

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 16**

(Concerning the Respondents’ Request for Reconsideration of 30 June 2016)

Following the Tribunals’ Third Decision on the Payment Claim of 26 May 2016 and other decisions on pending matters, the Tribunals hereby rule on the Respondents’ 30 June 2016 Application for reconsideration of the 26 May 2016 Decision.

1. Background

1. As set out in the Tribunals’ prior rulings, the Claimant sought in these arbitrations *inter alia* payment of the sums due under the GPSA (the **Payment Claim**). The Tribunals have decided the Payment Claim as summarized in the Tribunals’ Third Decision on the Payment Claim of 26 May 2016:

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

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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.

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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.

2. In the submission of 25 March 2016 to which reference is made in the above quotation, the Respondents requested on behalf of Petrobangla that

the Tribunal[s] find that the GPSA was procured by corruption and is thus voidable

and that

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[s] order Niko to bear all the costs of these proceedings and reimburse Petrobangla for all its legal fees and expenses.

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

Niko is not entitled to any payment or credit for past performance. As a result of Niko’s corruption, the Tribunal[s] 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 would 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.

4. In their Third Decision on the Payment Claim, the Tribunals, after the fullest consideration of the Respondents’ application of 25 March 2016, rejected the request that the Tribunals vacate their prior decisions on the Payment claim and confirmed Petrobangla’s payment obligation, ruling on the payment modalities as follows:

(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.

5. In Procedural Order No. 13, the Tribunals decided to suspend the proceedings on all issues other than the Corruption Issue and the Claimant’s Request for Provisional Measures which the Tribunals decided on 19 July 2016.

2. The Respondents’ 30 June 2016 Application and Relevant Procedural History

6. By letter of 30 June 2016, the Respondents (below referred to as the **Application**) requested that

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... the Tribunal[s] reconsider their order of immediate payment and suspend any payment obligations until a final award is issued in these arbitrations.

7. In Procedural Order No. 14, issued on 29 July 2016, the Tribunals invited the Claimant to respond to the Respondents’ request by 8 August 2016, which the Claimant did.
8. On 10 August 2016, the Tribunals held procedural consultations with the parties by telephone conference. As set out in the Draft Minutes of the 10 August 2016 consultations, the procedural consultation concerned the organization of the proceedings on the Corruption Claim and other pending procedural issues, and particularly the parties’ 8 August 2016 replies to the Tribunals’ Procedural Order No. 14. During this telephone conference, the Respondents indicated that they wished to comment on the Claimant’s 8 August 2016 response, and the Respondents did so by letter of 17 August 2016.

3. The Tribunals’ Analysis

3.1 The Respondents’ Case For Reconsideration

9. As explained in the account of the background to the Respondents’ Application, the Joint Venture delivered gas to Petrobangla during the years from 2004 to 2010. Apart from a payment on account, Petrobangla failed to pay for this gas when the relevant invoices became due. Despite the Tribunals’ decisions referred to above, Petrobangla still has not made the payment. The question which arises from the Respondents’ Application is whether Petrobangla should be allowed to continue avoiding the payment which it was ordered to make.
10. In support of the Application, the Respondents rely on three lines of argument: In their **first line of argument**, the Respondents
 - (i) rely on the possibility that, when deciding the Respondents’ Corruption Claim, these Tribunals may find that the GPSA is avoided as having been obtained by corruption,
 - (ii) assert that Petrobangla would not owe payment for the gas received on grounds of unjust enrichment and,
 - (iii) having made the payment, Petrobangla would be unable to recover it from the Claimant.

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11. The **second line of the Respondents’ argument** relies on the injunctions of the courts in Bangladesh and states that these injunctions prevent Petrobangla from making the payment.
12. According to the **third line of argument** the Tribunals did not issue an award and, under the ICSID Convention, did not have the power to order immediate payment in any form other than an award.
13. The Claimant denies that any of these arguments justifies reconsideration of the Third Decision on the Payment Claim.
14. While reserving their position on the question whether, as a matter of principle, such applications for reconsideration of decisions on the substance of a dispute are admissible in ICSID proceedings, the Tribunals have examined the Respondents’ arguments:

3.2 The Respondents’ First Argument: The Possibility That Petrobangla May Be Relieved Of Any Obligation To Pay For The Gas Received

