

**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**

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DECISION ON THE PAYMENT CLAIM

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*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: September 11, 2014

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## **GLOSSARY**

ACC	Bangladesh Anti-Corruption Commission
B-PC.1	BAPEX Counter-Memorial concerning the Payment Claim, 28 November 2013
B-CD.1	BAPEX Counter-Memorial concerning the Compensation Declaration, 30 January 2014
Bangladesh Bank	Central Bank of Bangladesh
BAPEX	Bangladesh Petroleum Exploration & Production Company Limited, the Second Respondent
BELA Proceedings	Proceedings brought by the Bangladesh Environmental Lawyers Association (BELA) and others in the Supreme Court of Bangladesh, High Court Division against the Government of Bangladesh, Petrobangla, BAPEX, Niko and others
BDT	Bangladeshi taka
BGSL	Bakhrabad Gas System Ltd.
C-CD.1	Niko's Memorial concerning the Compensation Declaration, 27 September 2013
C-CD.2	Niko's Reply concerning the Compensation Declaration, 29 May 2014
C-PC.1	Niko's Memorial concerning the Payment Claim, 27 September 2013
C-PC.2	Niko's Reply concerning the Payment Claim, 30 January 2014
C-PC Interest.1	Niko's Observations on Respondents' Submission on Applicable Interest in the Payment Claim, 6 June 2014
C-MJ.1	Claimant's Memorial on Jurisdiction, 1 April 2011
C-MJ.2	Claimant's Second Memorial on Jurisdiction, described as Claimant's Response to the Respondents' First Counter-Memorial on Jurisdiction for the Payment Claim, and the Claimant's Memorial on Jurisdiction for the Compensation Claim, 30 June 2011
C-MJ.3	Reply to the Respondents' Response with respect to the Compensation Declaration, 10 October 2011
Centre or ICSID	International Centre for Settlement of Investment Disputes
Committee	Gas Pricing Committee, formed further to a letter from the Ministry of Power, Energy and Mineral Resources dated 15 July 2004
Chattak field	One of the gas fields to which the JVA relates

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 2 wells in the Chattak field (subject matter of ARB/10/11)
Compensation Declaration	The declaration requested by the Claimant concerning the Compensation Claims
Convention or ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Cooperation Claim	Niko's claim concerning obligations of BAPEX to cooperate under the JVA (see Decision on Jurisdiction, paragraph 490)
Crore	10 million in the South Asian numbering glossary
Feni field	One of the gas fields to which the JVA relates
GOB or Government	The Government of the People's Republic of Bangladesh, the First Respondent until the Decision on Jurisdiction
Goyal WS I	First Witness Statement of Mr Amit Goyal
Goyal WS II	Second Witness Statement of Mr Amit Goyal
GSM	GSM Inc., engaged by Niko to design and implement the relief programme, following the first blowout
Framework of Understanding	Framework of Understanding for the Study for Development and Production of Hydrocarbon from the Non-producing Marginal Gas Fields of Chattak, Feni and Kamta executed on 23 August 1999 between BAPEX and Niko
GPSA	Gas Purchase and Sale Agreement of 27 December 2006 between Petrobangla and the Joint Venture Partners BAPEX and Niko
HT Day 1 and Day 2	Hearing Transcript Day 1 (13 October 2011) and Day 2 (14 October 2011)
HT Day 3, 4 and 5	Hearing Transcripts Day 3 (28 April 2014, pp. 1-271), Day 4 (29 April 2014, pp. 271-545) and Day 5 (30 April 2014, pp. 546-624)
Hossain WS I	First Witness Statement of Mr Imam Hossain
Hossain WS II	Second Witness Statement of Mr Imam Hossain
ICSID Arbitration Rules	Rules of Procedure for Arbitration Proceedings
ICSID Institution Rules	Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings
Joint Venture Partners	BAPEX and Niko
JVA	Joint Venture Agreement between BAPEX and Niko, dated 16 October 2003

Ministry	Ministry of Power, Energy and Mineral Resources, unless otherwise specified
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 Bangladesh or NRBL	Niko Resources (Bangladesh) Ltd., the Claimant
Niko Canada	Niko Resources Ltd., the Canadian parent company of the Claimant
P-PC.1	Petrobangla Counter-Memorial concerning the Payment Claim, 28 November 2013
P-PC.2	Petrobangla Rejoinder to Niko's Reply concerning the Payment Claim, 27 March 2014
P-PC Interest.1	Petrobangla Submission on Interest in the Payment Claim, 22 May 2014
P-PC Interest.2	Petrobangla's Observations on Interest in the Payment Claim, 17 June 2014
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
The Procedure	Procedure for Development of Marginal/Abandoned Gas Fields, prepared in 2001 and attached as to the JVA as Annex C
R-CMJ.1	Respondents' Counter-Memorial on Jurisdiction, 16 May 2011
R-CMJ.2	Supplemental Counter-Memorial, described as Respondents' Response to the Claimant's Presentation of its Position with respect to the Request for the Compensation Declaration
RfA I	Request for Arbitration, dated 1 April 2010 and received by the Centre on 12 April 2010 (ARB/10/11)
RfA I Clarification	Claimant's response of 18 May 2010 to the Centre's request for clarification of 7 May 2010
RfA II	Request for Arbitration, dated 16 June 2010 and received by the Centre on 23 June 2010 (ARB/10/18)
R-Preliminary Objections	Preliminary objections raised by the Respondent in the letter of 21 June 2010 (ARB/10/11)
R-RJ	Respondents' Rejoinder on Jurisdiction for the Payment Claim, 30 August 2011
Stratum Tk Tribunal	Stratum Development Ltd. Bangladeshi taka (also BDT) Collectively, the two Arbitral Tribunals constituted in ICSID Case No. ARB/10/11 and ICSID Case No. ARB/10/18

## 1. INTRODUCTION

1. The present case relates to marginal or abandoned gas fields in Bangladesh that the Government of the People's Republic of Bangladesh (the **Government**) had decided to develop. Niko Resources (Bangladesh) Ltd. (**Niko**), the Claimant, proposed to carry out this development. Niko evaluated three such fields and concluded that two of them, the Chattak and the Feni fields, were sufficiently promising to continue with a work plan.
2. With the approval of the Government, Niko concluded on 16 October 2003 a Joint Venture Agreement (the **JVA**) with the Bangladesh Petroleum & Production Company, Limited (**BAPEX**), the Second Respondent.
3. The development of the Feni field was successful and gas supplies from two wells in this field started in November 2004. BAPEX and Niko (the **Joint Venture Partners**) began to negotiate a Gas Purchase and Sale Agreement (**GPSA**) with the Bangladesh Oil Gas and Mineral Corporation (**Petrobangla**), the Third Respondent. However, due to difficulties in reaching an agreement on the price for the gas, the finalisation of the GPSA was much delayed. Eventually it was concluded on 27 December 2006, again with the approval of the Government.
4. The Joint Venture Partners had already delivered gas to Petrobangla before the conclusion of the GPSA. They continued to do so thereafter. Petrobangla made some payments but much of the gas delivered remains unpaid.
5. During drilling in the Chattak field, a blowout occurred on 7 January 2005 and another on 24 June 2005. The Government formed a committee to enquire about the causes of the blowouts and the damage caused. It concluded that Niko was responsible for the blowouts and estimated the damage caused by them.
6. In the fall of 2005, the Bangladesh Environmental Lawyers' Association (BELA) and others introduced 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 declaration that the JVA was invalid

and an injunction restraining payments to Niko in respect to the Feni gas field (the **BELA proceedings**). The court issued the injunction against Petrobangla. On 5 May 2010, the court denied the requested declaration but maintained the injunction.

7. In May or June 2008, Petrobangla and the Government of Bangladesh commenced legal action in the Court of District Judge, Dhaka, against Niko and others, seeking compensation on the order of Tk746.5 crore as damages for the two blowouts (the **Money Suit**). These proceedings are still pending.
8. The present proceedings were started by two successive Requests for Arbitration against the two Respondents and the Government, one filed with the International Centre for Settlement of Investment Disputes (**ICSID** or the **Centre**) on 1 April 2010 (the **First Request** or **RfA I**) and registered as ARB/10/11; the other filed with ICSID on 16 June 2010 (the **Second Request** or **RfA II**) and registered as ARB/10/18. In these requests Niko sought an award for payment of the outstanding invoices for the gas delivered (the **Payment Claim**) and a declaration that it was not liable for damages in relation to the blowouts (the **Compensation Declaration**).
9. At the First Session of the two arbitrations on 14 February 2011 in Geneva, it was agreed that the two cases were to proceed in a concurrent manner and that the two Tribunals may render their decisions in the two cases in a single instrument. In the present decision the two Tribunals therefore are referred to collectively as “the Tribunal”.
10. The Respondents objected to the jurisdiction of ICSID. In a first phase of the arbitration, the Tribunal decided this jurisdictional objection in a decision of 19 August 2013 (**the Decision on Jurisdiction**). It held that it had jurisdiction with respect to the claims against BAPEX and Petrobangla but not with respect to the Government, which was dismissed from the arbitration. The Tribunal refers to this decision for a detailed account of the initial phase of this arbitration and the facts related to it.
11. The proceedings thereafter were divided in two tracks, running partly in parallel, one dealing with the Payment Claim, the other with the Compensation Declaration. The Tribunal first



addressed the Payment Claim, which is the sole subject of the present decision.

12. In this phase of the proceedings, the Tribunal received written submissions on 27 September, 28 November 2013, 30 January and 27 March 2014, held an evidentiary hearing in London from 28 to 30 April 2014 and received post-hearing submissions on the question of interest on 22 May, 6 June and 17 June 2014. It now renders its Decision on the Payment Claim.
13. The Tribunal also heard requests for provisional measures and decided them in Procedural Order No. 6 of 1 May 2014.

## **2. THE PARTIES AND THE ARBITRAL TRIBUNAL**

### **2.1 The Claimant**

14. The Claimant in both cases 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.

15. The Claimant is now represented in this arbitration by

Mr Barton Legum, Ms Anne-Sophie Dufêtre, and  
Ms Brittany Gordon  
SALANS FMC SNR DENTON EUROPE LLP  
5, boulevard Malesherbes  
75008 Paris, France

and

Mr Frank Alexander and Mr Anthony Cole  
DENTONS CANADA LLP  
850 – 2<sup>nd</sup> Street SW  
15<sup>th</sup> Floor, Bankers Court  
Calgary, Alberta T2P 0R8, Canada

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.

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 - 2<sup>nd</sup> 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**

16. The Respondents remaining 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.<sup>1</sup>
17. Petrobangla is a statutory corporation created by the Bangladesh Oil, Gas and Mineral Corporation Ordinance 1985.<sup>2</sup>
18. BAPEX is a wholly owned subsidiary of Petrobangla incorporated under the Bangladesh Companies Act 1994.<sup>3</sup> 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”.<sup>4</sup>
19. 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.
20. The Respondents are represented in this arbitration 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
- and

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<sup>1</sup> The sequence in which the three Respondents are presented is that adopted by the Claimant in the First Request, even though a different sequence was adopted in the Second Request.

<sup>2</sup> RfA II, Attachment G.

<sup>3</sup> HT Day 1, p. 42.

<sup>4</sup> Exhibit 2, Appendix B to R-CMJ.1.

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

### **2.3 The Arbitral Tribunal**

21. The Arbitral Tribunal is composed of

Professor Jan Paulsson  
Bahrain World Trade Centre  
East Tower, 37th Floor  
P.O. Box 20184  
Manama, Bahrain

National of Sweden, France and Bahrain  
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**

22. The present dispute relates to two gas fields named Feni and Chattak (sometimes also spelled Chhatak) in Bangladesh. These two fields, together with the Kamta gas field, had been declared by the Government as “Marginal/Abandoned Gas Fields.”
23. The mineral resources in the Chattak and Feni gas fields are vested in the People’s Republic of Bangladesh pursuant to Article 143 of Bangladesh’s Constitution, as confirmed in the Preamble of the JVA.
24. The Chattak field (located in Sylhet) was discovered in 1959 by Pakistan Petroleum Ltd (subsequently renamed Bangladesh Petroleum Ltd) and brought into production in 1960. It supplied local users and, from 1974, the Sylhet Pulp and Paper Mill. It was shut down in 1985 due to increased water production.<sup>5</sup>
25. The Feni field (located in Chittagong) was discovered by a predecessor of BAPEX in 1980. It was in production between 1988 and 1998.<sup>6</sup>
26. Both fields were at some point sold or transferred to BAPEX.<sup>7</sup> Only the Feni field became productive again and delivered gas, which is the subject of the present arbitrations.

#### **3.1 The negotiations for the GPSA and initial gas deliveries**

27. The agreements out of which the present arbitration arose were the result of negotiations that lasted over several years conducted by the Claimant and Niko Resources Ltd, its parent company, on the one hand, and Bangladesh, Petrobangla and BAPEX, on the other hand. These negotiations started with a letter and preliminary proposal that Niko Resources Ltd addressed on 12 April 1997 to the Bangladesh Minister of Energy and Mineral Resources regarding the development of

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<sup>5</sup> ‘Bangladesh Marginal Field Evaluation – Chattak, Feni and Kamta’ (February 2000), p. B-8 (Annex B to the JV produced as Attachment A to RfA I and RfA II)

<sup>6</sup> *Ibid.*

<sup>7</sup> Imam Hossain, HT Day 2, pp.160-161.

some marginal and non-productive gas fields in Bangladesh;<sup>8</sup> eventually they led to the conclusion of the JVA and the GPSA.

28. These negotiations were described in detail in the Decision on Jurisdiction. The summary here is limited to the facts that are relevant specifically to the Payment Claim and its context.
29. Following the directions of the Government and Petrobangla, the JVA between BAPEX and the Claimant was executed on 16 October 2003. Annex C thereto, the Procedure for Development of Marginal/Abandoned Gas Fields (the **Procedure**) which the Ministry of Power, Energy and Mineral Resources (**the Ministry**) was developed in 2001 and formed the framework for the JVA.<sup>9</sup>
30. The JVA's "object" or "scope" was the development and production of Petroleum from the Chattak and Feni fields, including gaseous hydrocarbons, at Niko's sole risk and expense. It defines the investment and operation activity of Niko, identified as the Operator, and manner in which BAPEX and Niko cooperate in the context of the project.
31. With respect to the sale of the Petroleum produced by the Operator, Article 24.3 of the JVA provides:

"OPERATOR and BAPEX (hereinafter referred to as SELLER) agree to sell the produced Petroleum to the Bangladesh domestic market under this JVA. BUYER of JV gas shall be Petrobangla or a designee of Petrobangla (hereinafter referred to as BUYER). BUYER & SELLER shall enter into a Gas Purchase and Sales Agreement (GPSA) under which the Buyer shall agree to purchase the Petroleum to which the Seller is entitled to under this JVA, subject to deliverability and testing and proof of such Petroleum. OPERATOR shall be free to find a market outlet within the Country if a market outlet is not given by Petrobangla within six months after a request is made."

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<sup>8</sup> The original correspondence is listed in the letter of Niko Resources Ltd to BAPEX dated 1 February 1999, produced in the first phase of this arbitration as Exhibit 9, Appendix B to R-CMJ.1.

<sup>9</sup> The Procedure is also described in Exhibit 18, Appendix B to R-CMJ.1.

32. The JVA also refers in Article 24.4 to the procedure for determining the price of the gas:

“The well head price of natural gas and associated products to be produced by the Seller and delivered to the Buyer shall be determined through negotiations as per Article 7 of the ‘Procedure for the Development of Marginal /Abandoned Gas Fields’. The Well Head Gas would meet the specifications (quality, pressure etc.) of the sales gas determined by Petrobangla.”

33. Article 6.2.2 of the JVA provides that a “Joint Bank Account is to be opened in Bangladesh and operated jointly by the representatives of the Operator & BAPEX for receiving sales proceeds and making distribution to the Parties”. The share split between the Parties is regulated in Article 23 of the JVA.

34. Upon conclusion of the JVA, Niko commenced work on the development of the two fields. The first well it sought to develop in the Feni field was Feni-3, which tested water instead of gas in 17 of a total of 19 zones.<sup>10</sup> Nevertheless, towards the end of the first semester of 2004, gas production was considered imminent.

35. Niko then sought to negotiate a GPSA with Petrobangla. These negotiations lasted for almost two years. The GPSA was eventually executed on 27 December 2006. The main point of disagreement during the negotiations was price. Still, Niko commenced delivery of gas on 2 November 2004 in the absence of a finalised GPSA. At several occasions during the negotiations, Niko reduced or suspended deliveries. This met with immediate objections from Petrobangla which insisted that Niko resume deliveries and even increase them.

36. The events during this period have been described in some detail in the Decision on Jurisdiction.<sup>11</sup> In its Memorial on the Payment Claim, the Claimant refers to and concurs with this

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<sup>10</sup> Explanations contained in Niko’s letter to the Ministry of 7 August 2004 (year erroneously shown as 2002), produced in the first phase of this arbitration as Claimant’s Exhibit 6, p. 475 and paragraph 3 at p. 476.

<sup>11</sup> Paragraphs 48-85 of the Decision on Jurisdiction.

account of the facts.<sup>12</sup> The present Decision reiterates elements of this factual account that are of specific present relevance.

