

Niko Resources (Bangladesh) Ltd.

v.

**Bangladesh Petroleum Exploration & Production Company Limited (“Bapex”), and
Bangladesh Oil Gas and Mineral Corporation (“Petrobangla”)
(ICSID Case Nos. ARB/10/11 and ARB/10/18)****Procedural Order No 14**

Further to Procedural Order No 13 of 26 May 2016 and the Parties’ comments and submissions of 7 and 14 June 2016, the Tribunals have deliberated and examined the further proceedings concerning the Corruption Claim. They thank the Parties for their explanations concerning the negotiations leading to the conclusion of the JVA and the GPSA and related documents.

The Tribunals have also considered the Respondents’ request of 30 June 2016 seeking reconsideration of the Tribunals’ Third Decision on the Payment Claim. The Tribunals have also taken note of the Respondents’ letter of 25 July 2016, registering their objections to the Tribunals’ decision of 19 July 2016.

They now give the following directions concerning the next steps in these proceedings.

1. Documents

- 1.1 The Tribunals considered the document production request in the Respondents’ letter of 10 May 2016, the preceding correspondence between the Parties, as produced with this request, and in particular Annex C to that letter, describing the requested documents. They also considered the Claimant’s comments thereon of 14 June 2016.
- 1.2 The Tribunals recognise that, if acts of corruption occurred in the course of the negotiations of the JVA and the GPSA, the requested documents are relevant places to seek evidence. Therefore, they wish to proceed along the lines indicated in the Respondents’ request.
- 1.3 The Tribunals noted, however, the description of the difficulties which the Claimant and its counsel have faced in their search for responsive documents and the efforts to overcome them. The Tribunals concluded from these explanations that the efforts were successful to some extent.
- 1.4 The Claimant describes the document production request as “grossly overbroad”, by illustrative reference to request No 4, which seeks financial records “showing transfers and/or payments of funds between 2001 and 2006 from or on behalf of Niko Resources Ltd, its affiliates, its officers or its agents to any entity or person in Bangladesh (including affiliates, employees and agents of Niko Resources Ltd) or to any of the persons named in items 1 – 3 above”. The Tribunals accept that this request is of a very wide scope in the

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context of international arbitration proceedings, especially considering the fact that, during the period identified in the request, Niko was not only negotiating the JVA and the GPSA but was conducting drilling and gas production operations and related activities in Bangladesh. The Tribunals accept the Claimant’s assertion that the ordinary flow of transfers and payments was extensive and concludes that requesting the production of this documentation would indeed be overbroad. Similar considerations apply to the Respondents’ other requests.

- 1.5 The Tribunals also have considered the suggestion made in the Respondents’ letter of 7 June 2016, referring to a 2011 declaration of counsel then representing the Claimant. This declaration concerned information in the possession of the law firm of the Claimant’s counsel at the time. To the extent to which the Claimant knows the information available to its counsel’s law firm and referred to at that occasion, and subject to the explanations below in section 4, the Tribunals wish to receive further details about this information.
- 1.6 In view of these considerations, the **Tribunals, in a first stage, invite the Claimant by 8 August 2016:**
- (i) To provide information about the status of the research referred to above in paragraph 1.3;
 - (ii) To provide information about their system of payments in and to Bangladesh so as to identify possible criteria for a more focused search of relevant documentation;
 - (iii) To state its view concerning the “narrow parameters” that should be applied in the context of the Tribunals’ examination of the Corruption Claim;
 - (iv) To inform the Tribunals about its knowledge concerning the information of its counsel’s law firm to which reference was made at the hearing on jurisdiction as quoted in the Respondents’ letter of 7 June 2016.
- 1.7 Upon receipt of this information, the Tribunals will examine further directions concerning the Respondents document production request.
- 1.8 The Tribunals have considered the documents produced by the Respondents according to their list of Annex A to their letter of 14 June 2016. The Tribunals noted that, with very few exceptions, the list does not include any company records of BAPEX or Petrobangla. **They ask the Respondents to inform the Tribunals by 8 August 2016 about the respondent companies’ record-keeping practices and provide lists of relevant documents.**

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2. Witnesses

- 2.1 The Tribunals have considered the identification of persons in the Claimant’s account of events and the list submitted by the Respondents in Annex B of its letter of 14 June 2016.
- 2.2 To the extent that this has not been done already, **the Tribunals invite the Parties by 8 August 2016:**
- (i) To identify the function of each of the named person during the period relevant for the contract negotiations and specify the period during which this function was occupied;
 - (ii) To provide information about the role of the named person in the negotiations of the GPSA and JVA and in the decision of BAPEX and Petrobangla to enter into these agreements;
 - (iii) To identify the present function and domicile of each of these persons and the manner in which they can be contacted.
- 2.3 Once this information has been received, the Tribunals will consider which of these persons should provide witness testimony. They will then invite the party having named the relevant persons to contact them, inform the Tribunals about their availability and make the arrangements for their appearance at a hearing before these Tribunals.

3. Canadian Investigations

- 3.1 In their submission of 14 June 2016, the Respondents referred as source of information to “the Royal Canadian Mounted Police [RCMP] and the Alberta Court of Queen’s Bench that handled the Niko corruption matter in Canada”, suggesting an application “under the Canada and Alberta Evidence Acts to obtain testimony of witnesses in Canada and documentation from the Canadian proceedings and investigations”. The Tribunals have considered carefully this suggestion, in particular in view of the information indicating that the Canadian investigations had a broad scope and were conducted very thoroughly.
- 3.2 When examining these suggestions, the Tribunals considered the conviction of Niko Canada, dated 24 June 2011, as examined during the course of the proceedings on jurisdiction and discussed in detail in the Decision on Jurisdiction of 19 August 2013.¹ They also examined a document now produced by the Respondents as Exhibit R-290 and entitled “Royal Canadian Mounted Police, Foreign Bribery Investigations” by Kevin Duggan, “E” Division, Financial Integrity, Federal and Serious Organised Crime; as identified by the Respondents, this is an undated PowerPoint presentation (referred to below as the Duggan

¹ In particular pages 107 to 110.

