arbitrations and on issuing a "single instrument"

199. **The Respondents** point out that Niko had proposed identical Tribunals for the two cases and rely on the procedural agreement reached during the Joint First Session of the Two Arbitral Tribunals on 14 February 2011.[44] As quoted above, the Summary Minutes of this session record the procedural agreement in the following terms:

> *The parties agree that the two cases proceed in a concurrent manner as reflected in these minutes and in the procedural order concerning the procedural calendar. The Tribunals may therefore issue a single instrument (procedural order, decision or award) in relation to both cases, and may discuss the two cases jointly except where circumstances distinct to one case necessitate separate treatment.*[45]

[44] Hearing on Heads of Recoverable Loss, HT, page 309.
[45] Summary Minutes of the Joint First Session of the Two Arbitral Tribunals, page 11, Section 20.

200. Putting this agreement in its proper context, **the Tribunal** recalls the distinct nature of the two cases. The Claimant initiated two distinct arbitrations, indicating both the relationship between the two cases and their separate nature. In the first Request for Arbitration, dated 1 April 2010 and registered by ICSID on 27 May 2010 as Case No ARB/10/11, Niko stated:

> *Niko seeks to resolve the Compensation Claims and recover payment of amounts due for gas delivered through international arbitration. Niko has delivered a separate Notice to Arbitrate under the GPSA and will deliver a separate request to ICSID in that regard.*

201. As recalled above, that separate request, RfA II, was filed on 16 June 2010 and was recorded as ICSD Case No ARB/10/18. In that request Niko stated the following:

> *Niko seeks under this Request to resolve all claims to payment under the GPSA and recover payment of amounts due for gas delivered through international arbitration. Niko previously requested arbitration of the Compensation Claims, which request was registered by ICSID on May 27, 2010 and assigned case # ARB/10/11.*

202. Upon receipt of the first request for arbitration, RfA I, the Parties proceeded with the constitution of the Tribunal in ICSID Case No ARB/10/11.[46] The Claimant then requested on 9 September 2010 that, in view of the similarity and overlap of the two cases, the same tribunal be constituted for both cases. On 19 October 2010 the Respondents replied, recognising "that ICSID Case Nos ARB/10/11 and ARB/10/18 may be linked so that the modality for the constitution of the Arbitration Tribunal, the Arbitrators and the President of the Arbitral Tribunal in both proceedings may be the same".

203. Two identical tribunals were indeed constituted and, on 20 December 2010, the Secretary-General of ICSID notified the Parties that the proceedings in both cases had begun.

204. On 14 February 2011 the First Session in the two arbitrations was held and agreement was reached on a concurrent conduct of the proceedings, as quoted above.

[46] For details of the process see Decision on Jurisdiction, Section 4.1.

205. It is important to note that the Parties did not decide to consolidate the two cases into one arbitration. Prior to the First Session, the Tribunals had proposed an agenda item in the following terms: "Coordination of the two proceedings, including an examination of possibilities of their consolidation".[47] The discussion did not lead to agreement on the consolidation of the proceedings but on a concurrent conduct in the terms quoted above.

206. According to this agreement, the distinct nature of the two arbitrations was preserved; but some flexibility in the conduct of the two arbitrations was agreed. In particular, the Tribunals were given the possibility of rendering decisions that deal jointly with the two cases: "The Tribunals may" issue "a single instrument" in relation to both cases. The procedural agreement does not require the Tribunals to do so.

207. Indeed, from the very beginning the Tribunals and the Parties recognised that they were dealing with two distinct cases. These cases had points in common and differed from each other on other points. There was no obligation for the Tribunals to deal in all of their decisions with both cases.

208. This is how the procedural agreement was applied: issues that concerned both cases were heard jointly and were decided in a single instrument applying to both cases; other issues that were specific to one or the other case and to only one of the contracts were treated separately and addressed in separate decisions.

209. The distinction between the two cases and the need for separate treatment became apparent already when the Respondents' jurisdictional objections were addressed. At the Procedural Consultation, held also on 14 February 2011, the Respondents had reserved the possibility of a counterclaim. In view of this possibility, the proceedings on jurisdiction, in their initial phase, were limited to the Payment Claim in ICSID Case No ARB/10/18 and the Respondents were not required to present in the Counter-Memorial on Jurisdiction for the Payment Claim any objections to jurisdiction with respect to the Claimant's Compensation Declaration. Procedural Order No 1 provided as follows:

> *If the Respondents wish to oppose the Payment Claim on grounds of a claim for the compensation of the damage from*

[47] Summary Minutes of the Joint First Session of the Two Arbitral Tribunals, page 3.

the well blowouts (Compensation Claim), they must raise this claim with their First Counter-Memorial on Jurisdiction.[48]

210. In case the Respondents had decided to raise a claim for damages in defence against the Payment Claim, a separate arbitration concerning the Compensation Declaration could have been seen as no longer necessary. Procedural Order No 1 therefore provided that, in that situation, the Claimant had to declare whether it wished to maintain the arbitration concerning the Compensation Declaration, registered as ICSID Case No ARB/10/11.

211. The objections to jurisdiction concerning the Compensation Declaration would have become relevant only in case the Respondents did not claim for compensation for the damage from the blowouts. Only in that case would there have been a need for the Claimant to justify jurisdiction in ICSID Case No ARB/10/11. The agreed procedure provided that the Claimant had to address the jurisdictional issues with respect to the Compensation Declaration only if the Respondents had decided that they would not raise a counterclaim in ICSID Case No ARB/10/18. Therefore jurisdiction in ICSID Case No ARB/10/18 was addressed only in the Claimant's Second Memorial on Jurisdiction.[49]

212. As it turned out the Respondents did not claim for the losses caused by the blowouts in defence against Niko's Payment Claim. Instead, they requested to be authorised to extend their objections on jurisdiction also to the case for the Claimant's Compensation Declaration. This request was granted by Procedural Order No 2 of 19 September 2011.

213. From then on, the proceedings on jurisdiction concerned both cases. The hearing on jurisdiction was held jointly and the Tribunals' Decision on Jurisdiction of 19 August 2013 addressed in "a single instrument" the Respondents' objections to jurisdiction in both cases.

214. Thereafter, the Parties dealt separately with the Payment Claim and the Compensation Declaration and the Tribunals issued decisions that concerned each of the two cases separately. On other issues which related to both cases and specifically the

[48] Procedural Order No 1, paragraph 2.
[49] Procedural Order No 1, paragraph 3.

exclusivity of their jurisdiction and the Corruption Claim the Tribunals issues their decision in a "single instrument".

215. **The Tribunal concludes** that the terms of procedural agreement of 14 February 2011 and the manner in which it was implemented do not require the Tribunal to issue its decisions in a single instrument jointly with the decision of the Tribunal in the case on the Compensation Declaration. The Tribunal has the discretion to do so and, in the past both Tribunals have done so when the substance matter to be decided concerned both cases in the same or in a similar manner.

216. From the perspective of the procedural agreement the question therefore is whether there are any issues concerning the Payment Claim that remain outstanding and relate to matters also outstanding in the ongoing proceedings on the Compensation Declaration.

217. The Tribunal has decided that it has jurisdiction to decide the Payment Claim and that this jurisdiction is exclusive. It has decided that Petrobangla owes the agreed price for the gas delivered by the Niko/BAPEX Joint Venture and the amount that must be paid to the Claimant as Niko's share and the interest for the delay in this payment.

218. When, in the Third Decision on the Payment Claim of 26 May 2016, the Tribunal addressed the Claimant's request of 15 December 2015 for an award on the Payment Claim, it pointed out that at that time the proceedings on the Corruption Claim were still pending. Thar part of the proceedings concerned both cases and was conducted concurrently. The decision on this claim was issued on 25 February 2019.

219. Since then, the proceedings are limited to the Compensation Declaration. No issue concerning the Payment Claim, apart from the costs, remains outstanding. Considering the Claimant's renewed request of 7 October 2020, **the Tribunal sees therefore no justification for holding the proceedings on the Payment Claim in abeyance.**

220. **The Claimant** argues that a decision in the form of an award is now not only justified but necessary. In its request of 7 October 2020, the Claimant stressed its opinion that Petrobangla will not pay voluntarily and that Niko should be allowed "to use the

mechanism for enforcement" provided by the ICSID Convention.[50]

221. When the Tribunal, in its Third Decision on the Payment Claim, ordered that payment had to be made "immediately", it clarified that its Decisions

> *… whether in the form of an award or otherwise, must be complied with in good faith by the Parties.*

222. No payment was made by Petrobangla in compliance with this decision or any other of the Tribunal's decision ordering Petrobangla to pay. Instead, **the Respondents**, in their Application for Reconsideration of 30 June 2016, asserted that only an award would bring into play Article 54 of the ICSID Convention and ensure implementation of the Tribunals' decisions. They argued that a "decision to order immediate payment without an award" deprived them of their right to seek annulment under the ICSID Convention.[51]

223. The Tribunal concludes that not only is there no justification for delaying the award on the Payment Claim any longer; an award is indeed necessary. In the view of the Claimant, an award is necessary in order to "begin enforcing" the payment obligation long since decided by the Tribunal; in the view of the Respondents the award is necessary to enable them to avail themselves of their remedies under the ICSID Convention. In other words, the circumstances require an award and thus **"necessitate separate treatment" for the Payment Claim**, as envisaged in the procedural agreement of 14 February 2011.