37. The negotiations commenced with the letter that Niko wrote to Petrobangla on 19 May 2004, explaining that a skid-mounted gas plant was to arrive on 1 June and the Feni-3 would go into production in July 2004. The letter continued:

“We, therefore, would like to initiate discussions with the Government of Bangladesh and Petrobangla to finalise the subject agreement so that Feni-3 can be on production as soon as the gas plant is commissioned.

We understand that pursuant to Article 7 of the “Procedure for Development of Marginal/Abandoned Gas Fields” as approved by the Honorable Prime Minister, the gas price of the Investor shall be negotiated between the Government, Petrobangla, and the Investor. Moreover, Article 24.3 of the Bapex-Niko JV stipulates that the Buyer of the gas from the Feni Gas Field shall be Petrobangla or its designee.

In view of the above, we request a meeting with the authorised representatives of the GOB, Petrobangla, and Bapex to initiate the process to execute the subject agreement so that Feni-3 well could be on production at the earliest.”<sup>13</sup>

38. On 6 June 2004, Petrobangla requested that Niko submit a proposed GPSA for the Feni Gas Field.<sup>14</sup> Niko responded on 14 June 2004, announcing that Feni-3 was completed, that work on Feni-4 was advancing, and that the gas plant was expected to be in place and commissioned in time to produce gas from those two wells by early August 2004. The letter was accompanied by a draft for the GPSA.<sup>15</sup>
39. Further to a letter from the Ministry dated 15 July 2004,<sup>16</sup> a committee was formed “to negotiate for finalisation of gas pricing of Ex. Feni gas field which is being developed by BAPEX-

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<sup>12</sup> C-PC.1, paragraphs 6 and 18.

<sup>13</sup> Produced in the first phase of this arbitration as Claimant’s Exhibit 6, pp. 494-495.

<sup>14</sup> This letter has not been produced but is referenced in the first phase of the arbitration as Claimant’s Exhibit 6, p. 492.

<sup>15</sup> Produced in the first phase of the arbitration as Claimant’s Exhibit 6, p. 492. The draft GPSA is not attached to this Exhibit.

<sup>16</sup> This letter has not been produced but is referenced in the letter produced in the first phase of the arbitration as Claimant’s Exhibit 6, p. 482.



NIKO”. The Committee, described here as the **Gas Pricing Committee**, was composed of a representative of the Ministry in the function of Convenor<sup>17</sup> and representatives from Petrobangla, BAPEX and Niko.<sup>18</sup>

40. The first two meetings of the Committee took place on 24 July and 4 August 2004 under the chairmanship of the Convenor. Minutes of both were drawn up on the letterhead of the Ministry.<sup>19</sup> They record that Niko requested a price of USD 2.75/MCF. At the end of the discussion “the Chair offered Niko to agree Feni Gas Price at USD1.75/MCF, since Niko signed the JVA considering this price”. Niko stated that it would respond later.<sup>20</sup>
41. Niko answered the proposal by a letter to the Additional Secretary in the Ministry on 7 August 2004, insisting that the gas price that it sought was reasonable and justified. It suggested consultations on the economics of the Feni development.
42. On 1 November 2004, Petrobangla wrote to Niko, 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.”<sup>21</sup>
43. 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.
44. On 7 January 2005, a first blowout occurred in the Chattack field, followed by another on 24 June 2005. These blowouts gave rise to proceedings before the courts of Bangladesh. The events will be discussed below in Section 3.2; they did not affect the production from the Feni fields.

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<sup>17</sup> Mr Ehsan-ul Fattah, identified as “Addl. Secretary, Petroleum & Mineral Resources Division, Ministry of Power, Energy & Mineral Resources, GOB, Dhaka”.

<sup>18</sup> For a list of members and observers see Claimant’s Exhibit 6, p. 485 produced in the first phase of the arbitration.

<sup>19</sup> Minutes produced in the first phase of the arbitration as Claimant’s Exhibit 6.

<sup>20</sup> Claimant’s Exhibit 6, pp. 482, 484, produced in the first phase of the arbitration.

<sup>21</sup> Exhibit C-3; also produced as Exhibit R-1.

45. On 14 February 2005 Niko wrote to Petrobangla that the

“trial production period has ended. Our gas plants have been commissioned. We now find ourselves in an extremely difficult position with our management and board to justify and continue gas production from Feni without finalisation of the price of our share of the gas.”<sup>22</sup>

The letter went on to ask for an immediate interim payment for the gas delivered from November 2004 to January 2005 at the price of USD 2.35/MCF and finalisation of the gas price within the next ten days, failing which Niko would suspend gas production from the Feni field.

46. Petrobangla responded the same day, announcing that it “*would make a lump sum interim payment against the gas supplied from November, 2004 to January, 2005*” without prejudice to the rate to be agreed.<sup>23</sup> On 10 March 2005 Petrobangla announced that it had “*arranged a payment of US\$2 million today for the time being to you on a lump sum basis ...*”<sup>24</sup> Niko confirmed receipt as “*lump sum partial payment for Niko’s share of gas production for November, December and January*”.<sup>25</sup>

47. In a letter of 10 March 2005, BAPEX referred to the letter that Niko had addressed to the Ministry on 9 March 2005 of which it had received copy. BAPEX relied on Article 16.1(c) of the JVA which identified as an event of default if “[a]ny of the party indulges/commits any act which is contrary to the interests of Bangladesh” and required Niko to withdraw the notice of suspension of gas production “*or else we would be constrained to take all necessary steps under the JVA to up hold the interests of the country*”.<sup>26</sup>

48. Further meetings of the Gas Pricing Committee were held. After a meeting on 16 March 2005, Niko wrote to the Ministry, to the attention of the Minister himself, summarising its

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<sup>22</sup> Claimant’s Exhibit 6, p. 471 produced in the first phase of the arbitration.

<sup>23</sup> Claimant’s Exhibit 6, p. 472 produced in the first phase of the arbitration.

<sup>24</sup> Claimant’s Exhibit 6, p. 470 produced in the first phase of the arbitration.

<sup>25</sup> Claimant’s Exhibit 6, p. 479 produced in the first phase of the arbitration.

<sup>26</sup> Claimant’s Exhibit 6, p. 470 produced in the first phase of the arbitration.

understanding of the differences. The letter contained the following passage:

*“It was expressed by the Chairman of Petrobangla that the final result of the Committee’s deliberations may be that we will not reach a consensus on the price. He further opined that it is possible that the Committee will have to conclude its deliberations with a report to the Ministry that a price for the gas could not be agreed. Niko acknowledged that this could be a possible outcome of the Committee meetings, however it was requested by Niko that this conclusion be arrived at as soon as possible so that other avenues for concluding the price agreement could be pursued. Mr Osman [the Chairman of Petrobangla] suggested that if the Committee did not agree on a price that Niko/Bapex may have to directly approach the Government of Bangladesh for a final decision.”<sup>27</sup>*

49. During these negotiations Niko ordered the motor vehicle which was delivered on 23 May 2005 to the State Minister for Energy and Mineral Resources. In June 2005, Niko Canada invited the Minister, at its costs, to an exposition in Calgary. This was followed by the Minister’s resignation on 18 June and the return of the vehicle to BAPEX on 20 June 2005. These events were discussed at length in the Decision on Jurisdiction;<sup>28</sup> no further explanations of substance or evidence have been produced in the present phase of the arbitration.
  
50. The Gas Pricing Committee continued its work and held its final meeting on 23 October 2005.<sup>29</sup> It issued a report entitled “Committee Report on Feni Gas Pricing”; the report is not dated but the signatures of the members show the dates of 25 and 26 October 2005. The members of the Committee were identified in the report consisting of, on the one hand, “Officials from Government”, including Additional Secretary of the Ministry in the position of the Convener, the Chairman and a Director of Petrobangla and the Managing Director of BAPEX and, on the other hand, “Officials from Niko Resources (Bangladesh) Ltd”. The report concluded as follows:

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<sup>27</sup> Claimant’s Exhibit 6, p. 480 produced in the first phase of the arbitration.

<sup>28</sup> Section 9 of the Decision on Jurisdiction.

<sup>29</sup> Committee Report, p. 4 at Claimant’s Exhibit 6, p. 460-463 produced in the first phase of the arbitration.

**“Committee’s recommendation:**

The Committee could not reach a consensus in respect of pricing of gas to produce from Feni field. The matter, therefore, remained unresolved.

The members representing Government side recommend that the Niko’s share of gas from Feni filed under the terms of JVA may be purchased by Petrobangla at best at a price of US\$1.75/MCF.”<sup>30</sup>

51. The report included comments by Niko to the effect that it “*will therefore suggest to the GOB this solution [i.e. “to pursue an arbitrated settlement”] to move forward on the matter*”.<sup>31</sup> In a letter to the Ministry dated 25 October 2005, Niko referred to Article 18.3 of the JVA and proposed that the gas price determination “*be referred to a sole expert to arbitrate ...*”.<sup>32</sup>
52. This proposal was not accepted and the matter remained unresolved.
53. By 24 November 2005 no agreement had been reached on the gas price and the GSPA, but Petrobangla had made interim payments to Niko of a total amount of USD 4 million.<sup>33</sup> Niko wrote to Petrobangla that as of 28 November 2005 it would suspend gas production from the Feni Field pending “*mutual resolution*” of the gas price, the agreement and execution of a GPSA, and “*settlement of arrears for gas sold to date from the Feni Field*.”<sup>34</sup> Petrobangla responded on the same day, requesting Niko to withdraw the notice and not to suspend deliveries. It concluded: “*If you are still determined to do so that will be seriously prejudicial to our national interest and we shall be constrained to act accordingly*.”<sup>35</sup>
54. Following a letter from Niko dated 26 November 2005, postponing the start of suspension to 29 November 2005, Petrobangla wrote on 28 November 2005 requiring Niko to continue delivering under the terms of the agreement, stating its position as follows:

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<sup>30</sup> Claimant’s Exhibit 6, pp 460, 463 produced in the first phase of the arbitration.

<sup>31</sup> Claimant’s Exhibit 6, pp. 432, 433 produced in the first phase of the arbitration.

<sup>32</sup> Claimant’s Exhibit 6, pp. 452, 453 produced in the first phase of the arbitration.

<sup>33</sup> Exhibit C- 313; confirmed by Niko at Exhibit C-32.

<sup>34</sup> Exhibit C-30.

<sup>35</sup> Exhibit C-31.

*“May it be reiterated that Niko cannot unilaterally decide to suspend gas production from Feni field at its sole choice under the JVA without first terminating the same. The obligation of Niko to deliver gas continuously has arisen on November 01, 2004 when Petrobangla (vide its letter no 121.16.14/648, dated November 01, 2004) issued the confirmation sought by Niko, or at least when Niko reconfirmed the same vide its letter Niko/President/04-12/036, dated December 11, 2004. As such it is not true that Petrobangla has not confirmed the agreement as asked for. May it be also noted that payment of US\$ 4 million is obviously a part payment which also establish that Petrobangla has not only confirmed but also made interim payment.”<sup>36</sup>*

55. Petrobangla added that it was restrained from making further payments by an order of 16 November 2005 of the High Court Division of the Supreme Court of Bangladesh of which it quoted the following passage:

*“Since the order restraining the respondents 1.9 from making any payment to respondent No. 10 in respect of any gas field or any other account passed by the High Court Division has not been modified by the Appellate Division that order shall continue.”<sup>37</sup>*

56. Petrobangla concluded from this order: *“As such we cannot make any payment anymore until the said Order of the Court is vacated.”* Nevertheless Petrobangla insisted that deliveries should not be suspended;

*“We would like to state that we are equally serious to conclude a GPSA which in our opinion could reasonably expected to be completed within a month or two, until such time there should not be any suspension of production. Accordingly we request you not to take any measures which might cause us to react otherwise.”<sup>38</sup>*

57. On 29 November 2005 a meeting between Niko representatives and Mr Mahmudur Rahman, Energy Advisor of the Ministry,

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<sup>36</sup> Exhibit C-4.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

took place at the Ministry. Niko wrote to him on the same day, thanking him for the meeting and reiterating that Niko

*“... requires the full support of your Ministry and the Government of Bangladesh to assist us in having the ad-interim order of the Writ Petition No. 6911 of 2005 stayed as they apply to stopping the government from making payments to NRBL. Suspension of the ad-interim order to prohibit payments from the Government of Bangladesh is crucial to allowing us to resume drilling operations and continue production of gas from the Feni Gas Field.*

*We will be making an application to the Supreme Court Division in the next few days to request that the ad-interim order stopping payments to NRBL be stayed. The support and attendance at the Supreme Court, together with Niko’s counsel, by the most senior government legal officials would be most beneficial in this regard.”<sup>39</sup>*

58. On the same day, 29 November 2005, Petrobangla wrote to Niko:

*“Please be informed that the purchase price of gas of the Feni Gas Field is fixed at US\$1.75/MCF.*

*We hereby invite you to negotiate the terms of the GPSA for the production of Feni Gas Field, finalise, agree and execute the same based on the above price.”<sup>40</sup>*

59. Niko responded on 30 November 2005, stated its disagreement with that price and reiterated its proposal to settle the difference by reference to a sole expert. In the interim it accepted payment on the basis of USD1.75/MCF *“for volumes delivered to date, and in the future, as partial settlement for the gas sales pending final resolution and settlement of the gas price in a GPSA”*.<sup>41</sup>
60. On 5 December 2005, Niko confirmed that it accepted payment of USD 1.75/MCF on an interim basis until determination by the proposed expert.

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<sup>39</sup> Exhibit C-33.

<sup>40</sup> Exhibit R-5.

<sup>41</sup> Exhibit C-34.

61. On the same day, Niko sent the draft for an interim GPSA to BAPEX,<sup>42</sup> which responded on 11 December 2005 with some suggested changes.<sup>43</sup> Niko replied on 14 December, sending revised version of the draft GPSA and stating that it had incorporated the requested changes.<sup>44</sup> BAPEX suggested further changes on 19 December,<sup>45</sup> which Niko incorporated in a further revision of the draft GPSA returned to BAPEX on 20 December 2005.<sup>46</sup>
62. On 16 January 2006, Niko announced to BAPEX the temporary reduction and shut down of production from the Feni field.<sup>47</sup> It also seems to have made such announcements to Bakhrabad Gas Systems Ltd (**BGSL**). BAPEX objected to this communication in a letter of 19 January 2006, stating *inter alia*:
- “In our opinion this sort of unilateral decision and message to BGSL is a violation of JVA article no 24.3 since Petrobangla is the only authority & agent of GOB [i.e. the Government of Bangladesh] that purchases, sells, monitors and controls the transmission and distribution systems of gas in the country. ...”*<sup>48</sup>
63. On 18 January 2006, a meeting apparently took place between the “Advisor, Energy & Mineral Division” of the Ministry and Niko, followed on 19 January 2006 by a meeting between Niko and Petrobangla. As a follow-up to these meetings, on 22 January 2006, Niko sent to Petrobangla and BAPEX what it described as the “final version” of the Interim GPSA, already initialled by Niko.<sup>49</sup>
64. This version was not executed. Instead, a meeting between Niko representatives and the Advisor, Energy & Mineral Resources Division, at the Ministry took place on 12 February 2006. The meeting was followed by a letter from Niko to the Advisor dated 13 February 2006 in which it stated that the Advisor’s “confirmation of the delay in getting final approval from the Prime Minister’s Office to allow us to proceed with our work was

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<sup>42</sup> Exhibit C-36.

<sup>43</sup> Exhibit C-37.

<sup>44</sup> Exhibit C-39.

<sup>45</sup> Exhibit C-40.

<sup>46</sup> Claimant’s Exhibit 6, p. 369 produced in the first phase of the arbitration.

<sup>47</sup> Claimant’s Exhibit 6, p. 368 produced in the first phase of the arbitration

<sup>48</sup> Claimant’s Exhibit 6, p. 366 produced in the first phase of the arbitration.

<sup>49</sup> Claimant’s Exhibit 6, pp. 357-365 produced in the first phase of the arbitration.

*concerning ...*". Among the matters of concern Niko listed the finalisation of the Interim GPSA and the appointment by the Government of legal counsel to represent it in the BELA proceedings.<sup>50</sup>

65. At a meeting on 14 February 2006 Petrobangla requested Niko to increase production from the Feni field. This request was confirmed in a letter from Petrobangla to Niko of 20 February 2006, which referred to the request at that meeting as well as to "*repeated requests*" to the same effect.<sup>51</sup> On 26 February 2006, Niko announced to Petrobangla, with copy to the Prime Minister, the Ministry and others, that as of 27 February 2006 it planned to shut down all gas production from the Feni field "*until further notice*"; no reasons were given for this decision.<sup>52</sup>
66. Petrobangla objected to the decision in a letter of 28 February 2006 and requested Niko "*to immediately restore gas production to an increased quantity*". It added:

*"We are carefully scrutinising the draft GPSA you have submitted and our response to the same shall be communicated to you in due course. If the shut down has any connection with finalisation of the GPSA, it appears to be unnecessary at this point of time when negotiations even have not started."*<sup>53</sup>

67. In a letter to Petrobangla of 2 March 2006 Niko provided explanations for the shutdown, referring in particular to the absence of an approved Work Programme and Budget and of a GPSA.
68. Petrobangla replied on 5 March 2006, stating that "*the gas price under the JVA is a matter of common understanding of the Government of Bangladesh (GOB), Petrobangla and the investor*". That issue could not be subject to arbitration or determination by a sole arbitrator "*since GOB is not going to be a party to that*". Referring to the draft GPSA that Niko had submitted, Petrobangla declared that it was "*ready and willing to start negotiation on that. Feel free to contact us.*"<sup>54</sup> The letter

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<sup>50</sup> Exhibit C-42.

