

Corrected Version

NIKO RESOURCES (BANGLADESH) LTD.
v.
BANGLADESH PETROLEUM EXPLORATION & PRODUCTION COMPANY LIMITED (“BAPEX”)
AND BANGLADESH OIL & GAS MINERAL CORPORATION (“PETROBANGLA”)
(ICISD CASE NOS. ARB/10/11 AND ARB/10/18)

Procedural Order No 18

1. At the Status Conference on 30 January 2017 and in the correspondence leading up to it, the Parties raised a number of issues for the Tribunals’ decision, as recorded in the Tribunals’ Summary Minutes of 4 February 2017. Some of these issues were the subject of subsequent submissions, the latest of which being (i) the Respondents’ comments of 28 February 2017, in support of their application for intervention by the Tribunals before the Court in Alberta, and (ii) their letter of 14 March 2017 seeking to remedy allegedly inadequate disclosure of documents and requesting the Tribunals to order the Claimant to produce additional documents. To the extent to which these issues require decision in light of the state of the records, the Tribunals now address them in this Procedural Order.

I. Application for an Intervention by the Tribunals before the Court in Alberta

1.1 The Application of 26 January/10 February 2017

2. The Respondents have asked that the Tribunals request the Alberta Court of Queen’s Bench to order the Royal Canadian Mounted Police (RCMP) to provide to these Tribunals with evidence gathered in the investigation against the Claimant (referred to as the “Canadian investigation”), and the appearance of Corporal Duggan for testimony before these Tribunals. Following prior requests of a similar nature denied by the Tribunals, the Respondents raised the matter again in the correspondence leading up to the Status Conference on 30 January 2017. In their letter of 26 January 2017 they wrote:

Specifically, Respondents maintain that the Tribunals should reconsider, as envisaged in Procedural Order No 15, seeking evidence from the Canadian investigation and [...].

3. At the Status Conference on 30 January 2017 the Tribunals heard the Claimant’s comments on the application and invited the Respondents to provide further explanations on their

application, including “their records concerning the enquiry they made with the RCMP and the response received” and “the precise steps” they wished the Tribunals to take.¹

4. The Respondents wrote on 3 February 2017 and provided a copy of the 5 July 2016 letter which RMRF, a Canadian law firm, “acting as agent for Foley Hoag LLP., the law firm representing BAPEX and Petrobangla in the ICSID proceedings”, addressed to “Justice Canada”, seeking “the assistance of Corporal Duggan with respect to potential testimony before ICSID”. The Department of Justice, Canada, replied in a letter of 19 October 2016, also attached to the Respondents’ letter of 3 February 2017. Referring to the request of 5 July 2016 and subsequent telephone conversations in July and August 2016, the Department of Justice stated that “the RCMP is unable to accede to the request in these circumstances, and the RCMP members are not in a position to voluntarily attend the arbitration”.²
5. In their letter of 3 February 2017 the Respondents also described the process which they requested the Tribunals to apply:

The process would be for the Tribunals to issue a letter to the Alberta Court of Queen’s Bench requesting the assistance of the Court in obtaining evidence. Respondents would then engage Canadian counsel to make an application in the Court for an originating order based on the letter. The RCMP would be named as respondent and Niko Canada would be given notice and an opportunity to be heard. Canadian counsel informs us that, if Niko and the RCMP do not oppose the application, the process could be completed in a matter of weeks. If there is opposition, the process could take many months, as hearings would be necessary to decide upon the application.

6. The Respondents’ explanation continued by offering “to provide the Tribunals with a draft of a letter to the Canadian Court ...”.³ The Tribunals invited the Respondents to provide such a draft which the Respondents did on 10 February 2017, describing the specific steps which they requested the Tribunals to take; the request of 26 January 2017, as amplified by the 3 February 2017 letter and in the draft of 10 February 2017, will be referred to here as “**the Application**”.

¹ Summary Minutes of the Status Conference, as revised following the Parties’ comments, paragraph 10.2.

² Annex A to the Respondents’ letter of 3 February 2017.

³ Letter of 3 February 2017, p. 5.

7. In the proposed draft the Respondents provided for a request, on ICSID letterhead but signed by the President of the Tribunals, addressed to the Alberta Court of Queen’s Bench and requesting from that court an order “to compel the testimony and production of documents from the RCMP and testimony from Corporal Kevin Duggan of the RCMP ...”. The orders requested from the Alberta Court were drafted as follows:

- 1.) *The RCMP will provide the Tribunals with the following documents and video recordings obtained or created during the course of the investigation of Niko and that are still in its possession:*
 - a. *Video of interview of Mr. Qasim Sharif on December 16, 2010 and video and transcript of interview of Mr. Qasim Sharif on May 20, 2008;*
 - b. *Video and transcript of interview of Mr. Selim Bhuiyan;*
 - c. *Videos and/or transcripts of interviews of former Chief Financial Officers mentioned at paragraph 25 of the Duggan affidavit;*
 - d. *Video and/or transcript of March 12, 2009 interview of former accounting employee mentioned at paragraph 93 of the Duggan affidavit;*
 - e. *Video and/or transcript of December 11, 2009 interview of former employee mentioned at paragraph 115 of the Duggan affidavit; and*
 - f. *Transcripts or videos of other interviews conducted in the Niko investigation and other evidence of corruption in obtaining the JVA and GPSA referenced by Corporal Duggan in his affidavit.*
- 2.) *Corporal Duggan will be examined under oath before the ICSID Tribunals and counsel for BAPEX and Petrobangla and then cross examined by counsel for Niko in relation to his investigation of Niko that led to its conviction on June 24, 2011.*
- 3.) *The place, timing, and method of the requested production and Corporal Duggan’s examination will be determined by the Tribunals in*

consultation with the RCMP to be as convenient to Corporal Duggan and the RCMP as possible.

