



INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

Procedural Order No 23

**(Redactions in the Decision on the Corruption Claim and publication of the redacted
Decision
on the ICSID Website)**

1. The present procedural order concerns the questions (i) whether the Decision on the Corruption Claim (the Decision) may be released without any redactions to the Respondents and (ii) whether effect must be given to the notice of 19 March 2019 by which the Respondents declared that their consent to publication of the award, interim decisions and procedural orders was withdrawn.
- I. The positions of the Parties and the relevant correspondence**
2. The Decision on the Corruption Claim was dispatched on 25 February 2019. Two separate communications were sent to the Parties on that day:
3. The operative part of the Decision was quoted in a letter sent to all members of each Party's legal teams as notified to the Centre pursuant to Arbitration Rule 18. This letter also contained the following passages:

The Decision references and reproduces material containing Confidential Information. In accordance with the Confidentiality Arrangements set out in Procedural Order No. 17 dated January 11, 2017, the Tribunals' Decision on the Corruption Claim has been released only to counsel for the Claimant and to lawyers and staff of Foley Hoag concerned with the Corruption Claim.

If the Respondents wish to make the entire Decision available to any other person, including personnel of BAPEX and Petrobangla, they shall seek agreement with the Claimant; failing such agreement, the Respondents may apply to the Tribunals.

4. The complete and unredacted Decision was sent to the Claimant's Counsel on record and to Mr Reichler, Mr Smith and Ms Pasipanodya at Foley Hoag. The accompanying cover letter contained the same explanations concerning the Confidentiality Arrangements set out in Procedural Order No. 17 quoted above.

5. On 26 February 2019, the Respondents' counsel wrote an email to the Secretariat stating:

I write on behalf of Respondents to request that ICSID refrain from publishing the result of the decision, including the conclusions of the Tribunals contained the letter to the Parties of yesterday's date, pending discussions of this matter between the parties. Counsel for Claimant will respond to this email in due course.

6. The Claimant announced by email on 15 March 2019 that it was "preparing a redacted version of the Decision on the Corruption Claim suitable for publication on the ICSID Website" in which it attempted "to limit the redactions to the minimum necessary", adding that by such limitation it did "not waive confidentiality protection in place".

7. Responding to this announcement by the Claimant, the Respondents declared in an email dated 18 March 2019 that they "maintain that ICSID cannot proceed to publish a version of the Decision with redactions unilaterally determined by Claimant and respectfully insist that ICSID must refrain from taking any such action".

8. On the following day, in an email of 19 March 2019, the Respondents referred to their consent to publication of "any award, interim decision and procedural order" given during the First Session of the Tribunals, as recorded in the "Summary Minutes of the Joint First Session of the Two Arbitral Tribunals". They continued by the following statement:

Respondents hereby withdraw their consent to the publication of any further award, interim decision or procedural order, including the Decision on the Corruption Claim, until such time as an agreement is reached between the parties.

9. On 20 March 2019, the Tribunals communicated the following message to the Parties:

1. *The Decision on the Corruption Claim (the Decision) is "Derivative Material" as defined in Procedural Order No 17. The restrictions set out in this Procedural Order apply to it.*

2. *Redactions in the Decision which the Claimant may request must be limited to those required by the Confidentiality Regime as set out in Procedural Order No 17.*
3. *The Respondents' Counsel is given one week from receipt of the redacted version of the Decision to review the redactions and raise any objections to them to the Claimant. If the Parties fail to reach agreement on the redactions requested by the Claimant, the Tribunals will decide as provided by item (v) of Procedural Order No 17, paragraph 40.*
4. *Once the issue of the redactions requested by the Claimant is determined by agreement of the Parties or by the Tribunals, the question arises whether the Decision in the version so redacted may be published by placing on the ICSID Website, as had been agreed in the Joint First Session in these Arbitrations. The Tribunals have taken note that the Respondents have provided a notice of withdrawal of their consent to such publication "until such time as an agreement is reached between the parties".*
10. Referencing the Secretariat's obligation in Administrative and Financial Regulation 23(1) to maintain Registers, the Secretariat informed the Parties on 22 March 2019 that it "will proceed to publish on its website an indication that the Decision on the Corruption Claim has been issued in these cases on February 25, 2019".
11. Under cover of a letter dated 4 April 2019, the Claimant submitted a redacted version of the Decision in which redactions were made on eight of the 572 pages of the Decision. In the cover letter, the Claimant relied on Procedural Order No 17 and requested from the Tribunals approval of its proposed redactions, indicating that it considered the redacted version of the Decision as a version for publication.
12. In the same letter, the Claimant objected to the "Respondents' Purported Withdrawal of Consent to Publication by the Centre".
13. On 11 April 2019, the Claimant informed the Tribunals that