<sup>51</sup> Exhibit C-43.

<sup>52</sup> Exhibit C-44.

<sup>53</sup> Exhibit C-45.

<sup>54</sup> Exhibit C-47.



concluded with a request “to restore gas production with a promised 10 MMCF increased daily production within 24 hours of receipt of this letter or else we shall be constrained to take any measure legally possible”.<sup>55</sup>

69. Petrobangla, BAPEx and Niko then met on 7 March 2006. The following day, on 8 March 2006, Niko wrote to Petrobangla and to Mr Jamaluddin in his function as Managing Director of BAPEx and “Member Secretary of the Committee for Finalisation of Gas Pricing for the JVA”, requesting that a meeting of the Committee be urgently convened and added:

*“Furthermore, we value the relationship we have with the Government of Bangladesh and considering the national interest Niko Management after having detail discussion with the Hon’ble Advisor for the Energy & Mineral Resources Division decided to turn on the Gas Production from Feni Gas Filed [sic] as a gesture of our goodwill ...”*<sup>56</sup>

70. Gas deliveries did indeed resume; but the negotiations for the GPSA were completed only on 27 December 2006 when the GPSA was executed. No evidence has been produced as to whether the status of the injunction against payments to Niko was addressed in these negotiations. In particular there is no indication that Petrobangla informed Niko that, after the conclusion of the GPSA and until the injunction had been lifted, it would not make payments that it committed to make in the GPSA.

### **3.2 The blowouts and their consequences**

71. As mentioned above, on 7 January 2005 a first blowout occurred in the Well No. 2 of the Chattak field. The circumstances and consequences of this blowout are still controversial. However, it appears that gas escaped from the well, ignited forming a high flame and caused damage to the surroundings.

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<sup>55</sup> *Ibid.*

<sup>56</sup> Produced in the first phase of the arbitration as Claimant’s Exhibit 6, p. 308.

72. Niko conducted relief well operations in the course of which a second blowout occurred on 24 June 2005 in the Chattak gas field at the Relief Well Chattak 2A.
73. Niko, the Government of Bangladesh, and Petrobangla investigated the causes and consequences of the two blowouts. These investigations and their findings will be considered in the course of the proceedings concerning the Compensation Declaration. Brief reference to them must be made here, since the blowouts and their consequences in terms of liability and the damage caused form part of the background for the court proceedings in Bangladesh and the injunction on which the Petrobangla relies as justification for not paying Niko's invoices for gas delivered.
74. Starting on 9 January 2005, the Government of Bangladesh formed a number of enquiry committees to determine the causes of the fire and assess various categories of losses.<sup>57</sup> The first committee report was submitted on 10 February 2005;<sup>58</sup> it held Niko responsible for the first blowout. Subsequent reports in Bangladesh concluded that Niko was responsible for both blowouts and assessed the quantity and value of the gas lost,<sup>59</sup> the damage to the local population, environmental damage and other losses.<sup>60</sup>
75. Niko participated in some of these investigations and committees but not in others. It made its own investigations, including the engagement of a well-control consultant, who produced the Safety-Boss report on 24 January 2005.<sup>61</sup> It concluded that the blowout was "*in relative terms not a serious event*" and that Niko dealt with it "*immediately, responsibly, effectively and without regard to costs dealing with this emergency event thereby minimising its impact to all parties*".<sup>62</sup>
76. The Claimant states that it performed remedial work and "*made substantial ex gratia payments to local families, businesses,*

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<sup>57</sup> For a summary see the Judgment of the BELA proceedings, Exhibit C-21, pp. 14-16 and C-CD.2, pp. 47-56.

<sup>58</sup> Exhibit R-8.

<sup>59</sup> Report of 4 June 2005, Exhibit R-7.

<sup>60</sup> Information on the committees and their reports is provided in the Annex to B-CD.1 and in C-CD.2, pp. 47-56.

<sup>61</sup> The investigations are described in C-CD.2, pp. 33 et seq.

<sup>62</sup> C-CD.2, paragraph 108.

*religious centres, schools and other organisations as part of its commitment to fully remediating the potential consequences of the blowouts*".<sup>63</sup> The Claimant quantifies at USD 290'687 the direct compensation that it paid to members of the local community affected by the blowouts, in addition to payments through the local Deputy Commissioner following the conclusions of the local loss committee.<sup>64</sup>

77. In the fall of 2005, the Bangladesh Environmental Lawyers' Association (BELA) and others issued a petition in the Supreme Court of Bangladesh, High Court Division, against the Government of Bangladesh, Petrobangla, BAPLEX, Niko and others, seeking *inter alia* a determination that the JVA was invalid, that the payments made in respect of Feni gas purchases by Petrobangla were without lawful authority and an injunction restraining payments to Niko in respect to the Feni gas field or on any other account (the **BELA Proceedings**). These proceedings are discussed below in Section 7.2.
78. In the course of these proceedings, the injunctions on which Petrobangla relied when suspending payments under the GPSA and in defence against the Payment Claim were issued.
79. On 27 May 2008, Petrobangla served legal notice on Niko, claiming Tk746.50 crore as damages for the blowouts.<sup>65</sup>
80. Niko responded on 9 June 2008, denying liability for any damages arising from the blowouts at Chattak and that Petrobangla suffered the alleged damage. It added that the claims brought by Petrobangla had to be resolved by arbitration and that it was willing to resolve the issues between the Parties through arbitration conducted through ICSID, as agreed between the Parties.<sup>66</sup>
81. On 15 June 2008, the People's Republic of Bangladesh and Petrobangla, further to the notice of 27 May 2008 served by Petrobangla, commenced proceedings in the Court of the District Judge in Dhaka against Niko, two of its executives, GSM, and its drilling manager. They claimed damages in the

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<sup>63</sup> C-CD.2, paragraph 154.

<sup>64</sup> C-CD.2, paragraph 156.

<sup>65</sup> Exhibit E to RfA I; also produced in the proceedings concerning the Compensation Declaration.

<sup>66</sup> Exhibit E to RfA I.

amount specified in the Notice (these proceedings are referred to as the **Money Suit**).<sup>67</sup>

82. The proceedings in the Money Suit are still pending in the 2<sup>nd</sup> Court of Joint District Judge, Dhaka, with the reference “Money Suit No. 224/2008”. The merits of the claim have not been heard;<sup>68</sup> but during the time preceding the hearing in the present proceedings on the Payment Claim, applications for stay of the proceedings were made. The matter is further discussed below in Section 4.2.2 and 4.2.3.

### **3.3 The Payment Claims under the GPSA**

83. 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 were not paid. Details are described below in Section 7.1.
84. After several reminders, on 30 September 2007 Niko sent a Notice of Default to Petrobangla, claiming payment of the outstanding amounts.<sup>69</sup>
85. At 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.<sup>70</sup>
86. On 8 January 2010, Niko served Notice of Arbitration on Petrobangla under the GPSA.<sup>71</sup> By a separate Notice of the same date, Niko joined BAPEX to the arbitration commenced against Petrobangla.<sup>72</sup> 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.

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<sup>67</sup> Exhibit C-92.

<sup>68</sup> At the May 2014 hearing the Parties produced a schedule of the procedural steps in the Money Suit as C-98 (revised).

<sup>69</sup> Exhibit C-15.

<sup>70</sup> See letter of Niko to BAPEX, dated 17 April 2008, Exhibit C-24.

<sup>71</sup> RfA II, Attachment P.

<sup>72</sup> RfA II, Attachment Q.

## 4. THE PROCEDURAL HISTORY

### 4.1 From Registration to the Tribunal's Decision on Jurisdiction

87. A detailed account of the procedural history in the present two arbitrations until the Tribunal's Decision on Jurisdiction was set forth in that decision, issued on 19 August 2013. It will suffice here to recall only the main elements of that record.
88. Niko Resources (Bangladesh) Ltd. (Niko or the Claimant) filed a Request for Arbitration dated 1 April 2010 against the People's Republic of Bangladesh, Petrobangla, and BAPEX (the First Request or **RfA I**). Pursuant to Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (**ICSID Convention or Convention**), the Acting Secretary-General registered that request on 27 May 2010 and assigned to it ICSID Case No. ARB/10/11.
89. The Claimant filed a further Request for ICSID Convention Arbitration, dated 16 June 2010, against the same three Respondents, i.e., the People's Republic of Bangladesh, Petrobangla, and BAPEX (the Second Request or **RfA II**). The Acting Secretary-General registered that request on 28 July 2010 and assigned to it ICSID Case No. ARB/10/18.
90. The Tribunals in both arbitrations, collectively referred to as "the Tribunal", were constituted on 20 December 2010 in accordance with Article 37(2)(b) of the ICSID Convention. At the request of the Parties, the composition of the Tribunal was identical, consisting of Professor Jan Paulsson, a national of Sweden, France and Bahrain, 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.
91. The First Session in these two arbitrations was held on 14 February 2011. During this Joint First Session the Parties agreed *inter alia* that the two cases were to proceed in a concurrent manner, that the Tribunal may issue one single instrument in relation to both cases, and that it may deal with

the two cases jointly except where circumstances distinct to one case necessitate a separate treatment. It is in light of this agreement that in the two arbitrations and in the present decision, the two Tribunals, as pointed out above, will be referred to in the singular. The Parties also agreed that the applicable arbitration rules would be the ICSID Arbitration Rules in force as of 10 April 2006, 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.

92. At the Joint First Session, the Tribunal and the Parties also considered the procedural timetable. It was decided that the Respondents' objections to jurisdiction would be dealt with as a preliminary matter. The Parties subsequently filed several rounds of written submissions on jurisdiction and a hearing on jurisdiction was held on 13 and 14 October 2011 in London.
93. On 19 August 2013, The Tribunal issued its Decision on Jurisdiction, deciding *inter alia* that the Tribunal:
  - (1) 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;
  - (2) has jurisdiction to decide the Claimant's claim against Petrobangla for payment under the GPSA;
  - (3) reserves the questions related to the necessary role (or otherwise) of BAPEX in relation thereto;
  - (4) will give by separate order directions for the continuation of the proceedings pursuant to Arbitration Rule 41(4).

## 4.2 Subsequent to the Tribunal's Decision on Jurisdiction

94. Further to its Decision on Jurisdiction, the Tribunal provided the Parties on 27 August 2013 with preliminary proposals for the organization of the proceedings on the merits and invited their comments regarding (i) the Payment Claim and the related Cooperation Claim (collectively referred to as the "**Payment Claim**"), and (ii) the requested Compensation Declaration.
95. On 5 September 2013, the Claimant provided comments on the Tribunal's request of 27 August 2013 and proposed a tentative procedural timetable for the further written and oral procedure on the merits related to both the Payment Claim and the Compensation Declaration.
96. On 16 September 2013, the Respondents provided comments on the Tribunal's request of 27 August 2013, disagreeing with the Claimant's proposals.
97. On 19 September 2013, the Tribunal set out the deadlines for the Claimant's first written submissions and invited the Parties to consult and agree on the deadlines for the remainder of the written procedure.
98. In accordance with the Tribunal's 19 September 2013 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**).
99. Having received on 24 and 25 September 2013 the Parties' views regarding the organization of the further procedure, the Tribunal issued, on 15 November 2013, **Procedural Order No. 3** concerning the procedural calendar for the remainder of the proceedings on the merits in relation to the Payment Claim and the Compensation Declaration.
100. The proceedings on the **Compensation Declaration** follow a separate track in which, until now, the Claimant has filed, in addition to C-CD.1, on 29 May 2014 its Reply (**C-CD.2**) and BAPEX on 30 January 2014 its Counter-Memorial (**B-CD.1**). The Rejoinder of BAPEX is due on 25 September 2014, followed by a

hearing in London from 10 to 14 November 2014, with 15 November held in reserve.<sup>73</sup> Since they will follow a separate track, the proceedings concerning the Compensation Declaration will not be addressed further in the present decision.

#### *4.2.1 Proceedings on the Payment Claim*

101. Procedural Order No. 3 provided for additional written submissions on the Payment Claim and a hearing in London. Following consultations with the Parties and considering the dates for the written submissions and the availability of the Parties and the members of the Tribunal, the time for the hearing on the Payment Claim was fixed for the week starting from 28 April 2014.
102. In accordance with Procedural Order No. 3, 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.
103. The Claimant filed its Reply concerning the Payment Claim on 30 January 2014 (**C-PC.2**), together with exhibits, legal authorities and a second witness statement of Mr Goyal.
104. Further to proposals made by the Claimant on 13 December 2013 and comments by the Respondents of 19 December 2013, the Tribunal issued, on 31 January 2014, **Procedural Order No. 4**, modifying and completing the directions with respect to the means of communication in these proceedings which it had given at the First Joint Session on 14 February 2011.
105. 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.

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<sup>73</sup> These dates were fixed at the hearing in the Payment Claim on 30 April 2014; see Summary Minutes of that hearing, dated 9 May 2014, paragraph 7.4.



4.2.2 Requests for Provisional Measures related to the Payment Claim

106. On 23 December 2013, the **Claimant** filed 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<sup>74</sup> before the 2<sup>nd</sup> 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.
107. On 2 January 2014, the Tribunal invited comments from Petrobangla on the Claimant's request of 23 December 2013. Petrobangla filed its observations on 31 January 2014.
108. On 6 January 2014, the Respondents requested that, following their written reply, an oral hearing be held concerning the request for Provisional Measures, "given the importance which both the Claimant and Petrobangla attach" to these measures. The Claimant informed the Tribunal that it saw no need for such a hearing.
109. Following the receipt of Petrobangla's Response to the Claimant's Request for Provisional Measures, the Tribunal decided on 16 February 2014 that an oral hearing on the Claimant's 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.
110. In its letter dated 16 February 2014, the Tribunal moreover noted that a hearing in relation to the attachment application had been scheduled to take place in Dhaka on 13 March 2014, i.e., before the provisional measures hearing in these arbitrations. The Tribunal hence perceived the need to ensure that in the meantime the situation relating to the Claimant's provisional measures request would not be aggravated, nor that compliance with a possible recommendation by the Tribunal be rendered more difficult. The Tribunal invited the Parties to state

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<sup>74</sup> See above Section 3.2.

what measures they considered necessary to ensure such result.

111. In accordance with the timetable set forth in the Tribunal's letter dated 16 February 2014, the Claimant filed on 17 February 2014 a reply to Petrobangla's observations on provisional measures made on 31 January 2014.
112. On 28 February 2014, Petrobangla filed a Rejoinder on Provisional Measures. In this rejoinder **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*". On 24 March 2014, the Claimant filed observations on Petrobangla's request for provisional measures.
113. Having received the Parties views regarding the preservation of the *status quo* on provisional measures, the Tribunal issued **Procedural Order No. 5** on 6 March 2014. In this procedural order, the Tribunal instructed Petrobangla to request the 2<sup>nd</sup> 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.
114. On 14 April 2014, the Claimant informed the Tribunal that Niko had requested on 13 March 2014 an adjournment of the hearing on the Attachment Application and that the Court granted Niko's application and issued the order on the same day postponing the hearing in the Money Suit until 12 June 2014.

#### 4.2.3 Hearing on the Payment Claimant and Provisional Measures

115. 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.
116. Prior to the hearing, the Tribunal had written to the Parties on 15 April 2014, setting out some preliminary considerations

concerning the substance of the dispute that may impact the scope and organisation of the hearing. With respect to the Payment Claim, it identified factual questions and legal considerations which it considered possibly relevant for its decision; it identified information which it invited the Parties to provide, in particular with respect to pending court proceedings relating to the requested provisional measures, and addressed other matters relating to the organisation of the hearing and pre-hearing consultations.

117. After some further correspondence, the Tribunal proposed on 24 April 2014 a tentative agenda and gave further directions for the organisation of the hearing.
118. 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.

119. In the course of the hearing on the **Payment Claim**, the Tribunal sought to clarify certain issues identified in the Tribunal's letter dated 14 April 2014 and other issues arising from the Parties' written and oral submissions concerning the Payment Claim. Mr Amit Goyal, Controller of Niko Resources Ltd., and Mr Md. Imam Hossain, Secretary of Petrobangla testified as witnesses and responded to the Tribunal's questions. The Parties were given an opportunity to examine the witnesses, to develop their case orally and to respond to questions from the Tribunal.