15. The Respondents argue that the obligation to pay, expressed in the Third Decision on the Payment Claim of 26 May 2016, “should be suspended because the obligation depends on the Tribunals’ findings on the Corruption Issue”. Put in this form, the Application rests on an incorrect premise: the payment obligation arose from the GPSA and has been found to be valid and binding. It does not depend on any future findings of the Tribunals.
16. The argument of the Respondents in reality amounts to asserting that, in the hypothesis that the Tribunals were to find that the GPSA was procured by corruption and its declaration of avoidance of the GPSA were held to relieve Petrobangla of any payment obligation under the GPSA, no payment would be due to the Claimant. It further relies on the assumption that, under the law of Bangladesh, compensation for the gas received would not be owed by Petrobangla on grounds of unjust enrichment.
17. If Petrobangla now made the payments as ordered by the Tribunals and it then turned out that these hypotheses were realised, Petrobangla would have to claim reimbursement from the Claimant. The Respondents assert that, if it had to do so, there is a high risk for Petrobangla of not being able to obtaining reimbursement.
18. Considering the Application therefore requires the Tribunals to proceed with a balance of risks and interests. They must examine whether the possibility that the Respondents’

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claims may be upheld justifies allowing Petrobangla’s continued non-payment in accordance with the Tribunals’ Third Decision on the Payment Claim.

19. As the starting point of their examination, the Tribunals take their prior decisions as summarised above: the payment obligation arose under the GPSA and concerns a benefit which Petrobangla actually received during the period of November 2004 and April 2010. In the First Decision on the Payment Claim the Tribunals held that “Petrobangla owes Niko USD 25’312’747 plus BDT139’988’337” and must pay these amounts plus interest. The obligation to pay, therefore, has been determined in a binding manner already by the First Decision on the Payment Claim of 11 September 2014. In their Second and Third Decision on the Payment Claim of 11 September 2014 and 14 September 2015, respectively, the Tribunals addressed the payment modalities, ordering in the Third Decision that “payment must be made immediately and is not subject to any contrary orders from the Courts in Bangladesh”.
20. The Respondents do not contest that the amounts are due and payable under the GPSA. They rather invite the Tribunals to assume that this confirmed payment obligation may be nullified and the amounts would be due on no other grounds. On that assumption, Petrobangla’s payment would have been made without basis and Petrobangla would be entitled to have the payment returned. The Respondents therefore invite the Tribunals to balance a confirmed payment obligation against a potential obligation of reimbursement, depending on hypothetical findings.
21. In other words, it is not Petrobangla’s obligation to pay that depends on the Tribunals’ possible decision, but its right to receive reimbursement. The Respondents argue that Petrobangla’s right to reimbursement is at risk, due to the Claimant’s legal and financial situation.
22. Considering now the Respondents’ first hypothesis, *i.e.* a finding by the Tribunals that the Claimant or the Niko Group committed acts of corruption in the context of the investment in Bangladesh and that by these acts the Claimant procured, directly or indirectly, the GPSA, the Tribunals will refrain from prejudging the outcome of the proceedings on the Corruption Claim.
23. At this stage, the Tribunals merely note that, in the proceedings until now, the only acts of corruption which have been established are the benefits granted to Mr Mosharaf Hossain, the then Bangladesh State Minister for Energy and Mineral Resources¹ in the form of a vehicle and certain expenses related to a trip to Canada in 2005. They further note that the Canadian authorities were “unable to prove that any influence was obtained

¹ Decision on Jurisdiction, para 382.

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as a result of providing these benefits to the Minister”.² In addition, in the BELA proceedings the Supreme Court of Bangladesh concluded that “the JVA was not obtained by flawed process by resorting to fraudulent means”.³ Finally, and judging from the prices which the Respondents now have revealed as payable under other gas delivery contracts, the price for the gas agreed under the GPSA is in fact advantageous to Petrobangla.

