

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 15**

(Concerning the Procedure on the Corruption Claim)

Following Procedural Order No 14 of 29 July 2016, the Tribunals’ preliminary indication of possible issues for discussion concerning the Corruption Claim, the Procedural Consultation of 10 August 2016 (“the August 2016 Procedural Consultation”) and the Parties’ observations of 29 August 2016 on the Tribunal’s Summary Minutes of this consultation (“the Summary Minutes”), the Parties’ other submissions on the subject, the Procedural Consultation of 1 September 2016 (“the September 2016 Procedural Consultation”) and the Parties’ comments on the draft of the present Procedural Order at that consultation, the Tribunals now resolve pending issues concerning the organisation of the proceedings on the Corruption Claim.

1. Scope and Nature of the Examination of the Corruption Claim and the Tribunals’ Role

1. The Tribunals note the Claimant’s insistence on the adversarial nature of ICSID arbitration proceedings, which require that a party state clearly the case which the other party must meet and the decision which it requires the arbitral tribunal to make.
2. The Tribunals also note the Respondents’ comments in their letter of 8 August 2016 and in their explanations during the August 2016 Procedural Consultation, insisting that the Tribunals’ decision concerning their exclusive jurisdiction with respect to the Corruption Claim, entails an augmented responsibility of the Tribunals and the need for a broad enquiry not necessarily confined to the argument and evidence which the Parties are prepared to submit to these Tribunals. The Tribunals note the Respondents’ further explanations during the September 2016 Procedural Consultation on the desirable scope of the enquiry concerning the Corruption Claim, and also their recognition that their position and an approach by which the Tribunals seek “to get to the truth” were not incompatible with the adversarial process.
3. In response to these observations, the Tribunals provide the following clarifications. The Tribunals are not like a criminal court tasked with punishing acts of corruption as such. Their mandate is that of resolving disputes concerning the JVA and the GPSA and specifically the Respondents’ request seeking the avoidance of these two agreements on grounds of corruption. The Tribunals therefore must determine whether the JVA and the GPSA were procured by corruption.

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4. For the reasons previously explained, the Tribunals have exclusive jurisdiction to make these determinations. They are conscious of the responsibility that flows for them from their exclusive jurisdiction and from their general obligations as ICSID tribunals. This may lead them to take their own initiatives in the evidentiary process in accordance with the ICSID Arbitration Rules; but they must preserve and protect the adversarial nature of ICSID proceedings, which requires that each Party clearly state its case and identify the evidence on which it relies so that the other Party has the opportunity to address this case.
5. The Respondents have affirmed that “BAPEX and Petrobangla now have evidence to demonstrate that both the JVA and GPSA were procured by corruption”.¹ On the basis of this affirmation, the Tribunals have decided to suspend the proceedings on the remaining issues in these arbitrations and to give priority to the examination of the Respondents’ Corruption Claim. In doing so, they may take their own initiative in the evidentiary process on these issues; but in the interest of a rational and efficient conduct of the proceedings and in view of their adversarial nature, the Tribunals are of the view that any requests by the Parties that the Tribunals take such initiatives must be justified with particularity. In any event, the scope of the evidentiary enquiry must be limited to the issue that has to be decided, namely whether the two agreements were procured by corruption.
6. In light of these considerations, the Tribunals prepared the draft of the present Procedural Order, addressing the various evidentiary and procedural issues that were raised during the August 2016 Procedural Consultation and in the submissions of the Parties before and after this consultation. The arbitrators have carefully considered the written comments made by the Parties on this draft as well as their observations in the course of the September 2016 Procedural Consultation. In view of these comments the Tribunals have decided to adjust the draft Procedural Order and in particular the proposed procedural timetable so as to afford the Parties an opportunity to comment further on the substance of the Corruption Claim and the procedural options taken by the Tribunals. In particular, they wish to afford the Respondents the opportunity to develop their position on the Corruption Claim within the scope of the enquiry defined by the Tribunals and to provide justification for their request of enlarging this scope beyond the limits provisionally defined in the present Procedural Order.

¹ Memorial on Damages, 25 March 2016, at paragraph 60.