[p]ursuant to the [Tribunals' 20 March 2019] Directions, on 4 April Claimant provided the Tribunals and the Respondents with a redacted version of the Decision on the Corruption Claim for publication. As submitted in Claimant's letter, the redactions are limited and confined to Confidential Information falling within the scope of Procedural Order No. 17.
14. The Claimant then informed the Tribunals that

as contemplated by paragraph 3 of the [20 March 2019] Directions, on 10 April 2019 the Respondents' counsel raised objections, orally, to certain of the redactions proposed by Claimant. Niko has considered those objections. Claimant advises that it considers the Respondents' objections to be without merit and accordingly, maintains that the scope of the redactions as submitted on 4 April 2019 are fully within the scope of Procedural Order No. 17.

15. The Claimant concluded

[a]s the Parties have not reached agreement on the redactions requested by the Claimant, in accordance with paragraph 3 of the Directions, the Claimant requests the Tribunals proceed to decide the matter as provided by item (v) of Procedural Order No. 17, paragraph 40.

16. On 12 April 2019, the Respondents requested to be given time "until Friday April 19, 2019 to respond to Claimant's letter of [11 April] and present their views to the Tribunal on Claimant's proposed redactions."

17. On 12 April 2019, the Tribunals recalled

that by letter of March 20, 2019, the Secretariat had informed the parties that the Respondents' counsel was given one week from receipt of the redacted version of the Decision on the Corruption Claim, i.e. until April 11, 2019, to review the redactions and raise objections, if any. The redacted version was communicated to the Respondents' counsel at Foley Hoag on April 4, 2019; therefore, the deadline to review the redactions and raise objections was April 11, 2019. The Tribunals invite the Claimant to inform the Tribunal by cob on Monday, April 15, 2019 if there is a particular urgency in the matter or whether the Claimant agrees to the Respondents' extension request."

18. On 14 April 2019, the Respondents informed the Tribunals that they

in good faith did not interpret the Tribunals' letter of March 20, 2019 as creating a deadline for providing its position regarding the redactions to the Tribunals

and that the Respondents

understood this language to mean what it says: that the Tribunals were providing Respondents a week from receipt of the redaction to raise objections to the redactions to Claimant and that, as in past occasions during these proceedings, the Parties were to seek to reach an agreement based on Claimant's proposed redactions and Respondents' objections.

19. The Respondents further quoted Procedural Order No. 17, item (v), which foresaw that failing an agreement on redaction of Confidential Information and Derivative Materials as defined in that order, the Respondents may apply to the Tribunals. The Respondents requested the Tribunals to "*reconsider their communication of April 13, 2019 and consider Respondents' application to the Tribunals to present their position regarding Claimant's proposed redactions and respond to Claimants' [sic] communication by April 19, 2019.*" The Respondents also added "*Respondents further respectfully request that this request be decided upon by all the Members of the Tribunals.*"

20. On 15 April 2019, the Claimant wrote to the Tribunals that it

does not oppose Respondents' request to provide observations on the redactions proposed by Niko. While there is no great urgency presented, Niko considers it appropriate for ICSID's publication of the Decision to take place reasonably promptly and does not understand why Respondents would require 15 days to reduce to writing the objections orally stated last week. Only eight pages of redacted text are at issue. Niko therefore respectfully submits that Wednesday, 17 April would be an appropriate deadline for this submission."

21. On the same day, the Respondents noted in an email

that Claimant has requested that the Tribunals reduce by two days the time for Respondents to present their explanation to the Tribunals of why they object to Claimant's proposed redactions. Claimant makes this request after affirming that there is no urgency to its request to have the Decision published. Claimant's only observation regarding timing is that that publication should take place reasonably promptly, assuming ICSID would publish the Decision despite Respondents' withdrawal of consent. In this context, there is no reason to accede to Claimant's request to reduce by two days the time sought by Respondents. It is not for Claimant to determine the time Respondents need to present their case, and two days will not make the time for publication more or less reasonable.

22. On 15 April, the Tribunals sent the following message to the Parties:

The Tribunals confirm receipt of the Respondents' letter of 14 April 2019 and of the messages sent by the Parties to the Secretariat on 15 April 2019.

The Tribunals concluded from the Claimant's letter of 11 April 2019 that the Respondents communicated their objections to the Claimant on 10 April and that the Claimant considered the comments to be without merit. The

Respondents' request of 12 April did not explain why it would take until 19 April for the Respondents to communicate these comments to the Tribunals. The Respondent's letter of 14 April does not contain such explanations, nor does the email exchange of 15 April.

The Tribunals noted that the Claimant sees no great urgency in the matter. They grant the Respondents' request for time until 19 April 2019 to present their views on the proposed redactions and on the Claimant's letter of 11 April 2019.