8. The draft also provided:

The Tribunals are willing to cooperate with Corporal Duggan and the RCMP as much as possible to avoid any undue burden. Such cooperation could include payment of the cost for Corporal Duggan’s appearance or having him provide testimony by video link from Calgary.

and

The Centre is willing, as able, to provide similar assistance to the Courts of Canada when requested. The Centre, as reimbursed by the parties, is willing to reimburse the Alberta Court of Queen’s Bench for any costs incurred in executing this request.

9. The Claimant provided comments on 15 February 2017 with respect to the Application and the draft letter of 10 February 2017; the Respondents provided further explanations by letters of 10 and 28 February 2017.

1.2 The Parties’ positions with respect to the Application

10. **The Respondents** argue that the “evidence available from the Canadian investigation is very relevant to these Tribunals’ consideration of the Corruption Issue”.⁴ They point out that “the RCMP worked closely with the Bangladeshi investigators and gathered extensive evidence of Niko’s corruption”. They assert:

*... that this evidence can best be evaluated if the Tribunals benefit from the testimony of the RCMP’s lead investigator, Corporal Kevin Duggan. Corporal Duggan will be able to provide key information on how the evidence was gathered and the context in which it is to be understood. He was present at the videotaped interviews now in the record and the others in possession of the RCMP.*⁵

⁴ Letter of 10 February 2017, p. 1.

⁵ Ibid.

11. As stated in their letter, the Respondents

*determined that it would be beneficial for the Tribunal to have an unredacted version of Corporal Duggan’s affidavit because it contains significant information regarding Niko’s activities in Bangladesh and the redacted version is difficult to read and omits many details. The Respondents also considered it necessary for the Tribunals to obtain the full record of the RCMP’s investigation and the testimony of its lead investigator.*⁶

12. They state that their earlier applications to the Canadian authorities were different from the present one: their earlier application to the Alberta Court was not filed by the Respondents themselves but by their counsel who acted as applicant and as affiant in the affidavit produced in support of the application. According to the Respondents, once they had received the Tribunals’ Procedural Order No 14, they withdrew this application.⁷
13. The Respondents explain that the evidence they now seek can be obtained by the requested order from the Alberta Court, based on the Canada Evidence Act and the Alberta Evidence Act; in the draft letter to the Alberta Court they rely specifically on section 46(1) of the Canada Evidence Act, RSC 1985, c C-5 and section 56 of the Alberta Evidence Act, RSA 2000, c A-18 and describe the request to the Alberta Court as a “request for Mutual Legal Assistance”.
14. The Respondents argue that ICSID tribunals have the power to proceed as requested by the Application. They state that they “have not been able to find a reported case in which an ICSID tribunal has sought such assistance”⁸ but rely on Arbitration Rule 34 and specifically paragraph (2)(b) which provides that an ICSID tribunal “may, if it deems it necessary at any stage of the proceedings [...] visit any place concerned with the dispute or conduct inquiries there”; it sees the Canadian connection with the dispute in “extensive investigation by Canadian authorities into Niko’s corruption in Bangladesh”.⁹

⁶ Letter of 28 February 2017, p. 1.

⁷ Letter of 28 February 2017, p. 2

⁸ Letter of 3 February 2017, p. 2.

⁹ Letters of 3 and 28 February 2017.

15. When arguing that ICSID tribunals may make applications as the one requested, the Respondents also rely on legal commentary, in particular the book of Professor Schreuer; some decisions of tribunals proceeding under the ICSID or UNCITRAL Rules; and the IBA Evidence Rules.¹⁰ They conclude by stating:

*Notwithstanding Claimant’s suggestion to the contrary, seeking evidence through the assistance of domestic courts does not in any way jeopardize the self-contained nature of the ICSID system. Such a request would not subject the Tribunals’ decision to the review of national courts, but would instead assist the Tribunals in carrying out their duties within that self-contained system ...*¹¹

16. **The Claimant** argues that the present Application is “the third occasion on which the Respondents seek to argue for something they previously twice tried and failed to get the Tribunals to pursue”, adding that the further attempt caused “Niko to have to devote its limited and valuable resources to yet a further effort by the Respondents is abusive”.¹²

17. The Claimant also refers to the reply of the Department of Justice of Canada of 19 October 2016, denying the Respondents’ request concerning the appearance of Corporal Duggan as witness in the arbitration, stating that there “is no reason to believe the RCMP or the Department of Justice has changed their minds or that they will consent to an application of the nature suggested by the Respondents”.¹³

