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

THIRD DECISION ON THE PAYMENT CLAIM

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

Secretary of the Tribunals
Ms Frauke Nitschke

Date of Decision: 26 May 2016

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GLOSSARY

2005 Injunction	Injunction issued on 12 September 2005 by the Supreme Court of Bangladesh, High Court Division, further to Writ Petition no 6911 by BELA against ten respondents, including BAPEX and Niko
2016 Injunction	Order issued on 12 May 2016 by the Supreme Court of Bangladesh, High Court Division, further to Writ Petition N. 5673 of 2016 by Professor M. Shamsul Alam against the Government of Bangladesh, Petrobangla, BAPEX, Niko and Niko, Canada
BAPEX	Bangladesh Petroleum Exploration & Production Company Limited, the Second Respondent
BDT	Bangladeshi taka
BELA	The Bangladesh Environmental Lawyers Association
Centre or ICSID	International Centre for Settlement of Investment Disputes
Compensation Claims	Claims for compensation brought by the First and Third Respondents in the Court of District Judge, Dhaka, against the Claimant and others for damages alleged to arise from the blowout of two wells in the Chattak field (subject matter of ICSID Case No. ARB/10/11)
Compensation Declaration	The declaration requested by the Claimant concerning the Compensation Claims
First Decision on the Payment Claim	The Tribunals' Decision of 11 September 2014 concerning the Claimant's Payment Claim
GPSA	Gas Purchase and Sale Agreement, 27 December 2006
Government of Bangladesh	The Government of the People's Republic of Bangladesh, the First Respondent until the Decision on Jurisdiction
JVA	Joint Venture Agreement between BAPEX and Niko, dated 16 October 2003
Money Suit	Proceedings brought by Bangladesh and Petrobangla in the Court of the District Judge in Dhaka against Niko and others (see Decision on Jurisdiction, paragraph 102)

Niko	Niko Resources (Bangladesh) Ltd., the Claimant
Payment Claim	Claims to payment under the GPSA for gas delivered (subject matter of ARB/10/18)
Petrobangla	Bangladesh Oil Gas and Mineral Corporation, the Third Respondent
Second Decision on the Payment Claim	Decision on the Implementation of the Decision on the Payment Claim, 14 December 2015
Tribunals	Collectively, the two Arbitral Tribunals constituted in ICSID Case No. ARB/10/11 and ICSID Case No. ARB/10/18

1. INTRODUCTION

1. This Third Decision on the Payment Claim relates to the Gas Purchase and Sale Agreement of 27 December 2006 (**GPSA**) concluded between Bangladesh Oil Gas and Mineral Corporation (**Petrobangla**) and the Joint Venture between Niko Resources (Bangladesh) Limited (**Niko**) and Bangladesh Petroleum Exploration & Production Company Limited (**BAPEX**). The decision concerns the payment for Niko's share in the price for the gas delivered to Petrobangla pursuant to the GPSA (the **Payment Claim**).

2. In the First Decision on the Payment Claim of 11 September 2014, the Tribunals determined that Petrobangla owed Niko USD 25,312,747 plus BDT 139,988,337 as per Niko's invoices for gas delivered from the Feni Field between November 2004 and April 2010, plus interest. During the proceedings a number of issues had been raised by the Parties concerning an injunction before the Courts of Bangladesh, the liability for two blow-outs in the Chattak Field, and possible set-offs. The Tribunals had noted indications that the Parties might be able to resolve these differences amicably, including the placement of the funds in an escrow account and interim arrangement concerning the use of the funds in Bangladesh. Rather than simply ordering payment of the funds, the Tribunals gave to the Parties an opportunity of determining the most effective use of the funds by agreement among themselves. In the First Payment Decision, the Tribunals therefore invited the Parties to seek an amicable settlement with respect to the modalities for implementing the decision.

3. Subsequent to this First Decision, the Parties did indeed report to the Tribunals several times indicating that they had conferred with a view to finding such a solution; but no agreement was reached. The Claimant then requested a decision from the Tribunals regarding the implementation of the First Decision on the Payment Claim, proposing several alternatives on which the Respondents were invited to comment, including payment into an escrow account. Despite several extensions of the deadline for such comments, the Respondents did not take any position.

4. On 6 August 2015 the newly appointed counsel of the Respondents wrote to the Tribunal, making no proposal concerning the use of the funds or the implementation of the Tribunals' First Payment Claim Decision but requested that a decision on the outstanding funds be made "*only after all issues regarding Niko's liability are resolved*". The Tribunals concluded that there were no longer any real chances for an agreement between the Parties about the implementation of the First Decision.