As stated in the Secretariat's message of 14 April 2019, the communication in that message was sent on instructions of the Tribunals. Like all other communications of the Tribunals' views and determinations, this communication reflected the position of all members of the Tribunals; so does the present communication.

23. By letter of 19 April 2019, the Respondents applied to the Tribunals to determine that the Respondents "*may have full and unrestricted access to the Decision on the Corruption Claim of 25 February 2019 ("Decision") and evidence cited therein without redactions and without restrictions on distribution*". The Respondents objected to the redactions proposed by the Claimant, stating that the "*Respondents would be highly prejudiced by restricted access to the full text of the Decision*". The Respondents also addressed the parties' dispute over the Respondents' purported withdrawal of its consent to publication of the Tribunals' rulings, reiterating its position in this regard and stating that "*[a]fter Respondents have had the opportunity to review the full Decision, they will again consider consenting to publication.*"
24. On 29 April 2019, the Claimant provided its comments on the Respondents' 19 April 2019 letter. Attached to the Claimant's letter was an email chain between Dentons and Foley Hoag between 28 February and 1 March 2019 (see below. Section 2).
25. In its letter, the Claimant objected to the Respondents' request as set out in their 19 April 2019 letter. The Claimant considered that "*[t]his request is yet another attempt on the Respondents' part to seek reconsideration of these Tribunals' decisions and orders*". The Claimant further reiterated its opposition to "*the Respondents' attempt to withdraw unilaterally their consent to the Centre's publication of decisions, orders and awards of the Tribunals.*"
26. The Claimant also explained in its letter of 19 April 2019:

... Niko previously agreed, pursuant to paragraph 40(v) of Procedural Order No 17, to Foley Hoag's sharing the unredacted Decision with those officers of

that firm's clients and the Government of Bangladesh who had a need to know its contents for purposes of providing instructions on the next steps. Niko considers its previous agreement also to apply to the accompanying partly redacted version of the decision.

27. The Respondents were granted at their request an opportunity to make further comments by 6 May 2019 on the Claimant's letter of 29 April 2019. The Respondents filed their comments on 6 May 2019.

II. The agreement on extended access to the unredacted version

28. The agreement mentioned in the Claimant's message of 29 April 2019 took the form of an exchange of messages between counsel of the Parties on 28 February and 1st March 2019 in the following terms:

- (i) Message by Mr Barton Legum to Mr Derek Smith on 1st March 2019, 4:05am:

Dear Derek —

I have discussed with my client your request to disclose an unredacted version of the Decision on the Corruption Claim to your clients in order to receive further instructions from them. The Decision contains information protected under Procedural Order No. 17 and cannot, absent an agreement between the Parties or further order from the Tribunals pursuant to paragraph v of that Order, be disclosed to your clients in unredacted form.

Notwithstanding this, the Claimant agrees to such a disclosure on the following conditions:

- 1. that the Decision be shared only with your clients' representatives who need to know the specifics of its contents for the purpose of providing you with instructions on settlement or next steps in the proceedings;*
- 2. that it be held in confidence by all to whom it is disclosed and not further disclosed beyond the specific individuals to whom you provide the Decision;*
- 3. that the disclosure of the Decision in this context and for these purposes does not remove or constitute a waiver of the confidentiality of the information that is subject to the Tribunals' Confidentiality Order.*

Niko Resources (Bangladesh) Ltd.

v.

*Bangladesh Petroleum Exploration & Production Company Limited ("Bapex"), and
Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")
(ICSID Case Nos. ARB/10/11 and ARB/10/18)*

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I would be grateful if you could confirm the Respondents' agreement on the terms stated above.

Please do not hesitate to contact me should you have any questions.

*Best regards,
Bart*

- (ii) Mr Smith replied in a message showing the date of 28 February 2019, 23:23:

Dear Bart,

We interpret this to include sharing the Decision with the relevant officers of Petrobangla and BAPEX and local counsel. Our will also want to share the Decision with with and the State Minister and Minister of Energy (the PM) as well as the Law Minister and the Attorney General for advice on the extensive interpretations of Bangladeshi law in the Decisions. Would this level of sharing, subject to your conditions 2 and 3, comport with your client's position?

*Regards,
Derek*

- (iii) Mr Legum replied in a message bearing the date of 1 March 19:38:

Dear Derek –

That sounds reasonable to us.

*Best regards,
Bart*

- (iv) Mr Smith then wrote:

Dear Bart,

Thank you for your response. I confirm that my client agrees to the limited distribution of the Decision on the Corruption Claim in accordance with our email exchange below, and will distribute copies on that basis.