24. In other words, the evidence which the Respondents had produced in support of prior decisions of the Tribunals did not justify a conclusion of unlawful procurement of the GPSA. This does not predetermine the Tribunals’ findings with respect of the additional evidence to be considered when dealing with the Corruption Claim. At this stage, the Tribunals have not made any determination in this respect and it would be open to them to decide, on the basis of such additional evidence, that the avoidance of the payment obligation under the GPSA is justified. However, such a possible decision remains a hypothesis which, at present, is not firmly established and does not justify that the established payment obligation be disregarded.
25. Considering nevertheless the hypothesis that the GPSA would be avoided on grounds of corruption, the question arises whether Petrobangla would be entitled to claim reimbursement of the payments it would have made in compliance with the Tribunals’ Decisions on the Payment Claim. That might depend on whether the avoidance of the GPSA applies to deliveries made in the past and the corresponding payments; and whether the law of Bangladesh would allow Petrobangla to keep the benefit of the gas without any compensation or to the contrary the Claimant would be entitled to claim payment for the gas delivered on grounds of unjust enrichment or, if Petrobangla had complied with the Tribunals’ Decisions on the Payment Claim, it could claim reimbursement on the grounds that the Claimant had been enriched by receiving payment for that gas.
26. For the purpose of its analysis of risks and interest in the context of the Respondents’ Application the question of who has jurisdiction for these decisions need not be examined; nor need the Tribunals determine whether, as the Respondents put it: “Niko cannot use the international arbitration system to assert claims associated with its illegal conduct”.⁴ It is also unnecessary for the Tribunals to make a determination of the law of

² Id. Para 429.

³ Id. Para 103

⁴ The Tribunals note that the Claimant, not without good reason, points out in its letter of 8 August 2016 that it cannot be said that this is the position under international law. In any event, the case on which the Respondents rely in their letter of 17 August 2016 concerns the unilateral offer of investment protection made in a treaty, not the case where the parties to an investment contract have agreed to submit disputes to ICSID arbitration.

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Bangladesh concerning unjust enrichment. The Tribunals merely note the Respondents’ explanations in their letter of 29 April 2016 to the effect that “Niko can only make a claim for the limited relief of restitution under sections 64 and 65 of the Bangladeshi Contract Act”. The Respondents do not argue that Petrobangla’s enrichment is less than the price agreed in the GPSA; indeed they argue: “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,...”.

27. The consideration on which the Tribunals relied in the Third Decision related to the Respondents’ presentation of the situation under the Bangladeshi Contract Act and the “limited relief of restitution” available under this Act. The Tribunals had not been requested to grant this relief and they did not make a finding as to the availability of this relief. They merely noted that, according to the Respondents’ own explanations, this relief was available under the Contract Act.
28. In their 30 June 2016 Application and subsequent observations, the Respondents do not demonstrate that considerations of unjust enrichment were excluded in case it would be found that the GPSA was procured by corruption. They state that “if corruption is found, it may be that a request for restitution must be denied under Bangladeshi law”. They present the exclusion of restitution in these circumstances as a mere possibility and have not provided legal authorities supporting it.
29. In view of these considerations, the Tribunals do not accept that the possibility of annulment of the GPSA is sufficient ground for them to reconsider their assessment of the risk of Petrobangla in case it complied now with its payment obligation set out in the First Decision on the Payment Claim of 2014, as confirmed in the Tribunals’ Second and Third Decision on the Payment Claim of 2015 and 2016.
30. Finally, the Respondents assert that Petrobangla’s payment now “will likely be irreversible even if the [payment] decision is later annulled when eventually rendered in a final award, since Niko is essentially a shell company in terms of assets and its parent company, which would certainly deny its responsibility for debts of Niko, has been in financial trouble for many years and is burdened by hundreds of millions of dollars in debt.”
31. The Respondents have not shown that Niko or its parent company have defaulted on any of their financial obligations. If the Respondents were right and the Claimant and its parent company did indeed have such difficulties, there would be even less justification for depriving Niko now of the funds on the assumption that the Respondents’ claim of avoidance of the GPSA might prevail, and that, despite its

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enrichment and the Respondents’ contentions with respect to the law of Bangladesh, Petrobangla might have a claim for reimbursement.

32. The Tribunals therefore see no justification to reconsider their Third Decision on the Payment Claim.

3.3 The Respondents’ Second Argument: The Injunctions

33. The second argument invoked by the Respondents relies on the injunctions of the courts in Bangladesh ordering Petrobangla not to make the required payments. The Tribunals have addressed this argument in their various decisions on the Payment Claim, and specifically in their Decision Pertaining to the Exclusivity of the Tribunals’ Jurisdiction of 19 July 2016. They decided that the Tribunals had exclusive subject matter jurisdiction over, *inter alia*,

the payment obligations of Petrobangla towards Niko under the GPSA for gas delivered,

and that they had

the jurisdiction for injunctions seeking to prevent such payments and to retract such injunctions;

The Respondents have not presented any arguments which the Tribunals have not already considered. Tribunals see no justification to reconsider this decision, and therefore reject the Respondents’ second argument.