5. The Tribunals therefore issued on 14 September 2015 a decision, entitled Decision on the Implementation of the Decision on the Payment Claim and now referred to as the Second Decision on the Payment Claim. They ordered that the funds owing to Niko be paid into an escrow account and indicated the modalities for this account. The decision concluded by providing the following:

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

6. The Claimant prepared the documentation for the Escrow Account, consulted the Respondents about the terms of this account, made the modifications in the documentation to take account of the Respondents' observations and signed the documentation. The Tribunals approved the documentation. The Respondents confirmed that they were willing to implement the Escrow Agreement but stated that, before they could do so, they had to obtain a modification of the injunction which had been issued in 2005 by the Supreme Court of Bangladesh (the **2005 Injunction**).

7. Thereupon the Claimant requested on 15 December 2015 that the Tribunals issue an award ordering payment by Petrobangla of the amount which the Tribunals had found to be due to Niko.

8. In response, the Respondents explained that on 6 January 2016 they had applied for the modification of the 2005 Injunction and that it would take some three months for the court to decide.

9. At the expiration of this period, no information about the status of the 2005 Injunction and the related proceedings was provided. Instead, the Respondents submitted on 25 March 2016 documentation on which they rely to demonstrate that the Joint Venture Agreement between BAPEX and Niko (the **JVA**) and the GPSA were procured by corruption and are void or voidable and declared that they avoided these agreements. In response to the Tribunals' invitation the Parties provided explanations on 29 April 2016. The Respondents argued that Petrobangla did not owe anything under the GPSA; if Niko made a claim for unjust enrichment, they would have to compensate for the value of the gas; but this value could not be more than the price agreed under the GPSA.

10. On 12 May 2016 the Respondents submitted to the Tribunals an injunction of the same date by the High Court Division of the Supreme Court directing the Respondents and the Government of Bangladesh "*not to give any kind of benefit*" and "*not to make any kind of payment*" to the Claimant and its mother company (the

2016 Injunction). On 19 May 2016 the Claimant requested Provisional Measures in relation to this injunction.

11. The Payment Claim is part of two arbitration proceedings, introduced on 1 April and 16 June 2010, registered on 27 May and 28 July 2010 as ICSID Case Nos. ARB/10/11 and ARB/10/18, respectively against the Respondents and the Government of People's Republic of Bangladesh. The Tribunals in these two cases, constituted on 20 December 2010, are composed of Professor Jan Paulsson, Professor Campbell McLachlan and Mr Michael E. Schneider. In the First Session of these two arbitrations, the Parties agreed *inter alia* that the two cases were to proceed in a concurrent manner, that the Tribunals may issue a single instrument in relation to both cases and that they may deal with the two cases jointly except where circumstances distinct to one case necessitate a separate treatment.

12. In the Decision on Jurisdiction of 19 August 2013, the Tribunals determined that they did not have jurisdiction over Bangladesh but accepted jurisdiction over the remaining two Respondents. The Tribunals then proceeded to the examination of the Payment Claim and, after having issued the First Decision on this claim, are examining another claim by which Niko seeks a declaration that it is not liable for the damage caused by two blow-outs that occurred in 2005 in the Chattak Field and, contrary to the claims made against it in the courts of Bangladesh, owes no compensation for the blow-outs (the **Compensation Declaration**). This latter phase of the proceedings is still pending.

2. THE PARTIES AND THEIR REPRESENTATIVES

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. Since August 2013, the Claimant is 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 – 2nd Street SW
15th Floor, Bankers Court
Calgary, Alberta
Canada T2P 0R8

and

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

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

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

and

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

2.2 The Respondents

16. The Respondents remaining in these arbitrations are

    (a) Bangladesh Petroleum Exploration & Production Company Limited ("BAPEX"), the Second Respondent
    and
    (b) Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"), the Third Respondent.[1]

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

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

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 these arbitrations by

    Mr Syed Ashfaquzzaman
    Secretary, Petrobangla
    Petrocentre
    3 Kawran Bazar C/A
    Dhaka 1215, GPO Box 849
    People's Republic of Bangladesh

    and

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

Mr Md. Atiquzzaman
Managing Director, Bapex
Level-6, BAPEX Bhabon
4 Kawran Bazar C/A
Dhaka 1215
People's Republic of Bangladesh

and

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

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

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

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

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

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

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

3. PROCEDURAL HISTORY

3.1 Prior Decisions on the Payment Claim

24. A detailed account of the procedural history in the two arbitrations until the Tribunals' Second Decision on the Payment Claim was set forth in the First and Second Decisions on that claim, issued on 11 September 2014 and 14 September 2015, respectively.