5.2.2 The close commercial relationship of the Payment Claim with BAPEX's claims for compensation and Niko's alleged impecuniosity

224. **The Respondents** argue that the two cases are closely related and should be decided jointly in a single award. They rely on this close relationship as an argument distinct from that based on the procedural agreement on a concurrent conduct.

225. For the Respondents the two cases "arise out of the same commercial relationship, and essentially also both arise out of the

[50] The complete text is reproduced above in paragraph 175.
[51] For details see above Section 4.6.

JVA, although there's a subsequent agreement that was made necessary in order to implement JVA".[52] The Respondents see "one financial relationship here where it is likely that Niko owes money to BAPEX and the Government, and Petrobangla owes money to Niko, and those should not go off on separate change, but they should be available to set each other off".[53]

226. The Respondents also argue that Niko faces financial difficulties. As they "pointed out again and again, [Niko] is in dire financial straits"; Niko "would be incapable of paying Respondents at the conclusion of this arbitration what it would owe under the Award".[54]

227. **The Claimant** stresses the difference between the two claims: "One concerns a debt owed by Petrobangla to Niko under the GPSA for gas taken from the Feni field but never paid for. The other concerns the amount of Niko's liability under the JVA for the first of two blowouts at Chattak West Field".[55]

228. As to its alleged impecuniosity, the Claimant points out that this argument had been made repeatedly: "the Tribunal has considered and rejected it on multiple occasions".[56] The Claimant refers to the arrangement of an escrow account:

> *The arrangement ordered by the Tribunals denied Niko immediate access to the long-overdue funds, but it gave Niko security that its claims would be satisfied and also provided security that any amounts that Niko might owe to the Respondents would be satisfied.*[57]

229. Considering the relationship between the two cases, **the Tribunal** notes that they arise out of different contracts and these different contracts are between different parties. In the Payment Claim Petrobangla owes Niko payment for gas delivered from the Feni field; the Compensation Declaration concerns damages owed by Niko to BAPEX and the Government for a breach of its operator obligations when seeking to develop the Chattak field.

230. The difference also concerns the amounts in the two cases: the amount owed under the Payment Claim was finally determined

[52] Hearing on Heads of Recoverable Loss, HT, page 309.
[53] Hearing on Heads of Recoverable Loss, HT, page 310.
[54] Hearing on Heads of Recoverable Loss, HT, page 310
[55] Hearing on Heads of Recoverable Loss, HT, page 251.
[56] Hearing on Heads of Recoverable Loss, HT, page 252.
[57] Hearing on Heads of Recoverable Loss, HT, page 253.

in the First Decision on the Payment Claim of 11 September 2014. It was practically uncontested in the procedure and had been accepted by Petrobangla already in its Counter-Memorial of 28 November 2013.[58] The amount due by Niko remains to be determined.

231. The Respondents have not attempted to show that under the law of Bangladesh, the two claims may be set off against each other. Indeed, while the Respondents referred to a possible "position to set off the amount eventually owed by Niko under the Compensation Claim against the debt owed pursuant to the Payment Claim",[59] neither Petrobangla nor the Government have declared such set-off.

232. In these circumstances, the Tribunal has no basis for deciding that **a legal link between the two claims** requires the two claims to be decided in the same award and that the final determination of the Payment Claim be deferred until the proceedings on the Compensation Declaration are completed.

233. The Tribunal has also considered that neither Petrobangla nor BAPEX have sought to establish a link between the two claims for the following reasons.

234. Petrobangla concluded the GPSA on 27 December 2006, i.e. almost two years after the first blowout and over a year after the Government Committees had assessed the damage from the blowouts which the Government and Petrobangla are claiming in the Money Suit. In other words, when Petrobangla concluded the GPSA and committed to pay for the gas, it was aware of the losses caused by the blowouts but did not link the payment for the gas to potential claims for these losses.

235. When the Government and Petrobangla initiated the Money Suit for the damages claimed for the blowouts,[60] they made no reference to the money owed by Petrobangla to Niko. While the court in the BELA proceedings, after having declared that the JVA was not obtained by flawed process by resorting to fraudulent means", directed Niko "to pay the compensation money as per the decision to be taken in the money suit now pending …",[61] the

[58] First Decision on the Payment Claim, Section 7.1.
[59] Hearing on Heads of Recoverable Loss, HT, page 312.
[60] Merits Phase Exhibit C-006.
[61] For details on the BELA injunctions and this decision see Decision on the Payment Claim, Section 7.2 and specifically paragraph 174.

Respondents have not explained on what basis the sums owed by Petrobangla under the GPSA could be applied to claims for damages owed to BAPEX, on its own account and on account of the Government.

236. In any event, when, at the commencement of the arbitration, the Respondents had the possibility to claim for the losses due to the blowouts in defence against the Payment Claim, they did not avail themselves of this possibility.

237. This being said and despite the Respondents' decision not to invoke the claim for blowout losses in defence against the Payment Claim, the Tribunal does not overlook the relationship that, from a broader perspective, exists between the two claims: they both relate to Niko's investment in Bangladesh and the development of the two gas fields as regulated in the JVA.

238. The Claimant recognised this relationship and made different proposals in the relief requested prior to the First Decision on the Payment Claim. One of the alternative requests for relief sought by the Claimant provided that the amount owed by Petrobangla be paid into an escrow account and be disbursed to Niko

> *only to the extent that Niko's liability is less than the amount paid by Petrobangla.*[62]

239. Having determined the amount owed by Petrobangla, the Tribunal invited the Parties in the First Decision on the Payment Claim to seek agreement on the modalities for implementing the decision. As no agreement on these modalities was reached, the Tribunal fixed the details of the **escrow arrangement** in the Second Decision on the Payment Claim.

240. The Respondents assured the Tribunal of Petrobangla's intention to comply with the Tribunal's decision; but Petrobangla did not execute the escrow documents and did not make any payment into the escrow account.

241. When the Respondents objected to the Claimant's request for an award on the Payment Claim, the Tribunal reminded the Parties of the escrow arrangements and, as explained above in Section 5.1, asked: "Are [the Respondents] prepared now to make forthwith payment into an escrow account, as ordered in the

[62] Alternative C, as recorded in the First Decision on the Payment Claim, page 43.

Second Decision on the Payment Claim?" As noted above, at the Hearing the Respondents gave a clear answer:

> *… Respondents are not willing to take on the financial burden of making a payment into an escrow account …*[63]

242. The Respondents explained their refusal by the risk of not being "able to recoup any compensation that might be rightly owed them by Niko". It was pointed out to them that payment out of the escrow account would be released to Niko only if, after the determination of the quantum of liability in the proceedings concerning the Compensation Declaration, "there would be something left to be paid to the Claimant". In their reply, the Respondents referred to the proceedings in Bangladesh, the injunctions and "solvency".[64]

243. The escrow arrangement would have created a legal link between the two claims: it would have ensured the Respondents that the full amount of Petrobangla's debt would have been available to pay for any losses for which the Tribunal in the Compensation Declaration proceedings would have found Niko liable; and it would have ensured that the Claimant would be paid for that part of Petrobangla's debt not required for the payment of these losses. Such an arrangement would have taken into account the interest of both Parties, treating them equally and fairly.

244. The gas deliveries started in 2004; Niko is still waiting to be paid as agreed by Petrobangla in the GPSA of December 2006. In disregard of several decisions of the Tribunals, Petrobangla has failed to make payment. It has frustrated the escrow arrangement and does not propose any other solution that would ensure payment for the gas or at least for the balance after deduction of any compensation for Niko's liability.

245. **The Tribunal concludes** that in the absence of an agreed link consistent with equal and fair treatment of the Parties, no link is justified between the completion of the proceedings on the Payment Claim and the ongoing proceedings on the Compensation Declaration, nor by a parity of reasoning any further suspension of the Award on the Payment Claim.