18. The Claimant also states that:

the Respondents failed to bring to the attention of the Tribunals that in June 2016 they, through their counsel, already brought an application to the Alberta court seeking an Order to unseal the search warrant materials in the Canadian Investigation referred to in the Duggan Affidavit (including

¹⁰ *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction (21 Oct. 2005), ¶ 47 and ¶¶ 258-263; C. Schreuer *et al.*, *The ICSID Convention – A Commentary*, 2nd ed., 2009, pp. 670-671 (¶ 121); International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (29 May 2010), Art. 3.9 and Art. 3.10; *Republic of Ecuador v. Stratus Consulting, Inc.*, Case No. 13-cv-01112, U.S. District Court for the District of Colorado, Order (29 May 2013), p. 3; *Methanex Corp. v. United States of America*, UNCITRAL (NAFTA), Final Award on Jurisdiction and Merits (3 Aug. 2005), Part II, Ch. G, ¶ 25 (RLA-209).

¹¹ Letter of 28 February 2017, p. 7.

¹² Letter of 15 February 2017, p. 4.

¹³ *Ibid.*

*the Informations to Obtain) with the objective of making them available for use in these arbitrations.*¹⁴

The Claimant explains that the Crown did not consent to the application, and that after a preliminary appearance on 30 June 2016 the application was withdrawn after the delivery of the Tribunal’s Procedural Order No. 14 on 29 July 2016. The Claimant argues that the Respondents “now seek to have the Tribunals bear the mantle of this request by proposing a ‘letter of request’ approach from the Tribunals ...”.¹⁵

19. Further, the Claimant objects that the items (a) to (e) of the requested evidence “are not records but interviews of individuals apparently conducted by, or with the participation of, the RCMP” and contests that “any such materials are not properly evidence”.¹⁶ The Claimant points out that the persons in question could not be questioned at the hearing by the Tribunals and the Claimant. It objects to the “hearsay information of Corporal Duggan” and contests that the requested evidence was not already available or not otherwise obtainable:

*The Respondents have not identified in the proposed request a single piece of direct evidence as missing from the material they already have available, or even any suggestion or basis to think that such additional direct evidence exists.*¹⁷

20. The Claimant also contests that the request to the Alberta Court meets the requirements under the relevant Evidence Acts, including the provision that the requested evidence is “not otherwise obtainable”:

*... this would require evidence from the Respondents, not the mere assertions of counsel. Where the Respondents have clearly had access to material portions of the RCMP’s investigative files, and where they have been less than forthcoming in explaining what they do have and the sources of that information, it remains uncertain that they could establish this to the satisfaction of an Alberta court.*¹⁸

¹⁴ Letter of 15 February 2017, p. 5.

¹⁵ Ibid.

¹⁶ Letter of 15 February 2017, p. 6.

¹⁷ Ibid.

¹⁸ Letter of 15 February 2017, p. 7.

21. Concerning the Tribunals’ power to make the request to the Alberta Court, the Claimant argues that “the ICSID Convention is a self-contained system that does not contemplate parallel resort to national courts”. It refers to Article 26 of the Convention providing that, unless otherwise stated, consent to ICSID arbitration is “to the exclusion of any other remedy”. The Claimant points out:

*A consequence of the Convention’s stand-alone dispute settlement regime is that, contrary to accepted practice in commercial arbitration, resort to national courts for provisional measure in aid of arbitration is not permissible unless the parties explicitly agree to it.*¹⁹

1.3 Prior applications and decisions concerning the investigation against Niko

22. From the time they raised the Corruption Claim on 25 March 2016 in the context of BAPEX’s Memorial on Damages, the Respondents have emphasised the importance of the corruption investigation conducted against Niko. They produced documents indicating the broad scope of this investigation, in particular the 5 May 2008 Charge Sheet of the ACC, produced as Exhibit R-211, and the Duggan Affidavit, produced as Exhibit R-213.²⁰ In that memorial BAPEX made reference to the ACC investigation and explained:

Under the Bangladesh Anti-Corruption Commission Act, 2004, the ACC is an independent statutory body entrusted with the powers to enquire, investigate, and file corruption cases. The Government has no control over the activities of the ACC and, for obvious reasons, the ACC has no obligation to share information with the Government, much less a company like BAPEX or Petrobangla. Other than the court orders available, BAPEX/Petrobangla have had no information on the content of the ACC investigation or what evidence was being gathered. BAPEX and Petrobangla have requested documentation from the ACC on the Niko corruption case, and now that the trial has restarted, the ACC provided them with some of the evidence that it recently submitted to the Bangladesh court. Only this week has BAPEX received the information from the ACC to

¹⁹ Letter of 15 February 2017, p. 2.