25. In the First Decision on the Payment Claim, the Tribunals held that:

> *(1) Petrobangla owes Niko USD 25'312'747 plus BDT 139'988'337 as per Niko's invoices for gas delivered from November 2004 to April 2010;*
>
> *(2) Petrobangla must pay simple interest on Niko's invoices at the rate of six month LIBOR +2% for the US Dollar amounts and at 5% for the amounts in BDT; interest is due on the amount of each invoice as from 45 days after delivery of the invoice but not before 14 May 2007 and until it is placed at Niko's unrestricted disposition;*
>
> *(3) The claim for compound interest on the amount awarded under above item (1) and (2) is reserved;*
>
> *(4) The entitlement of BAPEX to payments under the GPSA is not affected by the present decision;*
>
> *(5) The Parties are invited to seek an amicable settlement with respect to the modalities for implementing the [11 September 2014] decision and to report by no later than 30 September 2014;*
>
> *(6) Failing amicable settlement, any Party may seize the Tribunals for recommendations on provisional measures or a final decision concerning the outstanding amounts;*
>
> *(7) The decision on costs of the proceedings concerning the Payment Claim is reserved.*

26. As explained above, the Parties reported that they did indeed confer further to the Tribunals' invitation but they did not reach agreement. Upon the Claimant's request, the Tribunals then

issued on 14 September 2015 the Second Decision on the Payment Claim.

27. In the Second Decision on the Payment Claim the Tribunals held:

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

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

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

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

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

28. In the reasons for their Second Decision on the Payment Claim of 14 September 2015, the Tribunals concluded "*that there is no*

justification for Petrobangla to further withhold the funds owed to Niko". They considered the different proposals which the Claimant had made, receptive to considerations of preserving "*the funds for possible payments in the event Niko were liable for damage caused by the blow-outs.*"

29. In light of these considerations, the Tribunals granted the Claimant's request, adopting from among the proposals included in its request for relief the one that provided for payment into an Escrow Account. They considered, however, the possibility that "*difficulties occur which prevent the operation of the Escrow Account as intended by the present decision*" and, for that eventuality, reserved the possibility for any Party to "*address itself [to] the Tribunals for a ruling as required.*"

3.2 Procedure following the Second Decision on the Payment Claim

30. Upon receipt of the Second Decision on the Payment Claim, Petrobangla confirmed to the Tribunals on 23 September 2015 that it *"intends to comply with the Tribunals' decision as expeditiously as possible.*"

31. By the same letter, Petrobangla expressed concerns with respect to the injunction that the Supreme Court of Bangladesh, High Court Division, had issued on 1 September 2005, and confirmed by order of 17 November 2009 (the **2005 Injunction**[5]), in the context of the proceedings instituted by the Bangladesh Environmental Lawyers Association (**BELA**) against the Government of Bangladesh, Petrobangla, BAPEX, Niko. Petrobangla stated that this injunction remained in force.

32. Specifically, Petrobangla expressed concern that a payment by Petrobangla pursuant to the Tribunals' First Decision on the Payment Claim would be considered "*a violation of the injunction*", and that "*any official who authorizes a payment into the escrow account without seeking a modification of the order would be subjected to contempt of court proceedings and be exposed to a risk of penal sanctions*". Petrobangla informed the Tribunals that "*in order to comply with the Tribunals' decision, Petrobangla will seek a modification of the injunction order to permit the payment into the escrow account as directed by the Tribunal[s].*" It announced that "*Petrobangla will file its request on 30 October 2015 and inform the Tribunal as soon as it has been filed*".

[5] The history of this injunction has been discussed by the Tribunals in their First Decision on the Payment Claim, pp. 53 to 57.

33. By letter of 28 September 2015, the Claimant objected to Petrobangla's understanding that payment made into an escrow account would constitute a violation of the November 2009 order, submitting that "*Petrobangla's suggested application to a Bangladesh national court can be viewed only as a delaying tactic to avoid payment of the money it has owed for a decade.*"

34. By the same letter, the Claimant requested "*that the Tribunals rule that Petrobangla is indeed obligated to make the payment ordered by that Decision immediately upon establishment of the escrow account.*" The Claimant went further on to say that

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

35. The Tribunals responded on 10 October 2015, informing the parties that they "*consider that the matter is sufficiently clear given their rulings in paragraph 167 of the* [Second Decision on the Payment Claim] and confirm that payment is to be made by Petrobangla immediately upon establishment of the Escrow Account".

36. By that time, the Claimant had filed on 8 October 2015 a Draft Escrow Agreement and accompanying documentation, requesting that the Tribunals "*confirm that the draft escrow agreement secured by Niko meets the requirements*" of the Second Decision on the Payment Claim. The Tribunals invited the Respondents by their correspondence of 10 October 2015 to file by 16 October 2015 any observations they might have had in regard to the proposed escrow agreement.