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[63] Hearing on Heads of Recoverable Loss, HT, page 312.
[64] Hearing on Heads of Recoverable Loss, HT, pages 312 – 314.

5.2.3 Conclusion on the justification of a separate decision in ICSID Case No ARB/10/18 and confirmation of the Tribunal's prior Decisions on the Payment Claim

246. For the reasons explained in the preceding sections, there is no need nor justification for continuing to conduct the proceedings in ICSID Case No ARB/10/18 concurrently with ICSID Case No ARB/10/11 and no justification for linking the claims in the two proceedings. Consequently, there is no justification for delaying the award on the Payment Claim any longer. A separate award on the Payment Claim is thus justified and indeed necessary in the circumstances.

247. The Tribunal therefore closed the proceedings on the Payment Claim by Procedural Order No 29 of 24 September 2021 and now renders an award on this claim, without awaiting the completion of the proceedings on the Compensation Declaration.

248. The issues that must be addressed in this award have been determined in the Decisions on the Payment Claim made by the Tribunal in the course of these proceedings. These Decisions are binding on the Parties and had to be complied with by them. For the purpose of the present Award, and without putting into doubt their binding force, the Tribunal has reviewed these Decisions and summarised the reasons supporting them above in Section 4. The complete Decisions, setting out the Tribunal's reasons in detail, are attached to the present Award.

249. Relying on the reasons so summarised and set out more fully in the Decisions on the Payment Claim themselves, **the Tribunal confirms these Decisions and incorporates them into the present award.**

6. INTEREST

250. As explained above in Section 5.2, the Tribunal has determined in the First Decision on the Payment Claim that Niko's invoices must bear interest at the rate of six-month LIBOR for the US Dollar amounts and at 5% for the amounts in BDT. Interest is due on the amount of each invoice as from 45 days after delivery of the invoice but not before 14 May 2007 and until the payment is placed at Niko's unrestricted disposition. In the Second Decision on the Payment Claim the Tribunal decided that interest shall be compounded annually.

251. During the course of the proceedings the Claimant presented calculations of the amount of interest incurred up to specified dates. The last of these calculations was presented to the Respondents on 23 November 2020. The Claimant calculated interest until 19 November 2020, claiming USD 13'195'703 and BDT 116'852'605. The Respondents informed the Claimant on 4 December 2020 that they had "no observations on the calculations as presented".

252. The Claimant and the Respondents informed the Tribunal of this exchange on 7 and 15 December 2020, respectively.

253. The Tribunal concludes that for the time **until 19 November 2020** the amount of interest due by Petrobangla is **USD 13'195'703 and BDT 116'852'605**.

254. For the period as from 20 November 2020, the Claimant seeks a modification of the reference for the calculation of interest on the USD claim. The quotation of LIBOR will end at a date that was not certain when the matter was discussed at the November 2020 Hearing. The Claimant requested that the reference to six-month LIBOR be replaced by that to the 180 days average Secured Overnight Financing Rate (SOFR).[65]

255. The Tribunal asked the Respondents whether they agreed to the adjustment of the interest rate decision from LIBOR based to SOFR based; in case the Respondents would not agree, the Tribunal asked what other solution the Respondents proposed.[66]

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[65] Request of 7 October 2020 and Hearing on Heads of Recoverable Loss, HT, pages 258 and 429 – 431.
[66] Questions for the November 2020 Hearing, question 35.

256. At the November 2020 Hearing the Respondents agreed to the replacement:

> *The first question is whether we accept using the SOFR, that is the Secure Overnight Financing Rate, instead of LIBOR, and we certainly have no objection to that as one of the commercially accepted ways in which everybody is dealing with the disappearance of LIBOR.*[67]

257. The Tribunal concludes that, **as from 20 November 2020 interest on the outstanding USD amount shall be calculated by reference to 180-days average SOFR plus 2%**. **Interest on the BDT amount remains unchanged at the rate of 5%.** Compounding continues to apply, as determined in the Second Decision on the Payment Claim.

[67] Hearing on Heads of Recoverable Loss, HT, pages 308 – 309.

7. COSTS

258. When the Claimant requested on 7 October 2020 an award on the Payment Claim, it included a request that the Tribunal "decide the reserved question of costs in the Payment Claim".

259. In the proceedings on the Payment Claim both Parties claimed for their costs in relation to the arbitration. In its last submission before the First Decision on the Payment Claim, the Claimant requested that the Tribunal

> *Award Niko's costs in accordance with Article 61 of the ICSID Convention.*[68]

260. The Respondents requested that

> *Petrobangla is entitled to its costs in connection with the Payment Claim.*[69]

261. The Tribunal reserved the decision on costs.

262. Upon the Claimant's request of 7 October 2020, the Tribunal on 10 October 2020 invited comments on the request and included the following instructions:

> *The Tribunals further invite each party to file, by the same deadline, its submission on costs related to the payment claim proceedings, including the relevant share of the proceedings on jurisdiction. The parties may respond to their opponent's cost submissions by 6 November 2020. The payment claim has been decided and no issues remain outstanding. Therefore, the parties are in a position to quantify their costs concerning this claim now, without prejudice to the Tribunals' decision with respect to the other requests made by the Claimant in its letter of 7 October 2020.*

263. The Parties made submissions on their respective costs on 29 October 2020 and commented on 6 November on those of their opponents. Neither Party contested that the identified costs were reasonably incurred.

264. The Tribunal considered these submissions in light of Article 61(2) of the ICSID Convention which provides:

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[68] Reproduced in paragraph 132 of the First Decision on the Payment Claim.
[69] Reproduced in paragraph 135 of the Frist Decision on the Payment Claim.

> *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.*

265. The provision distinguishes between "the expenses incurred by the parties in connection with the proceedings", on the one hand, and "the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre", on the other hand. In this award, the Tribunal shall apply this distinction, referring to the first category as "**the Parties' costs**" and the second as "**costs of the proceedings**" or "**Arbitration Costs**".

266. In view of this provision, and having considered the Parties' cost submissions, the Tribunal identified the following issues arising from these submissions and the Parties' comments:

(i) should there be, in advance of the award on the Compensation Declaration by which the proceedings in both cases are completed, a separate identification and decision on the costs concerning the Payment Claim proceedings?

(ii) what are the Parties' costs with respect to the Payment Claim proceedings in the different phases of these proceedings?

(iii) what are the Arbitration Costs related to the Payment Claim proceedings?

(iv) how shall the Parties' costs and the Arbitration Costs be allocated between the Parties? and

(v) should post-award interest on the cost awarded be granted?

7.1 The Parties' cost submissions

267. In its submission of 29 October 2020, **the Claimant seeks a total of USD 224'322.98 and CAD 3'202'964.55 for its legal fees and other expenses in relation to the Payment Claim proceedings** (excluding advances to ICSID).

268. The Claimant's cost submission is divided into three sections, according to the phases of the proceedings related to the Payment Claim, viz. (i) the Jurisdiction Phase, (ii) the merits of the Payment Claim (the Payment Claim phase) and (iii) the Corruption Claim. With respect to the Payment Claim phase, the Claimant seeks the full amount of its costs. The other two phases, related to Jurisdiction and the Corruption Claim, concerned both the Payment Claim and the Compensation Declaration proceedings; the Claimant seeks an award for only half of the costs incurred in these two phases.

269. For the Jurisdiction phase, the Claimant indicates CAD 659'047.42 and USD 166'477.35 as costs incurred for legal fees and disbursements of their Canadian lawyers Gowling WGL and their Bangladeshi lawyers, A. Hossain & Associates, respectively.[70] The Claimant allocates 50% of these costs to the Payment Claim and seeks a cost award in its favour for CAD 329'523.71 and USD 83'238.68.[71] In addition, the Claimant seeks a cost award in its favour for CAD 4'294.70 as 50% of Officers' and Employees' Hearing Expenses in connection with the Jurisdiction phase of the Payment Claim proceedings.[72]

270. For the Payment Claim phase, the Claimant seeks the full amount of its legal fees and disbursements in the amounts of CAD 1'222'976.34 for Dentons Canada and Dentons Europe[73] and USD 70'938.71 for Rokanuddin Mahmud & Associates.[74] In addition, it claims USD 15'000 as payment to Madison Pacific Trust Limited related to the escrow account,[75] CAD 29'672.88 for payment of Officers' and Employees' Hearing Expenses,[76] viz. a total of CAD 1'252'649 and USD 85'939 (rounded to the nearest dollar).[77]

271. For the Corruption Claim phase, the Claimant indicates CAD 3'203'695.27 and USD 24'400 as costs incurred for legal fees and disbursements for Dentons Canada and Dentons Europe and for Rokanuddin Mahmud & Associates, respectively,[78] USD

[70] Claimant's 29 October 2020 Cost Submission, pp. 7 and 8.
[71] Claimant's 29 October 2020 Cost Submission, p. 20.
[72] Claimant's 29 October 2020 Cost Submission, p. 17.
[73] Claimant's 29 October 2020 Cost Submission, p. 12.
[74] Claimant's 29 October 2020 Cost Submission, p.12.
[75] Claimant's 29 October 2020 Cost Submission, p. 12.
[76] Claimant's 29 October 2020 Cost Submission, p. 18
[77] Claimant's 29 October 2020 Cost Submission, p. 20.
[78] Claimant's 29 October 2020 Cost Submission, p. 16.