²⁰ Affidavit of Corporal Kevin Paul Duggan in In the Matter of an Information to Obtain a Production Order Pursuant to Section 487.012 of the Criminal Code, Provincial Court of Alberta, Judicial District of Calgary (21 Dec. 2009) (“Duggan Affidavit”).

be able to share it with the Tribunal. The full record, however, is still not public and is not yet available to BAPEX.²¹

and

BAPEX did not have access to the information from the ACC investigation and did not have Corporal Duggan’s affidavit. It had to wait for the investigation and criminal proceedings underway in Bangladesh to progress to a stage where the evidence would become available. When that proceeding started back up last year, BAPEX sought to gather the evidence needed for this Tribunal to determine that the agreements were procured by corruption and are therefore voidable. Claimant, the corrupt actor, had all the information and evidence all along. BAPEX is the innocent party. There is no allegation that BAPEX was involved in any acts of corruption. Rather, BAPEX was directed to execute the JVA by corrupted government officials bribed by Niko.

60. As outlined above, BAPEX and Petrobangla now have evidence to demonstrate that both the JVA and GPSA were procured by corruption. BAPEX hereby requests that the Tribunal determine that the JVA was procured by corruption and is thus voidable and informs the Tribunal of its invocation of its resulting right to rescind the JVA.²²

23. In response to requests for clarification sought by the Tribunals, the Claimant wrote on 29 April 2016, addressing specifically the Duggan Affidavit. The Claimant described it as “an affidavit filed in support of an investigation of Canadian Senator Mac Harb”. It explained:

The Globe & Mail newspaper reported on that affidavit in an article on 24 June 2011 and published it online, on that same date, in precisely the same form now presented by BAPEX in Exhibit R-213. The Respondents did not present this affidavit in their August or September 2011 submissions on jurisdiction or at the hearing on jurisdiction in October 2011, despite the fact that at that time the affidavit was available to any member of the public either through a simple Google search, or upon a simple request to the Court of Queens’ Bench in Alberta. It is abundantly apparent that any

²¹ Memorial on Damages, pp. 20 and 21; footnotes omitted.

²² Ibid, pp. 29 and 30; footnotes omitted.

*degree of reasonable diligence by BAPEX would have enabled BAPEX (or indeed any member of the public) to obtain a copy of the affidavit well before the hearing on jurisdiction.*²³

24. On 10 May 2016 the Respondents addressed the Tribunals, producing an exchange with the Claimant, consisting of two letters they had addressed on 18 and 19 April 2016 to the Claimant and the Claimant’s reply of 21 April 2016. In these letters the Respondents had requested the Claimant to (i) cooperate and not oppose “the removal of redactions related to” the Claimant and (ii) produce specified evidence relating to the Corruption Issue. The Claimant opposed both requests. The Respondents also quoted from the transcript of the hearing on jurisdiction in which the Claimant’s counsel had mentioned that it had “additional information relating to the ACC and the Canadian investigation and possibly the US investigation”.²⁴
25. In their letter of 10 May 2016 the Respondents affirmed that they “do not believe that any further evidence is needed for the Tribunal to grant our requests for relief. Therefore, we do not at this time seek an order compelling the production of documents by Niko”. They added:

However, to the extent the Tribunal deems additional evidence necessary to reach a conclusion on corruption in the procurement of the JVA and GPSA, it should use all the tools at its disposal, including its authority under Article 43 of the ICSID Convention to order the production of documents “at any stage of the proceedings,” to establish the facts and ensure that the international arbitration process is not used to aid corruption.

26. With respect to the Duggan Affidavit:

... to the extent the Tribunal considers that a less-redacted version of Corporal Duggan’s affidavit would be helpful, Respondents request an order from the Tribunal to compel Niko’s cooperation to seek such a version from the Canadian courts.

27. In Procedural Order No 13 of 26 May 2016, the Tribunals gave directions concerning their investigation of the Corruption Issue and invited “the Parties to produce to the Tribunals

²³ Letter of 29 April 2016, pp. 1-2.

²⁴ Transcript of the hearing on jurisdiction, Day 2 (14 October 2011, pp. 38 – 40), as quoted in Letter of 7 June 2016.

information and documents in relation to the negotiations and conclusion of the JVA and the GSPA”. They invited specifically from the Claimant a response concerning the Respondents’ letter of 10 May 2016 and the request concerning the Duggan affidavit, and a list of compliant documents in response to the Respondents’ document production request.

28. On 7 June 2016 the Respondents extended their document production request of 19 April 2016 to “documents Niko has relating to the Bangladeshi and Canadian corruption investigation”.²⁵ They referred again to the statement that, during the hearing on jurisdiction, the then counsel for the Claimant had made and quoted it as follows: “our law firm has additional information relating to the ACC and the Canadian investigation and possibly the US investigation”. The Respondents added “we suggest that Claimant should also be asked to provide a list of documents relating to corruption investigations that it, its affiliates and its counsel had and did not produce during the jurisdiction phase”.²⁶
29. On 14 June 2016 the Parties responded to the directions set forth in Procedural Order No 13, providing explanations *inter alia* about the negotiations of the JVA and the GPSA.
30. The Respondents produced a number of documents. They explained that they

*... have not been investigating Niko’s corruption and do not have access to all the information uncovered in investigations of Niko by the Anti-Corruption Commission (“ACC”), the Royal Canadian Mounted Police (“RCMP”), and others. BAPEX and Petrobangla do not know everything that transpired between Niko, its paid agents, and corrupted Government officials.*²⁷

and

The Canadian investigation of Niko was extensive and the evidence acquired would be highly relevant to these Tribunals’ enquiry. The RCMP undertook an investigation of a breadth and depth which is not possible in the context of ICSID proceedings. According to Corporal Duggan, the Niko investigation involved assistance of the United States Federal Bureau of Investigation, City of London Police, the World Bank, and the United States

²⁵ Letter of 7 June 2016, pp. 1-2.