37. The Respondents did indeed file observations in their letter of 16 October 2015, requesting changes in the draft agreement. The Claimant commented on these observations and submitted on 23 October 2015 a revised version of the escrow agreement in which the changes requested by the Respondent had been made. It "*reiterated its request that the Tribunals decide whether these escrow arrangements accord with the Decision on Implementation*".

38. The Tribunals invited on 23 October 2015 "*the Respondents' views as to the Claimant's calculations*" of the amount to be deposited in the escrow account by no later than 27 October 2015. No further comments were received from the Respondents by that date nor thereafter, despite a reminder from the Claimant dated 28 October 2015.

39. At the opening of the 2 – 7 November 2015 hearing, the Claimant recalled its request for the Tribunals' confirmation that the draft escrow agreement met the requirements of the Second Decision on the Payment Claim. As recorded in the Summary Minutes of the November 2015 hearing, the Tribunals noted the absence of further comments from the Respondents and "*that therefore there were no objections to the Tribunals now approving the arrangements as amended by the Claimant following the Respondents' initial observations. These arrangements were thus accepted for implementation*".[6]

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

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

41. In its communication of 1 December 2015 the Claimant requested from the Tribunals an order in the following terms:

> *(1) each of Respondents Petrobangla and BAPEX to execute a counterpart of the USD Escrow Agreement that the Tribunals approved at the hearing in early November 2015, to provide Niko with a PDF of such executed document by email, and to transmit the original of such document to Madison Pacific by courier;*

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[6] Summary Minutes of the Hearing of 2 to 7 November 2015, section 7.

(2) each of Respondents Petrobangla and BAPEX to provide to Madison Pacific by email the information pertinent to Petrobangla and BAPEX that is required by Madison Pacific's KYC Certification Protocol and by the FATCA Entity Certification; and

(3) Petrobangla to proceed to pay the amounts ordered by the Decision on Implementation of the Payment Claim Decision forthwith after the USD Escrow Account is opened.

42. The Respondents requested an opportunity to file observations. The request was granted by the Tribunals. On 10 December 2015, they presented these observations, explaining that

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

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

44. Thereupon the Claimant noted that "*Petrobangla and BAPEX refuse to sign the Escrow Agreement and, as a result, the Escrow Account cannot be opened, much less operated or funds paid*". It concluded that a "*difficulty has occurred that prevents the operation of the Escrow Account as intended*". Relying on item (v) of paragraph 167 of the Second Decision on the Payment Claim, the Claimant requested on 15 December 2015:

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

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

> *the Tribunals fix a prompt schedule for costs submissions in order to place the Tribunals in a position to render a final*

and unconditional award in the Payment Claim as soon as possible.

46. In support of the application, the Claimant submitted that Petrobangla had not in fact filed a petition for a modification of the November 2009 order, but had filed an "*application for review of the judgment and order*" which in the Claimant's estimate would take "*a minimum of two years, if not more*" to be decided upon. The Claimant further reiterated its view that "*the Respondents are not prepared to comply with the Decision*" and that Petrobangla was "*attempting to delay indefinitely the date when it makes the payment to Niko*". The letter concluded the explanations on the escrow arrangements as follows:

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

47. Following an invitation by the Tribunals, Petrobangla responded to the Claimant's 15 December 2015 application on 6 January 2016, requesting the Tribunals to reject the same. The Respondents confirmed that in their view "*[t]here is no difficulty preventing operation of the Escrow Account"*, adding that "*[t]he Respondents have not refused to sign the Escrow Agreement. They simply seek the opportunity to do so in conditions that do not create a risk of their officials being held in contempt of court.*"

48. In the 6 January 2016 observations, the Respondents confirmed Petrobangla's undertaking that it "*has committed to making payment into the escrow account as soon as the injunction is modified or lifted.*" With regard to the type of application filed with the Supreme Court, Petrobangla indicated that it "*chose the procedural mechanism its lawyers recommended as the most effective means of achieving its goal of being able to comply with the Tribunals' order without being subject to contempt of court proceedings in Bangladesh*", and that "*based upon Petrobangla's Bangladeshi Supreme Court litigation counsel's extensive experience with the Bangladeshi judicial system, Petrobangla anticipates that the petition for revision of the injunction should be*

resolved in approximately three months." Petrobangla added that *"[a]s they have previously committed, upon lifting or modification of the injunction, Respondents will sign the escrow agreement and Petrobangla will pay the amount owed into the escrow account.*"

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

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

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

51. By letter of 17 February 2016, the Respondents stated that their petition for a modification of the 2005 Injunction was before the Chief Justice of the Supreme Court awaiting allocation of the bench that will hear that petition.