120. With regard to the further procedure on the Payment Claim, it was agreed that Petrobangla would file by no later than 22 May 2014 a written submission on the applicable interest in relation to the Payment Claim and that the Claimant would file by no later 6 June 2014 its observations on Petrobangla's submission.
121. Subject to these submissions concerning the applicable interest rates, the **proceedings on the Payment Claim were closed** and the Tribunal announced that it would now render its decision on this claim.
122. In the course of the hearing on **Provisional Measures**, the Parties were given an opportunity to present their case-in-chief, offer rebuttal statements, and to respond to questions from the Tribunal.
123. On 30 April 2014, the last day of 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.
124. During the course of the hearing, the Parties submitted additional Legal authorities and documentary evidence, including an agreed translation of the docket in the Money Suit.<sup>75</sup> All of these are listed in the Summary Minutes of the hearing.
125. At the end of the hearing, the Tribunal enquired whether there were any outstanding points or issues to be addressed. Since this was not the case, the Tribunal declared the hearing closed. **Summary Minutes** of the hearing were prepared by the Tribunal and sent to the Parties on 9 May 2014.
126. The hearing was recorded and a transcript was prepared by Ms Georgina Ford and Mr Ian Roberts of Briault Reporting Services. A copy of the transcript was sent to the Parties and the Members of the Tribunal on each hearing day. The audio recording of the hearing was distributed to the Parties at the hearing and was sent to the Members of the Tribunal on 6 May

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<sup>75</sup> Exhibit C-98 (revised); See HT Day 5, p. 551.

2014. The Parties were given an opportunity to correct the transcript. A revised version of the transcript with the Parties agreed corrections was distributed on 18 June 2014.

127. Further to the programme agreed at the end of the hearing, Petrobangla filed its Submissions on Interest in the Payment Claim on 22 May 2014 (**P-PC Interest.1**); the Claimant responded by its Observations on Respondent's Submission on Applicable Interest in the Payment Claim (**C-PC Interest.1**); in view of new information and evidence contained in the latter submission, Petrobangla was given an opportunity for comments, and on 17 June 2014 submitted Observations on Submissions on Interest in the Payment Claim (**P-PC Interest.2**).
128. The Tribunal deliberated in person and by correspondence and reached the present decision unanimously.

## **5. THE RELIEF SOUGHT BY THE PARTIES AND THE ISSUES TO BE DECIDED**

### **5.1 The Claimant's requests for relief**

129. The dispute concerning the Payment Claim was first defined in the Claimant's Notice to Arbitrate of 8 January 2010, as amplified in its Request to Institute Arbitration Proceedings of 16 June 2010 in which the Claimant also identified the relief it sought as follows:

“...that the following disputes be arbitrated:

- (a) Petrobangla's failure or refusal to pay for gas delivered under the GPSA from and after November 2, 2004, including its refusal to pay the invoices rendered to it under the GPSA, as particularized in Niko's Notice of Default to Petrobangla dated December 13, 2007 Ref: NRBL/FIN/07-08-085 (a copy of which was attached thereto);
- (b) Petrobangla's failure or refusal to pay for gas delivered under the GPSA from and after November 2, 2004 including its refusal to pay the invoices rendered to it under the GPSA, to the date of the notice or the date or [sic] arbitration;
- (c) The validity of Petrobangla's alleged excuses for non-payment to the Joint Account established by Niko and Bapex for the purpose of receiving payments under the GPSA, including
  - (a) any alleged excuse arising from or relating to any injunctive or other order made by the Court in the BELA Proceedings or in any appeal proceedings relating to the suit;
  - (b) any set off claimed by Petrobangla arising from the Compensation Claims, which claims are described in the Legal Notice dated May 27, 2005 issued on behalf of Petrobangla to Niko (a copy of which was attached) and/or in the pleadings in the Money Suit;
- (d) If Petrobangla is entitled to any set off on account of the Compensation Claims, the amount of such set off;

(e) Determination of the net amount owed by Petrobangla to Niko (or alternatively the Seller as defined in the GPSA), pursuant to the GPSA for gas delivered from and after November 2, 2004 until the date of the hearing of the arbitration.”

130. In its Memorial concerning the Payment Claim of 27 September 2013, the Claimant defined the relief sought thus:

“... an award in its favor and against Petrobangla and BAPEX:

a. Declaring that:

i. Niko is entitled to bring and capable of bringing a claim for that amount due under the Invoices owed to Niko on its own; or

ii. In the alternative, that Niko is entitled to bring and capable of bringing a claim for the entire amount owed under the Invoices to Niko and BAPEX;  
or

iii. In the further alternative, that BAPEX is required to cooperate with Niko in advancing a claim for the total amount owed under the Invoices, which cooperation includes pursuing arbitration under Article 13 of the GPSA with Niko and accordingly BAPEX shall be deemed to consent to same in specific performance of its obligations;

b. Ordering Petrobangla to pay to:

i. Niko the total amount owing to Niko under the Invoices, being \$25,313,920.00 in USD plus 139,993,479 in BDT; or

ii. In the alternative, Niko the total amount owing to Niko and BAPEX under the Invoices, being \$25,313,920.00 in USD plus 750,848,445 in BDT, being both Niko’s share in BDT and BAPEX’s share in BDT; or

iii. In the further alternative, to Niko and BAPEX the total amounts owing under the Invoices, being

\$25,313,920.00 in USD plus 139,993,479 in BDT to Niko and 610,854,966 in BDT to BAPEX;

- c. Ordering Petrobangla to pay interest on any payment awarded under paragraph 78b,<sup>76</sup> above at a simple annual rate of 5 percent through the date of the award;
- d. Awarding Niko costs in accordance with Article 61 of the ICSID Convention;
- e. Ordering that all sums awarded be in freely transferable and exchangeable funds, in accordance with the requirements of Article 26.1.6 of the JVA;
- f. Ordering post-award interest at an annual rate of 5 percent compounded monthly until the award is paid in full; and
- g. Awarding such other and further relief as the Tribunals deem appropriate.”

131. In its Reply concerning the Payment Claim of 30 January 2014, the Claimant restated its request for relief in this way:

“An award in its favor and against Petrobangla and BAPEX:

- (a) Declaring that Niko is entitled to bring and capable of bringing a claim to that portion of the Invoices owed to Niko on its own;
- (b) Ordering Petrobangla to pay to Niko the total amount owing to Niko under the Invoices, being US\$ 25’312’747 plus BDT 139’988’337;
- (c) Ordering Petrobangla to pay interest on any payment awarded under paragraph 146b<sup>77</sup> above at a simple annual rate of 5 percent through the date of the award;
- (d) Ordering post-award interest at an annual rate of 5 percent compounded monthly until the award is paid in full;
- (e) Awarding Niko costs in accordance with Article 61 of the ICSID Convention;  
and

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<sup>76</sup> This refers to the preceding paragraph (b) in the same prayer for relief.

<sup>77</sup> This refers to the preceding paragraph (b).



- (f) Awarding such other and further relief as the Tribunals deem appropriate.”
132. At the last day of the hearing, on 30 April 2014, the Claimant produced a new version of the relief requested, in the following terms:<sup>78</sup>

“1. Claimant Niko respectfully submits that the Tribunals should issue an award in its favor and against Petrobangla and BAPEX:

- (a) Declaring that Niko is entitled to bring and capable of bringing a claim to that portion of the Invoices owed to Niko on its own;
- (b) Ordering Petrobangla to pay to Niko the total amount owing to Niko under the Invoices, being 25,312,747.00 USD plus 139,988,337.00 BDT;
- (c) Ordering Petrobangla to pay interest on any payment awarded under paragraph b above at a simple annual rate of 5 percent through the date of the award;
- (d) Ordering post-award interest at an annual rate of 5 percent compounded monthly until the award is paid in full;
- (e) Awarding Niko costs in accordance with Article 61 of the ICSID Convention;  
and
- (f) Awarding such other and further relief as the Tribunals deem appropriate.

2. In the alternative, Niko respectfully submits that the Tribunals should issue an award in its favor and against Petrobangla and BAPEX:

Alternative A

- (a) Declaring that Niko is entitled to bring and capable of bringing a claim to that portion of the Invoices owed to Niko on its own;
- (b) Finding that Petrobangla and Niko have agreed that Petrobangla owes to Niko and should pay to Niko the total amount owing to Niko under the Invoices, being 25,312,747.00 USD plus 139,988,337.00 BDT;
- (c) Finding that this agreement reflects an amicable settlement within the meaning of the BELA injunction of 17 November 2009;

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<sup>78</sup> The text distributed had the words “alternative submissions”. Upon enquiry from the Tribunal, the Claimant explained that the new text, as reproduced above in the body of this decision, is not an alternative version but the updated principal submission; HT Day 5, pp. 553-554.

- (d) Ordering Petrobangla to pay to Niko the total amount stated above;
- (e) Ordering Petrobangla to pay interest on any payment awarded under paragraph b above at a simple annual rate of 5 percent through the date of the award;
- (f) Ordering post-award interest at an annual rate of 5 percent compounded monthly until the award is paid in full;
- (g) Awarding Niko costs in accordance with Article 61 of the ICSID Convention;  
and
- (h) Awarding such other and further relief as the Tribunals deem appropriate.

Alternative B

- (a) Declaring that Niko is entitled to bring and capable of bringing a claim to that portion of the Invoices owed to Niko on its own;
- (b) Declaring that Petrobangla owes to Niko the total amount due under the Invoices, being 25,312,747.00 USD plus 139,988,337.00 BDT;
- (c) Declaring that Petrobangla shall pay interest on the amount under paragraph b above at a simple annual rate of 5 percent through the date of the award;
- (d) Declaring that Petrobangla shall pay post-award interest at an annual rate of 5 percent compounded monthly until the amount in full is paid in accordance with paragraph e below;
- (e) Ordering Petrobangla to pay the amounts stated under paragraphs b, c and d to a bank designated by Niko, which bank shall act as account holder and independent escrow agent with respect to such funds pursuant to a standard escrow account agreement of such bank with the following characteristics:
  - i. Petrobangla and Niko shall appoint the bank as escrow agent;
  - ii. The funds on account shall bear interest;
  - iii. The funds shall remain owned by Petrobangla until disbursed;
  - iv. The funds shall be disbursed only to parties unrelated to Niko and upon presentation by Niko of (a) bank details for such a party; and (b) a certification that the payee is not affiliated with Niko by common ownership or control and that the payment concerns

- operations or activities in the territory of Bangladesh;
- (f) Ordering that, in the event that Petrobangla fails to make the payment specified in paragraph e within 120 days of the award, Petrobangla shall make payment to Niko directly;
  - (g) Awarding Niko costs in accordance with Article 61 of the ICSID Convention;  
and
  - (h) Awarding such other and further relief as the Tribunals deem appropriate.

#### Alternative C

- (a) Declaring that Niko is entitled to bring and capable of bringing a claim to that portion of the Invoices owed to Niko on its own;
- (b) Declaring that Petrobangla owes to Niko the total amount due under the Invoices, being 25,312,747.00 USD plus 139,988,337.00 BDT;
- (c) Declaring that Petrobangla shall pay interest on the amount under paragraph b above at a simple annual rate of 5 percent through the date of the award;
- (d) Declaring that Petrobangla shall pay post-award interest at an annual rate of 5 percent compounded monthly until the amount in full is paid in accordance with paragraph e below;
- (e) Ordering Petrobangla to pay the amounts stated under paragraphs b, c and d to the International Centre for Settlement of Investment Disputes, which shall hold such sums in an interest-bearing account pending the Tribunals' award in the Compensation Declaration and disbursed by the Centre in accordance with the directions of the Tribunals, it being understood that such sums shall be paid to Niko only if the Tribunals in the Compensation Declaration find that Niko is not liable for the blowouts at issue or only to the extent that Niko's liability is less than the amount paid by Petrobangla pursuant to paragraphs b, c and d above, and also understood that any moneys not paid to Niko further to the preceding phrase shall be paid at the direction of Petrobangla or BAPEX;
- (f) Ordering that, in the event that Petrobangla fails to make the payment specified in paragraph e within 120 days of the award, Petrobangla shall make payment to Niko directly;

- (g) Awarding Niko costs in accordance with Article 61 of the ICSID Convention;  
and
- (h) Awarding such other and further relief as the Tribunals deem appropriate.

Alternative D

- (a) Declaring that Niko is entitled to bring and capable of bringing a claim to that portion of the Invoices owed to Niko on its own;
- (b) Finding that Petrobangla and Niko have agreed that Petrobangla owes to Niko and should pay to Niko the total amount owing to Niko under the Invoices, being 25,312,747.00 USD plus 139,988,337.00 BDT;
- (c) Finding that Petrobangla and Niko have expressed in the GPSA their mutual agreement to arrive at an extrajudicial settlement in the present circumstances and have appointed these Tribunals to arrive at, and formally record, the Parties' amicable settlement;
- (d) Ordering Petrobangla to pay to Niko the total amount stated above;
- (e) Ordering Petrobangla to pay interest on any payment awarded under paragraph b above at a simple annual rate of 5 percent through the date of the award;
- (f) Ordering post-award interest at an annual rate of 5 percent compounded monthly until the award is paid in full;
- (g) Awarding Niko costs in accordance with Article 61 of the ICSID Convention;  
and
- (h) Awarding such other and further relief as the Tribunals deem appropriate."

**5.2 The Respondents' requests for relief**

133. In its Counter-Memorial concerning the Payment Claim of 28 November 2013, **Petrobangla** sought the following relief:

"Petrobangla submits that the Tribunal should dismiss the claims in its entirety and should declare that:

- (1) For Petrobangla to pay Niko would be inconsistent with Bangladesh law, and would require

Petrobangla to violate its legal and constitutional obligations.

- (2) The gas supply contract between the Parties has been frustrated by the Court's Order in the BELA proceedings, and is therefore terminated.
- (3) The GPSA was procured by corruption and is therefore void.

134. In its Rejoinder of 27 March 2014 Petrobangla reiterated the request for relief in the Counter Memorial.

135. During the course of the hearing, Petrobangla presented on 30 April 2014 its request for relief in the following terms:

“Petrobangla requests the Tribunal to declare that:

1. Petrobangla is not in breach of GPSA and no interest is to be paid until the date of the decision of this Tribunal (“**Decision**”).
2. Petrobangla cannot be required to violate its constitutional and legal obligations under Bangladesh law.
3. Petrobangla's non-performance under the GPSA is a legitimate excuse under Article 14 of the GPSA and or Bangladesh law.
4. The Decision or any proceedings thereof do not constitute an *amicable settlement* as envisaged in the Order of High Court Division dated 17.11.2009 (“**High Court Division Order**”).
5. About the dues owed to Niko from Petrobangla, the following actions need to be taken:
  - (a) The dues as admitted by the Parties to be put into 2 (two) separate accounts to be opened in a bank in Bangladesh acceptable to both Petrobangla and Niko (“**Designated Bank**”). The account will be opened in the name of Petrobangla, but will be opened for the sole purpose of holding the said amount. There will be one USD account and one BDT account for holding the respective USD and BDT part of the dues (jointly referred to as “**Accounts**”).
  - (b) The funds in the Accounts will be held by Petrobangla until disbursed in accordance with the Decision.

- (c) The funds in the Accounts will be disbursed to Niko only when the conditions set out in the High Court Division Order are satisfied.
  - (d) The Accounts will be interest bearing at prevailing interest rates as provided by the Designated Bank.
6. Petrobangla's [sic] is entitled to costs in connection with the Payment Claim."

136. In its Counter Memorial of 28 November 2013, **BAPEX** stated its position in the following terms:

- "(1) Insofar as Niko's claim is based on a contractual breach of an alleged direct liability of Petrobangla under the GPSA as a 'buyer' concerning the amounts 'owed' to it under the invoices in this arbitration, that claim does not require BAPEX's approval or co-operation. It is further submitted that Niko cannot bring a claim against Petrobangla for the entire sum alleged owed to Niko-BAPEX as Joint Venture partners.
- (2) BAPEX submits that there is no basis for adding BAPEX as a third party in this arbitration."

137. "For avoidance of doubt", BAPEX added in these submissions that it "is not a respondent in this case". It made no further submissions in the proceedings concerning the Payment Claim.

### **5.3 The issues to be decided**

138. The Tribunal notes that the Parties have set out in detail the relief requested in this phase of the arbitration and that the relief so requested varied considerably as the proceedings evolved. It concludes that the changes in these requests were considered and intentional. Therefore, the Tribunal considers the Parties' respective cases by reference to the latest version of the relief requested and treats earlier versions of this relief, to the extent that they have not been incorporated in this latest version, as abandoned, at least with respect to the Payment Claim which it now has to decide.

139. Against this background, the Tribunal has identified the following issues:

- (a) The role of BAPEX with respect to the Payment Claim;
- (b) The amounts due from Petrobangla;
- (c) The *force majeure* defence in respect to the GPSA or any earlier agreement;
- (d) The obligations of Petrobangla in the absence of a valid *force majeure* defence;
- (e) Interest;
- (f) Costs of the arbitration.