²⁶ Letter of 7 June 2016, p. 2.

²⁷ Respondents’ Responses to Procedural Order No 13, paragraph 3.

*Department of Justice, eight completed Mutual Legal Requests, 16
Procedural Orders, and 20 people interviewed in six different countries.*

31. In support of this affirmation, the Respondents relied on a presentation, included as Exhibit R-290 in their 14 June 2016 submission and entitled “Royal Canadian Mounted Police, Foreign Bribery Investigation” by Corporal Duggan. The presentation described *inter alia* “Project KOIN: Niko Resources Ltd.” It describes broad investigations against Niko, in different countries, including Bangladesh and Canada, and involving a variety of organisations. Under the heading “The Bribe” two items are identified which formed the basis for Niko’s conviction in Canada and which had been considered in the Tribunals’ Decision on Jurisdiction.
32. In their 14 June 2016 submission the Respondents made occasional reference to the ACC Charge Sheet that had been produced as Exhibit R-211 with the Memorial on Damages; but it did not provide any explanations on the role of the ACC in the investigation, the evidence gathered by the ACC and any efforts by the Respondents to accede this evidence.
33. The Claimant, responding to Procedural Order No 13 in its letter, also dated 14 June 2016, explained that it had “been working diligently to identify and collect the documents and information” that the Respondents had requested but objected to the Respondents’ “overbroad and unfocused request” for document production and requested the Tribunals to “narrow the parameters for the compilation of a document list to address the corruption allegations”. With respect to the Duggan Affidavit, the Claimant stated:

The Duggan affidavit is not evidence. Instead, it is a recitation of second-hand or third-hand hearsay concerning events of which the author had no personal knowledge. The Duggan Affidavit would not constitute evidence in any merits trial in Canada.

A Canadian court recognised the Duggan Affidavit’s lack of evidentiary value and the prejudice that its use could cause to third parties such as Niko, who will never have any opportunity to cross-examine Corporal Duggan or the hearsay declarants whose statements he references. The court considered to what extent the Duggan Affidavit could properly be disclosed outside the particular proceedings for which it was produced. The court decided the question in a carefully reasoned decision. The Respondents offer no basis for reconsidering the question decided by that court. [...]

The Duggan Affidavit was tendered in connection with an investigation into an alleged offence by an unnamed Canadian official. BAPEX in its

*Memorial on Damages identifies the official as Senator Marc Harb. It is important to note that the Duggan Affidavit was not tendered in connection with an investigation of Niko or its affiliates.*²⁸

34. The Tribunals examined the argument and evidence presented by the Parties’ submissions in response to Procedural Order No 13. They summarised in Procedural Order No 14 the scope of the investigation as informed in particular by Exhibit R-290. From the evidence produced, the Tribunals concluded that the acts of corruption established by the investigation were those that had been considered already in their Decision on Jurisdiction and consisted in two bribes to a Minister who was forced to resign shortly after these bribes were made public and the finding that “The Crown is unable to prove that any influence was obtained as a result of providing the benefits to the Minister”.²⁹
35. The Respondents insisted that the Canadian Investigation had revealed a much broader scope of Niko’s alleged corrupt activities. Contrary to what the Tribunals had concluded from the Canadian conviction, or so the Respondents say, the investigation had produced evidence that the JVA and the GPSA were obtained by Niko’s acts of corruption. They sought to enlist the support of Niko and the Tribunals in order to obtain a version of Corporal Duggan’s affidavit which was at least less redacted or even unreacted. They also sought to ensure that Corporal Duggan would testify before these Tribunals and to obtain from him or from the Canadian authorities the release for production in these arbitrations the evidence gathered by the Canadian investigation.
36. In their letter of 8 August 2016, the Respondents made reference to “shared evidence from the Bangladesh, United States and Canadian investigations” and asserted that “without authorisation from the [Bangladesh Anti-Corruption Commission, ACC] or a Bangladeshi court order, such evidence is not available to Respondents or these Tribunals”. They stated:

As we have explained to the Tribunals in earlier submissions, the Anti-Corruption Commission (ACC) in Bangladesh undertook an investigation into Niko’s corruption in Bangladesh and filed criminal charges against numerous persons, including former Bangladeshi officials and the former President of Niko in Bangladesh. We noted to the Tribunals that the ACC is an independent entity and has been unwilling to share information that it

²⁸ Claimant’s letter of 14 June 2016, pp. 1 and 2; reference is made to the decision of Justice Tilleman in *Globe & Mail v. R.*, 2011 A.B.Q.B. 363 (Can.), produced as CLA-91.