*Best regards,
Derek*

III. Procedural Order No 17 and its implementation by the Parties

29. Procedural Order No 17 concerned confidentiality and protective measures related to the production of documents ordered by Procedural Order No 15. During the procedure leading to this latter order, the Claimant had raised the issue of confidentiality and the Parties consulted about arrangements protecting the confidentiality of certain documents made available by the Claimant. The Tribunals had invited the Parties at the time to report on the progress of these consultations and ordered that "[u]ntil further notice, the Respondents' Counsel are instructed not to make any document produced by the Claimant available to any person other than the legal team of their law firm".
30. Thereafter, the Parties reached agreement on the terms of a Confidentiality Undertaking by a financial expert retained by the Respondents. The expert agreed to maintain the confidentiality of certain documents received from Niko and undertook that these documents "*shall not be copied or disclosed to any other person (including personnel of the Respondents or any other person in Bangladesh)*".
31. When the Respondents subsequently filed their Memorial on Corruption of 23 November 2016, they produced a confidential version and another version in which the reference to confidential documents had been redacted. The redacted passage referred to Exhibits R-374 and R-375 and provided some information about the content of these documents. These exhibits are the two agreements to which the Claimant's proposed redactions in the Decision relate.
32. Thereafter, in late 2016, the Parties continued their communications and exchanged drafts for proposed confidentiality orders but did not reach agreement on the text of such an order. The Tribunals, therefore, addressed the matter in their Procedural Order No 17 issued on 11 January 2017.
33. The Tribunals noted in Procedural Order No 17 that "*confidential documents produced by the Claimant in these arbitrations found their way into the hands of a third person, Professor Alam, who used them in proceedings which he commenced in the courts of Bangladesh against the Claimant.*" The Tribunals observed:

It has not been contested that such use of Confidential Information produced in these arbitration proceedings to support claims by other unrelated persons in court proceedings against the party having produced the documents is undesirable and disruptive to the present proceedings. The Respondents themselves, as they stated at the Procedural Consultation of 1 August 2016, were prepared to make commitments with the objective of preventing such

leakages in the future; and they participated in the work on arrangements to this effect in the form of the proposed drafts for Procedural Order No. 17.¹

34. The Tribunals also noted:

No means have been proposed of how to prevent transmission of documents and information to third parties other than by instituting in these arbitrations a specific regime for regulating access to the confidential documents.²

35. In Procedural Order No 17, the Tribunals considered the experience with the provisional arrangement made by Procedural Order No 15 in October 2016 and the use of Confidential Information by the Respondents in their Memorial on the Corruption Claim filed in November 2016. The Tribunals noted that, in that memorial, the Respondents had made their choice as to the Confidential Information which they considered necessary for the presentation of their case. The Tribunals noted that from the confidential documents made available by the Claimant to the Respondents, the Respondents had chosen only two agreements which they produced as Exhibits R-374 and R-375 and that the Respondents had referred to these agreements only in a footnote. The Tribunals considered therefore in Procedural Order No 17 that "*at this stage of the proceedings, the confidentiality issue, while remaining of importance, has a rather narrow scope of practical application*". The Tribunals were

... conscious that a confidentiality regime which they might order must strike a balance between the interest of the Claimant in the protection of the Confidential Information produced in the arbitration and the interest of the Respondents in making use of these documents in an effective manner.³

36. The Tribunals considered that this balance could best be struck on a case by case basis and concluded that a "*general confidentiality regime does not appear necessary at this stage*"; but they reserved the possibility to "*reconsider their position if they consider an evolution of events so requires*".⁴
37. In this context the Tribunals also considered the manner in which authorised recipients of Confidential Information had to proceed in case they were ordered to reveal this information on instruction "*by a court, legislative or administrative body*". The Tribunals stated:

¹ Procedural Order No 17, paragraph 20.

² Procedural Order No 17, paragraph 21.

³ Procedural Order No 17, paragraph 29.

⁴ Procedural Order No 17, paragraph 33.

If the Respondents seek to make Confidential Information available to persons in Bangladesh, they are invited to explain how they propose to ensure that the information will not be seized in this manner and used in proceedings other than the present arbitrations.⁵

38. In Procedural Order No 17 the Tribunals adopted the definitions of Confidential Information and Derivative Materials, as proposed by the Claimant in the drafts of the procedural order and the amendments to them, as proposed by the Respondents. By reference to these definitions and given that only the Claimant had produced information to the Respondents for which it required protection, **Confidential Information** is understood as comprising

all records and information of the Claimant produced or provided by it [...] in relation to the Corruption Claims further to Procedural Order No 15 of 7 October 2016 or any subsequent Procedural Orders issued by the Tribunals [...] but shall not include information already in the possession of the Respondents or in the public domain [...]

39. **Derivative Materials** is understood as

Any records of any nature whatsoever [...] that incorporate or quote from the Confidential Information.⁶

40. On the basis of these considerations the Tribunals issued Procedural Order No 17 of 11 January 2017 in the following terms:

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

⁵ Procedural Order No 17, paragraph 34.