85'891.17 for Moyes & Co as experts[79] and CAD 29'262.55 for Officers' and Employees' Hearing Expenses.[80] The Claimant allocates 50% of these costs to the Payment Claim proceedings and seeks a cost award in its favour for CAD 1'601'847.64 and USD 12'200 for legal fees and disbursements, USD 42'945.59 for expert fees and CAD 14'631.28 for Officers' and Employees' Hearing Expenses.[81]

272. In their 29 October 2020 cost submission, **the Respondents identify a total of USD 456'825.22 as their legal fees and other expenses** related to the Payment Claim proceedings (excluding advances made to ICSID).[82]

273. The Respondents' cost submission is divided into three sections, (i) legal fees, (ii) witness travel costs, and (iii) administrative costs, each of these being sub-divided between the Jurisdiction phase and the Payment Claim phase.

274. For the Jurisdiction phase, the Respondents state that half of their costs during this phase be allocated to the Payment Claim and identify USD 170'840.95 as the allocated share of the legal fees and USD 1'195.53 as administrative costs (described as including "telecommunication, transportation, express delivery, document production, translations and other administrative costs").

275. For the Payment Claim phase, the Respondents identify USD 282'816 in legal fees of Juris Counsel and Matrix Chambers and USD 1'972.74 as witness travel costs, i.e. a total of USD 284'789 (rounded to the nearest dollar).

276. **The Tribunal** notes that in their 29 October 2020 cost submissions, the Respondents only claimed for legal fees for the fees of Juris Counsel (which ended in December 2014) and those of Matrix Chambers (which ended in June 2015). The Respondents' cost submissions did not contain any indication or claim of their costs incurred thereafter. The Tribunal notes that the Parties had confirmed at the occasion of the pre-hearing conference, held on 4 November 2020, that the 6 November 2020 submissions would complete the Parties' cost submissions on the

[79] Claimant's 29 October 2020 Cost Submission, p. 17.
[80] Claimant's 29 October 2020 Cost Submission, p. 19.
[81] Claimant's 29 October 2020 Cost Submission, pp. 16, 17, 19 and 20.
[82] Respondents' 29 October Submission, p. 3.

Payment Claim. This understanding was reflected in paragraph 13 of the Summary Minutes of that conference:

> *Argument on the claim for arbitration costs concerning the Payment Claim, will be completed by the replies on 6 November 2020 and no further argument will be heard [at the November 2020 Hearing].*

277. In their 6 November 2020 letter, **the Respondents** did not advance any further claim for legal fees and "maintain[ed] their request that the Tribunals not make any determination of costs until both arbitrations have been concluded".

7.2 Should there be a separate cost decision for the Payment Claim proceedings?

278. In their cost submission of 29 October 2020, the Respondents recognise the Tribunal's discretion with respect to cost decisions as provided by Article 61(2) of the ICSID Convention. Referring to the decisions in the ICSID cases of *PNG SDP v. Papua New Guinea* and *Tulip v. Turkey*, they argue that cost decisions should be made "in light of all the circumstances" of the case and after "[t]aking into account all factors of th[e] case". They argue that in the present case,

> *the intricate connection between the Payment Claim and the Compensation Declaration prevents any consideration of "all of the circumstances" relevant for a cost award to be made before the conclusion of both arbitration[s].*

279. The Respondents also quote from the Second Decision on the Payment Claim in which the Tribunal referred to the interrelation between "the claims and decisions made by the Tribunals and those still outstanding" and deferred the cost decision requested by the Claimant to a later stage.

280. The Respondents conclude that the "reservation of an allocation of costs until the conclusion of both arbitrations remains the appropriate approach". In their comments of 6 November 2020 the Respondents repeat this request, arguing that "a truly fair and principled cost award in these arbitrations must take into consideration all of the circumstances of the case at the conclusion of both arbitrations. A piecemeal allocation of costs

would be inequitable considering the interrelated nature of all the matters raised in both arbitrations."

281. **The Tribunal** has explained above that the Payment Claim is ripe for an award that decides the claim in a final manner as provided by the ICSID Convention. Any decision on costs related to the proceedings on that claim must be made in the present award; the decision cannot be deferred to the award on another claim.

282. In any event, the merits of the Payment Claim were treated during a phase specific to that claim. Where steps in the proceedings concerned issues related to both the Payment Claim and the Compensation Declaration, the costs incurred by the Parties can be allocated accordingly, as the Claimant has shown and as the Respondents have done with respect to the Jurisdiction phase and a certain period related to the Payment Claim phase of the proceedings. Indeed, with respect to the allocation to the Payment Claim proceedings of the costs incurred during the Jurisdiction phase, the Parties agree on the ratio.

283. In the passage of the Second Decision on the Payment Claim to which the Respondents referred, the Tribunal addressed the Claimant's request for implementing the Tribunal's First Decision on the Payment Claim for which the Claimant had proposed several alternatives. The Tribunal stated:

> *The Tribunals recognise that it may be indicated in certain circumstances to decide on a party's costs not only in the final award but also at some prior stages of the proceedings. In the present case, the claims and the decisions made by the Tribunals and those still outstanding are interrelated to a point that the Tribunals consider it preferable to defer the cost decision to a later stage.*[83]

284. In that decision the Tribunal ordered payment into an escrow account. It did not exclude that "difficulties occur which prevent the operation of the Escrow Account as intended by the present decision" and provided that "any Party may address itself [to] the Tribunals for a ruling as required". Obviously, further proceedings and further claims for costs remained possible. Since then, the Tribunal has completed the proceedings on the Payment Claim and now concludes that a deferral of the cost decision is no longer justified.

[83] Second Decision on the Payment Claim, paragraph 166.

285. The Tribunal therefore decides that it is proper for a decision on the costs incurred in relation to the Payment Claim to form part of the present award.

7.3 The Parties' costs for the proceedings on the Payment Claim, as accepted by the Tribunal

286. Before deciding "how and by whom" the Parties' costs are to be paid, the Tribunal must assess the costs to be considered in the context of the Payment Claim proceedings. This assessment concerns (i) the amounts of the costs indicated by the Parties and their evidentiary support (ii) the question whether any costs incurred in relation to the Payment Claim should be excluded, (iii) with respect to those phases of the arbitrations during which both the Payment Claim and the Compensation Declaration were dealt with, the size of the share of these costs that must be allocated to the Payment Claim proceedings. The Tribunal shall consider these aspects separately.

7.3.1 Evidence of the Parties' costs

287. **The Claimant** explained that "[i]n accordance with general practiced in international arbitration and with ICSID Arbitration Rule 28(2)", it presented "detailed tables stating the costs that it has reasonably incurred" and asserted that these "costs are supported but in accordance with ICSID practice Niko does not burden the record with the supporting materials at this time". The Claimant adds that it "would be pleased to present invoices or information concerning such costs upon the Tribunals' request".[84] In the tables forming part of its submission, the costs are grouped by the three phases of the Payment Claim proceedings and supported it by a list of all invoices, identifying the author of the invoice, the date and the amount and stating that the amount was paid.

288. **The Respondents** have not questioned this mode of proceedings and the amounts indicated in the Claimant's tables.

[84] Claimant's 29 October 2020 Cost Submission, paragraph 6.

289. The Respondents presented for each of the Jurisdiction and the Payment Claim proceedings lump sums of costs for legal fees, witnesses and administrative costs.

290. **The Claimant** objected that it "does not consider the level of detail provided in the Respondents' Cost Submission to be acceptable. It is not apparent from that submission who was paid what when." The Claimant has not, however, requested more detailed information for the cost decision on the Payment Claim but "calls for and reserves its right to request an order requiring more detailed cost submissions in the Compensation Declaration at the appropriate time".[85]

291. In these circumstances, **the Tribunal** sees no need for requesting the supporting evidence and information offered by the Claimant nor supporting evidence for the costs claimed by the Respondents. It accepts that the costs were incurred as stated in the Parties' submissions of 29 October 2020.

