

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)**

In the present proceedings the Claimant filed a request for provisional measures, dated 23 December 2013 (“the Claimant’s Request for Provisional Measures”), seeking an order directing Petrobangla to withdraw its application for attachment (“Petrobangla’s Attachment Application”) before the Second Court of the Joint District Judge in Dhaka (the “Dhaka Judge”) before whom the Money Suit is pending. By its communication dated 16 February 2014, the Tribunals decided that a hearing on the Claimant’s request for provisional measure will be held during the week of 28 April to 2 May 2014 in London.

Given that the hearing before the Dhaka Judge on Petrobangla’s Attachment Application is scheduled for 13 March 2014, i.e. before the provisional measures hearing in April 2014 in these arbitrations, the Tribunals invited the parties to state which measures would be required to ensure that, before the Tribunals’ decision on the Request for Provisional Measures, the situation surrounding this Request is not aggravated or compliance with a possible recommendation by the Tribunals is not rendered more difficult.

Having considered the parties’ submissions on these issues, the Tribunals now make the following

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(PRESERVATION OF STATUS QUO UNTIL
THE HEARING ON PROVISIONAL MEASURES)**

1. The Tribunals have considered the parties’ submissions on the Claimant’s Request for Provisional Measures dated 31 January 2014, 17 February 2014, and 28 February 2014, as well as their respective correspondence dated 19 and 21 February 2014 in response to the specific issue of the preservation of the status quo until the April hearing before the Tribunals.
2. In its 19 February 2014 letter, the Claimant indicated that “Petrobangla should, well before 13 March 2014, request the Second Court of the Joint District Judge in Dhaka to adjourn the hearing on the Attachment Application until the Tribunals issue their decision on Niko’s request for provisional Measures”. According to the Claimant, such measure would ensure that the status quo be maintained and that the situation is not aggravated. The Claimant further indicated that it would be agreeable to filing an application for adjournment of the 13 March 2014 hearing jointly with Petrobangla.

3. Petrobangla confirmed that, with respect to its Attachment Application, a hearing is scheduled before the Dhaka judge on 13 March 2014. It argued that the Claimant will be given an opportunity to present its case before the Dhaka Judge and that the attachment proceedings are expected to last several months after the hearing in March 2014. Petrobangla did not comment on the Claimant’s invitation that Petrobangla, alone or jointly with the Claimant, request the Dhaka Judge to adjourn the hearing until after the April 2014 hearing in the present arbitrations.
4. In its 19 February 2014 correspondence, Petrobangla asserted that the Claimant “engaged in conduct that exacerbates the dispute”, alleging that (i) the Claimant intends to sell its assets in Bangladesh which may prevent Petrobangla from recovering any potential damages; and that (ii) the Claimant has filed a petition to suspend the Money Suit litigation (the Claimant’s “Money Suit petition”). In its Rejoinder on Provisional Measures of 28 February 2014, Petrobangla stated that “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”. The Tribunals understand this statement by Petrobangla as a request for provisional measures (“Petrobangla’s Request for Provisional Measures”); Petrobangla is invited to clarify the matter if this understanding is not correct. Petrobangla did not express concern about any imminent change in the status quo caused by the Claimant’s application in the Money Suit.
5. On 21 February 2014, and in response to the Respondents’ 19 February 2014 communication, the Claimant informed the Tribunals that it “is not currently attempting to sell or in any way to ‘dissipate’ its assets in Bangladesh, and provided a written undertaking not to sell any asset in Bangladesh prior to the hearing on provisional measures without the permission of the Respondents and/or the Government. The Claimant further stated that its application for a suspension filed in the Money Suit proceedings was unrelated to the subject matter of the 13 March 2014 hearing, and could not be perceived as aggravating the status quo in relation to the circumstances that have given rise to the Claimant’s request for provisional measures.
6. The Tribunals have carefully considered the measures proposed by the parties in their respective recent communications. They are of the view that, until they have decided the respective requests of both parties for provisional measures, the status quo must be preserved. The Tribunals intend to decide the requests for provisional measures as soon as possible after the April 2014 hearing. It is therefore not expected that the preservation of the status quo is required beyond 31 May 2014.
7. Concerning the hearing before the Dhaka Judge scheduled for 13 March 2014, the Tribunals have taken note of Petrobangla’s explanations according to which it is not certain and indeed unlikely that the Attachment Application will be decided during the 13 March 2014 hearing or immediately thereafter. However, if the Claimant has to appear at that hearing and present its defence, the Claimant would be required to appear and prepare argument in proceedings against which it has applied for provisional measures. Preserving the status quo therefore requires that

this be avoided and the 13 March 2014 hearing be adjourned.

8. The parties have not provided any explanations about the manner in which such adjournment is to be brought about under the rules applicable to the proceedings before the Dhaka Judge. The Tribunals assume that such adjournment can be brought about by Petrobangla, the party that has made the Attachment Application. It is therefore Petrobangla that must request the adjournment. If the consent of the Claimant or a joint application are required, Petrobangla must inform the Claimant of the required action so that it can act accordingly.
9. Concerning Petrobangla’s Request which, as stated above, the Tribunals understand to be a request for provisional measures, the Tribunals will hear oral argument in this regard at the April 2014 hearing. The Claimant may submit written comments on this request as set forth in para.12.b. below. Until the Tribunals have decided Petrobangla’s Request, the Claimant must preserve the status quo relating to Petrobangla’s Request.
10. The Tribunals have taken note of the Claimant’s assurances concerning any removal of its assets from Bangladesh; for the sake of good order, they wish to confirm this position in the present Procedural Order.
11. Concerning the Claimant’s suspension application in the Money Suit, which is the subject of Petrobangla’s Request, the parties have not indicated that there is a risk that in the near future that the status quo would be affected by any action prior to the Tribunals’ decision on Petrobangla’s Request for Provisional Measures. There is therefore, at present, no need to recommend specific measures to preserve the status quo.
12. For these reasons the Tribunals now make the following recommendations in the interest of preserving the status quo until they will have decided the parties’ respective requests for provisional measures:
 - a. Petrobangla shall request the Second Court of the Joint District Judge in Dhaka to adjourn the hearing on the Attachment Application, currently scheduled for 13 March 2014, until a date after 31 May 2014. To the extent necessary, the Claimant shall support this request if and when invited by Petrobangla to do so.
 - b. The Claimant may submit by 24 March 2014 comments on Petrobangla’s Request for Provisional Measures. Oral argument on this request will be heard together with the Claimant’s request at the April 2014 hearing and the parties will be given an opportunity of orally presenting their respective positions at that occasion.
 - c. The Tribunals have taken note of the Claimant’s undertaking regarding its assets located in Bangladesh as expressed in the Claimant’s 21 February 2014 submission. The Claimant is invited to report on the status of any plans for divesting its assets in

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Bangladesh at the provisional measures hearing in April 2014. The Tribunals recommend that no action be taken by the Claimant causing the removal of such assets before the Tribunals have decided on Petrobangla’s Request.

[Signed]

On behalf of the two Arbitral Tribunals

Michael E. Schneider

President

6 March 2014