⁶ Further to Procedural Order No 17, paragraph 17.

- (iv) *Further written submissions filed in these proceedings containing Confidential Information shall be submitted to the ICSID Secretariat which will transmit the same to the Members of the Tribunals, to counsel for the Claimant and to Foley Hoag.*
- (v) *If the Respondents wish to make such Confidential Information and Derivative Materials available to any other person, including personnel of BAPEX and Petrobangla, they shall seek agreement with the Claimant. Failing such agreement, the Respondents may apply to the Tribunals, as described above.*

41. Pursuant to these directives, the Parties produced versions of their subsequent submissions in which Confidential Information related to Exhibits R-374 and R-375 and to other documents was redacted (and the submission identified as confidential); in particular the Respondents produced

- a version of its Reply on Corruption in which redactions were made on six of the 193 pages, and an Annex A in which the reference to Exhibit R-374 was redacted;
- a version of their First Post-Hearing Brief in which redactions were made on 23 of 147 pages, including references to Exhibits R-374 and R-375;
- a version of their second Post-Hearing Brief in which redactions were made on 15 of the 94 pages; most of these redactions concerned the agreements produced as Exhibits R-374 and R-375 and payments pursuant to them.

42. When the Claimant produced the Post-Hearing briefs, it announced that it would produce shortly thereafter redacted versions. It did indeed make such redaction. The redacted version of the Claimant's First Post-Hearing Brief in particular showed redactions on 11 of its 106 pages. In their Second Post Hearing Brief, the Respondents noted in particular the redactions concerning the agreements in Exhibits R-374 and R-375 and drew conclusions about Niko's alleged lack of transparency;⁷ but they did not argue that these redactions and the resulting restrictions in communication between the Respondents and their counsel made it impossible for them to instruct their counsel effectively.

⁷ Respondents' Second Post-Hearing Brief, paragraph 23.

43. There is no allegation that Foley Hoag made any of the information labelled as Confidential Information and Derivative Material pursuant to Procedural Order No 17 available to any third person, including their clients. The Tribunals conclude that the instructions of Procedural Order No 17 were correctly and completely implemented and that the Respondents' submissions were prepared without the confidential information being available to anyone else but the "*lawyers and staff of Foley Hoag concerned with the Corruption Claim*" as envisioned in Procedural Order No 17.

IV. Redactions in the Decision on the Corruption Claim

44. The proposed redactions to the Decision on the Corruption Claim which the Claimant communicated on 4 April 2019 were made on pages 4, 89, 299, 474 – 476, 489 and 506.⁸ In its letter of 29 April 2019, the Claimant explained that the redactions focus on the two agreements that it had made available to the Respondents as part of its document production and which the Respondents then submitted into the record of the arbitrations as Exhibits R-374 and R-375, and which were redacted in the Respondents' November 2016 memorial on the Corruption Claim.
45. It is uncontested that the two agreements are part of the Confidential Information regulated by Procedural Order No 17. Any references to the agreements were treated by both Parties in their submissions as Confidential Information and Derivative Materials. Pursuant to Procedural Order No 17, the submissions containing Confidential Information were made available, on the Respondents' side, only to Foley Hoag. In such submissions the relevant information was redacted and, as just explained, Foley Hoag made available to third persons, including their clients, no version of the submissions other than the redacted ones produced in the arbitrations.
46. The Respondents have not contested that the redactions to the Decision proposed by the Claimant on 4 April 2019 concern Confidential Information, covered by Procedural Order No 17. The Tribunals, too, see no grounds for disallowing the redactions. No argument has been made that would raise doubts that the redactions concern text that incorporates or quotes from Confidential Information as it is protected by Procedural Order No 17 and to which access is "*restricted to the lawyers and staff of Foley Hoag concerned with the Corruption Claim*".

⁸ In its cover letter of 4 April 2019, the Claimant indicates the page numbers not as they are printed in the Decision but as they appear on the electronic document: 18, 104, 314, 489 – 491, 504 and 521.