²⁹ Exhibit C-15, paragraph 58.

intends to use in pursuing the criminal charges in Bangladesh. Petrobangla and BAPEX consider that this evidence is essential to the Tribunals’ inquiry into the Corruption Issue.

37. In support of the assertion that the ACC was “an independent entity and has been unwilling to share information that it intends to use in pursuing the criminal charges in Bangladesh”, the Respondents in a footnote made reference to the ACC Act 2004 (RLA-179).³⁰ They did not provide any explanations on how they determined that the ACC was unwilling to share the information.
38. In that letter of 8 August 2016 the Respondents proposed a different approach to access evidence from the ACC enquiry. They referred to a request by Professor Alam for the production of ACC evidence held by a third person, Mr Ferdous Khan, “an individual consultant to the ACC”. They explained:

We have been informed that the Supreme Court hearing the Writ Petition [of Professor Alam] is considering a request from the petitioner to order a Bangladeshi citizen with evidence from the ACC investigation to turn it over. According to the Application for Production of Evidence submitted by the writ petitioner, an individual consultant to the ACC, Mr. Ferdous Khan, has “substantial evidence of corruption in procurement of the Impugned Agreements” in his possession. The evidence in Mr. Khan’s possession includes shared evidence from the Bangladesh, United States, and Canadian law enforcement investigations. Because this evidence is part of the ACC investigation, without authorization from the ACC or a Bangladeshi court order, such evidence is not available to Respondents or these Tribunals. If the court orders it, then the information should be released and be available for these Tribunals. Niko opposed this request based on the Tribunals’ 19 July Decision. The court held that in order to compel Mr. Khan to provide evidence, the writ petitioner must add him as a party to the proceedings. Thereafter, the Writ Petitioner withdrew the application requesting to compel Mr. Khan to produce evidence.

³⁰ Letter of 8 August 2016, p. 2, FN 1.

39. When they explained that the evidence from the ACC investigation was not available “without authorization from the ACC or a Bangladeshi court order”, the Respondents did not indicate that they themselves had taken any steps to obtain the authorisation from the ACC, or an order from the Bangladeshi court to the extent that they considered it necessary for making the ACC evidence available to them and the Tribunals. Instead they requested that these Tribunals “issue a declaration that could be presented to the court hearing in the Writ Petition [of Professor Alam] that the evidence should be produced ...”, referring not to the evidence gathered by the ACC in its enquiry but that held by Mr Khan.

40. In the Procedural Consultation of 10 August 2016 the Claimant objected to the request. Following (i) comments by the Parties on the Summary Minutes which the Tribunals had prepared on the August 2016 Procedural Consultation, (ii) further submissions, (iii) a Procedural Consultation on 1 September 2016, (iv) a draft of Procedural Order No 15 and (v) the Parties’ comments on this draft, the Tribunals issued on 7 October 2016 the final version of Procedural Order No 15, which addressed *inter alia* the matter of the evidence said to be held by Mr Khan. The Tribunals stated in paragraphs. 56 and 57:

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 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.

41. Since then the Respondents produced on 23 November 2016 their Memorial on Corruption. Together with that memorial, the Respondents produced a statement from Mr Khan, whose evidence Professor Alam had sought to obtain in support of his Writ Petition and for which the Respondents had requested a declaration from the Tribunals. Mr Khan explained that since 2007 he and his company Octokhan had been

formally engaged to provide key strategic services to the Anti-Corruption Commission of Bangladesh, initially through the National Coordination Committee against Grievous Offences (‘NCCAGO’) and then directly to the Anti-Corruption Commission, the Office of the Attorney General for

Bangladesh and other agencies. [He] was appointed Special Assistant to Prime Minister Sheikh Hasina on corruption matters in 2009 and [his] appointment was renewed in 2014.³¹

42. In his Statement, Mr Khan describes *inter alia* the “Investigation of the Niko Corruption Case”. He explains:

The Office of the Attorney General for Bangladesh sent mutual legal assistance requests to Canada and the US and the RCMP and the United States DOJ came to Bangladesh to investigate Niko offences, gather evidence of corruption and money laundering, and take witness statements. The Attorney General sent formal letters to his Canadian and US counterpart Central Authorities to share evidence among the three governments and cooperate in the investigation of Niko.

[...]

...authorities from Bangladesh, Canada and the United States cooperated in their investigation of Niko’s corrupt activities in Bangladesh. I was involved on the Bangladeshi side throughout the investigation.³²

43. Elsewhere in his Statement Mr Khan refers to “the NCCAGO investigation and the cooperative investigation of Niko by the RCMP, the FBI and Bangladesh”.³³
44. The Respondents produced with their Memorial on Corruption a large number of documents. Some of these documents clearly appear to have formed part of this “cooperative investigation”. Exhibit R-317, for instance, is entitled “Information Revealed Regarding Corruption in the Energy Sector (Niko/Chevron) – in Selim Bhuiyan Interview”; it is presented as the English translation of an original in Bengali. The English translation bears a reference number preceded by the letters “RCMP Calgary-CCS”. Another document, produced as Exhibit R-333, is entitled “Statement: Qasim SHARIF” and is presented as the transcript of an interview taken by “Corporal Kevin Duggan and Corporal

³¹ Statement of Ferdous Khan, 23 November 2016 (WS Khan I), paragraph 3.