## **6. THE ROLE OF BAPEX**

140. The GPSA provides that payments shall be made to the “Seller”. This term is defined on the title page of the GPSA as “the Joint Venture Partners”, that is to say Niko and BAPEX. The expression “Joint Venture Partners” is also used in the Preamble, together with the expression “BAPEX-NIKO jointly”. In Article 1.13 the Seller is defined as “the BAPEX-NIKO Joint Venture as described in the Preamble of this Agreement”.
141. In their submissions concerning the Tribunal’s jurisdiction, the Parties took conflicting positions concerning the question of whether Niko could act alone for the “Seller” or for its share in the amounts due for the gas delivered.
142. In its Decision on Jurisdiction, the Tribunal examined in detail whether it had jurisdiction with respect to claims under the GPSA, in particular those made by the Claimant against Petrobangla. It concluded that it had jurisdiction to decide on claims made by Niko against Petrobangla arising under the GPSA.<sup>79</sup>
143. It reserved its decision about the question of whether such claims, if they exist, must be made for the Joint Venture Partners jointly or whether they may be made for Niko alone; it also reserved the decision concerning the position of BAPEX in the proceedings concerning the GPSA.<sup>80</sup>
144. In the proceedings concerning the Payment Claim, the Claimant concluded that Niko was entitled to act alone in bringing a claim to that portion of the Invoices which, according to the JVA, was owed to Niko; it seeks payment only for that portion.
145. Although named as Respondent in this part of the proceedings, BAPEX declared that it was “not a respondent in this case”. The only objection which BAPEX raised against Niko’s Payment Claim consisted in stating that “Niko cannot bring a claim against Petrobangla for the entire sum alleged owed to Niko-

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<sup>79</sup> Paragraphs 529-574 of the Decision on Jurisdiction.

<sup>80</sup> Paragraph 574 of the Decision on Jurisdiction.



BAPEX as Joint Venture partners”.<sup>81</sup> Since Niko does not claim the entire sum, this objection is moot.

146. The question remains whether the consent of BAPEX, as one of the Joint Venture partners, is required for Niko to claim from Petrobangla payment of a portion of the sums due to the Seller under the GPSA. Neither the JVA nor the GPSA gives a clear answer. In the JVA, the JV is defined as the “Joint Venture between Niko and BAPEX” and there is no clear indication of a distinct legal personality of the JV; nor has there been, as far as the Tribunal has been informed, an incorporation of the JV. In the GPSA there are references to the “Joint Venture Partners” Niko and BAPEX as “the Seller” and to “the BAPEX-NIKO Joint Venture” also as “Seller”. Article 11.1.4 makes reference to the “joint bank account [...] in accordance with Article 6.2.2 of the JVA” but then distinguishes between the “sales proceeds due to BAPEX according to the JVA and five percent (5%) of sales proceeds of NIKO’s share ...”.
147. The documentary record of the arbitration contains some indications to the effect that the JV may be considered as a distinct “legal” or “business entity”.<sup>82</sup> Yet there are also numerous indications to the contrary: in particular the negotiations and correspondence concerning the conclusion of the GPSA were primarily conducted between Niko and Petrobangla. The payment on account which Petrobangla made in the form of two payments of 2 million US Dollars each was made to Niko directly. The invoices for the gas delivered were sent by Niko; they identified separately the amounts due to Niko and to BAPEX. This practice was followed from the first set of invoice sent on 10 January 2007<sup>83</sup> to the last invoice sent on 2 May 2010;<sup>84</sup> there is no record of a complaint by either Petrobangla or BAPEX against this practice. The dispute about the payment of the Invoices and Petrobangla’s defence based on the Injunction concerns specifically Niko as a separate entity and not the Joint Venture.
148. These are strong indications that, in the dispute with Petrobangla concerning the payment of the Invoices for the gas

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<sup>81</sup> B-PC.1, paragraph 2(1).

<sup>82</sup> These expressions are used in BAPEX’s letter of 19 December 2005, Exhibit C-40.

<sup>83</sup> Exhibit C-5.

<sup>84</sup> Exhibit C-7.

delivered, Niko may act alone, provided it seeks payment only for its share according to the allocation under the JVA.

149. In any event, in this arbitration BAPEX has raised no objection to Niko's claiming its share of invoices from Petrobangla. In its Memorial, the Claimant had expressly stated that BAPEX had a duty to cooperate and was deemed to consent. BAPEX did not object in its Counter Memorial. If and to the extent to which BAPEX's consent to a claim by Niko for its portion of the sales price were required, BAPEX must be deemed to have given that consent.
150. The Tribunal concludes that Niko may pursue its claim for that portion of the "Seller's" invoices which concerns the portion of the sales price due to Niko under the JVA.

## 7. THE PAYMENT CLAIM

151. Niko seeks an order against Petrobangla for payment of USD 25'312'747 and BDT 139'988'337, plus simple interest at the rate of 5% per annum.
152. Petrobangla does not contest that it owes the amount claimed but raises as defence that, on grounds of *force majeure*, it was and continues to be excused for not making the payment. As long as non-payment is excused on this ground, so it argues, Petrobangla does not owe interest on the principal. Petrobangla accepts, however, that the amount owed be placed into an interest earning escrow account.
153. In its Counter Memorial, Petrobangla argued that “the gas supply contract between the parties has been frustrated by the Court’s Order in the BELA proceedings, and is therefore terminated”.<sup>85</sup> In its Reply Niko denied that there was merit in that position and added: “even if Petrobangla was to succeed in establishing a frustration defence, it would still be liable to pay Niko for the gas it received, on the basis of the doctrines of frustration and unjust enrichment”.<sup>86</sup> Petrobangla did not pursue this argument in its Rejoinder and, in its final version of the relief sought, no longer asserted that the “gas supply contract” had been terminated. The Tribunal concludes that this claim has been abandoned by Petrobangla.
154. Petrobangla sought in its Counter Memorial a declaration that the “GPSA was procured by corruption and is therefore void”.<sup>87</sup> The Claimant objected to this request, relying on the Tribunal’s findings in the Decision on Jurisdiction.<sup>88</sup> In that decision the Tribunal had examined the allegations of corruption. It referred in particular to the conclusion of the High Court Division in the BELA case “that the JVA was not obtained by flawed process by resorting to fraudulent means”; it also found that there was no evidence that the GPSA had been procured by corruption. No new argument or evidence has been produced since then. Petrobangla did not pursue the matter further and omitted the claim in the final version of the relief sought. The Tribunal

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<sup>85</sup> P-PC.1, paragraph 78(2), and paragraphs 62-67.

<sup>86</sup> C-PC.2, paragraph 135.

<sup>87</sup> P-PC.1, paragraph 78(3).

<sup>88</sup> C-PC.2, paragraphs 27-30.

concludes that the request concerning the avoidance of the GPSA on grounds of corruption has been withdrawn.

### **7.1 The amounts due (the principal)**

155. The amounts owed for the gas delivered are undisputed: they consist of the amounts due for gas delivered from November 2004 to December 2006 and specified in the 26 invoices sent on 10 January 2007, plus those amounts invoiced monthly for the gas delivered from January 2007 to the end of April 2010.<sup>89</sup>
156. In its Memorial of 27 September 2013, the Claimant quantified the amounts owed to Niko at USD 25'313'920 and BDT 139'993'479.<sup>90</sup> In its Counter-Memorial of 28 November 2013 Petrobangla, relying on the Witness Statement of Mr Hossain, quantified "the total amount owed for gas supplied by Niko" at USD 25'312'747 and BDT 139'988'337.<sup>91</sup>
157. In its Reply of 30 January 2014, the Claimant noted that the difference between the Parties concerning the amounts owed was small. It declared that the difference resulted from slightly different approaches to calculating the amounts and that the "differences between the parties are sufficiently minor that it is not worthwhile to debate them." It adopted the amounts that Petrobangla had stated as owing to Niko.<sup>92</sup>
158. On this basis the Tribunal takes **USD 25'312'747** and **BDT 139'988'337** as the undisputed amounts which, after deduction of payments made already, are owed by Petrobangla to Niko for its share of the price for the gas delivered during the period from November 2004 to April 2010.
159. The GPSA provides in Article 11.1.3 that amounts invoiced "shall be paid to Seller not later than forty five (45) days from the date of receiving the invoice by the Buyer". Article 11.1.4

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<sup>89</sup> Exhibits C-5 to C-7.

<sup>90</sup> C-PC.1, paragraph 78.b.i.

<sup>91</sup> P-PC.1, paragraph 55. At that paragraph Petrobangla states that the amount indicated is « with respect to the 26 invoices that followed the lump sum payment ». This is obviously incorrect since both Parties agree that an amount of some USD 25 million is due not just for the 26 invoices but for the total deliveries until April 2010. Indeed, Mr Hossain, on whose Witness Statement Petrobangla relies, states that the amount of some USD 25 million is for the 66 invoices that "have been raised with respect to gas supplied from feni field" Hossain WS I, paragraph 17.

<sup>92</sup> C-PC.1, paragraph 144.

GPSA adds that all payments “shall be made in the joint bank account at a scheduled bank of Bangladesh ...”. The Tribunal concludes that, unless and until the joint bank account had been established, Petrobangla could not have made any payment. Therefore, no amount was due before this time.

160. The Joint Bank Account was opened on 14 May 2007.<sup>93</sup> On the same day, Niko wrote to Petrobangla, requesting immediate payment of the amounts that had been invoiced by that time.<sup>94</sup>
161. The Tribunal concludes that all invoiced amounts were **due and payable 45 days** after the receipt of the invoice by Petrobangla but not before **14 May 2007**.

## **7.2 The Injunction in its successive versions**

162. The excuse on which Petrobangla relies for not paying the undisputed amount is the injunction issued by the BELA Court on 12 September 2005, subsequently upheld in appeal proceedings, confirmed and transformed.
163. The injunction in its original form was issued on 12 September 2005. On that day the Bangladesh Environmental Lawyers Association (BELA) had made the Writ Petition No. 6911 of 2005 against 10 respondents, including Bangladesh, represented by the Secretary, Energy Division, Ministry of Power, Energy and Mineral Resources (Respondent 1), Petrobangla (Respondent 4), BAPEX (Respondent 5) and Niko (Respondent 10).<sup>95</sup> The petition sought a declaration that the Niko/BAPEX Joint Venture Agreement was concluded without lawful authority and had no legal effect, that it should be “treated as a nullity having been procured through flawed process and resorting to fraudulent means and forged documents” and “should be treated as illegal; [having come] to an end as a result of material breach of the statutory and legal obligations”. In the petition BELA also requested that Bangladesh and BAPEX be

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<sup>93</sup> C-PC.1, paragraph 37. Petrobangla accepts that the joint bank account was opened in « May 2007 », P-PC.2, paragraph 17(4), p. 8; at the hearing 14 May 2007 was accepted by Petrobangla as the date when the joint account had been opened (HT Day 3, p. 118).

<sup>94</sup> Exhibit C-11.

<sup>95</sup> Exhibit R-10.

“... directed to take immediate effective measures to realize full compensation for destruction of the valuable natural gas resources and the damage to live [sic] and property and environment by the blow outs resulting from the respondent No. 10’s failure to discharge its legal obligations ...”

Pending the hearing of the case, the petitioners applied for a number of injunctions and orders.

164. On the same day, 12 September 2005, the Supreme Court of Bangladesh, High Court Division (Special Original Jurisdiction), proceeding *ex parte*, gave directions for further proceedings on the petition and made *inter alia* the following order:

“Pending disposal of the Rule, Respondents no. 1 to 9 are restrained from making any payment of [to?] no. 10 in respect of Feni Gas Field or any other account up to 22.10.05.”<sup>96</sup>

165. In addition, the order contained directions to Bangladesh, Petrobangla and BAPEX (Respondents 1, 4 and 5), *inter alia*

“...to submit a report within 45 days if receipt of this order specifying the measures that have been taken against respondent no. 10 to recover compensation for the successive blow outs, [...] and freeze all bank accounts of respondent No. 10 maintained in Bangladesh.”

166. The following day, on 13 September 2005, Niko filed “Civil Miscellaneous Petition No. 712 of 2005” in the Supreme Court of Bangladesh, Appellate Division (Civil Appellate Jurisdiction). It stated that it had learnt about the interim orders of the High Court Division from the daily newspapers and requested a stay of these interim orders. It explained in particular that the freezing of its bank accounts would lead to a stoppage of the day-to-day operations both for the gas supply from the Feni Field and the relief operations from the Chattak Field. Restraining payments to Niko would “add to the adverse effect on the finance and cash flow required for the continuous

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<sup>96</sup> Exhibit C-26; also produced as Exhibit R-11.

operations” of Niko “jeopardising and stopping gas production and supply”.<sup>97</sup>

167. On 14 September 2005, the Appellate Division of the Supreme Court removed the freezing order concerning the bank accounts, but left the injunction against payments to Niko intact. It made the following order:

“Let the application for stay be placed before the Court on 23<sup>rd</sup> October 2005. The interim order so far it relates to freezing of all the Bank accounts of the Respondent No. 10 maintained in Bangladesh is stayed till that date. The Respondent No. 10 is restrained from making any foreign remittance from the Bank Account.”<sup>98</sup>

168. The High Court Division considered the matter again on 19 October 2005. It noted that the order freezing Niko’s bank accounts had been stayed by the Appellate Division and concluded that “there is no scope to extend the previous stay order”. Concerning payments to Niko, the court found that no decision had been made by the Appellate Division and concluded:

“Since the order retraining the respondents 1-9 from making any payment to respondent No. 10 in respect of any gas field or any other account passed by the High Court Division has not been modified by the Appellate Division that order shall continue.”<sup>99</sup>

169. Niko filed on 23 October 2005 Civil Petition No. 1395 of 2005 (arising out of C.M.P. No. 712) for leave to appeal against the interim orders of 12 September 2005, essentially on the grounds exposed in the petition of 13 September 2005.<sup>100</sup>

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<sup>97</sup> Exhibit C-96, p. 12.

<sup>98</sup> Exhibit C-27.

<sup>99</sup> Exhibit C-28. In Petrobangla’s letter of 28 November 2005 (Exhibit R-13) the same passage is quoted as part of an order of the High Court Division of 16 November 2005; but no order of that date has been produced. Since the order of 19 October 2005 is uncontested, it does not seem to make any difference for the issues that have to be decided here whether, in addition, there was a further order on 16 November 2005. The Tribunal therefore leaves the uncertainty about the possible order of 16 November 2005 unresolved.

<sup>100</sup> Exhibit C-96.

170. The Appellate Division addressed the petition on the same day, 23 October 2005, and left the situation unchanged. It made the following order:

“The order of stay granted earlier is extended till 11<sup>th</sup> December, 2005 on which date the leave petition will come up for hearing before the Court.”<sup>101</sup>

171. On 12 December 2005 the Appellate Division extended its order for further six weeks;<sup>102</sup> on 24 January 2006 it was extended for further two months,<sup>103</sup> on 28 March 2006 for further three months<sup>104</sup> and on 26 June 2006 for further six months.<sup>105</sup> On 12 December 2006, the Appellate Division decided that “the earlier order of stay is still in force and hence tantamount to continue”.<sup>106</sup>

172. The Appellate Division considered the Petition No. 1395 of 2005 for a last time at a hearing on 3 October 2007. In its order of that day, the Appellate Division referred to the High Court’s order of 12 September 2005 and the order which the Appellate Division had made in response to Niko’s “leave petition”, i.e. the stay of the freezing of Niko’s bank accounts in Bangladesh and the restraining order against making any foreign remittances from the Bank Account. It concluded:

“The aforesaid order passed earlier by this Division is extended till hearing of the aforesaid Writ Petition.”<sup>107</sup>

173. Thereafter the High Court Division held several hearings in the BELA proceedings which spanned a period of several months, starting in February 2009.<sup>108</sup> The Court rendered its judgment

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<sup>101</sup> Exhibit C-29.

<sup>102</sup> Exhibit C-38.

<sup>103</sup> Exhibit C-41.

<sup>104</sup> Exhibit C-50.

<sup>105</sup> Exhibit C-57.

<sup>106</sup> Exhibit C-61.

<sup>107</sup> Exhibit R-12.

<sup>108</sup> HT Day 3, pp. 27-29 and Exhibit C-21, p. 2.



on 16 and 17 November 2009,<sup>109</sup> finding that the “JVA was not obtained by flawed process by resorting to fraudulent means”.<sup>110</sup>

174. Concerning the claim for compensation and the injunction against payments to Niko, the High Court Division made the following order:

“... 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 from making any payment to respondent No 10. This order of injunction shall remain in force till disposal of the money suit or till amicable settlement amongst the parties, whichever is earlier.”<sup>111</sup>

175. In this form the injunction has remained in force and no information has been provided to the Tribunal that this version of the injunction has been modified or terminated.

176. The Money Suit by which Bangladesh and Petrobangla claim damages relating to the blow outs was filed in the Court of the District Judge, Dhaka on 15 June 2008.<sup>112</sup> As explained above, these proceedings are still pending. The requests for provisional measures in this arbitration, as they were described above, relate to these proceedings in the Money Suit.

### **7.3 Force Majeure defence prior to the conclusion of the GPSA**

177. Petrobangla’s principal line of defence relies on an agreement for the sale of gas concluded in November 2004. It argues that, in relation to this agreement, the injunction by the BELA Court, issued on 12 September 2005 was unforeseen and justifies its

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<sup>109</sup> The judgment indicates, at p. 2, 16 and 17 November 2009 as the dates of the judgment; the signatures at p. 42 show the dates of 2 and 3 May 2010, the Claimant gave 5 May 2010 as the date when the final decision was made (C-PC.1, paragraph 43). At the hearing it was clarified that the judgment was delivered on 16 and 17 November 2009 (HT Day 3, pp. 27, 29, 138; but as explained at the hearing by Mr Nawaz, the certified copy was issued only on 2 May 2010 (HT Day 3, p. 139).

<sup>110</sup> Exhibit C-21, p. 40.