V. The application of Procedural Order No 17 to the Decision and the Claimant's proposed redactions of 4 April 2019

47. The Respondents seek, "*access to information under the procedure established in PO 17*". They seek "*access to specific, limited information*", consisting of (i) "*an un-redacted version of the Decision*" and (ii) "*the evidence on which the Tribunals based the Decision, evidence which is specifically cited therein*". According to the Respondents such access is required because (i) "*Respondents have a fundamental right to know a decision against them*" and (ii) they "*need to have sufficient information to instruct their counsel properly*" and without the redacted information they cannot "*instruct their counsel effectively*".⁹
48. The Respondents rightly point out that Procedural Order No 17 "*did not create a general confidentiality regime*". Indeed, as described above, the Order concerned specific confidential information which the Claimant had made available and for which the Tribunals accepted that protective arrangements were necessary. The Respondents rely on a passage in the Order in which the Tribunals had considered the case where "*the Respondents wish to make such Confidential Information and Derivative Materials available to any other person, including personnel of BAPEX and Petrobangla*". In the absence of agreement by the Claimant, the Tribunals had provided that "*the Respondents may apply to the Tribunals, as described above*".
49. In the application they now make, the Respondents do not make any reference to the circumstances in which the Confidential Information was introduced in the arbitrations and the considerations that led to its protection by Procedural Order No 17. In particular, the Respondents do not provide the explanations required in that Order from the Respondents if they wished to make Confidential Information available to persons in Bangladesh. In the passage quoted above, the Tribunals required that the Respondents, in such a case, "*explain how they propose to ensure that the information will not be seized in this manner and used in proceedings other than the present arbitrations*".
50. Rather than providing the required explanations, the Respondents state that "*decisions needed to protect the company and instruct counsel*" require that "*the Decision would have to be circulated to a significant number of people outside the control of Foley Hoag and Respondents' management. Foley Hoag and Respondents' management would not be in a position to guarantee that the Decision would remain confidential*".

⁹ Respondents' letter of 6 May 2019, page 2.

51. In these circumstances, the confidentiality protection provided by Procedural Order No 17 would be deprived of its very purpose; the balance which that Order sought to strike would disappear. In the application which they now make, the Respondents have not addressed these considerations and thus failed to provide adequate support for their request. The Tribunals have nevertheless examined the explanations which the Respondents did provide in support of their application.
52. The Respondents assert that they need access to the Confidential Information in order to be able to "*instruct their counsel effectively*". The information which the Respondents' counsel now seek to share with their clients is only part of the Confidential Information which counsel used in their submissions without sharing it with their clients. The Respondents' Counsel received the documents in the fall of 2016; they examined them and decided which of these documents should be produced as exhibits in the arbitrations. They relied on these exhibits in several of the Respondents' own submissions and developed the conclusions which they invited the Tribunals to draw from them.
53. The Tribunals find it difficult to believe that the situation should have changed radically now that the Tribunals have considered the evidence proffered by the Respondents and discussed it in the Decision and the Respondents' counsel wish to advise their clients effectively on further action. The Respondents' assertion that their counsel is unable to do so is all the more difficult to understand as the passages in the Decision which the Claimant propose to redact are only on eight out of 571 pages and in essence concern out of a large bundle of evidence only two documents which the Respondents' counsel themselves treated as Confidential Information in their submissions.
54. The difficulties in instructing their counsel which the Respondents allege to suffer from the redactions appear even less likely, if one considers the exceptions which the Claimant accepted in the exchange between the Parties' counsel as provided with the Claimant's 29 April 2019 letter quoted above. In this exchange the Claimant accepted that the Decision be disclosed in an unredacted form to Foley Hoag's "*clients' representatives who need to know the specifics of its contents for the purpose of providing [counsel] with instructions on settlement or next steps in the proceedings*". The exception was subsequently further extended to "*the State Minister and Minister of Energy (the PM) as well as the Law Minister and the Attorney General for advice on the extensive interpretations of Bangladeshi law in the Decisions*" as evidenced in the Parties' exchanges attached to the Claimant's 29 April 2019 letter.
55. At the end of this exchange, the Respondents' counsel confirmed on 1 March 2019 that clients' agreement to the limited distribution of the Decision "*in accordance with the email*

exchange below and will distribute copies on that basis". Some two months later, on 6 May 2019, the Respondents reverted on this agreement and declared that "*unless the confidentiality restrictions are lifted from the un-redacted version of the Decision, Foley Hoag is unable to share the Decision with its client*".

56. The Tribunals are unable to accept that, in the circumstances, the redactions should prevent the Respondents from instructing their counsel effectively.
57. Finally, the Tribunals have examined the situation under the assumption that the redactions in the Decision and the restrictions resulting from the limited distribution of the unredacted Decision could have an effect on the Respondents' effective instructions of their counsel. When making this examination, one would have to consider the circumstances in which the two documents to which the redactions relate were made available to the Respondents:
58. These documents had been delivered by the Claimant to the Respondents' counsel in 2016 subject to the specific confidentiality arrangements in Procedural Order No 15 and confirmed in Procedural Order No 17. The Respondents' counsel decided to produce this evidence in the arbitrations and to rely on it despite the restrictions set out in Procedural Order No 15 and later in Procedural Order No 17. The Respondents were fully aware that the provisions of the Confidentiality Arrangement would apply if they produced the documents in the arbitrations. They decided to produce the documents and treated them as Confidential Information.
59. The Respondents have not explained why, having decided to produce the Confidential Information in the arbitration, they should now be released of the restrictions they have freely accepted by introducing and relying on these documents in the form of Confidential Information.
60. The Tribunals conclude that the Claimant is justified to make the proposed redactions in the Decision and that Foley Hoag may release the Decision to third persons only in the redacted version.