³² WS Khan I, paragraphs 34 and 35.

³³ WS Khan I, paragraph 44.

Lloyd Schoepp of the Anti-Corruption Unit/Calgary Commercial Claim”. It bears the file number 2005-1943 and is identified as an RCMP file.³⁴

45. In the subsequent exchange about the completeness of the evidence produced by Niko, the Claimant wrote on 9 December 2016, referring to the

... extensive Niko and third party information already in the possession of the Respondents that is now revealed by the Respondents’ Memorial (that should have been disclosed months ago and formed part of their document disclosure). The Respondents clearly have access to extensive amounts of investigative material of the Bangladesh ACC, including materials from the Canadian RCMP investigation of Niko Resource Ltd., despite their repeated past denials of such. The Respondents already had available to them much of the material they have been demanding of Niko and indeed have access to material their expert says are necessary, and that are clearly not available to Niko [emphasis in the original].

46. In a footnote, the Claimant added:

On their face, at least half of the Exhibits appended to the Respondents’ Memorial are documents that originated from the RCMP. There are undoubtedly significantly more documents available to the Respondents from those investigations that have not formed part of their disclosure.

47. The Respondents commented in their letter of 15 December 2016, referring to the earlier application by Professor Alam and the request in their letter of 8 August 2016 for a declaration from the Tribunals. They stated that “[a]t this time Respondents also began efforts to reach out directly to Mr Khan” and added:

The Respondents were successful in reaching out to Mr Khan and obtained agreement to provide testimony and deliver evidence in the possession of his firm Octokhan.

48. The Claimant commented in its Counter-Memorial on the Corruption Claim of 11 January 2017 on the evidence produced by the Respondents:

³⁴ See, Respondents’ Memorial on Corruption, p. 16, FN 31.

That evidence shows that Petrobangla and BAPEX, contrary to their prior representations to these Tribunals, have access to the investigative record assembled by law enforcement authorities in Bangladesh, Canada and the United States. Pursuant to the Tribunals’ orders, Niko produced to the Respondents the banking records for the Barbados account. But the Respondents already had the copy of these records Niko had provided to the Royal Canadian Mounted Police many years ago. The Respondents also have produced as exhibits banking records that were previously unavailable to Niko – including those for Stratum Developments, Salim Bhuiyan, Giasuddin Al-Mamoon and others.³⁵

49. The Respondents replied to these comments in their Reply on Corruption of 22 February 2017, contesting the Claimant’s statements:

First, BAPEX and Petrobangla did not have access to the evidence presented with the Memorial until September 2016 when it was provided to us by Mr. Khan, and Respondents still do not have a complete record. Prior to September, as Respondents told the Tribunals, they did not have and were not entitled to information from the ACC’s criminal investigation.³⁶

50. The Respondents continued by explaining that, following the August 2016 Procedural Consultation and indications from the Tribunals, they “sought to obtain the evidence directly from Mr. Khan”.³⁷ They then added:

Second, Mr. Khan was authorized by the Government of Bangladesh to act as a witness and share information in his possession for use in this proceeding where the Tribunals are deciding the Corruption Issue.

[...]

Mr Khan carefully saved important pieces of the evidence for many years, but he is unable to provide us with the complete record of the investigation. That is why we are still seeking specific items from Canada.³⁸

³⁵ Niko’s Counter-Memorial on the Corruption Claim, paragraph 4.

³⁶ Respondents’ Reply on Corruption, paragraph 57, continuing by quoting from the letter of 8 August 2016 of which extracts have been quoted above.

³⁷ Respondents’ Reply on Corruption, paragraph 58.

³⁸ Respondents’ Reply on Corruption, paragraphs 59 and 60.

51. Mr Khan himself, in his second witness statement of 17 February 2017, provides the following explanations on the circumstance of the investigations:

In the Counter-Memorial, Niko also insinuates that it was somehow improper for me to provide evidence from the joint Canadian-US-Bangladesh investigation to Foley Hoag for submission to the Tribunals. They particularly focus on evidence that has the stamp of the RCMP. The vast majority of the evidence was gathered in Bangladesh in joint efforts between Canadian and Bangladeshi officials. This evidence was then given to the RCMP through the mutual legal assistance process to be processed, indexed and scanned to create a common source for the use of both countries and U.S. law enforcement agencies. It was returned to Bangladesh through the mutual legal assistance process and the RCMP stamp simply indicates that it has been shared with the RCMP, not that it was originally provided by Canada. It is my understanding that providing this evidence to the Arbitral Tribunals is appropriate, and the information was given to the Tribunals with the consent of the Government.³⁹

52. Mr Khan also explained that he was in contact with the RCMP concerning the production of the documents from the joint investigation:

I also discussed my participation in this arbitration and my intention to provide the evidence to the Tribunals with my counterparts at the RCMP and the Canadian Department of Justice. They had no objections. To the contrary, they are very supportive of my efforts to bring the details of Niko’s corrupt activities in Bangladesh to the attention of an international tribunal considering the matter.⁴⁰

53. In their letter of 14 March 2017 the Respondents revert to their application of 26 January 2017, confirming that

Respondents requested the Tribunals to seek evidence in the possession of the Royal Canadian Mounted Police (“RCMP”) and noted that Claimant has admitted that it possesses at least some of this evidence. Claimant has

³⁹ Second Statement of Ferdous Khan, 17 February 2017, (WS Khan II), paragraph 10.