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2. Targeted Period

7. The Tribunals note that the principal focus of the corruption enquiry pertains to the circumstances of the conclusion of the JVA and the allegation that it was procured by acts of corruption attributable to Niko. The Parties agree that the relevant period begins sometime in 2001 and continues until the conclusion of the JVA on 16 October 2003. The Tribunals moreover accept the Respondents’ observation to the effect that this period should be extended to the time immediately following signature of the JVA, in the event that evidence emerges of payments triggered by it.
8. Thus the relevant period of time comprises the years 2001 to 2003 as well as the period immediately following the conclusion of the JVA until the end of the first quarter of 2004 (“Targeted Period”).
9. Concerning the GPSA, the Tribunals have explained that in their view the conclusion of this agreement with Petrobangla was a necessity once the Feni Field started to produce gas. The critical issue therefore is, in the present understanding of the Tribunals, not the conclusion of the GPSA in and of itself, but its terms.
10. Concerning the GPSA negotiation period (from May 2004 to the conclusion of the GPSA on 27 December 2006), the Tribunals note that, given their present state of understanding, the critical issue was the price Niko would receive for the gas delivered. Niko had requested a price of US\$2.35/MCF. However, Petrobangla and the representatives of the Government involved in the negotiations were prepared to pay no more than US\$1.75/MCF; they made no concession and the price eventually agreed in the GPSA was US\$1.75/MCF.² As revealed by the Respondents in these arbitrations, this price is substantially below that paid during the period from 2004 to 2015 to other suppliers of gas.³ The Respondents have not shown any undue advantage procured to Niko through the GPSA.
11. At the present time and on the present state of the evidence, the Tribunals see no justification for ordering document production for the period relating to the GPSA negotiations, notwithstanding the contentions made by the Respondents in the course of the September 2016 Procedural Consultation, notably to the effect that the conclusion of the GPSA was not a necessity and that, irrespective of the price agreed in the GPSA, Petrobangla granted an advantage to the Claimant by concluding the GPSA. On the other hand, the Tribunals have not taken a final view in this respect, and the Parties are not precluded from providing evidence and argument relating to the GPSA negotiation

² For details on these negotiations see Decision on Jurisdiction, see pages 24 to 33.

³ See the Third Decision on the Payment Claim, paragraph 101 and the accompanying references.

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period. In other words, the Tribunals remain prepared to reconsider their position if they are shown that it is justified.

3. Respondents’ Applications for Reconsideration of Procedural Order No 14: The Canadian Investigation

12. In an application of 9 August 2016 (“the Application”), the Respondents requested that the Tribunals reconsider Procedural Order No 14 of 29 July 2016 insofar as it declined to seek assistance from the Canadian courts under the Canada and Alberta Evidence Act to obtain information and documents gathered in the course of the Canadian investigations.
13. In neither of the two documents produced as evidence of the outcome of the Canadian investigation is there any indication that acts of corruption other than the two gifts to the Minister were established against Niko Resources Ltd. as the target of the Canadian investigation or any other company of the Niko Group. The Agreed Statement of Facts also records: “The Crown is unable to prove that any influence was obtained as a result of providing the benefits to the Minister.” It adds that “the sentence takes into consideration the fact that the company has never been convicted of a similar offence nor has it been sanctioned by a regulatory body for a similar offence”.
14. Considering this evidence, the Tribunals concluded in Procedural Order No 14 that the Canadian investigations were 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 about these acts was known to the Tribunals and examined in detail in the Decision on Jurisdiction. The Tribunals saw 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 saw no useful purpose in requesting from the Canadian authorities information and documents gathered in the course of the Canadian investigations.
15. In the Application, the Respondents now argue that the conviction of Niko Resources Ltd., based on the Agreed Statement of Facts, does not justify the assumption that there were no other acts of corruption. They describe the conviction of Niko Resources Ltd. as being based on a “plea deal” and argue that such a “plea deal will involve dropping or lowering charges in exchange for avoiding the time and expense of a full trial”. The Respondents rely on the opinion of Mr Scott C. Hutchison, announced in the Application and produced some days later, on 12 August 2016. Mr Hutchison is a barrister and, according to the biographical note produced with his opinion, held the

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position of Crown Counsel at the Crown Law Office-Criminal during the years 1989 to 2005.

16. Mr Hutchison explains that the correct term to be used for the agreement underlying the conviction of Niko Resources Ltd. is “resolution agreement” and that, in the case of prosecution of Niko Resources Ltd. “the charge moved forward in an atypical fashion”:

“Niko is unusual in that the case seems to have had all the normal processes subsumed in the resolution negotiations between the Crown’s office and the company. The case did not involve a charge laid by the police, but rather a ‘direct indictment’ filed by the Deputy Attorney General, essentially skipping over all the usual preliminary steps and moving directly to the last stage of the process – an appearance before the superior court, Alberta’s Court of Queen’s Bench (the senior trial court in the province)”.⁴

17. Mr Hutchison states that, in these circumstances, the record before the court is limited and that, from this limited record “it is not possible to know whether or not there were other possible allegations that the police and Crown ‘walked away from ‘ as a quid pro quo within the efficient resolution agreement presented to the Court”. Mr Hutchison identifies some of the “many reasons why a prosecutor might, quite properly, determine not to proceed with a charge or potential charge in the context of resolution discussions”. He describes the “overriding question [...] by reference to whether, in view of all the circumstances (including any charges to which the accused is prepared to plead guilty), it is in the public interest to pursue the charges to verdict”.⁵ He then gives three concrete examples, stating that the list is not exhaustive. These examples relate essentially to a balance between the charges to which the accused pleaded guilty and the state resources needed to prosecute any remaining allegations. When considering “marginal value” of prosecuting any “remaining allegations”, the Crown will take account of “any increased penalty or social labelling that might be achieved”. In other words, the Crown

“... may determine that allegations which are marginal or which will present significant legal or logistical challenges to prove may be withdrawn or not proceeded with as part of a broader resolution agreement.”⁶

18. The Claimant’s response of 19 August 2016 opposes the Application. It argues that the probative value of evidence and the question whether evidence should be produced is “exclusively for the Tribunals’ appreciation”. The Claimant rejects the Respondents’ “speculation as to what was in the mind of the Crown in entering into the resolution agreement with Niko Resources Ltd.” and denies that there is any evidence in the record

⁴ Hutchison Opinion, p. 6.