VI. The Respondents' notice withdrawing consent to publication on the ICSID Website

61. The Respondents' position concerning their objections to the publication of the Decision on the ICSID Website evolved. In initial communications on 26 February and 18 March 2019, the Respondents' statement concerned specifically the non-publication of the

Decision; they first made it subject to "discussions of this matter between the parties" and then objected specifically to the publication of "a version of the Decision with redactions unilaterally determined by Claimant".

62. In their message of 19 March 2019, the Respondents expanded the purported withdrawal of their consent to publication as recorded in the Minutes of the Joint First Session and now extend it to *"any further award, interim decision or procedural order, including the Decision on the Corruption Claim, until such time as an agreement is reached between the parties"*. The Respondents did not specify the terms of the agreement they required nor the substantive matters such agreement should encompass.
63. In its letter of 4 April 2019, the Claimant also addressed the Respondents' notice withdrawing consent to publication of the Tribunals' rulings by the Centre. The Claimant referred to paragraph 19 of the Summary Minutes of the Joint First Session in these arbitrations which records the parties' agreement regarding publication of the award, interim decisions and procedural orders issued in the course of these arbitrations, noting that pursuant to Rule 20(2) the Tribunal "shall apply any agreement between the parties on procedural matters..." It stated that such procedural agreements are binding, and that the parties did not agree to modify these publication rules. The Claimant pointed to Article 44 of the Convention, explicitly recognizing the authority of the parties to agree on procedural questions and referred to the Report of the Executive Directors on the ICSID Convention which sets out that *"the parties to...arbitration proceedings may agree on the rules of procedure which will apply in those proceedings."*
64. The Claimant also referenced ICSID practice and the commentary by Professor Schreuer which notes that agreements on procedural matters between the parties *"are almost invariably recorded in the form of the minutes of the first session of the tribunal...The record shows that the resulting arrangements are essentially trilateral accords between the tribunal and the parties."* Referring to the accompanying note to Rule 20, asserting that *"ICSID arbitrations would never be able to progress in an orderly fashion if agreement by the parties on these questions could be undone at any time by a party's unilateral assertion of withdrawal of consent."*
65. In their letter of 19 April 2019, the Respondents explain that they withdrew their consent to publication *"because they would have been prejudiced by publication of a redacted version and, under the Tribunals' orders and Claimant's conditions, they could not obtain a copy of the unredacted Decision"*. They added:

The injury to Respondents in having to defend their interests without access to the full Decision and without being able to adequately instruct counsel would

be compounded if the incomplete Decision were made public. After Respondents have had the opportunity to review the full Decision, they will again consider consenting to publication.

66. The Respondents also contested the Claimant's contention that consent to publication could not be withdrawn and argued that the list of procedural matters set out by the Claimant from which a party may not withdraw does not extend to publications of orders, decisions or awards. They argued:

An agreement to publish a decision is not akin to an agreement on the number of arbitrators or rounds of submissions. While altering the number of arbitrators could prevent "progress in an orderly fashion," there is no indication that the progress of the proceedings would be affected by not publishing the Decision, the contents of which was not yet known at the time of the agreement. Instead, general practice in international arbitration and the writings of eminent jurists support the view that at any point before publication, a party can withdraw its consent to the publication of a decision.

67. The Claimant contested these explanations, in particular it argued that there was no support for the assertion that general practice in international arbitration and the writings of eminent jurists supported a right of unilateral withdrawal from a procedural agreement between the parties to the arbitration. The Claimant also contested the differentiation between certain procedural agreements and an agreement to publication.¹⁰
68. In their final comments of 6 May 2019, the Respondents refer to Article 48(5) of the ICSID Convention, requiring approval of the parties before publishing an award; they add that this requirement applies also to other decisions of a tribunal which are not awards.
69. The Tribunals have considered that at the Joint First Session "*the parties consented to the publication of any award, interim decision or procedural order rendered in the course of the two proceedings*", as recorded in the Summary Minutes of this session. It is uncontested that the Decision is an interim decision for the purposes of paragraph 19 of the Summary Minutes. The difference between the parties concerns not the validity of the consent to publication but the question whether this consent, once given, can be unilaterally withdrawn.
70. It is uncontested that the consent by the Parties as recorded in the Summary Minutes formed an agreement. The Parties also seem to agree that certain procedural agreements cannot be withdrawn unilaterally. The Respondents accept that an agreement on the number of

¹⁰ Claimant's letter of 29 April 2019.

arbitrators or rounds of submissions is among those procedural agreements which cannot be unilaterally withdrawn. They point out, however, that the list of procedural matters from which a party may not withdraw, as it was presented by the Claimant in a non-exclusive form in its letter of 4 April 2019, did not include agreements on the publication of orders, decisions, or awards.