7.3.2 Should any Payment Claim-related costs be excluded?

292. When examining the indications of the Parties' costs, the Tribunal noted differences between these claims with respect to both the Payment Claim phase and the Corruption Claim phase. The Tribunal therefore will first examine whether any of the costs related to the Payment Claim should be excluded from the determinations in this Award.

293. Concerning the **Payment Claim phase**, the Tribunal noted the substantial difference between the Parties with respect to legal fees and disbursements. While the Claimant sought CAD 1'252'649 and USD 85'939, corresponding together to some USD 1 million,[86] the Respondents indicated only USD 284'789 (rounded to the nearest dollar) The Respondents explained that the fees and disbursements were those of Juris Counsel and Matrix Chambers. The services provided by Juris Counsel ended in December 2014 and those of Matrix Chambers in June 2015, i.e. before the Tribunal's Second Decision on the Payment Claim

[85] Claimant's submission of 6 November 2020, page 2.
[86] Applying the daily exchange rate of 1 CAD = 0.74 USD, published by the Bank of Canada on the date of the Parties' cost submissions, 29 October 2020, available at https://www.bankofcanada.ca/rates/exchange/daily-exchange-rates-lookup/?series%5B%5D=FXUSDCAD&lookupPage=lookup_daily_exchange_rates_2017.php&startRange=2011-09-16&rangeType=range&rangeValue=&dFrom=2020-10-29&dTo=2020-10-29&submit_button=Submit.

on 14 September 2015. No mention is made of any fees by Foley Hoag, whose appointment was announced by the Respondents on 9 July 2015, two months before the Second Decision on the Payment Claim.

294. The Respondents did not provide any explanation why for the Payment Claim phase no fees other than those for Juris Counsel and Matrix Chambers were indicated.

295. The Tribunal also noted the difference between the Parties concerning the costs relating to the Payment Claim during the **Corruption Claim phase**. The Claimant seeks over USD 1.2 million,[87] while the Respondents do not make any claim for this phase. In their 6 November 2020 submission, the Respondents object that the Claimant included any costs that arose in the context of the Corruption Claim.

296. In support of this objection, the Respondents argue that the Tribunal had "only requested information on costs related to the Payment Claim proceedings and the relevant share of the proceedings on jurisdiction in their communication of 10 October 2020". The Respondents state:

> *The Tribunals appropriately did not include the costs related to the Corruption Claim proceedings in their request for cost information. Accordingly, to the extent it determines that a partial award of costs is appropriate at this time, the Tribunals should exclude Niko's claim for costs related to the Corruption Claim proceedings.*

297. The Respondents conclude on this point:

> *… Niko's claim for costs related to the Corruption Claim proceedings should be excluded from any consideration of a partial award of costs at this stage of the proceeding.*

298. Considering this position of the Respondents, **the Tribunal** takes as starting point Article 61(2) of the ICSID Convention, as quoted above, which provides that the decision on the Parties' costs and the Arbitration Costs "shall form part of the award". Neither the Convention nor the ICSID Arbitration Rules provide for a partial

[87] As indicated above, the Claimant seeks CAD 1'601'847.64, USD 12'200 for legal fees and disbursements, USD 42'945.59 for expert fees and CAD 14'631.28 for Officers' and Employees' Hearing Expenses, applying the daily exchange rate of 1 CAD = 0.74 USD, published by the Bank of Canada on the date of the Parties' cost submissions, 29 October 2020.

award which reserves the decision on costs or on some of the costs for a later award. It is therefore clear that in ICSID arbitration the parties must present the claims for all costs which they seek to recover in time for the arbitral tribunal to consider them and rule on them in the award.

299. The Claimant's presentation of its claim for its Payment-Claim-related costs during the Corruption Claim phase in its cost submission of 29 October 2020 was therefore justified. The Tribunal must consider the costs so claimed and rule on them in the present award without reserving the presentation of any of the Payment-Claim-related costs and without reserving its decision on any of the presented costs.

300. Contrary to what the Respondents assert, when the Tribunal fixed on 10 October 2020 the time for the cost submissions concerning the Payment Claim, it did not exclude the costs in the Corruption Claim phase that related to the Payment Claim. This is clear from the text of the instructions themselves, quoted above and repeated here for ease of reference:

> *The Tribunals further invite each party to file, by the same deadline, its submission on costs related to the payment claim proceedings, including the relevant share of the proceedings on jurisdiction. The parties may respond to their opponent's cost submissions by 6 November 2020. The payment claim has been decided and no issues remain outstanding. Therefore, the parties are in a position to quantify their costs concerning this claim now, without prejudice to the Tribunals' decision with respect to the other requests made by the Claimant in its letter of 7 October 2020.*

301. By this communication, each Party was invited to present "its submission on costs related to the payment claim proceedings"; by inviting the inclusion of the "relevant share in the proceedings on jurisdiction", the Tribunal did not exclude any costs. If there would have been any need for clarification, it was provided in the same paragraph by the passage stating that the Parties were "in a position to quantify their costs concerning this claim now".

302. Similarly, when the Tribunal presented the List of Issues for the pre-hearing conference on 4 November 2020 it made it clear that it did not consider any costs related to the Payment Claim as

reserved or excluded. With respect to the Claimant's request for a final award on the Payment Claim, the Tribunal included the following statement:

> *… the Tribunals assume that, following the Parties' replies to be filed on 6 November 2020, no argument on the costs related to the proceedings on the Payment Claim will be required at the Hearing;*

303. The statement reserved no item of cost concerning the Payment Claim and there was no basis for the Respondents to assume that the Payment-Claim-related costs during the Corruption Claim phase had been excluded from the award on the Payment Claim.

304. Indeed, the Respondents addressed in their submission of 6 November 2020 the situation that "some portion of the Corruption Claim proceedings were to be included in the costs of the Payment Claim proceeding" and presented argument on this "portion". The Tribunal will consider this argument below.

305. **The Tribunal concludes** that there is no basis for assuming that, contrary to Article 61(2) of the ICSID Convention, some costs related to the Payment Claim proceedings had been excluded from the scope of the award on the Payment Claim. The Respondents were aware that the Payment-Claim-related costs would be considered as part of the costs that the Tribunal would address in the present Award and they presented arguments with respect to these costs. The Tribunal sees no basis for excluding these costs from the cost decision in the present award.

7.3.3 The Parties' costs relevant for the Payment Claim proceedings and specifically, the share of the costs in the Jurisdiction phase and the Corruption Claim phase that should be allocated to the Payment Claim proceedings

306. It is uncontested that the costs indicated by the Parties for the **Payment Claim phase** fully concern the Payment Claim proceedings. As noted above in Section 7.1,

- the Claimant identifies these costs as CAD 1'252'649 and USD 85'939; and
- the Respondents as USD 284'789.

307. In the Jurisdiction phase and the Corruption Claim phase of the two arbitrations, the Parties argued, and the Tribunals had to consider, issues that related both to the Payment Claim and the Compensation Declaration. The Parties have discussed, and the Tribunal must decide, which share or portion of the costs in each of these phases relates to the Payment Claim and must be considered in the Tribunal's award on this claim.

308. With respect to **the Parties' costs for the Jurisdiction phase**, the Parties agree that the costs they incurred in this phase are to be allocated in equal shares to the Payment Claim and to the Compensation Declaration proceedings.

309. The Tribunal notes that, as reflected in the Decision on Jurisdiction, the vast majority of the issues considered during this Jurisdiction phase concerned both claims. Those issues that related specifically to claims under the JVA, of relevance primarily to the Compensation Declaration, were not substantially more important than those related to the Payment Claims under the GPSA.

310. **The Tribunal therefore accepts** that 50% of the Parties' costs for the Jurisdiction phase be allocated to the Payment Claim proceedings.

311. As mentioned above in Section 7.1,

- the Claimant allocates to the Jurisdiction phase of the Payment Claim proceedings, CAD 329'523.71 and USD 83'238.68 for legal fees and CAD 4'294.70 for Officers' and Employees' Hearing Expenses; and

- the Respondents allocate to this phase USD 170'840.95 for legal fees and USD 1'195.53 for administrative costs.

312. With respect to the **Parties' costs for the Corruption Claim phase**, the Parties take different positions concerning the share of these costs that concern the Payment Claim proceedings.

313. **The Claimant** asserts that 50% of its costs for this phase of the two proceedings must be attributed to the Payment Claim proceedings.