52. No further information was provided to the Tribunals about the Respondents' petition concerning the 2005 Injunction.

53. On 25 March 2016 the Respondents submitted, as part of the proceedings on the Compensation Declaration, "BAPEX Memorial on Damages". In this Memorial, BAPEX requests a declaration that (i) Niko procured the JVA through corruption, (i) that Niko is not entitled to "*use the international arbitration system to pursue claims related to the JVA*", (iii) that the JVA is voidable and BAPEX avoided it. In support of these requests the Respondents produced documentation to demonstrate that JVA and the GPSA were procured by corruption.

54. On the same day, the Respondents wrote to the Tribunals and, relying on BAPEX's Memorial on Damages and the documentation produced, sought declarations with respect to the GPSA as BAPEX had requested for the JVA and requested that the Tribunals vacate the First and Second Decisions on the Payment Claim.

55. On 18 April 2016 the Tribunals invited the Claimant to comment on the new requests from the Respondents and the Respondents to comment

on the consequences of the avoidance of the JVA and the GPSA with respect to, in particular, past performance, addressing:

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

(ii) *with respect to the JVA, whether any credit must be given to investments made by Niko in performance of the agreement and how such credit is to be valued.*

56. On 29 April 2016 the Claimant made submissions with respect to both the JVA and GSPA. The Claimant argued that the documents produced with BAPEX's Memorial did not contain any new evidence and that the earlier charges had been considered by Tribunals and rejected. Any avoidance of a contract for corruption had to be made "*unequivocally and timeously*". The Claimant argued that "*Petrobangla offers neither argument nor authority to suggest that the Tribunals' Decision was incorrect – even if that Decision could be reopened, which it cannot.*" It declared Petrobangla's application as frivolous and that it "*should summarily be rejected*".

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

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

59. On 19 May 2016 the Claimant requested Provisional Measures in relation to this injunction

60. In the present decision the Tribunals will address the Claimant's request of 15 December 2015, concerning an award on the Payment Claim and those aspects of subsequent applications which have a bearing on the requested decision. Other pending issues will be addressed by Procedural Order No 13, which the Tribunals intend to issue immediately following the present decision.

4. THE PARTIES' REQUESTS

The Claimant's requests

61. In its application of 15 December 2015, the Claimant requested "*that the Tribunals issue an award in the Payment Claim ordering Petrobangla unconditionally to make payment to Niko of the amounts the Tribunals found to be due and owed*".[7] It also requested that "*the Tribunals fix a prompt schedule for costs submissions in order to place the Tribunals in a position to render a final and unconditional award the Payment Claim as soon as possible*".[8]

62. With respect to the Respondents' applications of 25 March 2016 the Claimant concluded that "*Petrobangla's application is frivolous and should be summarily be rejected*".

63. In its application of 19 May 2016 the Claimant requested the Tribunals to order provisional measures:

> *(a) Declaring that these Tribunals have exclusive jurisdiction over the questions of: (i) the validity of the JVA and GPSA as concerns Niko, BAPEX and Petrobangla, and their successors, predecessors, assignors and assignees; (ii) whether Petrobangla must pay Niko for gas delivered under the GPSA; and (iii) whether Niko is liable to BAPEX or any of its successors, predecessors, assignors and assignees and if so, what compensation is due;*
>
> *(b) Ordering BAPEX and Petrobangla to consent to the removal of the interim injunction in Writ Petition No. 5673 before the Supreme Court of Bangladesh, High Court Division, and to take all measures to request and support the removal or discontinuance of such interim injunction and dismissal of the Writ Petition.*

The Respondents' requests

64. Concerning the Claimant's application of 15 December 2015, the Respondents requested on 6 January 2016 that "*the Tribunals reject Claimant's application and maintain the [Second Decision] on the Payment Claim in place while the petition for review of the*

[7] Application of 15 December 2015, p. 1.
[8] Ibid. p. 4.

injunction from the Supreme Court of Bangladesh is under consideration".

65. In their application of 25 March 2016 the Respondents requested on behalf of Petrobangla that

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

66. In their submission of 29 April 2016 the Respondents submitted that

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

67. In its communication of 12 May 2016, transmitting the 2016 Injunction, the Respondents provided information about the injunction but did not make any requests.

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

68. The Claimant relies on item (v) of the Second Decision on the Payment Claim and argues that difficulties have occurred which prevent the operation of the Escrow Account as intended by that decision and now requires an award ordering Petrobangla unconditionally to make payment to Niko of the amounts the Tribunals found to be due and owed.

5.1 The difficulties invoked by the Claimant

69. The difficulties on which the Claimant relies consist in the refusal of Petrobangla and BAPEX to sign the Escrow Agreement thus preventing the Escrow Account from being opened.[9]

70. The arrangements for the Escrow Account have been prepared and the required documents have been executed by the Claimant. The Respondents examined these documents and made some observations. These observations were taken into account in the finalisation of the documentation. No further objections were raised by the Respondents.