71. When the Respondents rely on "*general practice in international arbitration*" in support of the view that "*at any point before publication, a party can withdraw its consent to the publication of a decision*", they rely as the only support on the "Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration" of 1 January 2019, which states in its paragraph 4:

At any time before publication, any party may object to publication or require that any award be in all or part anonymised or pseudonymised, in which case the award will not be published or will be anonymised or pseudonymised.

72. The Tribunals note that the quoted passage concerns the practice of arbitration under the Rules of the International Chamber of Commerce (ICC); that practice is not necessarily applicable to ICSID arbitration. In any event, the Note in question provides, as a matter of principle, for publication of the award and the quoted passage provides for objections to such a publication. It says nothing about the question whether a pre-existing agreement about publication of rulings may be withdrawn unilaterally.

73. In addition to the reference to this Note of the ICC, the Respondents also rely on "the writings of eminent jurists". In support, the Respondents rely on the book of Professor Schreuer et al. *The ICSID Convention: A Commentary* and state:

*... obtaining party agreement on the publication of an arbitral award at the time of consenting to jurisdiction could be "premature." This is because "the parties will want to have a clearer picture of the circumstances and the outcome of an arbitration before giving their consent to the publication of the resulting award."*¹¹

74. The Respondents continue by arguing:

Although Schreuer notes that parties are routinely asked during the first session whether they consent to the publication of the award, he does not state that this consent cannot be later withdrawn.

¹¹ Referring to page 836, 48 :111.

75. The Claimant replied by pointing out that Professor Schreuer "does not state [consent] can be withdrawn either". It added:

*Respondents can point to no legal authority – for there is none- in support of their position.*¹²

76. The Tribunals have indeed not seen any legal authority that supports the Respondents' position on their right to unilateral withdrawal.
77. The Tribunals have also considered the Respondents' argument according to which a distinction must be made between procedural agreements on such issues as the number of arbitrators and the number of submissions in the proceedings and the consent to publication of decisions. The Tribunals accept that withdrawal of the former type of procedural agreements would cause serious disruption to the proceedings, while that can hardly be said about withdrawal of consent to the publication of a decision on the ICSID Website. The Tribunals however have difficulties to see why this distinction in the object of the agreement should justify a differentiation in the binding nature of a procedural agreement. As part of the specific rules applicable to these proceedings, the Respondents have agreed to the publication of decisions; the Tribunals see no reason why some of these agreed rules should be binding and others subject to unilateral withdrawal.
78. Even if one admitted that withdrawing consent to the publication of decisions could be admitted as a matter of principle, the least one would have to require is that the party wishing to withdraw its consent unilaterally gives persuasive reasons for such withdrawal.
79. The Respondents argued that they would be prejudiced by the publication of a redacted version. They rely on what they describe as the "*injury to Respondents in having to defend their interests without access to the full Decision and without being able to adequately instruct counsel*"; they assert that such injury "*would be compounded if the incomplete Decision were made public*". The Tribunals have decided above that the Confidentiality Arrangements according to Procedural Order No 17 apply to the Decision. They have also noted the agreement between the Parties in relation to limited circulation of the unredacted version for the purpose of taking instructions (above para 28). In the view of the Tribunals, publication of the Decision on the ICSID website has no bearing one way or another on the taking of instructions.
80. The Tribunals conclude that the arguments presented by the Respondents do not justify a unilateral withdrawal from their consent to publication of the Tribunals' rulings.

¹² Letter of 29 April 2019, page 4.

81. In view of the considerations set out above, the Tribunals, having duly deliberated the Respondents' requests and the parties' argument, make the following

VII. Order

- (a) The Decision on the Corruption Claim is subject to the Confidentiality Arrangements provided by Procedural Order No 17;
- (b) The redactions made by the Claimant in the Decision, as they were communicated to the Respondents by the Claimant's letter of 4 April 2019, are accepted;
- (c) On the Respondents' side access to the unredacted version of the Decision shall be restricted to the lawyers and staff of Foley Hoag concerned with the Corruption Claim, unless the Claimant otherwise agrees;
- (d) The Respondents are free in the distribution of the redacted version of the Decision;
- (e) The consent to publication of any award, interim decision and procedural order rendered in the course of the two proceedings has not been validly withdrawn by the Respondents. The redacted version of the Decision may be published, including on the Centre's website.

On behalf of the two Arbitral Tribunals

[signed]

Michael E. Schneider
President
24 May 2019