⁵ Hutchison Opinion, p. 5.

⁶ Hutchison Opinion, p. 5.

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“that the Canadian authorities declined to address other alleged incidents of corruption they felt could be substantiated”. The Claimant argues that the Respondents have failed “to disclose the totality of the information at their disposal regarding their corruption allegations” and states that the Respondents have “not identified what specific information they believed the Canadian authorities might have that would be relevant to their allegation of bribery relating to the JVA or GPSA”.

19. In the light of the Parties’ arguments and the evidence produced, the Tribunals have examined whether the procedural decision in their Procedural Order No 14 should be modified, in particular with respect to its observation about there being 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”.⁷
20. First of all, the Tribunals note that nothing in the record indicates that the Canadian authorities declined to address other alleged incidents of corruption that they felt could be substantiated. As the Claimant points out, “the record in fact indicates that Niko Resources Ltd. was never even charged in relation to any other alleged incidents of corruption.”⁸
21. The Tribunals are invited by the Respondents to infer that the Canadian investigations produced (or may have produced) evidence of other cases of corruption that were not mentioned in the Agreed Statement of Facts. The Respondents do not seem to suggest that such evidence escaped the attention of the Canadian authorities when they pronounced their conviction on the basis of the Agreed Statement of Facts; nor that this elusive evidence could be discovered by these Tribunals in their enquiry of the Respondents’ Corruption Claim – a supposition that does not appear to be very realistic.
22. The case that the Respondents now seem to make is that the Canadian authorities discovered evidence for other cases of corruption but decided not to rely on it in the charge against Niko Resources Ltd. As Mr Hutchison points out “it is not possible to know whether or not there were other possible allegations that the police and Crown ‘walked away from’ as a quid pro quo within the efficient resolution agreement presented to the Court”.⁹ The Respondents’ case in this respect, therefore, is speculative. The Tribunals nevertheless have examined the scenario on which the Respondents rely in order to determine whether it is likely that there might be evidence that the Canadian authorities did not pursue and which could be of relevance for the Tribunals’ examination of the Corruption Claim.

⁷ Procedural Order No. 14, paragraph 3.5.

⁸ Claimant’s letter of 19 August 2016, p. 3.

⁹ Hutchison Opinion, p. 6.

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23. The evidence that would be relevant for the Tribunals’ enquiry and the Respondents’ Corruption Claim would be acts of corruption by which Niko procured the JVA or the GPSA. The Respondents allege payments of large sums of money which actually caused the conclusion of these two agreements. Quite obviously, had such charges been established, they would have justified a punishment significantly more severe than that which the Alberta Court deemed adequate for the two gifts of a total value of less than 200’000 Canadian Dollars and which the court found had no effect on the conclusion of the agreements. The argument of the Respondents thus amounts to saying that the Canadian authorities may have disregarded the large payments by which Niko obtained illegal advantages and, instead, based themselves merely on the two gifts to the Minister which remained without effect on the award of the GPSA. The assumption is difficult to accept, unless one were to assume that the other acts of corruption were so uncertain and so difficult to establish that it was not in the public interest to engage the required resources to pursue them.
24. The Tribunals conclude that any other evidence gathered by the Canadian authorities either does not concern corruption of the gravity alleged by the Respondents or was so far from constituting conclusive evidence that it would not have justified the devotion of substantial public resources to pursue a prosecution. This conclusion is relevant for the Tribunals’ decision, even if one considered possible differences in the standard of proof,¹⁰ an issue that has not yet been decided by the Tribunals.
25. The Tribunals also have considered that the Parties disagree about the feasibility of the process by which the Respondents request the Tribunals would have to act in order to access the evidence gathered by the Canadian authorities. The Respondents suggest that the Tribunals make a request under the Canada and Alberta Evidence Act “to obtain testimony of witnesses in Canada and documentation from the Canadian proceedings and investigations”. According to the Respondents, the “Canadian courts grant such requests on the principles of international comity if the evidence sought to be obtained is relevant, necessary, not otherwise available, and identified with reasonable precision”.¹¹
26. The Claimant argues that the Respondents “grossly oversimplify the process under either section 46 of the Canada Evidence Act or section 56 of the Alberta Evidence Act”, on which the Respondents rely.¹² The Claimant points out that the subject of the request for the production of documents which the Respondents wish the Tribunals to make would be “an agent or instrumentality of the Crown” and that the Crown “enjoys

¹⁰ See Hutchison Opinion, pp. 6 and 7.

¹¹ Respondents’ Responses to Procedural Order No 13, paragraph 42.

¹² Claimant’s letter of 19 August 2016, p. 5.

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a general immunity or prerogative against being compelled to submit to a disclosure process”. To highlight the problems which a request for production in the present case would have to face, the Claimant refers to the “substantive redactions that were made to the Duggan Affidavit pursuant to the Order of Justice Tilleman of the Alberta Court before it was released to the public”. The Claimant also lists the factors which a request by the Tribunals would have to address and describes the difficulties which are likely to arise in the present case.