71. The Tribunals therefore have approved the documentation at the November 2015 Hearing.

72. The Respondents explained that, following this approval, they "*provided all of the information necessary to complete the Escrow Agreement*".[10] On the basis of this information the Escrow Agreement was completed and signed by the Claimant.

73. The Tribunals conclude that, given the Parties' complete agreement on its text, the Escrow Agreement could have been executed by both Parties, thus enabling the opening of the Escrow Account and Petrobangla's payment into the account.

74. By 15 December 2015 the Escrow Agreement had not been executed by the Respondents and there is no information that, since then, over five months later, any change occurred in this situation.

75. The Tribunals conclude that, indeed, difficulties did occur, preventing the Escrow Account to operate. The Claimant,

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[9] Application of 15 December 2015, p. 2.
[10] Letter of 10 December 2015.

therefore, is justified in addressing the Tribunals, as envisaged in the Second Decision on the Payment Claim.

5.2 The Respondents' defence: the 2005 Injunction

76. In their letter of 10 December 2015, the Respondents explained that they were advised by their Bangladesh counsel "*that execution of the Escrow Agreement may be determined by the Supreme Court to be a violation*" of the 2005 Injunction. They stated that Petrobangla sought a modification of the Injunction by a petition, dated 10 December 2015. The application was attached.

77. In the First Decision on the Payment Claim, the Tribunals considered the history of the 2005 Injunction and its relevance for the present ICSID arbitration. They stated in particular;

> *… Petrobangla and BAPEX, exercising rights and powers of the Government as described in the Preamble of the JVA and referred to in the GPSA, have agreed in the GPSA to submit all disputes with Niko to ICSID arbitration.* […]
>
> *286 The jurisdiction of the present Tribunal* [recte: Tribunals] *is exclusive with respect to the merits of the disputes 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.*

78. It follows from the exclusive jurisdiction of these Tribunals, as recalled in the First Decision on the Payment Claim, that an injunction by a court in Bangladesh may not be invoked as justification for a failure to comply with a decision from these Tribunals.

79. When the issue of the 2005 Injunction was raised by the Respondents on 23 September 2015 and the Claimant requested a ruling from the Tribunals holding that the Petrobangla was obligated to make payment into the Escrow Account, the Tribunals confirmed by their letter of 10 October 2015 that "*payment is to be made by Petrobangla immediately upon establishment of the Escrow Account*".

80. The Tribunals conclude that there is no justification for the Respondents' failure to execute the Escrow Agreement and for Petrobangla to make payment into the Escrow Account.

81. The Tribunals note in passing that throughout the period following the First Decision on the Payment Claim of 11 September 2014 until 10 December 2015 the Respondents do not seem to have taken any steps that would have allowed the courts in Bangladesh to comply with the international obligations of the State.

82. In the First Decision the Tribunals also had noted that the 2005 Injunction had been issued before the commencement of these ICSID arbitrations and that, with the commencement of these proceedings, a new situation had arisen with respect to the disputes now subject to ICSID arbitration. They added that they had no reason to believe that the courts of Bangladesh, including the High Court Division having issued the 2005 Injunction, would disregard the international obligations assumed by Bangladesh when adhering to the ICSID Convention.

83. The First Decision on the Payment Claim was issued on 11 September 2014. It would therefore have been in the interest of the Respondents to bring this decision to the attention of the Court in Bangladesh. The Respondents failed, however, to bring the decision to the attention to the court having issued the 2005 Injunction for over a year until, by the petition of 10 December 2015, Petrobangla informed the court of the ICSID proceedings and sought a modification. As the Respondents explained later, a "*petition for revision of the injunction should be resolved in approximately three months*".[11]

84. Eventually, the Respondents addressed the court in Bangladesh on 10 December 2015, making an application for a modification of the 2005 Injunction; but by now, more than five months have elapsed without any indication whether any modification of the 2005 Injunction will be issued.

85. For the avoidance of doubt the Tribunals add that the Respondents' failure to apply in timely fashion to the court in Bangladesh and the absence of a modification of the 2015 Injunction are not decisive matters with regard to whether the Respondents have complied with the decisions of the present Tribunals. As stated above, the Respondents have, without justification, failed to execute the Escrow Agreement and make payment into the Escrow Account. They are responsible for the

[11] Respondents' letter of 6 January 2016, confirmed by a letter from the Respondents' counsel in the court proceedings of the same date.

difficulties which arose, preventing the operation of the Escrow Account as intended.

5.3 The new decision

86. In the circumstances, the Tribunals now must make, further to item (v) of the operative part of the Second Decision on the Payment Claim, "*a ruling as required*".