<sup>111</sup> Exhibit C-21, p. 42.

<sup>112</sup> Exhibit C-92.

*force majeure* defence. The Claimant denies that there is such an agreement of November 2004 and argues that its claims for payment are based on the GPSA of 27 December 2006; which was concluded in full knowledge of the injunction.

178. The argument of **Petrobangla** relies on “an oral agreement for the sale of gas between Niko/BAPEX and Petrobangla in early November 2004”;<sup>113</sup> it specifies that this contractual relationship between Niko and Petrobangla began on 4 November 2004.<sup>114</sup> Elsewhere in its submissions, Petrobangla states that it was already “[i]n or around August 2004” that “Petrobangla and Niko agreed to enter into a commercial relationship to sell and purchase gas without a signed GPSA”.<sup>115</sup>
179. When on 12 September 2005 the BELA Court issued its injunction against payments to Niko, according to Petrobangla, this was “an unforeseen legal impediment beyond the control of Petrobangla. Since the Order is a Constitutional and legal impediment to Petrobangla’s performance under the sales contract with Niko and BAPEX, Petrobangla’s right to invoke *force majeure* is a complete defence to Niko’s payment claim”.<sup>116</sup>
180. In support of this argument, Petrobangla relies on the law of Bangladesh, in particular Article 56 of the Bangladesh Contract Act 1872, as well as the doctrine of *force majeure* under common law and general principles of law.<sup>117</sup> Petrobangla insists that the “relevant contract is the oral agreement between the parties, not the GPSA”;<sup>118</sup> for this reason, Petrobangla argues that *force majeure* provision of Article 14 of the GPSA, “has no application to that oral agreement”.<sup>119</sup>
181. The **Claimant** does not contest that, prior to the conclusion of the GPSA on 27 December 2006, the Parties were in discussion about an interim arrangement for the period until the GPSA was concluded. For the Claimant, the interim arrangement was the subject of correspondence that did not lead to an agreement.

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<sup>113</sup> P-PC.2, paragraph 5(1).

<sup>114</sup> P-PC.1, paragraph 7; also P-PC.2, paragraph 14(1).

<sup>115</sup> P-PC.1, paragraph 16.

<sup>116</sup> P-PC.1, paragraph 8.

<sup>117</sup> P-PC.1, pages 16-22.

<sup>118</sup> P-PC.2, title of chapter III, 1, at p. 13.

<sup>119</sup> P-PC.2, paragraph 30.

182. Examining the evidence produced with respect to the arrangement during the interim period, the Claimant concluded

“there was no agreement on volume. There was no agreement on price until late 2005 when Niko agreed to Petrobangla's proposal of USD 1.75 per MCF. There was no agreement on any other term of the interim arrangement with one exception: all parties agreed that the price during the interim period would be adjusted after the GPSA was concluded on the basis of the price fixed in the GPSA.”<sup>120</sup>

183. **The Tribunal** considered that immediately before delivery started in November 2004, Niko had addressed the following offer to Petrobangla:

“... we will be pleased to put gas on production from the Feni Gas Field with immediate effect, that is November 1, 2004, pending execution of the Gas Sales and Purchase Agreement (GPSA).

To facilitate the above we request a confirmation from Petrobangla that Petrobangla shall purchase and pay Niko for Niko's share of the gas at USD 2.35/MCF or the finalized price in the GPSA, whichever is lower, for the gas delivered during the interim period prior to signing the GPSA.”<sup>121</sup>

184. Petrobangla responded on the following day, 1 November 2004, thanking Niko for the “successful development of the Feni gas field”, and stated:

“Petrobangla undertakes to buy gas from Bapex-Niko Joint Venture’s Feni marginal gas field.

Price of gas will be paid as per agreed and signed GPSA when finalised.”<sup>122</sup>

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<sup>120</sup> HT Day 3, p. 43.

<sup>121</sup> The letter has not been produced, but it is mentioned in Petrobangla’s reply letter dated 1 November 2004 (Exhibit C-3). The quoted passage, on which the Claimant relied during the hearing (HT Day 3, p. 41), is taken from the letter of Petrobangla’s letter of 24 November 2005 (Exhibit C-31) which quotes the letter *in extenso*.

<sup>122</sup> Exhibit C-3 and R-1.

185. Although this response, as the Claimant pointed out, is not a clear acceptance of the offer of 31 October 2004, Niko delivered gas and, even prior to the conclusion of the GPSA, required payment on an interim basis, for instance in a letter of 14 February 2005.<sup>123</sup> Indeed, as Petrobangla pointed out, it made two payments of USD 2 million each<sup>124</sup> and now attributes these payments to the contractual relationship on which it relies.<sup>125</sup>
186. In these circumstances it may well be that some form of contractual arrangement existed prior to the conclusion of the GPSA, even though the manner in which it came about and its terms were not clearly defined and the persons who concluded it have not been identified by Petrobangla.<sup>126</sup> However, the question of whether an agreement prior to the GPSA was indeed concluded and in what terms need not be resolved for the following reasons.
187. As the Claimant rightly points out,<sup>127</sup> the Parties expressly referred in the GPSA to the correspondence that had been exchanged prior to the conclusion of that agreement and addressed the question of the effect that had to be given to it. They provided in Article 16 the following:
- “All the discussions and meetings held and correspondence exchanged between the Buyer and Seller in respect of the Agreement and any discussions arrived at therein in the past and before the coming into force of the Agreement are hereby superseded by the Agreement and no reference of such discussions or meeting [sic] or past correspondence will be entertained by either the Seller or the Buyer for interpreting the Agreement or otherwise.”
188. Any agreement that may have been concluded between the Parties by the exchange of correspondence, at meetings or otherwise, thus has been superseded by the conclusion of the GPSA. In this GPSA the Parties agreed on the delivery of gas to

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<sup>123</sup> At C-PC.1, paragraph 28, the Claimant relies on factual observations in the Tribunal’s Decision on Jurisdiction, specifically paragraph 56 and the documentary evidence quoted there.

<sup>124</sup> P-PC.1, paragraph 7.

<sup>125</sup> P-PC.1, paragraph 7.

<sup>126</sup> The Claimant pointed out at the Hearing that there was no evidence for an oral agreement but correspondence about the deliveries prior to the conclusion of the GPSA; see HT Day 3, p. 40 *et seq.*

<sup>127</sup> C-PC.1, paragraphs 56-59.

Petrobangla and the payments that Petrobangla had to make for the gas so delivered. The payments that the Claimant seeks in this arbitration are based on this GPSA. The Claimant made it quite clear that its payment claim is based on the GPSA and not on any prior agreement: the “Payment Claim is based on the GPSA, which contains a provision on *force majeure*.”<sup>128</sup>

189. It is therefore irrelevant for the claim which the Tribunal must decide whether, under a now superseded informal contractual arrangement, Niko had an obligation to deliver gas and Petrobangla had an obligation to pay; and the Tribunal need not examine the question of whether, when the injunction was issued on 12 September 2005, Petrobangla was excused for not meeting any such payment obligations which may have existed at that time (prior to their being superseded by the GPSA). All these questions are moot since there is no claim before the Tribunal that seeks performance of the superseded agreement, damages for failure of its performance, or interest for delay in payments that may have been required under it.
190. The claim which the tribunal must determine concerns payment under the GPSA of 27 December 2006 by reference to the obligations acknowledged and created under that Agreement and under the law applicable to obligations under it. Defences which Petrobangla may have had against obligations under an earlier tacit or oral agreement are not relevant for this decision.

#### **7.4 Force Majeure defence against payment obligations under the GPSA**

191. Petrobangla takes the position that a *force majeure* defence similar to that on which it relies under the prior tacit or oral agreement can be invoked in defence against its payment obligations under the GPSA. The Claimant denies that such defence is available to Petrobangla and argues that Petrobangla is in default.

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<sup>128</sup> C-PC.1, paragraph 55.

#### 7.4.1 The Parties' positions

192. While stating, in its principal line of argument, that the “relevant contract is the oral agreement between the parties, not the GPSA”,<sup>129</sup> Petrobangla nevertheless also relies on the *force majeure* defence as excuse for not paying the invoices under the GPSA. As explained above, Petrobangla relies on “the doctrine of *force majeure* under international general principles of law”,<sup>130</sup> on “a *force majeure* excuse under common law” and specifically on Section 56 of the Bangladesh Contract Act 1872.<sup>131</sup>
193. In the context of the defence against the payment obligations under the GPSA, Petrobangla also argues that, when it concluded the GPSA, it considered the injunction as a “short term obstacle which would end at the conclusion of the BELA proceedings” and that it did not and could not expect that the Injunction continued after the BELA case was dismissed.<sup>132</sup> Petrobangla also argues that it did what could reasonably be expected of it to “*resolve the legal issues as early as possible*”.<sup>133</sup>
194. The Claimant points out that all the sources on which Petrobangla relies make a *force majeure* or similar defence available only with respect to events which occur subsequently to the creation of the obligation and were not foreseeable at the time when the obligation was created. The Claimant also denies that Petrobangla made reasonable efforts to remove the injunction.<sup>134</sup>

#### 7.4.2 The requirement that the force majeure event be unforeseen

195. The Tribunal has decided for the reasons just explained that, with respect to claims based on the GPSA, as they are made in this arbitration by Niko, the “relevant agreement” is the GPSA and not some earlier oral or tacit agreement. It is therefore, by reference to this agreement and the time when it was

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<sup>129</sup> P-PC.2, title of chapter III, 1, at p. 13.

<sup>130</sup> P-PC.1, paragraphs 57-61.

<sup>131</sup> P-PC.1, paragraphs 62-67.

<sup>132</sup> P-PC.2, paragraph 44.

<sup>133</sup> P-PC.1, paragraphs 49-52 and P-PC.2, in particular paragraphs 17(8)-21, paragraphs 46-55.

<sup>134</sup> C-PC.2, paragraphs 108-114 and 115-121.

concluded, that Petrobangla's *force majeure* defence must be considered.

196. Section 56 of the Bangladesh Contract Act, 1872 on which Petrobangla relies for its *force majeure* defence, provides as follows:

“A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promissor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.”<sup>135</sup> (Emphasis added.)

197. An event relieves the “promissor” of his obligation only if it occurred after the obligation has been contracted. This is, indeed, a general feature of *force majeure* and similar defences, which normally apply only if the event is unforeseen and unavoidable.

198. In the present case, the Parties have regulated the matter in Article 14 of the GPSA, which provides that a failure to perform or a delay in performing shall not be considered a default if performance is “prevented, hindered or delayed” by certain events which are further defined in Article 14.1.

199. The list of events specifically identified as *force majeure* events, in Article 14.1, include “actions of government or governments”. In the Tribunal's view this includes injunctions by the judiciary, as that by the BELA Court. In any event, Article 14.1.1 generally refers to acts which are “beyond the control of such Party”, i.e. the party affected by the event.

200. However, one of the conditions for considering an impediment as a case of *force majeure* is that it “could not be foreseen”. The specific clause regulating between the Parties the circumstances under which the defence of *force majeure* is available confirms the general principle, that events prior to the conclusion of the contract, known to the parties and thus “foreseeable”, do not qualify as *force majeure* and are no excuse for non-performance.

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<sup>135</sup> Legal Authority 14 to P-PC.1

201. This is undisputed and expressly accepted by Petrobangla. Events which occurred prior to the creation of the obligation do not provide a *force majeure* defence. Petrobangla stated it in the following terms:

“Petrobangla accepts that, in principle, neither the doctrines of frustration (encapsulated in s.56 of the Contract Act) nor force majeure apply to events which pre-date the contract.”<sup>136</sup>

202. When the GPSA was concluded, the injunction had been in place for over 15 months. There can therefore not be a question whether the Parties could foresee a future injunction preventing payment to Niko; the Parties were fully aware of this impediment.

203. Indeed, Petrobangla had expressly relied on the injunction prior to the conclusion of the GPSA. During the negotiations for the GPSA, after deliveries of Gas had commenced, Petrobangla invoked the injunction of the BELA Court in defence against Niko’s request for payment. In particular, in a letter of 28 November 2005 Petrobangla referred to this order in response to Niko’s announcement of a suspension of gas deliveries:

“Mr. Justice Md. Abdul Matin & Mr. Justice Md. Rezaul Haque of the Divisional Bench of the Honorable High Court Division of the Supreme Court of Bangladesh vide their order dated November 16, 2005 in the Writ Petition no. 6911 of 2005 have been pleased to direct as follows:

[follows the Order of 19 October 2005 as quoted above.]

As such we cannot make payment any more until the said Order of the Court is vacated.”<sup>137</sup>

204. Thus, Petrobangla was fully aware of the injunction, long before it concluded the GPSA. It may not rely on it as an unforeseen event. Indeed, Petrobangla expressly admits that the *force majeure* event on which it relies was known to it at the time when the GPSA was concluded:

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<sup>136</sup> P-PC.2, paragraph 32.

<sup>137</sup> Exhibit R-13.



“There is no dispute that Petrobangla was fully aware of the judicial supervision (i.e. the interim injunction) at the time of signing of the GPSA.”<sup>138</sup>

205. The Tribunal concludes that the injunction of the BELA Court is not a *force majeure* event on which Petrobangla may rely as a defence against the claim for the payment of the invoices.

#### 7.4.3 The risk of a long duration of the injunction

206. Petrobangla argues that, when it concluded the GPSA it expected that the injunction would not remain in place for long, but would be removed shortly thereafter. Petrobangla states that, at the time the GPSA was signed:

“... Petrobangla considered that the BELA injunction was simply a short-term measure which would end at the conclusion of the BELA case. Petrobangla believed that if the Court dismissed the BELA claim – as Petrobangla was arguing that it should – the Court would automatically discharge the injunction. Petrobangla expected such a decision by the BELA Court shortly after the signing of the GPSA.”<sup>139</sup>

207. The Tribunal has difficulties in accepting these explanations since, by the time the GPSA was concluded, the injunction had been in place for more than 15 months and there were no apparent signs that the BELA Court or the Appellate Division would remove it in the near future. Nor were there apparent signs that the BELA Court, by disposing of the principal action, would also put an end to the injunction.
208. There is no indication that the Parties agreed to suspend Petrobangla’s payment obligation until the BELA action had been completed and the injunction removed. Quite to the contrary, Petrobangla made an unconditional and unqualified commitment to pay for the gas.

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<sup>138</sup> P-PC.2, paragraph 44.

<sup>139</sup> P-PC.2, paragraph 9.

209. In Article 11.1.3 GPSA, Petrobangla commits to pay for the gas delivered “not later than forty five (45) days from the date of receiving the invoice”. In addition, Article 2.1 GPSA makes express provision for the payment of the gas delivered prior to the effective date of this agreement:

“This Agreement shall be fully effective from the date of its signing. However, it is acknowledged and agreed that the delivery of Gas from 2 November, 2004 shall be paid, after making appropriate adjustments for the payments already made, within reasonable time following execution of this Agreement ...”

210. Petrobangla accepts that this provision is a clear commitment to make payment. When discussing the 28 November 2005 letter quoted above, Petrobangla’s counsel explained what, in his view, the meaning of this passage in the letter was: “I cannot pay because of this, because of the order, but I will want to pay and I will pay.” Asked where in the letter it said “we will pay”, he responded:

“MR GONZALEZ: In the GPSA. There is Article 2.1 in the GPSA which says ‘I will pay’.

THE PRESIDENT: By saying, ‘We want to conclude the GPSA’, you make the commitment to pay? Is that what you are saying?

MR GONZALEZ: It is clear in the language of the GPSA. It is Article 2.1 and Niko has made extensive submissions to the obligation to pay.”<sup>140</sup>

211. The Tribunal fully agrees. In Article 2.1 GPSA Petrobangla clearly states “I will pay”, just as Article 11.1.3 contains a clear payment commitment. Both these commitments for payment are without any condition. Petrobangla confirmed that neither the GPSA nor any side agreement or declaration conditions the payment obligation upon the lifting of the injunction:

“THE PRESIDENT: Is there any reference in the agreement or outside the agreement or the GPSA or outside the

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<sup>140</sup> HT Day 3, p. 96.

GPSA that would open a defence for not paying by reference or as a result of the injunction?

MR GONZALEZ: I believe there is not one, not a reference in the GPSA.

THE PRESIDENT: And outside?

MR GONZALEZ: Not that I am aware of.

THE PRESIDENT: You showed us the letter of November --

MR GONZALEZ: Apart from the letter of 28 November 2005 which explicitly says, "I cannot pay until it is lifted, until the order is lifted", that is -- apart from that I believe there is no other document reflecting the legal obstacle that Petrobangla was facing.

THE PRESIDENT: Despite this recognition that you cannot pay in November 2005, Petrobangla concluded an agreement with an obligation to pay without reservation.

MR GONZALEZ: Apart from the letter of 28 November, no, there is not a reservation on the GPSA, an explicit -- <sup>141</sup>

212. In the absence of any such qualification or reservation, Petrobangla assumed the risk of any delay in the lifting of the injunction.
213. In these circumstances the fact that, contrary to Petrobangla's asserted expectation, the injunction was not lifted shortly after the conclusion of the GPSA and is still in place, does not relieve Petrobangla of its payment commitment. In particular, Petrobangla cannot rely on such delay as a *force majeure* defence; such a defence applies to events unforeseen at the time when the obligation is contracted. It does not apply to events which are known but which last longer than expected. Petrobangla has not provided any authority under the law of Bangladesh or any other law to the effect that the disappointment of hopes or expectations for the early removal of an impediment constitutes an event of *force majeure*.