314. As just discussed, **the Respondents** do not agree that any costs related to the Corruption Claim phase should be considered in

the present award. They also deny that 50% of the Parties' costs for the Corruption Claim in the two proceedings should be allocated to the Payment Claim proceedings.

315. The Respondents accept that the Corruption Claim concerned allegations of corruption related to both the JVA and the GPSA. They assert, however, that this claim "predominantly addressed allegations of corruption concerning the [JVA]".

316. The Tribunal agrees. The allegations of corruption concerned primarily Niko's initial approaches to the Government and its attempts to reach agreement on the JVA.

317. **The Respondents** do not indicate the share of their Corruption Claim costs that concerns the Payment Claim proceedings. They refer to Procedural Order No 13 of 26 May 2016 to conclude that the Tribunals' decision on the Corruption Claim "would affect primarily the Compensation Declaration, not the Payment Claim".[88] They assert that in Procedural Order No 13

> *… the Tribunals decided that the Corruption Claim proceeding would have no impact on their Decision on the Payment Claim of 11 September 2014, and confirmed Respondents' obligation to comply with that decision regardless of the outcome of the Corruption Claim.*

318. In support of this assertion, the Respondents quote from Procedural Order No 13. "Having weighed these considerations, the Tribunals, by their Third Decision on the Payment Claim, issued today, have ordered that this payment obligation must be implemented forthwith." As an examination of Procedural Order No 13 shows, this part of the order was determined by the status of the Tribunal's decisions on the Payment Claim and the possible consequences of a decision accepting the Respondents' request that the Tribunal declare the GPSA as null and void on grounds of corruption.

319. The order did not imply that the allegation of a corrupt procurement of the GPSA was not a matter to be examined during the proceedings on the Corruption Claim. Quite to the contrary, the first item of the operative part of Procedural Order No 13 was:

[88] Respondents' submission of 6 November 2020, page 2.

The Tribunals will now, as a matter of priority, examine whether the JVA and/or the GPSA were procured by corruption (the Corruption Issue).

320. **The Tribunal** concludes that the Parties were advised that the alleged corruption in relation to the procurement of the GPSA was part of the proceedings on the Corruption Claim; the Parties did indeed address in their submissions the alleged corruption in the procurement of the GPSA.

321. When determining the share of the Parties' costs related to the Corruption Claim phase that must be allocated to the Payment Claim proceedings, the principal criterion, in the Tribunal's view, must be the time and effort reasonably spent on developing argument and evidence for and against the alleged corruption in the procurement of the GPSA and related matters concerning the Payment Claim. The Parties have not provided any details on the relative importance of this time and efforts nor on the costs engaged for these efforts. The Tribunal must therefore rely on indicia of the relative magnitude of forensic activity.

322. The efforts concerning argument in relation to the procurement of the GPSA were not negligible, in particular since the only uncontested act of corruption occurred after the conclusion of the JVA and during the time when Niko attempted to obtain the GPSA. Nevertheless, by far the largest part of the Parties' argument concerned the many allegations concerning the period leading to the conclusion of the JVA.

323. Indeed, the Corruption Claim was brought by BAPEX as part of its Memorial on Damages in the proceedings on the Compensation Declaration; Petrobangla merely supported the argument by a letter relying on BAPEX's memorial. This approach can be seen as an indication that, from the very beginning of the proceedings on the Corruption Claim, the JVA and the Compensation Declaration were predominant.

324. The Tribunal also considered that the Parties' time and effort in arguing the Corruption Claim found some reflection in the Tribunal's own work, when preparing the Decision on the Corruption Claim. The Tribunal concludes that, in the absence of concrete information about the Parties' efforts and costs, this decision may be taken as guidance for estimating the Parties' work.

325. In the overall 580 pages of the Decision on the Corruption Claim only Sections 4.2 and 11.8 (together some 20 pages) are identified as dealing specifically with the GPSA. None of the "Governmental Acts Allegedly Procured by Corruption" concerned that agreement and among the "Specific Suspect Payments" only Section 11.8 deals with the GPSA. It must be considered also that there are other sections in the Decision which directly or indirectly relate to the GPSA and thus concern the Payment Claim; but in these sections that share is small.

326. Considering the Decision in its entirety, the Tribunal estimates that its own work related to the GPSA did not exceed 15% of the total work on the Corruption Claim.

327. On this basis, in the absence of any direct information on the relative size of the share concerning the Payment Claim proceedings in the Parties' work and hence the Parties' costs and availing itself of the discretion afforded by the Article 61(2) of the ICSID Convention, the Tribunal estimates that 15% of the costs of the Corruption Claim phase in the proceedings on both claims relate to the Payment Claim proceedings.

328. **The Tribunal determines** therefore the **Payment-Claim-related cost for the Corruption Claim phase** as follows:

- for the **Claimant** the 15% share of these costs amount to CAD 480'554 and USD 3'660 for legal fees and disbursements, USD 12'884 for expert fees and CAD 4'389 for Officers' and Employees' Hearing expenses, i.e. a total of CAD 484'943 and USD 16'544; and

- the Tribunal is unable to determine the costs incurred by the **Respondents** since they did not identify any costs related to the Corruption Claim phase.

7.4 The Arbitration Costs

329. Apart from the Parties' costs, the other group of costs that, as explained above, the Tribunal must consider according to Article 61(2) of the ICSID Convention concerns "the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre", to which the Tribunal refers as the Arbitration Costs.

330. In their cost submissions the Parties listed advances they had paid to ICSID during the course of the proceedings. These payments are just that, advances. The actual costs must be decided in the award. The advances paid by the Parties are not conclusive for this decision.

331. At the Joint First Session, it was agreed that the Parties shall defray the cost of the proceedings in ICSID Case Nos ARB/10/11 and ARB/10/18 in equal parts, without prejudice to the final decision of the Tribunals as to the allocation of costs in each case. In the course of the proceedings, the Parties have made advance payments in ICSID Case Nos ARB/10/11 and ARB/10/18 in equal amounts, and ICSID has made disbursements in these proceedings accordingly in equal parts following the First Session, amounting to USD 1'932'697.52 in ICSID Case No ARB/10/18 and USD 1,932,807.67 in ICSID Case No ARB/10/11,[89] totalling USD 3'865'505.19 in the two cases, as is reflected in the Financial Statements provided by ICSID to the Parties.

332. These disbursements in equal parts did not determine whether the costs so paid actually were costs of one or the other case or costs concerning the two cases jointly. Since the Parties' liability for the Arbitration Costs is not necessarily the same in both cases, fairness of the Tribunal's decision concerning the question "by whom [the costs] shall be paid" requires that the disbursements made in equal parts be analysed so as to determine the costs actually incurred for each case.

333. The Tribunal therefore determines the Arbitration Costs related to the Payment Claim proceedings. To this effect, the Members of the Tribunal identified to the ICSID Secretariat fees and expenses incurred in relation to the Payment Claim proceedings and requested the Secretariat to group all disbursements in the two arbitrations related to the Jurisdiction phase, the Corruption Claim phase, and the Payment Claim phase, except for the Centre's Administration Fees.

334. The Tribunal allocates all disbursements in relation to the Payment Claim phase to ICSID Case No ARB/10/18. With respect to the disbursements in the Jurisdiction phase and the

[89] The USD 110.15 difference between the disbursements in the two arbitrations relates primarily to expenses incurred prior to the First Session.

Corruption Claim phase, the Tribunal allocates only a portion to the Payment Claim proceedings, applying the ratio determined above, viz. 50% of the disbursements in the Jurisdiction phase and 15% of the disbursements in the Corruption Claim phase.

335. Based on this calculation, the Tribunal has determined that the total Arbitration Costs allocated to the Payment Claim proceedings amount to **USD 1'116'627.96**, composed of the following cost items per phase:

	Jurisdiction Phase	**Corruption Claim Phase**	**Payment Claim Phase**	**Administration Fee**	**Total**
Arbitrator Fees and Expenses					
Michael E. Schneider	94'410.96	88'589.36	244'526.26		427'526.58
Campbell A. McLachlan	39'669.94	22'913.27	51'816.94		114'400.15
Jan Paulsson	19'291.59	17'942.12	76'409.04		113'642.75
Total Fees and Expenses	153'372.49	129'444.74	372'752.24		655'569.47
Total Direct Costs	27'384.31	14'787.98	50'886.21		93'058.49
Administration Fee				368'000.00	
Total	**180'756.80**	**144'232.72**	**423'638.44**	**368'000.00**	**1'116'627.96**

336. The ICSID administration fee in ICSID Case No ARB/10/18 has been collected on an annual basis. A phase-by-phase allocation of this fee in the same manner as the other cost items is therefore not possible. The Tribunal decides to allocate this fee therefore to the three phases of the Payment Claim proceedings in the same proportion as that of the other Arbitration Costs taken collectively, i.e.:

- 24% or USD 88'320.00 to the Jurisdiction phase;
- 57% or USD 209'760.00 to the Payment Claim phase; and
- 19% or USD 69'920.00 to the Corruption Claim phase.