27. The Tribunals make no finding with respect to the applicability of the provisions of the two evidence Acts and the chances of success of a request as suggested by the Respondents. They note simply that such a request would engage the Tribunals in proceedings before domestic judicial authorities, an action which does not fall in the ordinary activity of arbitral tribunals. They have noted the explanations of the Respondents concerning the removal of some of the redactions from the “Duggan Affidavit” and the complexities in the related procedures. The Tribunals also note that the Duggan “Affidavit” relates to an investigation not of Niko Resources Ltd. but to the “investigation of the Canadian Senator”¹³ who is not party to the present arbitrations. The protection of the interests of third parties, therefore, is likely to require particular precautions, if it does not exclude production altogether.
28. As mentioned above, the Respondents affirm that “BAPEX and Petrobangla now have evidence to demonstrate that both the JVA and GPSA were procured by corruption”.¹⁴ While the Tribunals have the power to take their own initiative in the evidentiary process on the Corruption Claim, they are of the view that, before applying to other jurisdictions with applications concerning proceedings that have been closed by these other jurisdiction, the Tribunals must give priority to the evidence announced by the Respondents and other sources available to the Tribunals. As they are in no position to assess the reliability or indeed the very existence of any relevant evidence of the type said to be in the hands of the Canadian authorities, the Tribunals do not consider it justified to intervene with these authorities in the manner called for by the Respondents.
29. The request for reconsideration of Procedural Order No 14 with respect to the Canadian investigations is, therefore, denied. The Tribunals reserve the right to reconsider this decision once they have examined the argument and evidence produced by the Parties in respect of the Corruption Claim.

¹³ Respondents’ Request for Reconsideration of 9 August 2016, paragraph 5.

¹⁴ Memorial, paragraph 60.

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4. Respondents’ Applications for Reconsideration of Procedural Order No 14: the “Duggan Affidavit”

30. In their application of 9 August 2016, the Respondents requested the Tribunals to reconsider Procedural Order No 14 of 29 July 2016 also with respect to their decision not to order the Claimant to cooperate in seeking a less redacted version of the “Duggan Affidavit”.

31. The document described by the Respondents as the “Duggan Affidavit” was produced, in a redacted version, by the Respondents as Exhibit R-213 to BAPEX’ Memorial on Damages of 25 March 2016. It is entitled “In the Matter of an Information to Obtain a Production Order Pursuant to Section 487.012 of the Criminal Code”, presented “In the Provincial Court of Alberta, Judicial District of Calgary”. In this document, Corporal Kevin Paul Duggan, “a peace officer and a member of the Royal Canadian Mounted Police” makes a “Request for a Production Order – BNS”.¹⁵ As justification for his request, Corporal Duggan states that he had

“... reasonable grounds to believe that [redacted] an official of the Canadian government has committed the following offence, namely:

- 1) On or between August 1, 2004 and October 1, 2006, being an official of the Government of Canada, did commit a breach of trust in connection with the duties of [redacted] office, by using [redacted] office for a purpose other than the public good, to lobby on behalf of a private company, thereby undermining the interests of Canada, contrary to Section 122 of the Criminal Code.

Hereafter ‘the offence’”.¹⁶

32. The Respondents argued that, according to advice received from Canadian counsel,

“... an application can be made to the justice who originally ordered the redaction, the Honorable Justice Tilleman of the Court of the Queens’s Bench in Alberta, to remove the redactions related to Niko. This process will normally take about one year. However, Canadian counsel has advised us that the process to obtain an order from Justice Tilleman will be significantly quicker and simpler if Niko cooperates and does not oppose the removal of redactions related to it.”¹⁷

33. The Respondents informed the Tribunals that, in a first step, they requested the Claimant to cooperate in requesting Justice Tilleman to permit the release of an “un-redacted or

¹⁵ Exhibit R-213, pp. 68 to 72.

¹⁶ Exhibit R-213, p. 1.

¹⁷ Letter of 10 May 2016, p. 1.

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less-redacted version”; but the Claimant did not agree to do so. The Respondents then addressed themselves to the Tribunals. In their letter of 10 May 2016 they described the document as “compelling evidence from an eminently credible source” and continued by stating:

“... to the extent the Tribunal[s] consider that a less-redacted version of Corporal Duggan’s affidavit would be helpful, we hereby request an order from the Tribunal[s] to compel Niko’s cooperation.”