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<sup>141</sup> HT Day 3, p. 117.

214. In conclusion on this point, Petrobangla made a firm commitment to pay for the deliveries in the past (as per Article 2.1) and all future deliveries within 45 days from the receipt of the invoice. It did so in full knowledge of the injunction and assumed the risk of delay in its removal. The Tribunal does not accept that this injunction may serve as justification or excuse, relieving Petrobangla from the consequences of its failure to meet its contractual obligation to pay for the gas delivered by Niko.

7.4.4 The obligation to take “reasonable action to overcome” the impediment

215. If it were accepted, contrary to the Tribunal’s conclusion, that Petrobangla was entitled to rely on the injunction as an event of *force majeure*, the Tribunal would have to examine whether Petrobangla complied with the obligations under Article 14.1.3 which provides:

“When any such event or combination of events has occurred, such Party shall take all reasonable actions to overcome any cause that prevents, hinders or delays performance of its obligations and to minimize the consequences and shall, insofar as is practicable, continue to perform its obligations hereunder.”

216. As the Claimant pointed out, similar obligations exist in relation to *force majeure* and related defences under common law and other legal principles.<sup>142</sup>

217. Petrobangla argues that it made “reasonable efforts” to remove the injunction. It accepts that, to the extent Article 14 of the GPSA were applicable, it would have been required under Article 14.1.3 to make such efforts. The Claimant strongly contests that Petrobangla complied with this obligation.

218. Petrobangla identifies the following steps as actions to overcome the injunction:

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<sup>142</sup> See in particular C-PC.2, pp. 31-33.

- (a) It filed an “Affidavit-in-Opposition in the High Court Division in the BELA case, arguing that it should dismiss the proceedings”;<sup>143</sup>
  - (b) It “[c]onsidered whether there were any available lawful means to overcome the injunction”, in particular by obtaining legal advice from the Attorney General of Bangladesh and from counsel at Admiralty Chamber; and assured Niko that it was “actively considering ways to resolve the legal issues as early as possible”;
  - (c) It took “significant steps to support Niko’s attempts to lift the injunction”; the attempts mentioned include considering “different ways of making payment” and inviting others to “take necessary action”.<sup>144</sup>
219. The Claimant contests that any of these steps can be considered as serious measures to overcome the injunction and its effects. Concerning the Affidavit-in-Opposition, the Claimant points out that in the affidavit “Petrobangla merely laid out its defence to the merits of the claims [...] Nothing in this affidavit-in-opposition shows that Petrobangla sought a ‘discharge of the Rule and vacating the order of injunction’”. The Claimant adds that “at the hearing in the BELA suit, counsel for Petrobangla did not argue that the injunction against payment should be modified or lifted.”<sup>145</sup>
220. In addition, the Claimant lists a number of steps that Petrobangla could have taken to press for the review and revision of the 2005 injunction and the November 2009 judgement and order. When the Claimant filed on 21 August 2008 an application to modify the Interim Order, it invited Petrobangla to join or support the application. While BAPEX filed a separate application, Petrobangla did not – nor did it otherwise intervene in support of the application.<sup>146</sup>

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<sup>143</sup> Petrobangla relies in this respect on Exhibit R19, an affidavit of 18 March 2009 in opposition against the BELA Writ Petition No. 6911 of 2005.

<sup>144</sup> P-PC.2, pp. 9- 11, P-PC.1, pp 11-15. The matter was also discussed extensively at the hearing, *e.g.* HT Day 3, pp. 122 *et seq.*

<sup>145</sup> C-PC.2, paragraph 77 and Goyal WS II, paragraph 80.

<sup>146</sup> Goyal WS II, paragraphs 77 and 78.

221. At the hearing, Petrobangla provided explanations about the availability of some of these possible procedural remedies and the reasons why it did not pursue them. However, none of them were taken by Petrobangla. On several occasions at the hearing the question was put to Petrobangla:

“... why did Petrobangla not make an application to the BELA Court and say, ‘Put an end to the injunction’.”<sup>147</sup>

222. Petrobangla responded that Niko and BAPEX were the beneficiaries of the payments to be made by Petrobangla and they applied for a removal of the injunction; but no application was made by Petrobangla.<sup>148</sup>

223. The Tribunal pointed out that it was the performance of Petrobangla’s obligation that was affected by the injunction and that one would expect that it would be above all Petrobangla which would apply for the stay of the injunction so that it could perform the obligation as it says it wanted to do. The Tribunal put the question squarely to Petrobangla’s counsel:

“PROFESSOR PAULSSON: .... It is a straightforward question then it is for Petrobangla to do something about this impediment ...

[...]

PROFESSOR MCLACHLAN: I think the Tribunal’s point to you, Mr Gonzalez, is your submission to us at the outset is you were then and are still now under an injunction from the Bangladesh courts, breach of which will expose your clients to proceedings for contempt of court and it is that interdiction which prevents you from doing which you would otherwise wish to do, which is to pay, and the most straightforward way of resolving that would appear to be simply to apply yourself to the court to seek to have the restriction limited in order to enable you to comply with your contractual obligations.

Of course, you might have applied and failed. The court might have said no, but what we are on at the moment is

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<sup>147</sup> HT Day 3, p. 122.

<sup>148</sup> HT Day 3, pp. 122-125.

simply the question given that the legal impediment is one that rests upon you, why not apply?

MR GONZALEZ: In hindsight, of course, why did not we do this, why did not we do that? Again, I go back to this test, the test of reasonableness and it says not to do everything that you can, all that can be done is what was reasonable and what our submission is let us look at what Niko was asking Petrobangla to do and in 2007 the request, Niko's request and Niko's understanding was, ....<sup>149</sup>

224. Counsel then proceeded to discuss ways that Niko sought to receive payment despite the injunction – a matter quite different from the question the Tribunal had asked. The central question remained: why did Petrobangla itself not take any steps to have the injunction removed by the Court or in appeal?
225. The Tribunal finds the answer that it received wholly unsatisfactory. When signing the GPSA on 27 December 2006, Petrobangla made a firm commitment to pay for the gas delivered in the past and to pay for future deliveries within 45 days upon receipt of the invoices. If it was prevented from making such payments it had to take all possible steps to remove the impediment. The question is not what Niko could or should have done or what Niko's understanding was. The commitment was made by Petrobangla and Petrobangla had to take the necessary steps in order to be able to perform its payment obligations.
226. Since the impediment which Petrobangla invokes is the injunction, the most obvious and direct step to take for Petrobangla to overcome the impediment is and continues to be an application to the competent court requesting that the injunction be lifted. Neither in response to the Tribunal's questions nor at any other occasion did Petrobangla state that it had taken such a step; nor did it provide any satisfactory explanation as to why it had failed to take such a step.
227. The Tribunal concludes that Petrobangla knowingly assumed the risk of being prevented from making payments by the

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<sup>149</sup> HT Day 3, pp. 127-129

continuing injunction and failed to take any serious steps to remove this impediment.

#### 7.4.5 Conclusion on the force majeure defence

228. The Tribunal concludes that Petrobangla made its payment commitments under the GPSA in full knowledge of the injunction prohibiting such payments. It took the risk that this injunction would continue even after the conclusion of the GPSA. It may not now rely on the injunction as excuse for not making the payments that it promised to make.
229. Therefore Petrobangla's failure to make the contractual payments is not excused by the defence of *force majeure*. Petrobangla is in default of its payment obligations under the GPSA.
230. Despite the failure of Petrobangla to make the payments due under the GPSA, Niko continued delivering gas, month after month. It did so for over three more years until April 2010, issuing no less than 40 additional invoices for monthly deliveries. Petrobangla enjoyed the benefit of these deliveries without any counterpart. The law and the Contract require that Petrobangla must pay the agreed price and, since it has failed to do so, be held liable for this failure.



## **8. INTEREST**

### **8.1 The issues in dispute**

231. The Claimant seeks interest at the rate of 5% on all payments awarded on account of its invoices for gas deliveries pursuant to the GPSA; simple interest until the date of the award and monthly compounding thereafter until full payment. Alternatively, the Claimant adds: “if the Tribunals are minded to take a complex approach and apply a variable interest rate, such as one based on LIBOR, the rate it should apply should be that of sixth-month LIBOR plus 2%”.<sup>150</sup>
232. Petrobangla objects to the interest claim, in particular to the application of compound interest. It argues that “interest should only run from the point at which the terms of the Injunction granted by the High Court Division in the BELA’s Writ Petition are satisfied”, adding that Petrobangla should not be penalised for “obeying the law”.<sup>151</sup> As part of the “actions [which] need to be taken” according to the relief requested by it at the April 2014 hearing, Petrobangla provides for the deposit of amounts due in an account at a Designated Bank. This account “will be interest bearing at prevailing interest rates as provided by the Designated Bank”.
233. The Tribunal found that Petrobangla committed to make payments according to the GPSA and that it did so in full knowledge of the injunction. Petrobangla failed to make these payments and may not rely on the injunction as excuse for this failure. Payments are due as per the terms of the GPSA.
234. The Parties agree that the claim for interest on Niko’s invoices is governed by Section 61(2) of the Bangladesh 1930 Sale of Goods Act which provides as follows:

“In the absence of a contract to the contrary, the Court may award interest at such rate as it thinks fit on the amount of price –

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<sup>150</sup> C-PC.1, paragraph 19.

<sup>151</sup> P-PC.2, paragraph 64.

(a) To the seller in a suit by him for the amount of the price from the date of the tender of the goods or from the date on which the price was payable.”

235. Concerning the starting date for Petrobangla’s obligation to pay interest, the Tribunal found that all invoiced amounts were due and payable 45 days after receipt of the respective invoice but not before 14 May 2007.<sup>152</sup> According to Section 61(2) of the Sale of Goods Act, these due dates for the payments also constitute the dates when interest starts running on each of the invoiced amounts.

236. With respect to the rate of interest, there is no statutory rate for payments in default.<sup>153</sup> Both Section 61(2) of the Sale of Goods Act, quoted above, and Section 34 of the Civil Procedure Code leave it to the courts to fix the rate. The latter provision reads as follows:

“Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, when further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment or to such earlier date as the Court thinks fit.”

237. On this basis the courts apply “commercially reasonable rates of interest”.<sup>154</sup> This is not disputed; the controversy concerns what is reasonable in the circumstances.

238. The Parties agree that with respect to the invoices payable in taka, the rate of 5%, as sought by the Claimant, is reasonable. Niko claims interest with respect to these invoices at that rate. At the hearing, Petrobangla explained that “the prevailing interest rate on saving accounts in taka, it varies from 5 to 8 per

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<sup>152</sup> Above Section 7.1

<sup>153</sup> As explained by Petrobangla at the April hearing (HT Day 5, p. 564); confirmed by the Claimant (HT Day 5, p. 566).

<sup>154</sup> Claimant at HT Day 5, p. 566.

cent”.<sup>155</sup> The position was confirmed in Petrobangla’s submission on interest, where it stated that it “agrees that should Tribunal decide to award interest, it could consider the applicable interest rates on BDT deposits which is around 5% at the moment”.<sup>156</sup>

239. The disagreement between the Parties concerns the rate applicable to the invoices in US Dollars. Here, too, Niko claims simple interest at 5%, alternatively a LIBOR based rate.<sup>157</sup> Petrobangla argues that the interest should be calculated at “interest rate provided by commercial banks in Bangladesh on USD deposits”.<sup>158</sup> The disagreement between the Parties concerns, first, the question of whether the rates applicable to debts in taka should apply also to the invoice amounts in US Dollars and, second, whether the relevant rates should be those for deposits or for loans.
240. In support of its interest claim, the Claimant had submitted a document from the Central Bank of Bangladesh which showed interest rates paid by commercial banks in Bangladesh during the period from January 2009 to September 2013.<sup>159</sup> Petrobangla argued at the hearing that the rates shown on this document applied to deposits in taka and were not applicable to US Dollars.<sup>160</sup> The document indeed does not indicate that the rates applied by the commercial banks also apply to deposits or loans in US Dollars.
241. Prior to the hearing Petrobangla merely contested that any interest was due and, with respect to interest concerning US Dollars, stated in its Rejoinder that interest on deposits in US Dollars was “based on LIBOR” without further specification.<sup>161</sup>
242. At the hearing the Claimant, on the basis of a “quick calculation”, advanced 3.712% as average LIBOR one month rate from 2007 to 2014. With an appropriate mark-up, this would confirm the 5% interest rate claimed also for US

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<sup>155</sup> HT Day 5, p. 567.

<sup>156</sup> P-PC Interest.1, paragraph 12.

<sup>157</sup> C-PC Interest.1, paragraphs 9-12 and 13-19.

<sup>158</sup> P-PC Interest.1, paragraph 4.

<sup>159</sup> Exhibit C-23.

<sup>160</sup> HT Day 5, p. 574 et seq.

<sup>161</sup> P-PC.2, footnote 86.

Dollars.<sup>162</sup> Petrobangla requested time to make its own investigation with the Central Bank.

243. The Tribunal granted Petrobangla time to make a submission on interest rates for US Dollars and for a reply by the Claimant. These submissions were made on 22 May and 6 June 2014, respectively. Since the Claimant's submission contained new allegations and evidence, the Tribunal granted Petrobangla an opportunity to comment. Petrobangla submitted these comments on 17 June 2014. The Tribunal considered the two questions identified above in light of these submissions, together with the argument raised in prior submissions and at the April 2014 hearing.

## **8.2 Do the commercial interest rates for taka deposits apply to the claim in US Dollars?**

244. Concerning the application of the agreed rates for taka debts to the invoices in US Dollars, Petrobangla argued that, when determining the applicable interest rate, a distinction must be made according to the "relevant currency".<sup>163</sup> It stated:

"Our submission is that a court in Bangladesh will normally commercially look at the interest rate that is prevailing in Bangladesh. Therefore, because it is US dollar amount the interest rate will be what the Central Bank says on that –"<sup>164</sup>

245. Petrobangla produced a number of documents from commercial banks and from the Bangladesh Bank (Central Bank of Bangladesh). The documents from the commercial banks showed that, depending on the currency, different interest rates were quoted. The Bangladesh Bank wrote to the Respondents' counsel on 20 May 2014, explaining the "Interest on foreign currency accounts held in Bangladesh" and attached an extract of the Guidelines for Foreign Exchange Transactions (2009) edition, spelling out "the basis on which Authorised Dealer Banks pay interest on foreign currency deposits in accounts held with them". The letter continued:

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<sup>162</sup> HT Day 5, pp. 568- 569.

<sup>163</sup> P-PC Interest.1, paragraph 4.

<sup>164</sup> HT Day 5, p. 571.

“As per regulation referred above, Authorized Dealer Banks can pay interest on such accounts at the prevailing Eurocurrency deposit rates. Bangladesh Bank does not fix interest rates on deposits. Interest rate depends on the length of time and amount of deposits. Authorized Dealer Banks apply interest rate on foreign currency deposits based on their interest earnings against their deposits placed in international markets. ...”<sup>165</sup>

246. The Tribunal concludes that information provided by the Bangladesh Bank on interest rates distinguishes between rates for deposits in taka and those in foreign currencies. The publication on which the Claimant relied for the calculation of the claimed interest concerns deposits in taka and does not apply to deposits in US Dollars or other currencies.
247. The distinction of interest rates according to currencies, as applied by the Bangladesh Bank, reflects economic reality: interest rates for a debt in a certain currency are related to the corresponding economy and thus may vary from one currency to another, reflecting for instance differences in the rate of inflation. Irmgard Marboe, in the study on which the Claimant relies, mentions as an example, the differences in LIBOR rates for US Dollars and Euros and concludes that “the choice of currency also plays an important role for the determination of the interest rate”.<sup>166</sup>
248. The Tribunal concludes that the interest rates applicable to deposits in taka, on which the Claimant relied, are not applicable for determining interest on the amount due in US Dollars by Petrobangla. The rates applicable for the calculation of interest on that amount must be determined separately by reference to deposits or debts in US Dollars.

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<sup>165</sup> Unnumbered attachment to P-PC Interest.1.

<sup>166</sup> Irmgard Marboe, *Calculation of Compensation and Damages in International Investment Law*, Oxford UP, 2009, paragraph 6.131.

### 8.3 The relevant rate for the debt in US Dollars – rates for deposits or for loans?

249. When determining the relevant rate for Petrobangla’s debt in US Dollars, both Parties refer to LIBOR rates. With its submission on Interest the Claimant produced a table for LIBOR rates from January 2007 to May 2014. During this period the six-month rates varied between a high of 5.40140% in January 2007 and a low of 0.38780% in February 2010; the average calculated by the Claimant for this period is 1.57446%.
250. Petrobangla stated that “interest is paid on one month deposit in US dollar based on LIBOR”.<sup>167</sup> In its submission on interest Petrobangla explained that

“... interest rate on USD deposits varies from bank to bank. Since banks would normally get interest at the rate of LIBOR on their deposits placed with international banks, the usual practice for a bank in Bangladesh is, determine a suitable *margin* for itself taking into account its own balance sheet position and then determining interest rate on UDS [sic] deposits by deducting the *margin* from LIBOR.”<sup>168</sup>

Later Petrobangla clarified:

“... a commercial bank in Bangladesh, while giving interest on USD deposit would apply ‘LIBOR *minus* margin’ approach and it is submitted that the Tribunal should also opt for the same.”<sup>169</sup>

251. The Claimant also referred to LIBOR, but it claimed a premium on the published rate. It referred to “the differing credit and country risks”<sup>170</sup> and explained

“Niko found itself in the position of involuntarily loaning to Petrobangla an ever increasing sum of money for almost a decade”.<sup>171</sup>

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<sup>167</sup> P-PC.2, footnote 86.

