

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/10/11

and

ICSID Case No. ARB/10/18

DECISION PERTAINING TO THE EXCLUSIVITY OF
THE TRIBUNALS’ JURISDICTION

Members of the Tribunals

Mr Michael E. Schneider, President
Professor Campbell McLachlan QC
Professor Jan Paulsson

Secretary of the Tribunals

Ms Frauke Nitschke

Date of Decision: 19 July 2016

GLOSSARY

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|--------------------------|---|
| 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 |
| 2016 Injunction | Order issued on 12 May 2016 by the Supreme Court of Bangladesh, High Court Division, further to Writ Petition No. 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 |
| Centre or ICSID | International Centre for Settlement of Investment Disputes |
| Corruption Claim | Respondents' claim for the Tribunals to declare that the JVA and the GSPA have been procured through corruption |
| 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 |
| 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 ARB/10/18) |
| Petrobangla | Bangladesh Oil Gas and Mineral Corporation, the Third Respondent |

Request

Niko's Request for Provisional Measures of 19
May 2016 as amended on 1 June 2016

Tribunals

Collectively, the two Arbitral Tribunals
constituted in ICSID Case No. ARB/10/11 and
ICSID Case No. ARB/10/18

1. The present decision is issued in the course of proceedings initiated in 2010 and pending before the Tribunals in ICSID Cases Nos. ARB/10/11 and ARB/10/18. The Tribunals are requested to decide claims with respect to (i) payments to be made by Petrobangla to Niko under the Gas Purchase and Sale Agreement of 27 December 2006 between Petrobangla and the Joint Venture Partners BAPEX and Niko (**the GPSA**), (ii) the liability of Niko for two blow-outs of wells in the Chattak field in 2005 and, if Niko is found to be liable, the quantum of the damage for which Niko is liable, and (iii) the avoidance of the Joint Venture Agreement between BAPEX and Niko, dated 16 October 2003 (**the JVA**), and the GPSA on the grounds of corruption.
2. In several earlier decisions, the Tribunals have described the factual context of the disputes and have addressed a number of issues, in particular
 - I. The Decision on Jurisdiction of 19 August 2013;
 - II. The First Decision on the Payment Claim of 11 September 2014;
 - III. The Second Decision on the Payment Claim of 15 September 2015; and
 - IV. The Third Decision on the Payment Claim of 26 May 2016.
3. The Tribunals refer to these decisions for the factual and legal context and limit themselves in the present decision to a brief description of the circumstances specific to the issues to be decided now:
4. Following the blow-outs in 2005 the High Court Division of the Supreme Court of Bangladesh issued an injunction in 2005 which eventually was confirmed by an order of 17 November 2009, restraining Petrobangla from making any payment to Niko (**the 2005 Injunction**). In the meantime, on 27 May 2008, the People's Republic of Bangladesh and Petrobangla initiated proceedings in the Court of the District Judge in Dhaka against several parties, including Niko, claiming compensation for the damage resulting from the blow-outs (**the Money Suit**). On 12 May 2016 the High Court Division of the Supreme Court of Bangladesh issued another injunction, directing the Respondents and the Government of Bangladesh "*not to give any kind of benefit*" and "*not to make any kind of payment*" to Niko and its mother company (**the 2016 Injunction**).
5. The Tribunals found in their Decision on Jurisdiction that they had jurisdiction both with respect to the payments due by Petrobangla

under the GPSA and with respect to the question whether Niko is liable for the two blow-outs under the JVA. This jurisdiction extends to the question whether the GPSA and the JVA are avoided on grounds of corruption.

6. The Tribunals determined in their First Decision on the Payment Claim the amounts due to Niko by Petrobangla for the gas delivered to it and the interest on these payments. In that Decision the Tribunals provided for the Parties to agree terms for the payment of these amounts into an Escrow Account, pending the outcome of the other claims outstanding in the proceedings. In view of Respondent's failure to subscribe to the Escrow Agreement at the agreed terms and make payment into the Escrow Account provided by it, in the Third Decision on the Payment Claim, the Tribunals ordered immediate payment of the outstanding amounts.
7. The Tribunals also had proceeded to examine the issues concerning the liability for the blow-outs and heard evidence and argument on these issues in November 2015 and in February 2016. Before the Tribunals had issued their decision on liability and while the Parties were producing their submissions on the quantum of the resulting damage, BAPEX and Petrobangla served their requests concerning the avoidance of the JVA and the GPSA on grounds of corruption (**the Corruption Claim**). The Tribunals then decided to assign first priority to this claim and suspended the proceedings on liability. The Tribunals gave directions for the proceedings on the Corruption Claim. They nevertheless decided in the Third Decision on the Payment Claim that, in the circumstances, Petrobangla's obligation to make payment for the gas delivered in the amounts previously determined, as it had been determined in the First Decision of 11 September 2014, continued to exist, and ordered immediate payment thereof. The decision was in the following terms:

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.