34. In its response of 14 June 2016, the Claimant objected to the request. It denied any evidentiary value of the document, 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”.
35. In Procedural Order No 14 the Tribunals considered these arguments. They referred to the requirements of due process, in particular the absence of any indication that the Claimant would have an opportunity of questioning the author of the “Affidavit” and the persons quoted in it. They also referred to their decision concerning the Canadian investigations of which the “Duggan Affidavit” seemed to be a part. In particular they pointed out that any information contained in this “Affidavit” must have been considered by the Canadian authorities and that these authorities did not rely on any acts of corruption other than the two gifts to the Minister for which Niko Resources Ltd. was convicted. For these reasons the Tribunals denied the Respondents’ request.
36. In their Application, the Respondents argue that, relying on the Canada and Alberta Evidence Acts, the Tribunals could apply to a Canadian court to order the examination of Corporal Duggan. “He would then be available for Niko to cross-examine” and “Niko’s due process concerns can be resolved”.¹⁸ The Respondents add the description of a number of incidents to demonstrate that the “Duggan Affidavit” refers to important acts of corruption other than those on which the conviction of Niko Resources Ltd. relied.
37. The Claimant objects to the Application, contesting its probative value and arguing that the appearance for cross examination of Corporal Duggan does not resolve the due process issue: “the Duggan Affidavit draws predominantly from the untested hearsay statements of others; having Corporal Duggan repeat his recollection of such untested hearsay statements (including second-hand hearsay statements) would not enhance their

¹⁸ Request for Reconsideration, paragraph 18.

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evidentiary value, or otherwise mitigate their prejudicial nature.”¹⁹ The Claimant adds that, on certain other points on which the Respondents seek to rely, “Corporal Duggan’s statements are nothing more than statements of his opinion or belief in respect of circumstances that are neither within his personal knowledge nor his unique ability of expertise to address”.²⁰

38. The Tribunals consider that Corporal Duggan’s “Affidavit” is correctly is described as “Information to Obtain a Production Order” in an investigation of an offence by “an official of the Government of Canada”.²¹ As far as can be seen from the redacted text, the “Affidavit” is not direct evidence of the events which it describes but an account of statements by others. Examining him as witness, therefore, does not solve the serious concerns of due process if the Tribunals were to rely on his testimony without having heard the authors of the declarations on which Corporal Duggan relies.
39. It may also be noted that, in order to have him appear, the Tribunals would, once again, have to engage in proceedings with the Canadian courts; but there is no indication that such proceedings could ensure his appearance at the place of the hearing. It would seem that the hearing would have to be moved to Canada or Corporal Duggan would have to be heard in the absence of the Tribunals by letters rogatory or similar proceedings.
40. With respect to the evidentiary value of the “Duggan Affidavit”, similar considerations as those discussed in the previous section in the context of the Canadian investigation apply.
41. In addition, Mr Hutchison’s opinion sheds light on the nature and value of Corporal Duggan’s “Information to Obtain a Production Order”. Such a document is presented in support of an application for a production order or, as described in the relevant title of Mr Hutchison’s opinion, “orders preauthorising investigative activities”.²² Their purpose is to present to a judge with information on oath and in writing “that there are reasonable grounds to believe that a federally created offence had been committed and the production order would likely result in evidence of that offence being produced”.²³ Mr Hutchison explains that the standard of “reasonable grounds to believe” is “similar to the American concept of probable cause”. In other words, what was required of Corporal Duggan, in Mr Hutchison’s opinion, must be distinguished from the standard of proof required for a conviction on criminal charges.

¹⁹ Letter of 19 August 2016, p. 4.

²⁰ Ibid. emphasis in the original.

²¹ Duggan Affidavit, p. 1.

²² Hutchison Opinion, p. 7, title 3.

²³ Hutchison Opinion, p. 7.

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42. Mr Hutchison then continues by stating:

“The fact that a production order ultimately issued on the basis of the *Information to Obtain* in this case shows that a judicial officer was satisfied that the facts alleged in the *Information to Obtain* provided a reasonable basis to justify the officer’s sworn belief that the offences under investigation had in fact been committed and that evidence of those offences would be obtained by the issuance of the order”.²⁴

43. The Tribunals note that the offence identified in Corporal Duggan’s “Information to Obtain a Production Order” is that of “an official of the Government of Canada” (presumably a Senator²⁵), who used his office “to lobby on behalf of a private company” (presumably Niko Resources Ltd.). There is no evidence in the file to show that the production order requested by Corporal Duggan was ultimately issued, as stated by Mr Hutchison. If the order had been issued, it would, in the words of Mr Hutchison, justify Corporal Duggan’s reasonably grounded belief that the Senator did indeed commit the lobbying offence of which he was suspected. While it may contain the description of actions by Niko Resources Ltd. or the Claimant (assuming that the relevant redacted passages concern them), the “Duggan Affidavit” does not concern an offence of any of the Niko companies. For this reason, too, its probative value is less than what the Respondents attribute to it.

44. The Tribunals deny the request for reconsideration and confirm their decision in Procedural Order No 14.

5. Financial Records

45. The Tribunals have noted the Claimant’s explanations concerning the financial records relating to the period up to the conclusion of the JVA and until opening of a branch in Bangladesh. According to these explanations, payments to Bangladesh during this period were made to Stratum, and Stratum reported on the use of the funds so received. The Tribunals take note that the Claimant is prepared to produce these records as part of the document production. During the September 2016 Procedural Consultation the Claimant explained that it had been incorporated in 1997 and that its branch in Bangladesh was established in the latter half of 2003.

²⁴ Hutchison Opinion, p. 7.