<sup>168</sup> P-PC Interest.1, paragraph 8.

<sup>169</sup> P-PC Interest.2, paragraph 1(iv).

<sup>170</sup> C-PC Interest.1, paragraph 15.

<sup>171</sup> C-PC Interest.1, paragraph 10.

It added:

“If Niko had been paid as it was entitled to under the GPSA, it would have reinvested that money into its business and generated additional returns at rates significantly higher than 5% per year. In other words, the gas payments that Niko should have been receiving each month since 2004 would have earned returns on investment, but for Petrobangla’s failure to pay.”<sup>172</sup>

252. The Parties agree that LIBOR rates reflect rates between banks and are not rates at which Niko or Petrobangla normally may borrow or lend on the market. The principal issue which the Tribunal must resolve is whether interest must be calculated by reference to the Claimant’s approach of “LIBOR plus”, as it would apply when Niko borrows US Dollars from a bank in Bangladesh, or at “LIBOR minus” when it would make a deposit in US Dollars in a such a bank.
253. When proposing the “LIBOR minus approach”, Petrobangla argues that it “has been an agreed position of both parties that, if interest is to be allowed then the appropriate benchmark would be to consider interest rates given respectively to BDT deposits and USD deposits by commercial banks in Bangladesh”; it added that “both Petrobangla and Niko have submitted interest rates should be linked with interest on deposits as opposed to interest on lending by commercial banks”.<sup>173</sup>
254. The Tribunal has considered the passage on which Petrobangla relies when making this affirmation and examined whether it justifies the conclusion that the Claimant accepted in a binding manner interest calculation at LIBOR minus. When it first specified its interest claim, the Claimant indicated a fixed rate of 5%, applicable for both taka and US Dollars. It explained that interest rates for commercial banks in Bangladesh “were diverse”. It referred to the tables published by the Bangladesh Bank mentioned above,<sup>174</sup> and, without presenting any

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<sup>172</sup> C-PC Interest.1, paragraph 11.

<sup>173</sup> P-PC Interest.2, paragraphs 1(i) and (v).

<sup>174</sup> Exhibit C-23.

calculation, proposed the rate of 5%.<sup>175</sup> That calculation may have been based on rates for varying deposits, but it did not constitute an acceptance by the Claimant of a “LIBOR minus approach”, as now applied by Petrobangla.

255. The Tribunal therefore has no agreed position adopted by both Parties on which it may rely, but must consider the respective positions of the Parties, as they were proposed in the submissions on Interest.
256. Neither Party has provided any explanation concerning the factual solution adopted in the circumstances and the alternatives in case the payments would have been made. It is therefore not known whether Niko had to borrow money to compensate the amounts withheld by Petrobangla or whether it would have invested them in operations which would have been more profitable than US Dollar deposits in Bangladesh.
257. In this situation the Tribunal, following Section 61(2) of the Bangladesh Sales of Goods Act, considers what would be reasonable in the circumstances. In applying such a broad discretion to the case of an unpaid contract debt the Tribunal is guided by the objective that the successful party should be compensated for having been kept out of its money to which it was entitled.
258. This objective cannot adequately be achieved by limiting the compensation to that which the creditor would have obtained by depositing the funds in a bank account. This is only one of the options which a creditor has if the debtor makes timely payment. Especially for a commercial company such a deposit may well be the least attractive option. Normally such a company can be expected to invest the money in its business, as the Claimant states that it would have done.<sup>176</sup>
259. The debtor’s failure to make payment deprives the creditor of the options which it would have if the payment is made. Therefore the Tribunal considers that the appropriate reference is to determine the costs which the creditor would have had to incur in order to obtain the funds which would provide these

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<sup>175</sup> The passage on which Petrobangla relies is at C-PC.1, paragraph 45 and Goyal WS I, paragraph 15.

<sup>176</sup> C-PC Interest.1, paragraph 11.



options and of which the creditor was deprived by the debtor's failure to pay. For these reasons, the Tribunal takes as reference the rate at which the Claimant would have had to borrow the funds.<sup>177</sup>

260. Where, as here, the debt was expressly payable in Bangladesh, the Tribunal considers that it is the situation in Bangladesh which has to be considered. The proper approach is therefore to determine the rate or rates at which Niko could have borrowed US dollars from a commercial bank in Bangladesh.

261. The evidence on US Dollar related interest rates produced by Petrobangla, while confirming the reference to LIBOR as a "benchmark",<sup>178</sup> concerns the conditions at which banks accept deposits and not the conditions at which they lend in US Dollars. For the Tribunal's decision they are therefore not helpful.

262. The Claimant produced an extract of the 2012/2013 Annual Report of Bangladesh Bank in which the activities of the Export Development Fund (EDF) are described. The Fund is intended to provide to authorised dealer (AD) banks foreign currency facilities which these lend to Bangladesh exporters. The report explains the conditions at which these facilities are provided:

"The interest rate on USD under EDF is charged at six-month LIBOR+2.5 percent out of which LIBOR+1 percent is for EDF and the rest 1.5 percent is for concerned AD banks."<sup>179</sup>

263. Petrobangla confirmed that the rates quoted in this passage are rates "charged from a customer who borrows from the Authorised Dealer under the EDF facility".<sup>180</sup>

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<sup>177</sup> This is also the position taken under English law, applying a statutory discretion in similar terms to the Bangladesh statutes: *Peter Cremer v General Carriers SA* [1973] 2 Lloyd's Rep 366, 376 per Kerr J. See also CHITTY on Contracts, vol. I, 30<sup>th</sup> ed. (2008), 26-178 who conclude from this case that the Commercial Court awards "interest at a rate which broadly represents the rate at which the successful party would have had to borrow the amount recovered over the period in question".

<sup>178</sup> E.g. the letter of Standard Chartered Bank, dated 19 May 2014, attached to P-PC Interest.1, referred to as Exhibit R-39.

<sup>179</sup> Unnumbered Attachment to C-PC.1, referred to as Exhibit C-102.

<sup>180</sup> P-PC Interest.2, paragraph 1(v).

264. It follows that a commercial enterprise in Bangladesh seeking to borrow US Dollars may obtain from the EDF programme facilities at LIBOR +2.5 %. The Tribunal takes this as a credible representation of commercial conditions in Bangladesh for the interest on US Dollar loans. 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.
265. The Claimant also produced extracts from a Production Sharing Contract concluded by the Government of Bangladesh and Petrobangla with several other companies which provides under the heading of “Late Payments” that “overdue payments shall bear interest at LIBOR plus two percent (2%) ...”.<sup>181</sup> The definitions contained in that contract clarify that reference is made to six month deposits for US Dollars.<sup>182</sup> Petrobangla objects that this contract is not applicable in the present dispute. The Tribunal agrees. However, it takes the rate provided in this contract as an indication that default interest at the rate of six month LIBOR + 2%, as claimed by the Claimant, is commercially not unreasonable.
266. On the basis of these considerations, the Tribunal concludes that Petrobangla must pay interest on the outstanding invoices at six-month LIBOR + 2% for the US Dollar amounts and at 5% for the amounts in taka.
267. Throughout the proceedings the Claimant sought simple interest on the outstanding payments for the period up to the award. Only for the period thereafter it sought interest at “an annual rate of 5 percent compounded monthly until the award is paid in full”.<sup>183</sup> In its Observations on Applicable Interest dated 6 June 2014, the Claimant confirmed the claim for simple pre-award interest at the annual rate of 5%.
268. However, in this very last submission the Claimant added: “if a commercial rate such as [the LIBOR + 2%] is applied, the commercial practice of compounding of interest should also be applied”; it stated that “it would be logical and fair, to

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<sup>181</sup> C-PC Interest.1, paragraph 18; Exhibit C-101.

<sup>182</sup> Unnumbered Attachment to C-PC.1, referred to as Exhibit C-101.

<sup>183</sup> C-PC.1, paragraphs 78(c) and (f); HT Day 5, p. 578.

compound interest on a monthly basis to correspond to the period in which the LIBOR rate is updated in the calculation”.<sup>184</sup>

269. Petrobangla responded by stating that the claim for monthly compounding “is not either reasonable nor is supported by any of the materials produced by Niko and therefore should be rejected”.<sup>185</sup>
270. As explained above, the proceedings on the Payment Claim were closed at the end of the April 2014 hearing. The submissions which were authorised thereafter were limited to the narrow question of the interest rate in Bangladesh for US Dollar debts. The question of single or compound interest had not been raised before and was not part of what was allowed as additional submission at that stage.
271. Moreover, even in this limited submission on interest rates after the hearing, Niko stated expressly that it “maintains its position that interest at a simple annual rate of 5 percent is reasonable ...”<sup>186</sup> and confirmed its request that “it is fair to award interest at a simple annual rate of 5 percent ...”.<sup>187</sup> It was only in the alternative that the Tribunal would award interest at a rate fluctuating with LIBOR that Niko for the first time requested that pre-award interest be compounded monthly.
272. In these circumstances, the Tribunal does not consider the Claimant’s new claim for pre-award compound interest as admissible. Moreover, the Claimant having confirmed even after the hearing its claim for simple interest at the flat 5% rate, the Tribunal sees no justification for granting compound interest for the alternative LIBOR + 2% rate.
273. In denying the Claimant’s request for compound pre-award interest, the Tribunal does not express any position as to the question whether compound interest can or must be awarded under the law of Bangladesh or in ICSID proceedings. It leaves open the question of whether compound interest should be paid for the period after the notification of the decision.

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<sup>184</sup> C-PC Interest.1, paragraph 20.

<sup>185</sup> P-PC Interest.2, paragraph 1(vii).

<sup>186</sup> C-PC Interest.1, paragraph 4.

<sup>187</sup> C-PC Interest.1, paragraph 12.

274. As explained in the following section, the Tribunal invites the Parties to consult with the objective of an interim arrangement, dealing *inter alia* with the principal and interest subject of this decision. If that arrangement is found, the question of interest most likely will become moot. If the Parties fail to reach an agreement, the Parties may have to consider the matter further and, in this context, may also consider the question of whether compound interest must be paid on the amount due according to the present decision.
275. In conclusion, the Tribunal awards simple interest and reserves the question of compound interest for the period after the notification of the decision.

## 9. THE FUTURE OF THE INJUNCTION AND A POSSIBLE INTERIM REGIME

276. The Tribunal has concluded that, in the circumstances of the present case, the injunction prohibiting payment to Niko is a risk assumed by Petrobangla against which it failed to take adequate action and which does not excuse its failure to make payment under the GPSA. This being said, the injunction is still in place and, under the law of Bangladesh, is binding on Petrobangla.

277. The injunction prohibits Petrobangla and the other respondents in the BELA suit to make payment to Niko; and it defines its term:

“This order of injunction shall remain in force till disposal of the money suit or till amicable settlement amongst the parties, whichever is earlier.”<sup>188</sup>

278. The Claimant argues that, according to this order, “all Petrobangla need do in order to be able to make payment to Niko is to agree with Niko”.<sup>189</sup>

279. The Claimant also argues that such amicable settlement can be brought about on the basis of the dispute settlement clauses in the JVA and the GPSA. Article 13 of the GPSA requires the parties to “make their best efforts to settle amicably through consultation any dispute arising in connection with the performance or interpretation of any provision of this Agreement”. If they fail to settle their dispute amicably, the dispute may be referred to arbitration and the arbitral tribunal takes their place in providing the settlement.<sup>190</sup>

280. 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

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<sup>188</sup> Exhibit C-21, p. 42.

<sup>189</sup> HT Day 4, p. 287.

<sup>190</sup> C-PC.2, p. 37.

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.

281. Therefore, the Tribunal invites the Parties to seek an amicable settlement which would satisfy the order of the BELA Court and permit Petrobangla to meet its payment obligations under the GPSA. If the Parties were unable to reach such an amicable settlement, the Tribunal will have to decide and, in this context will have to address the various interim arrangements which the Claimant has set out in some of its alternative claims.
282. It may be of assistance to the Parties if the Tribunal, at this stage and without wishing to restrict the Parties in their search for the terms and conditions of their amicable settlement, make some preliminary observations concerning possible elements of a settlement arrangement and the Tribunal's powers to order them if the Parties fail to reach agreement.
283. As to possible elements of interim arrangements which the Parties may agree or, in the absence of such agreement, the Tribunal may order, it may be useful to consider the following elements:
  - (a) Petrobangla has agreed in Article 11.1.4 GPSA to pay in US Dollars an agreed share of the amounts due for the gas delivered under the GPSA. As a foreign currency payment, the amounts due to Niko in that currency must therefore be freely available.
  - (b) The Tribunal has been seized of the Claimant's request for the Compensation Declaration and, concluding from the Parties' submissions made until now, expects that Niko's liability for damage caused by the two blow outs and the quantum of such damage will have to be addressed. If Niko were found liable for some or all of that damage, one of the Claimant's alternative claims, which expressly refers to the possibility of setting off claims for compensation of such damage against the amounts owed under the Payment Claim, would have to be considered. In the context of the now pending

issues, interim arrangements may have to make allowance for this possibility.

- (c) Niko has made commitments that, at least for the time being, it will not remove assets from Bangladesh and, at repeated occasions, Niko has agreed that the amounts due from Petrobangla “would be used by the Joint Venture to fund further work as prescribed by the JVA”.<sup>191</sup> Any such assignment of the funds, if agreed between the Parties, could be regulated in the interim arrangement.
- (d) Funds payable by Petrobangla may have to be placed into an escrow account at a bank and at terms to be agreed, and the conditions for their release may have to be fixed. These conditions may include the use of the funds for the purposes of the JVA.
- (e) The question of the term of Petrobangla’s obligation to pay interest may have to be addressed, for instance by determining that payment of the outstanding amounts into an escrow account or their reinvestment for the purposes of the JVA work terminates Petrobangla’s obligation to pay interest.
- (f) For good order’s sake it may be proper that the Parties jointly notify the High Court Division having issued the injunction, informing it of any settlement and, possibly, requesting jointly the termination of the order prohibiting payment to Niko as contained in the Judgment of 17 November 2009.

284. The preceding considerations have arisen from the Parties’ explanations and arguments. They are provisional and the Tribunal may reconsider them when making any order for provisional measures, or any substantive decision, in the event the Parties fail to reach agreement.

285. Concerning the powers of the Tribunal, it should be recalled that Petrobangla and BAPEX, exercising rights and powers of the Government as described in the Preambles of the JVA and

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<sup>191</sup> See *e.g.* Goyal WS II, paragraph 79.

referred to in the GPSA, have agreed in the GPSA to submit all disputes with Niko to ICSID arbitration. In its Decision on Jurisdiction, the Tribunal found that it has jurisdiction to decide Niko's claim against Petrobangla under the GPSA. This includes jurisdiction with respect to Provisional Measures according to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, including such measures which the Tribunal may recommend on its own initiative.

286. The jurisdiction of the present Tribunal is exclusive with respect to the merits of the dispute validly brought before it. Since the Parties have not availed themselves of the possibility afforded under Rule 39 (6) of the ICSID Arbitration Rules to request provisional measures from judicial or other authorities, the Tribunal's exclusive jurisdiction also extends to provisional measures.
287. 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.
288. When the High Court Division and the Appellate Division of the Bangladesh Supreme Court were seized of issues affecting the contractual relationship between Niko and Petrobangla, and when they issued and partially confirmed the injunction against payment to Niko, the present arbitration had not yet commenced. As far as the Tribunal was able to determine from the procedural records of these court proceedings as they were filed in the present proceedings, no reference was made in the Bangladesh court proceedings to the existence of the contractual provision which required that disputes under the GPSA be submitted to ICSID arbitration.
289. Now that the present ICSID Tribunal has been seized of the Payment Dispute, a new situation has arisen. The payments which Niko must make under the GPSA must be decided by this Tribunal, including any injunctions against such payments.
290. The present Tribunal has 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.

291. The Tribunal is confident that the present Decision on the Payment Claim settles the dispute with respect to that claim and that the remaining issues should be susceptible to a mutually acceptable resolution crafted by the Parties themselves. The Tribunal nevertheless remains seized of the dispute in the event such a resolution is not achieved.

## 10. DECISION

292. Based on the argument and evidence before it and in view of the considerations set out above, the Arbitral Tribunal now makes the following decision:

- (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 present decision and to report by no later than 30 September 2014;
- (6) Failing amicable settlement, any Party may seize the Tribunal 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.

[Signed]

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Prof. Campbell McLachlan QC  
*Arbitrator*

[Signed]

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Prof. Jan Paulsson  
*Arbitrator*

[Signed]

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Mr Michael E. Schneider  
*President*