337. As a result, the Arbitration Costs for the three phases in the Payment Claim proceedings are the following:

- **For the Jurisdiction phase USD 269'076.80**, consisting of
    - (i) 50% of the total costs incurred during the Jurisdiction phase in ICSID Case Nos ARB/10/11 and ARB/10/18 (for the fees and expenses of the Tribunal and the direct costs of the Centre) in the amount of USD 180'756.80 and
    - (ii) USD 88'320.00 as the proportionate 24% share of the ICSID administrative fee for the Jurisdiction phase;
- **For the Payment Claim phase USD 633'398.44**, consisting of
    - (i)100% of the costs incurred during the Payment Claim phase for the fees and expenses of the Tribunal and direct costs of the Centre in the amount of 423'638.44 and
    - (ii) USD 209'760.00 as the proportionate 57% share of the ICSID administrative fee for the Payment Claim phase; and
- **For the Corruption Claim phase USD 214'152.72**, consisting of
    - (i) 15% of the total costs incurred during the Corruption Claim phase in ICSID Case Nos ARB/10/11 and ARB/10/18 (for the fees and expenses of the Tribunal and the direct costs of the Centre) in the amount of USD 144'232.72 and
    - (ii) USD 69'920.00 as the proportionate 19% share of the ICSID administrative fee for the Corruption Claim phase.

7.5 Who must pay for the costs of the Payment Claim proceedings?

7.5.1 Criteria for allocating the responsibility for the costs

338. As pointed out by the Respondents, the ICSID Convention does not, as some arbitration rules do, impose rules concerning the allocation of the costs between the parties to an arbitration. Article 61(2) of the ICSID Convention requires the Tribunal to decide "how and by whom" the costs shall be paid; but, unless otherwise agreed by the parties, the provision leaves discretion to the tribunal how it does so. In the present case, no agreement was made by the Parties with respect to the costs.

339. The Claimant identifies what it considers the key factors relevant to the allocation of costs by stating that they

> *… include the party's success on the claims or defenses presented and whether a party's conduct in the proceedings increased their cost or resulted in delay.*[90]

340. The Respondents did not object to these criteria; they pointed out: "In making a determination on allocation of costs, ICSID tribunals typically considered the entirety of the aspects of the case".

341. **The Tribunal** confirms that allocating costs according to the outcome of the arbitration is a widely applied principle in international arbitration in general[91] and is also applied in ICSID proceedings.[92] In any event, the Claimant's assertion that the parties' success was a key factor in the allocation of the costs is uncontested by the Respondents.

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[90] Claimant's cost submission of 29 October 2020, paragraph 7.

[91] As example the Tribunal refers to the UNCITRAL Arbitration Rules, recommended in their 2010 version by a resolution of the United Nations General Assembly. In their Article 42 (1), these rules provide that "The costs of the arbitration shall in principle be borne by the unsuccessful party or parties".

[92] *See e.g.*, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, paragraph 316; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paragraph 151; *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009, paragraph 156; *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award, 31 March 2011, paragraphs 364-366; *Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Savings & Loan, Ltd v. Macedonia, former Yugoslav Republic of*, ICSID Case No. ARB/12/31, Award, 22 September 2015, paragraphs 150-151; *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 27 October 2015, paragraphs 473-780; *Ickale Insaat Limited Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016, paragraph 409.

342. The Parties' conduct in the proceedings, including in the Tribunal's view the extent to which a party caused costs which were reasonably justified for its defence, is another key factor identified by the Claimant without contradiction from the Respondents.

343. When deciding allocation of a party's costs the Tribunal is of the view that it must consider not only whether the action for which the costs were engaged were reasonably justified; it also must consider whether the amount of the costs so engaged is reasonable. In this respect, the Parties have not raised any objections about their opponent's cost claim.

344. The Parties' submissions do not contain any information that would justify the exclusion from any of the claimed amounts any costs that were unreasonable or unreasonably high. In this respect not even the comparison of the costs claimed by the Parties for their defence can serve as a reliable consideration, since only the costs claimed for the work during the Jurisdiction phase cover the same scope and time period.

345. Finally, the Tribunal agrees with the Respondents that, when determining the allocation of costs, it must consider "the entirety of the aspects of the case". Where relevant, the Tribunal will therefore consider and assess each of the cost claims in their context of the Payment Claim.

7.5.2 The costs for the Jurisdiction phase

346. **The Claimant** argues that "the Respondents were not successful in the jurisdiction phase as concerned the Payment Claim. The Tribunals retained jurisdiction to decide the claim". The Claimant considered different arguments raised by the Respondents and concludes "the Tribunal accepted only one of the multiple objections to jurisdiction".

347. **The Respondents** identified their costs concerning the Jurisdiction phase but did not provide argument about how these costs should be allocated.

348. **The Tribunal** recognises that most of the Respondents' objections to the Tribunal's jurisdiction with respect to the Payment Claim proceedings were rejected in the Decision on Jurisdiction. The objection which the Tribunal did uphold,

however, was of critical importance. The Claimant had attempted to include the People's Republic of Bangladesh in both arbitrations, the one dealing with the Compensation Declaration and the other on the Payment Claim. The role of the Government, representing the State, in the contractual arrangements for the Claimant's investment remained relevant throughout the arbitration. The outcome of this issue weighs heavily in the Tribunal's considerations.

349. For this reason, and considering the jurisdictional dispute in its entirety, the Tribunal concludes that **each party must bear its own costs for the Jurisdiction phase** in the Payment Claim proceedings. There is therefore no need for the Tribunal to examine whether the Parties' costs were reasonable and no Party claims that it was compelled by the conduct of the other Party to engage costs that were not reasonably justified.

350. The Tribunal further concludes that **the Arbitration Costs in connection with the Jurisdiction phase** in the Payment Claim proceedings in the amount of **USD 269'076.80**, as identified above, **must be borne by both Parties in equal shares USD 134'538.40 each**.

7.5.3 The costs for the Payment Claim phase

351. With respect to the part of the proceedings dealing **specifically with the Payment Claim**, **the Claimant** points out that "three successive Decisions on the Payment Claim ruled respectively for Niko on liability and quantum, compounded interest and payment terms".

352. **The Respondents** have not provided any argument why the corresponding costs should not be awarded to the Claimant.

353. **The Tribunal** considered that in all three Decisions on the Payment Claim it found for the Claimant, requiring Petrobangla to pay for the agreed price for the gas delivered. The attempts to provide for escrow arrangements that would have made the payment for the gas under the GPSA available for any compensation due in relation to the blowout losses could not be implemented due to Petrobangla's failure to execute the escrow documentation and to make the required payment into the escrow account.

354. Taking the dispute on the Payment Claim in its entirety, the Tribunal sees no basis for imposing on the Claimant any share of the Arbitration Costs specific to the part of the proceedings dealing with the Payment Claim and for denying the Claimant full compensation for its own costs in this phase of the proceedings.

355. The Respondents have not shown any part of the Claimant's cost with respect to this phase of the proceedings for which the Claimant was not reasonably required to expend the claimed costs, nor have they argued that any of the relevant costs was not reasonably required.

356. In the information provided by the Parties the Tribunal has not seen any reason why the costs claimed by the Claimant should be reduced. A comparison of the costs identified by the Parties is not helpful since the costs identified by the Respondents apparently are incomplete and cover only the legal services Juris Counsel (which ended in December 2014) and those of Matrix Chambers (which ended in June 2015).

357. By the time when the identified services ended only the First Decision on the Payment Claim had been rendered. Thereafter, the proceedings on the Payment Claim continued, leading *inter alia* to the Second and Third Decision on the Payment Claim, the Decision pertaining to the Exclusivity of the Tribunals' Exclusive Jurisdiction and to the proceedings on the Respondents' Application for Reconsideration of the Third Decision on the Payment Claim. Obviously, important parts of the Respondents' activity in relation to the Payment Claim phase are not included in the costs identified by the Respondents. The amount presented by the Respondent therefore cannot serve for a comparison with the amount claimed by the Claimant for its cost.

358. For these reasons, the Tribunal has no basis for considering that the amount claimed by the Claimant for its costs related to the Payment phase is unreasonable.