3.4 The Respondents’ Third Argument: The Finality Of The Payment Decision

34. The Respondents’ third argument consists in noting that the Tribunals have not issued an award and in asserting that the “ICSID Convention does not permit final decisions on the merits of a claim with immediate payment obligations to be issued in any form other than an award”.
35. There is no basis for this assertion and, indeed, the Respondents do not provide any. It is correct that the Convention and the Arbitration Rules provide only for one award in an arbitration and that that award completes the proceedings. This does, however, not preclude ICSID Tribunals from making binding decisions on certain issues; indeed, as the Claimant rightly pointed out in its letter of 8 August 2016, “ICSID Tribunals routinely issue decisions finally deciding specific questions before rendering the award”. Such decisions

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are current practice in international arbitration generally and nothing in the Convention, the Rules or ICSID practice prohibits the Tribunals from issuing a decision finally deciding Petrobangla’s obligation to make payment. On the contrary, the Convention and Rules contemplate that a tribunal may make any number of decisions prior to the rendering of its Award.⁵ Such a decision imposes a binding international obligation to comply with it.⁶

36. The Respondents argue that, in the present case, “the parties initially agreed that the two arbitrations would proceed concurrently and the Tribunals will issue one final award resolving all questions presented to them”. In support of this affirmation the Respondents rely on a passage in the Third Decision on the Payment Claim. The relevant passage, however, reserves the possibility for rendering the decision “as single instrument in relation to both cases” but does not require the Tribunals to do so. Indeed the passage expressly provides for the exception that “circumstances distinct to one case necessitate a separate treatment” and it does not exclude that certain specific aspects of the dispute be dealt with in separate decisions.⁷ The Tribunals recall the Parties’ agreement on this point, as reflected in the Minutes of the First Session. Paragraph 20.1 of the Minutes provides

The parties agree that the two cases proceed in a concurrent manner as reflected in these minutes and in the procedural order concerning the procedural calendar. The Tribunals may therefore issue a single instrument (procedural order, decision or award) in relation to both cases, and may discuss the two cases jointly except where circumstances distinct to one case necessitate separate treatment.

37. Indeed, the Tribunals have issued a number of decisions settling certain aspects of the dispute without the Parties raising any objection or arguing that these decisions were not binding. The Respondents repeatedly refer to the Tribunals’ Decision on Jurisdiction

⁵ C Schreuer et al, *The ICSID Convention: A Commentary* (2nd edn, 2009), 807.

⁶ See, e.g., *ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Respondent’s Request for Reconsideration, 10 March 2014, para. 21; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 10.1; ICSID, *History of the ICSID Convention*, vol. II-1, at 408 (2009) (“The CHAIRMAN explained that the word ‘binding’ had been used in paragraph 11 of the comment so as to emphasize the distinction between the ruling of a tribunal and a recommendation by the conciliation commission concerning competence. The binding character of any decision by the former on preliminary questions or merits was clearly set forth in Article IV and could be discussed under that Article.”)).

⁷ Paragraph 11 of the decision, on which the Respondents rely reads: “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.”

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insofar as it excludes the Government of Bangladesh from these Arbitrations; they have not taken the position that this decision is not final and binding.

38. In conclusion, the Tribunals confirm that their decisions, including in particular the Third Decision on the Payment Claim, are binding and must be complied with.

ORDER

- (i) For the reasons set out in this Procedural Order, the Tribunals decide, without determining its admissibility in principle, that the Respondents’ Application of 30 June 2016 requesting reconsideration of the Third Decision on the Payment Claim, if it were admissible, would have to be denied.
- (ii) They confirm that the Third Decision on the Payment Claim must be complied with according to its terms.
- (iii) The Respondents are invited to report within one week of this Order on their compliance with the Third Decision on the Payment Claim.

[signed]

On behalf of the two Arbitral Tribunals
Michael E. Schneider
President
14 November 2016