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Presentation). Under the heading “Project Koin: Niko Resources Ltd”, the document provides in particular information about the Canadian investigation, showing the broad scope of this investigation. According to this document, the Canadian police, the RCMP, received assistance from Bangladesh, Japan, Switzerland, Barbados, United States and the United Kingdom; specific mention is made of

- “FBI,
- City of London Police,
- World Bank,
- USDOJ,
- ACC Bangladesh,
- AFT” and
- a number of Canadian bodies.

The document also mentions:

- “8 Mutual Legal [Assistance] Requests completed,
- 16 Production Orders,
- 20 people interviewed in 6 different countries”.

The presentation then sets out, under the heading “Niko – Court”, the conclusion reached by this broad ranging investigation:

The Bribe

- Toyota Landcruiser valued at \$ 194,000
- Trip to New York/Chicago

Penalty

- Fine \$8.2 Million + 15% Victim Surcharge = \$9.5 Million
- 3 years’ probation with extensive monitoring conditions”

3.3 The bribes referred to in this presentation, obviously are the benefits procured to the Minister of Energy in May and June 2005, as they are described in the Canadian Agreed Statement of Fact.² This statement also reports: “The Crown is unable to prove that any influence was obtained as a result of providing the benefits to the Minister.”³

3.4 It results from these documents that the Canadian investigations have been completed and that they established the two bribes just mentioned and the absence of proof for any influence being obtained as a result of these bribes. This information is known to the Tribunals and has been examined in detail in the Decision on Jurisdiction.

² Exhibit C-15, paragraphs 28 to 37.

³ Exhibit C-15, paragraph 58.

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- 3.5 The Tribunals have no reason to believe that, by examining the evidence gathered by the Canadian authorities, they would be able to discover cases of bribes by Niko which had escaped the attention of the Canadian authorities. The Tribunals therefore see no useful purpose in requesting from the Canadian authorities information and documents gathered in the course of the Canadian investigations.
- 3.6 The Tribunals will pursue their investigation of the Corruption Claim by considering other evidence.

4. The Duggan Affidavit

- 4.1 The Respondents requested in their letter of 10 May 2016 “an order from the Tribunal[s] to compel Niko’s cooperation to seek [a less redacted] version [of Corporal Duggan’s affidavit] from the Canadian courts”. They describe the affidavit as “compelling evidence from an eminently credible source”.
- 4.2 In its response of 14 June 2016, the Claimant objects to this application. It denies any evidentiary value of the affidavit, which it describes as a “recitation of second- or third-hand hearsay concerning events of which the author had no personal knowledge”; it also insists on the prejudice which the use of the Duggan Affidavit would cause to Niko “who will never have any opportunity to cross-examine Corporal Duggan or the hearsay declarants whose statements he references”.
- 4.3 While they are aware of the difficulties that tribunals often face when seeking to investigate cases of possible corruption, the Tribunals also are bound by the obligation to respect essential principles of due process. There is no indication that the Claimant will have an opportunity of questioning the author of the affidavit and the persons quoted in his affidavit. The probative value of the affidavit would be limited at best.
- 4.4 In any event, the Tribunals understand that Corporal Duggan’s information about acts of corruption committed by Niko in Bangladesh formed part of the Canadian investigations discussed above. The evidence provided by this information must have been considered by the Canadian authorities; and these authorities, as just explained, concluded that the material produced by these investigations (presumably including the Duggan Affidavit or the information contained in it) did not reveal acts of corruption other than those leading to the conviction of 24 June 2011. The record does not indicate that the Canadian authorities disregarded incidents of corruption or dropped charges for which there was evidence susceptible to lead to conviction.
- 4.5 In these circumstances the application requested by the Respondents cannot be expected to provide useful additional evidence for acts of corruption allegedly committed by Niko in Bangladesh.

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5. The Respondents’ Application of 30 June 2016

- 5.1 The Claimant is invited to respond **by 8 August 2016** to the Respondents’ 30 June 2016 application for reconsideration of the Tribunals’ Third Decision on the Payment Claim of 26 May 2016.

6. The Respondents’ Compliance with the Tribunals’ Decision of 19 July 2016

- 6.1 In their letter of 25 July 2016 the Respondents state that “their compliance with the Tribunals’ order and obligations deriving thereunder is without prejudice to such disagreement and Respondents’ substantive and procedural rights”.
- 6.2 The Respondents are invited to inform the Tribunals **by 8 August 2016** about the manner in which they have complied with the Tribunals’ 19 July 2016 decision.

7. Further Procedural Consultation

- 7.1 The Tribunals wish to discuss with the Parties issues that arise from the present Order and the Parties’ forthcoming replies as well as possible other pending procedural matters. The Tribunals confirm the 10 August 2016 date agreed during the November 2015 hearing for this discussion by way of telephone conference. The Secretariat will provide the logistical information for this call in due course. The hearing originally scheduled to be held during the week of 29 August 2016 will also be discussed.

[Signed]

On behalf of the two Arbitral Tribunals
Michael E. Schneider
President
29 July 2016