87. When determining the ruling that now must be made, the Tribunals start from their First Decisions on the Payment Claim in which they determined the amounts owed by Petrobangla to Niko and the Second Decision on the Payment Claim in which they concluded "*that there is no justification for Petrobangla to further withhold the funds owed to Niko*".[12]

88. When making the Second Decision, the Tribunals considered a proposal by the Claimant "*to use the funds owed by Petrobangla for operations in the territory of Bangladesh at large, rather than for operations limited to Chattak and Feni*".[13] They also considered arrangements which "*preserve the funds owed to Niko for possible payments in the event Niko were found liable for damage caused by the blow-outs and the quantum was determined*".[14]

89. In view of these considerations the Tribunals decided in the Second Decision on the Payment Claim that payment by Petrobangla be made into an escrow account. Thereby they provided for a modality for the payment by Petrobangla by which the right of Niko to receive the payment was restricted by the conditions of the Escrow Account. As Niko pointed out in its request of 15 December 2016, the escrow arrangement "*benefits the Respondents alone*".

90. These escrow arrangements have been frustrated by the Respondents and by no fault of the Claimant. The objectives considered by the Tribunals when they ordered payment into an Escrow Account cannot be achieved in the manner contemplated. No other arrangement has been proposed which would satisfy these objectives.

91. The ruling which is now required must give effect to the principles of the First and Second Decision and adapt the modalities to the situation that has now arisen. Since the Parties were unable to agree on these modalities and since the creation of an Escrow

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[12] Paragraph 79.
[13] Paragraph 80.
[14] Paragraph 81.

Account has been frustrated by the Respondents, the Tribunals see no other manner of implementing these decisions but by requiring Petrobangla to make direct payment to Niko. It is thus neither possible nor justified to maintain the restriction imposed on the use of the funds by Niko. Unrestricted payment to Niko must thus be ordered.

92. At the present state this decision cannot be made in the form of an award since the proceedings in the two arbitrations have not been completed. The Tribunals point out, however, that their decisions, whether in the form of an award or otherwise, must be complied with in good faith by the Parties.

6. THE RESPONDENTS' CORRUPTION CLAIM

92. The Tribunals were about to issue the Third Decision on the Payment Claim as just described, when they received the Respondents' submissions of 25 March 2016. In these submissions, as modified in the submissions of 29 April 2016, the Respondents not only seek avoidance of the JVA and the GPSA but also request that the Tribunals vacate the two decisions on the Payment Claim (the Corruption Claim). The Claimant requests that these applications be rejected.

93. Given the gravity of the accusations made by the Respondents, the Tribunals have decided to examine, by their own initiative, the allegations of corruption and to give priority to this examination. In Procedural Order No 13 that will be issued today, the Tribunals give initial directions concerning this examination.

94. Neither party has requested that, pending this examination, the Respondents' payment obligation be suspended. Since they will direct in Procedural Order No 13 that the proceedings on the Compensation Declaration be suspended, the Tribunals have examined whether a similar effect should be granted with respect to the Payment Claim.

95. In the Decision on Jurisdiction the Tribunals found that there is no illegality in the content of the Agreements or in their performance. The Respondents do not allege now that the content or performance of the GPSA were illegal. There is no indication in the material presented now which would suggest any such illegality.

96. There is, therefore, no risk that, by requiring Petrobangla to make immediate payment as set out in this decision, the Respondents would be required to perform any illegal act.

97. Rather the question to be considered here is whether the possibility of a finding by the Tribunals that corruption did occur and that the Respondents' claims are justified requires the Tribunals to suspend the Respondents' payment obligation and the present Third Decision on the Payment Claim until the Corruption Claim has been decided.

98. On the one hand, the gas for which the Claimant seeks payment has been delivered during the period from November 2004 to December 2006 and still has not been paid for. The Tribunals have decided that the amounts claimed for these deliveries are owed by Petrobangla and that there is no justification for Petrobangla to further withhold the payment. From this perspective there is no

justification for now suspending the performance of this payment obligation.

99. On the other hand the acts of corruption concern the conclusion of the JVA and the GPSA in 2003 and 2006, respectively. The Tribunals dealt with those aspects which had been raised in the initial phase of the arbitration proceedings in their Decision on Jurisdiction of 19 August 2013. It is difficult to understand why the Respondents raise their claim only now. The Claimant argues that the facts now relied on by the Respondents "*were either presented to the Tribunals at the jurisdictional phase or could have been so presented if the Respondents had deemed it desirable*."[15]

100. As to the merits of the Corruption Claim and the consequences of the alleged corruption, it is part of the Respondents' claim that, as a consequence of its acts of corruption and the avoidance of the Agreements, the Claimant may not benefit from the agreements and has no contractual claims. They accept, however, that the Claimant may be entitled to payment on other grounds. In their submission of 29 April 2016 the Respondents explained:

> *If, as Respondents maintain, the agreements are void, any claim for payment for gas delivered under the GPSA or credit for investment made under the JVA would be limited to restitution for 'unjust enrichment'. The limitation to unjust enrichment is the result under the Bangladesh Contract Act as well as long-standing English jurisprudence. It is axiomatic that a party to a void contract can make no claims pursuant to that contract, and Niko is entitled to no relief under the GPSA or the JVA. Niko can only make a claim for the limited relief of restitution under sections 64 and 65 of the Bangladeshi" Contract Act.*[16]

101. When discussing how to establish the value by which Petrobangla's enrichment is determined, the Respondents refer to the price which Petrobangla agreed to pay under the GPSA, as compared to the prices paid by Petrobangla to other suppliers. The Respondents produced an expert valuation in support of their claim for the loss of gas due to the blow-outs. This valuation determined that during the period from 2004 and 2015 Petrobangla paid to other suppliers of gas between USD 2.31 USD 2.92 per Mcf; the average price over this period is USD 2.69 per Mcf;[17] the price agreed under the GPSA was USD 1.75 per Mcf.

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[15] Submission of 29 April 2016, p. 2.
[16] Submission of 29 April 2016, p. 9.
[17] Report of Dr Paul R. Carpenter, Brattle Group (24 March 2016) Table 9 at p. 22.

102. The Respondents argue that their enrichment should be determined not by reference to the price which they agreed to pay to other suppliers but to the price agreed under the GPSA. They explain:

> *The best indication of what 'a reasonable person in [Petrobangla's] position would have paid for' Feni gas is the price negotiated between Petrobangla and the Feni joint venture partners. Where parties have agreed in an arm's length transaction on a price, that is the best measure of the market price for the good, particularly where, as here, none of the conditions of the sale would change between the negotiated price and the hypothetical price.*[18]

103. The Tribunals are aware that, as the Respondents rightly point out,[19] at this stage the Claimant has not made any claim for enrichment; no decision in this respect is required of the Tribunals at this stage. The Tribunals conclude, however, from the Respondents' explanations about possible claims for enrichment that the Respondents will suffer no loss if they now make payment for the gas on the basis of the agreed contract price and later prevail with their Corruption Claim. As they themselves have explained, they will then have to compensate Niko for their enrichment, valued on the basis of the contract price.

104. Finally, the Tribunals observe that they had previously sought to put in place, by their First Decision on the Payment Claim, an interim arrangement. The parties failed to agree on the modalities. The interim arrangements ordered by the Tribunals in the Second Decision on the Payment Claim was frustrated by the Respondents. There is no indication that further attempts in setting up an interim arrangement will be more successful.

105. The Tribunals conclude that there is no justification for deferring their Third Decision on the Payment Claim or to suspend its effect until the Corruption Claim has been decided. Petrobangla must pay the outstanding amounts forthwith.

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[18] Submission of 29 April 2016, p. 12.
[19] Submission of 29 April 2016, p. 1.

7. THE 2016 INJUNCTION

106. On 12 May 2016 the Respondents informed the Tribunals of another injunction issued by a court in Bangladesh concerning, inter alia, payments to be made under the GPSA (as indicated above, this is referred to as the 2016 Injunction).

107. The Tribunals have explained above that they have exclusive jurisdiction concerning the claims for payment under the GPSA, including interim measures. The injunction is therefore of no effect on the Respondents' payment obligation, as confirmed in the present decision. The State of Bangladesh, including its courts, is bound by its commitment under the ICSID Convention.

108. If the Respondents believe that this new injunction causes difficulties, it is for them to overcome these difficulties.

109. Concerning the Claimant's request for interim measures, the Tribunals have made it clear and confirm, once again, that their jurisdiction is exclusive and that the courts of Bangladesh must respect this exclusive jurisdiction. It is for the Respondents to deal with possible obstacles to their performance under the GPSA.

110. The Claimant's request therefore would seem to be moot: there is no need for the Tribunals to order the Respondents to take any steps to remove or discontinue an injunction which is of no effect on their obligation to comply with decisions of these Tribunals.

111. In the forthcoming Procedural Order the Tribunals, nevertheless, will invite comments from the Respondents and request specific information from them and they will invite the Claimant to examine whether it wishes to amend its Request in light of this Decision and the Procedural Order.

8. THE TRIBUNALS' DECISION

110. Based on the arguments and evidence before it and in view of the considerations set out above, the Arbitral Tribunals now make the following decision:

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

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

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

[Signed] [Signed]

Professor Campbell McLachlan QC
Arbitrator

Professor Jan Paulsson
Arbitrator

[Signed]

Mr Michael E. Schneider
President