²⁵ The Respondents state that Corporal Duggan’s “Affidavit” concerns “the investigation of the Canadian Senator” (Respondents’ Request for Reconsideration of 9 August 2016, paragraph 5).

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46. The Respondents object to limiting the production of financial records to those concerning Stratum and argue that corruption payments may have been made through other channels, and indicate that they are prepared to appoint a financial expert and would agree to Niko appointing one as well. They further believe it would be useful for the Tribunals to appoint one or several experts to examine the relevant financial information. In their letter of 8 August 2016 the Respondents request that Niko be ordered “to make its financial records available to an independent financial expert for review and hire an independent financial expert to assist in the collection and analysis of Niko’s financial records”. The Claimant objects to such an appointment.
47. The Tribunals consider that the production of the records concerning payments to Stratum are a useful start for the investigation; but they accept the Respondents’ view that it cannot be excluded that corruption payments took other routes, in particular through companies of the Niko Group other than the Claimant. The Tribunals have examined how this justified consideration can be taken into account in the most effective and least disruptive manner.
48. During the September 2016 Procedural Consultation the Claimant stated that it was prepared to produce complete records of all payments to Bangladesh made by any of the companies of the Niko Group. The Tribunals accept this production as a possibly sufficient measure in the production of financial records; but they reserve the right to consider the adequacy of this approach, once the production has been made and the Respondents have had an opportunity of commenting thereon. In particular, the Tribunals reserve the right to order a statement of the auditor of the Niko Group, as it had been announced in the draft of the present Procedural Order prior to the September 2016 Procedural Consultation.
49. When envisaging the order for Niko to produce the said audited statement, the Tribunals had considered that the Niko Group produces consolidated accounts for the fiscal years ending on 31 March. The Tribunals concluded that any payment from a company of the Niko Group to third parties in Bangladesh must be reflected in these consolidated accounts. According to the accounts posted on the Niko website, these consolidated accounts are audited by KPMG.²⁶ The Tribunals invite the Claimant to make the necessary preparatory arrangements with the auditor of the Niko Group so that, if the Tribunals decide that an audit report is required, the auditor may produce on short notice a statement identifying any payments during the fiscal years ending 31 March 2001 to 31 March 2004 which the Niko Group made to beneficiaries in Bangladesh, possibly

²⁶ Niko Resources Ltd, Annual Report March 2016, pp. 29 et seq.: at http://www.nikoresources.com/upload/media_element/120/01/ye-f2016---annual-report---final-v2---07142016.pdf, last consulted 7 October 2016.

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including Stratum, identifying each beneficiary and the amounts received. In view of these directions, the Tribunals see no need, at this stage, to make further directions concerning the financial records of the Niko Group.

6. Production of other documents

50. The Parties agree that, as the next step in the proceedings on the Corruption Claim, both Parties shall produce relevant documents. At the time of the September 2016 Procedural Consultation the Parties were actively engaged in assembling relevant documents in response to the requests for production previously made. The Tribunals had noted that the Parties do not see a useful purpose in the preparation of lists of documents prior to the production of the documents themselves. The Tribunals had envisaged in the draft of the Procedural Order to invite the Parties to identify in advance the categories of documents which they intended to produce, considering in particular section 4.4 of the Summary Minutes. This requirement was not further pursued in September 2016 Procedural Consultation.
51. Concerning the time by which the documents must be produced, the Tribunals noted that the Claimant proposed four weeks while the Respondents indicated that they expect to need more time, especially with respect to documents in Bengali. During the August 2016 Procedural Consultation the Parties confirmed that some members of their legal teams are familiar with the Bengali language so that documents in that language for which the translation has not been completed by the end of the period for production can be produced first in their original language. In the draft Procedural Order, the Tribunals had counted the four weeks’ time for the production of the documents from 1 September 2016. This period has expired and the Parties have had more time than previously envisaged for preparing the production of the documents. The additional time must have allowed the Respondents to resolve the difficulties described in the Procedural Consultation. If by now not all of the documents in Bengali have been translated, the time that has elapsed must have allowed the Respondents’ counsel to reach an understanding of the content of the documents that have to be produced to the Claimant.
52. In view of these considerations, the Tribunals order that the documents must be produced between the Parties forthwith and at the latest by 12 October 2016.