8. Niko thereafter addressed a request for provisional measures to the Tribunals on 19 May 2016 and amended on 1 June 2016 (**the Request**). In its amended version, the Request seeks the following relief:
 - (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 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.*
9. The Respondents were invited to comment on the Request in its original and amended version and did so on 1 June 2016 and 15 June 2016, respectively. Further submissions were made by the Respondents on 7 and 12 July 2016 and the Claimant on 11 and 13 July 2016. By instructions of 14 July 2016 the Tribunals closed the proceedings relating to the Request.
10. It follows from the Parties' submissions that, in order to respond to the Request, the Tribunals have to examine the following issues:
 - (i) The scope of the Tribunals' jurisdiction with respect to the requests;
 - (ii) The question whether the relief sought by Niko can be granted in the form of provisional measures and, if not,
 - (iii) Whether it can be granted in the form of another decision; and
 - (iv) Whether the Request is justified on its merits.

11. Concerning the scope of jurisdiction, the Tribunals have taken throughout these proceedings the following consistent position:

In the Decision on Jurisdiction, the Tribunals have described the process by which the Government of Bangladesh had delegated to Petrobangla and to BAPLEX the exercise of its rights and powers in the field of the JVA and the GPSA, as recorded in the Preamble of the JVA and referred to in the GPSA.¹ The Tribunals concluded that they did not have jurisdiction *ratione personae* over the Government. They do, however, have exclusive jurisdiction over the subject matter of these two agreements, including provisional measures. On the basis of the ICSID Convention, this exclusive jurisdiction *ratione materiae* binds the People's Republic of Bangladesh and all its organs, including the courts.² The Tribunals have stated expressly that

*... the Tribunals' exclusive jurisdiction also extends to provisional measures.*³

It follows from this decision that the Tribunals have exclusive jurisdiction to determine the issues that are validly brought before them.

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

¹ See in particular Section 3 of the Decision on Jurisdiction and paragraph 251 of that decision.

² First Decision on the Payment Claim, in particular paragraphs 285 to 287; and the Third Decision on the Payment Claim, in particular paragraph 77, 78.

³ Third Decision on the Payment Claim, paragraph 286.

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.

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.
16. The Tribunals have considered Niko's requests from the perspective of the type of decision that is sought by Niko. They have examined in particular the question whether the relief requested can be granted in the form of provisional measures. They have concluded that the relief granted is not provisional but requires a final determination of the issues raised. Therefore, the Tribunals are of the view that the requested relief, while justified in substance, cannot take the form of provisional measures.
17. The Tribunals observe, however, that the Respondents' submissions show a fundamental misunderstanding of the scope and implication of the Tribunals' jurisdiction. In particular, they note the Respondents' statements such as that denying "*the exclusive subject matter jurisdiction posited by the Claimant that would preclude*

proceedings instituted by a non-party to the ICSID proceedings".⁴ The position so expressed fails to distinguish between the two aspects of jurisdiction. Exclusive subject matter jurisdiction does not prevent a court in Bangladesh to be seized by a party not party to the ICSID proceedings; it does, however, bind the court in Bangladesh, when deciding the claim of such a party, to conform its decision to that of the ICSID Tribunals in all those matters for which the ICSID Tribunals have exclusive jurisdiction.

18. It follows from the Respondents' submissions, including the one just quoted, that a further clarification of the jurisdictional issues is required. Given the actions that the Respondents have taken before the courts in Bangladesh and those which they have failed to take before these courts, the Tribunals conclude that the clarification of these matters is a matter of urgency. The urgency results from the conduct of the Respondents and is irrespective of the question whether the injunctions cause immediate financial difficulties to Niko, as asserted by the Claimant in its recent submissions and denied by the Respondents.
19. For these reasons the Tribunals find it necessary and justified to render the present decision in the form of a Declaratory Decision concerning the jurisdictional issues and an order to the Respondents indicating the action the latter are required to take.
20. For the reasons set out above the Tribunals now grant in substance the relief requested but do so in the form not of a provisional measure but in the following decision. The Tribunals:
 1. Declare that the Tribunals have sole and exclusive subject matter jurisdiction with respect to all matters which have validly been brought before it, notably
 - (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

⁴ Respondents' Observations of 15 June 2016, paragraph 4.

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.

[signed]

Professor Campbell McLachlan QC
Arbitrator

[signed]

Professor Jan Paulsson
Arbitrator

[signed]

Mr Michael E. Schneider
President