359. The Tribunal therefore accepts the full amount claimed by the Claimant and concludes that the Respondents must

- pay to the Claimant **CAD 1'252'649 and USD 85'939** as compensation for the Claimant's cost in relation to the Payment Claim phase; and

- bear the entirety of the Arbitration Costs related to the Payment Claim phase in the amount of **USD 633'398.44**, as identified above.

7.5.4 The share of the Corruption Claim costs allocated to the Payment Claim proceedings

360. With respect to the costs of the Corruption Claim to be allocated to the Payment Claim proceedings, **the Claimant** points out that the Tribunal "rejected in its entirety the Corruption Claim". Therefore, the Claimant claims that the costs claimed and quantified be awarded to it.

361. **The Respondents** disagree that these costs should be considered at this stage of the arbitration, but they do not contest the amount of the Claimant's Payment-Claim-related costs incurred in connection with the Corruption Claim and they do not present any argument why they should not be awarded to the Claimant.

362. **The Tribunal** observes as a starting point that the Claimant fully prevailed on this claim. The Tribunal also placed this claim in the overall context of the arbitration and considered that the Respondents had raised a corruption objection already during the Jurisdiction phase; this objection was dismissed in 2013. Almost three years later the Respondents raised another, broader corruption claim, based on allegations of which at least some were known long before they were raised in the arbitration. The objections required extensive work both from the Claimant and from the Tribunal.

363. The Tribunal also considered the broad scope of the Respondents' allegations and the diversity of charges as well as the number of procedural applications. The Respondents have not contested the amount of costs for which the Claimant seeks compensation. The Tribunal has no basis for considering this amount as excessive and to reduce the amount to be awarded for 15% of the Claimant's overall costs for its defence against the Corruption Claim.

364. The Tribunal therefore sees no justification for placing on the Claimant any of the Arbitration Costs for this phase of the Payment Claim proceedings and no justification for denying the Claimant compensation for its cost allocated to the Payment Claim proceedings.

365. Applying its determination of the 15% share of the Corruption Claim set out above, the Tribunal concludes that the Respondents must

- pay to the Claimant **CAD 484'943 and USD 16'544** as contribution to the Claimant's cost allocated to the Corruption Claim phase of the Payment Claim proceedings; and

- bear the entirety of the Arbitration Costs related to the Corruption Claim phase of the Payment Claim proceedings in the amount of **USD 214'152.72**, as identified above.

7.5.5 Conclusion on the decision on costs

366. In conclusion and based on the Tribunal's rulings above, the Respondents must pay to the Claimant **CAD 1'737'592 and USD 102'483** as contribution to the **Claimant's costs** incurred in these Payment Claim proceedings.

367. The **Arbitration Costs** for these proceedings, in a total of **USD 1'116'627.96**, are allocated as follows:

Phase	Claimant	Respondents
Jurisdiction	134'538.40	134'538.40
Payment Claim	0	633'398.44
Corruption Claim	0	214'152.72
Total	**134'538.40**	**982'089.56**

368. As calculated by the Tribunal, the Arbitration Costs for ICSID Case No ARB/10/18 are USD 1'116'627.96. A disbursement of this amount in equal shares amounts to USD 558'313.98 each by the Claimant and the Respondents. It follows that the Claimant has paid more than its share in the Arbitration Costs as determined by the Tribunal, and the amount paid by the Respondents falls short of their share in these costs. The difference is USD 423'775.58 (i.e. 558'313.98 – 134'538.40 = 423'775.58). The Claimant's payments exceed the amount of its cost liability by this amount and those of the Respondents fall

short by it. **The Respondents must therefore pay USD 423'775.58 to the Claimant**.

7.6 Post-award interest on the costs awarded to the Claimant

369. The Claimant also seeks post-award interest on the costs awarded. It justifies this claim by "the substantial amount of time that has passed without Niko being able to recover these costs due to the conduct of the Respondents". The Respondents have not commented on this request.

370. In the Decision on the Payment Claim, the Tribunal considered the Claimant's claim for interest. The Tribunal was "guided by the objective that the successful party should be compensated for having been kept out of its money to which it was entitled".[93] On this basis, the Tribunal awarded interest on the amounts owed under the GPSA. Based on the law of Bangladesh and the reports of the Bangladesh Export Development Fund (**EDF**) concerning foreign currency facilities, as produced in the arbitration, the Tribunal concluded that for USD debts the "rate of six-month LIBOR plus 2%, as sought by the Claimant, thus is a reasonable rate in the context of commercial conditions in Bangladesh".[94]

371. This conclusion applied to the amount owed by Petrobangla for the gas delivered and not paid. The decision on costs was reserved. With respect to costs, the Tribunal now holds that Niko must be compensated for due (indeed long due) portions of the money so expended for its own defence in the arbitration and by the advances to the Arbitration Costs. Article 61(2) of the ICSID Convention grants to tribunals power not only to "assess the expenses incurred by the parties" and "by whom" those expenses shall be paid, but also "how" this must be done.

372. In view of this provision the Tribunal is of the view that it may determine the period by which the awarded costs must be paid and the consequences if the payment is not made by the end of this period.

373. When determining the claim for interest on the payments under the GPSA, the Tribunal noted that Article 11.1.3 of the GPSA

[93] First Decision on the Payment Claim, paragraph 257.
[94] First Decision on the Payment Claim, paragraph 264.

required payment within 45 days from the date on which Petrobangla received the invoice. The Tribunal concludes that Petrobangla must be granted a similar payment period for the costs awarded by the Tribunal.

374. For the same reason, the Tribunal concludes that at the end of this period any still outstanding payments awarded by the Tribunal on account of the costs must also bear interest at the rate applicable to delays in contractual payments. The replacement of LIBOR by SOFR applies also with respect to the interest on the cost claim.

8. THE TRIBUNAL'S AWARD

375. Based on the arguments and evidence before it and in view of the considerations set out above and its previous decisions, the Arbitral Tribunal now makes the following decision on the Payment Claim in ICSID Case No ARB/10/18:

(1) The previous decisions of the Arbitral Tribunal, in particular

(i) the Decision on Jurisdiction of 19 August 2013 (Attachment 1 to this Award);

(ii) the First Decision on the Payment Claim of 11 September 2014 (Attachment 2 to this Award);

(iii) the Decision on Implementation of the Decision on the Payment Claim (Second Decision on the Payment Claim) of 14 September 2015 (revised version) (Attachment 3 to this Award);

(iv) the Third Decision on the Payment Clam of 26 May 2016 (Attachment 4 to this Award);

(v) the Decision pertaining to the Exclusivity of the Tribunals' Jurisdiction of 19 July 2016 (Attachment 5 to this Award); and

(vi) the Decision on the Corruption Claim of 25 February 2019;

are confirmed;

(2) 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);

(3) The GPSA was not procured by corruption; it is valid and binding according to its terms;

(4) Petrobangla shall pay to Niko forthwith and free of any restrictions **USD 25'312'747 and BDT 139'988'337**, plus interest (a) in the amounts of **USD 13'195'703 and BDT 116'852'605** and (b) as from 20 November 2020 until

complete settlement at the rate of 180-day average Secured Overnight Financing Rate (SOFR) plus 2% for the U.S. Dollar amounts and at 5% for the amounts in BDT, compounded annually;

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

(6) Petrobangla must pay to the Claimant **CAD 1'737'592 and USD 102'483** as contributions to the Claimant's costs, consisting of the Claimant's legal fees and expenses incurred with respect to the Payment Claim proceedings

(7) The Arbitration Costs related to the Payment Claim proceedings, consisting of the Tribunal Members' fees and expenses and of the direct expenses and administrative charges of the Centre, amounting to a total of USD 1'116'627.96, shall be borne by the Claimant in the amount of USD 134'538.40 and in the amount of USD 982'089.56 by the Respondents. Taking account of this allocation and of the disbursements made from the advances to the Arbitration Costs paid by the Parties, the Respondents must pay to the Claimant **USD 423'775.58**.

(8) The payment under items (6) and (7) must be made within 45 days of the date of dispatch of this Award, failing which Petrobangla shall pay interest on any outstanding amount until complete settlement at the rate of 180-day average Secured Overnight Financing Rate (SOFR) plus 2%.

(9) All other claims and requests made in relation to the Payment Claim in ICSID Case No ARB/10/18 are denied.

Professor Campbell McLachlan QC
Arbitrator

Date: 23 September 2021

Professor Jan Paulsson
Arbitrator

Date: 23 September 2021

Mr Michael E. Schneider
President of the Arbitral Tribunal

Date: 23 September 2021