7. Witnesses

53. With respect to witnesses, the Tribunals

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- (i) note the Claimant’s confirmation that it will make available Mr Hornady, Mr Adolph and Mr Goyal; the Claimant is invited to present with its Counter-Memorial written statements by them in which they describe their testimony on the facts relating to the Corruption Claim (Witness Statements) and ensure their presence at the Evidentiary Hearing. Mr Goyal’s Witness Statement shall include a description of the payments made to Bangladesh during the Targeted Period;
- (ii) order the Claimant to seek to obtain a Witness Statement from Mr Sampson as well as his agreement to attend the Evidentiary Hearing as a witness; if the Claimant is unable to do so, it shall describe the steps it has taken to obtain the Witness Statement and Mr Sampson’s appearance at the hearing;
- (iii) note the Claimant’s statement that it has no control over Mr Sharif, has no contact with him and did not know his whereabouts. At the September 2016 Procedural Consultation, the Claimant confirmed that Niko had no contact with Mr Sharif for many years. The Respondents state that they were able to locate Mr Sharif in Houston, Texas. The Respondents are invited to obtain a Witness Statement from Mr Sharif and ensure his appearance at the Evidentiary Hearing. The Tribunals note the Respondents’ explanations concerning the possible objections by reason of Mr Sharif’s earlier role as agent and officer of companies of the Niko Group. They instruct the Claimant to deliver to the Respondents no later than 14 October 2016 a declaration in the name of all companies of the Niko Group by which Mr Sharif had been engaged as agent or officer, releasing him of all obligations which would prevent him to provide the above described Witness Statement and to appear at the Evidentiary Hearing. If the Respondents nevertheless are unable to obtain from him a Witness Statement and to procure his presence at the Evidentiary Hearing, they shall describe the steps they have taken in this respect;
- (iv) note the affidavits of Mr Imaduddin, Mr Hossain and Mr Nurul Islam, presented in the BELA proceedings and mentioned in the Claimant’s first letter of 8 August 2016. These affidavits shall form part of the record of the present arbitration; both Parties are invited to contact these persons with the objective of ensuring their appearance at the Evidentiary Hearing; if they are unable to do so, they shall describe the steps taken;
- (v) note the list of possible witnesses attached to the Respondents’ letter of 8 August 2016 and the Respondents’ statement that they reached out to some of these possible witnesses but that “many of them made it clear that they are unwilling

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or unable to appear before the Tribunal to testify”. At the August 2016 Procedural Consultation the Respondents were unable to identify which persons had been contacted and which of them declared their unwillingness or inability. They were also unable to provide such information at the September 2016 Procedural Consultation. The Respondents are invited to identify by Thursday 27 October 2016 the persons on their list whom they have contacted and indicate those who are prepared to testify before the Tribunals and to appear at the Evidentiary Hearing; this identification shall indicate the subject matters including the time period which the testimony is expected to cover. The Tribunals will then inform the Respondents whom of the persons so identified they require to present a Witness Statement and to appear at the Evidentiary Hearing. The Respondents’ right to present Witness Statements of other persons is reserved.

54. The Witness Statements of the persons identified above or, in case of unsuccessful efforts, the statements of steps taken to obtain witness statements and assurance of the appearance of these persons at the Evidentiary Hearing shall be produced with the Respondents’ Memorial and the Claimant’s Counter-Memorial, respectively. With their Reply and Rejoinder (see below paragraphs 61 and 66), the Parties may produce additional Witness Statements, provided that they are responsive to issues raised in the Memorials or Witness Statements produced by their opponents.

8. Declaration Concerning Mr Khan

55. In their letter of 8 August 2016, the Respondents refer to a writ petition by Professor Shamsul Alam in his case before the Supreme Court of Bangladesh against the Government of Bangladesh, in which the Writ Petitioner applied for the production of evidence held by an individual consultant to the ACC, Mr Ferdous Khan. The Respondents “request that the Tribunals issue a declaration that could be presented to the court hearing the Writ Petition that the evidence should be produced and any order compelling the production of evidence would not violate the Tribunals’ 19 July Decision”. At the August 2016 Procedural Consultation, the Claimant objected to the request. The Tribunals presented their position in the draft of this procedural order and now confirm it as follows:
56. The Tribunals understand the explanations provided by the Parties about Mr Khan’s evidence in the sense that he does not have any direct knowledge of the JVA and the GPSA nor of the alleged corruption; but that he is said to have in his possession evidence on such alleged corruption. There is no information about the evidence which he is said to have, except that Professor Shamsul Alam, in his application to the Supreme Court

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of Bangladesh, asserted that Mr Khan had in his possession “substantial evidence of corruption in procurement of the Impugned Agreements”.

57. In these circumstances, the Tribunals see no reason to pursue this allegation any further but leave it to the Parties to produce any relevant evidence which Mr Khan may have.

9. Other Issues Concerning the Procedural Timetable on the Corruption Claim

58. The Tribunals note that concerning the procedural timetable on the Corruption Claim the Parties agree on some points but a number of other points remain controversial:
59. The Parties agree that the Respondents shall first file a memorial in which they set out their complete case with respect to their allegations concerning the procurement by corruption of the two agreements, accompanied by the evidence on which they rely; and that the Claimant will respond in a Counter-Memorial containing its complete case in defence, accompanied by the evidence on which it relies. While the Claimant believes that four weeks are sufficient for each Party to produce these memorials, the Respondents request eight weeks. The Respondents also request that a second round of memorials be ordered, whereas the Claimant sees no need for it.
60. In the draft of this Procedural Order the Tribunals noted that the allegations on which the Corruption Claim is based were raised by BAPEX in their Memorial on Damages, dated 25 March 2016. Issues relating to this claim had been raised and discussed already in the proceedings on jurisdiction and have been further discussed in exchanges following BAPEX’s Memorial on Damages. The Tribunals are of the view that the Parties must be well familiar with the substance of this claim and that any new aspects that may arise from possibly new documents produced during the document production phase can be dealt with in six weeks, allowing for further consideration at the Evidentiary Hearing. Therefore, they had envisaged that a single round of submissions was sufficient, allowing six weeks for each Party and affording the Respondents an opportunity to submit additional Witnesses Statements after the filing of the Claimant’s Counter-Memorial.
61. The Tribunals continue to be of the view that many of the issues that arise in the context of the Corruption Claim have been argued already and confirm their instructions that each Party must now set out its position concerning this claim fully in its Memorial and Counter-Memorial, respectively. Upon the Respondents’ request, the Tribunals have, however, reconsidered their view concerning the number of written exchanges prior to the Evidentiary Hearing. The Tribunals have decided to accept the Respondents’ request for an opportunity to address in writing before the Evidentiary Hearing the

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Claimant’s Counter Memorial. The Tribunals afford a corresponding opportunity to the Claimant.

62. In order to allow adequate time for such a double exchange of written submissions before the Evidentiary Hearing, the Tribunals have decided to defer the dates of that hearing and now are able to make themselves available during the week of 24 April 2017 for a five day hearing until 28 April 2017. In view of the Respondents’ observations concerning the time required for this hearing, they provide for an additional day in reserve on 29 April 2017. The Parties are invited to confirm by 27 October 2016 their availability and that of their witnesses at these dates.
63. As pointed out above, the Tribunals have reserved, in light of the Respondents’ objections to certain of the Tribunals’ decisions on the scope of the enquiry of the Corruption Claim, to reconsider their scope decisions once they have received the Parties’ Memorials. For this purpose and in order to examine the status of the case on the Corruption Claim after the first round of written submissions, the Tribunals wish to use some of the time initially reserved for the Evidentiary Hearing. Therefore, the Tribunals have decided to hold a Status Conference on 30 January 2017, with possible extension to 31 January 2017 at which the Tribunals wish to consider with the Parties the case as it presents itself in the light of the Parties’ argument and evidence. The Parties are invited to reserve these two days for an in-person meeting in Paris. Depending on their assessment of the issues as they emerge from the first exchange of Memorials, the Tribunals reserve, however, the possibility, in consultation with the Parties, to adopt other modalities for this meeting, such as a video or telephone conference. They will inform the Parties of the modalities envisaged within the week following the receipt of the Claimant’s Counter-Memorial.
64. Having accepted the Respondent’s request for a double exchange of written submissions, the Tribunals are of the view that six weeks, starting from the date for the production of documents, are sufficient for the preparation of the Respondents’ Memorial. The Tribunals have noted that the corresponding period for the Claimant’s Counter-Memorial includes the Christmas and New Year period; they extended the Claimant’s time therefore by one additional week.
65. When calculating the time for the submissions by each of the Parties in the second round, the Tribunals consider that for this exchange, too, six weeks are adequate. They wished, however, to ensure that there were at least three weeks available to consider any adjustments resulting from the Status Conference on 30 and 31 January 2017.
66. In view of these considerations, the Tribunals now fix the following procedural timetable for the proceedings on the Corruption Claim:

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- Simultaneous Document Production (between the Parties only): 12 October 2016;
- Respondents’ indication of persons contacted for testimony and their availability for appearance at the Evidentiary Hearing; both Parties indication of their and their witnesses’ availability for the Evidentiary Hearing: 27 October 2016;
- Respondents’ Memorial on the Corruption Claim: 23 November 2016;
- Claimant’s Counter-Memorial on the Corruption Claim: 11 January 2017;
- Tribunals’ indications of modalities for the Status Conference: 18 January 2017;
- Status Conference: 30 and 31 January 2017;
- Respondents’ Reply: 22 February 2017;
- Claimant’s Rejoinder: 5 April 2017;
- Pre-Hearing Telephone Conference: during the week of 10 April 2017;
- Evidentiary Hearing: Paris, 24 to 28 April, with 29 April 2017 in reserve;
- Post-Hearing Submissions: reserved.

10. “Collateral Use”

67. The Tribunals have noted the Respondents’ declaration during the August 2016 Procedural Consultation to the effect that they will send to the Claimant the proposed confidentiality undertaking with the objective of preventing that information and materials produced in the arbitrations become available to third persons. When commenting on the Summary Minutes, the Claimant stated that this undertaking had not yet been received. In the draft of this Procedural Order, the Respondents were invited to submit the undertaking forthwith.
68. During the September 2016 Procedural Consultation the Parties stated that they had reached an agreement in principle regarding restrictions concerning the access to the record of these arbitrations. They announced further information by 15 September 2016. No such information has been received by the Tribunals.
69. The Tribunals invite the Parties to report forthwith on the progress achieved. Until further notice, the Respondents’ Counsel are instructed not to make any document

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)

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produced by the Claimant available to any person other than the legal team of their law firm.

11. Further Procedural Consultations

70. The draft of this Procedural Order provided that, if further procedural consultations are required prior to 30 January 2017, they may be held in the presence of the President of the Tribunals, subject to his separate consultation with the other members of the Tribunals. No objections were raised to this provision. The provision is now confirmed.

[Signed]

On behalf of the two Arbitral Tribunals

Michael E. Schneider

President

7 October 2016