⁴⁰ WS Khan II, paragraph 11.

not only refused to provide this evidence to the Tribunals, but also opposed Respondents’ request to have the Tribunals exercise their authority to seek the assistance of the Canadian courts to obtain the evidence.

1.4 The Tribunals’ considerations

54. The Parties disagree on the question whether an ICSID tribunal has the power to intervene with a domestic court in support of a party seeking evidence. Assuming that the Tribunals have such power, the Parties disagree with respect to the justification of such a request in the circumstances.

1.4.1 The powers of the Tribunals to make a request to the Alberta Court

55. **The Respondents** argue that a request by an ICSID tribunal to a national court as they seek by their Application “is within the powers of an ICSID Tribunal”, even though they “have not been able to find a reported case in which an ICSID tribunal has sought such assistance”.⁴¹ In support of this position the Respondents rely on Arbitration Rule 34 and specifically paragraph 2(b). In terms very similar to Article 43 of the Convention, this Rule provides that a tribunal may “visit any place concerned with the dispute and conduct enquiries there”. The Respondents argue that Canada is concerned with the dispute and a request by the Tribunals as provided by the Application can be seen as included in the powers of the quoted passage. The Respondents argue that

*Canada is without a doubt connected with the dispute because of the extensive investigations by Canadian authorities into Niko’s corruption in Bangladesh. The manner in which the Tribunals are able to conduct inquiries in Canada with respect to the highly relevant evidence from these investigations is to seek assistance from Canadian courts to obtain access to documentary evidence and witnesses.*⁴²

⁴¹ Letter of 3 February 2017, p. 2.

⁴² Letter of 3 February 2017, p. 2.

56. In support of this statement, the Respondents quote from Professor Born’s book on international commercial arbitration:

There are instances in which disclosure issues are not resolved solely within the arbitral proceedings. Under some national laws, the arbitral tribunal (or, more rarely, the parties) may seek the assistance of a national court in obtaining disclosure of materials for use in the arbitration. This typically, but not always, arises in connection with efforts to obtain disclosure from third parties, as distinguished from the parties to the arbitration. As discussed [...] below, judicial assistance of this sort is available only when, and under the conditions, provided for by national law.

and

If carefully applied, in order to assist and not undermine the arbitral process, judicial assistance in evidence-taking should be no different from court-ordered provisional relief in aid of arbitrations – including foreign arbitrations.⁴³

57. The Respondents argue that, under the provisions of Canadian law on which they rely, an applicant must meet the following requirements, which they assert are met:
- a. *the evidence sought to be obtained is relevant;*
 - b. *the evidence sought is necessary;*
 - c. *the evidence is not otherwise obtainable;*
 - d. *the order sought is not contrary to public policy*
 - e. *the documents requested have been identified with reasonable precision; and*
 - f. *the order sought is not [un]duly burdensome.⁴⁴*

⁴³ Letter of 3 February 2017, pp. 2 and 3, quoting from G. Born, *International Commercial Arbitration*, 2nd ed., 2014, p. 2320 and p. 2420.

⁴⁴ Letter of 3 February 2017, p. 3, relying on *Four Seasons Hotels Ltd. v. Legacy Hotels Real Estate Investment Trust*, [2003] O.J. No. 1341; 2003 ON.C.LEXIS 722 (“*Four Seasons Hotels v. Legacy Hotels*”), ¶ 22.

58. **The Claimant** denies that Arbitration Rule 34(2)(b) can be interpreted in the sense which the Respondents give it. Quoting from Professor Schreuer’s book they state “inquiries are related to visits by the tribunal”;⁴⁵ a visit to Calgary by these Tribunals is neither suggested nor warranted.⁴⁶

59. More generally, the Claimant argues that an ICSID tribunal does not have the power to proceed as requested by the Respondents. They quote again from the book by Professor Schreuer:

*The Convention does not provide for the right of an ICSID tribunal to enlist the assistance of national authorities, notably domestic courts, to obtain evidence. Under Arbitration Rule 39(6), the parties may agree that provisional measures may be requested from domestic courts. But such requests may be made by the parties only. There is no explicit legal basis for a tribunal’s request for judicial assistance.*⁴⁷

60. The Claimant also refers to the “object and purpose of the Convention, which was to establish a purely international dispute settlement regime not subjected to national court intervention or review”. The Claimant argues:

*A consequence of the Convention’s stand-alone dispute settlement regime is that, contrary to accepted practice in commercial arbitration, resort to national courts for provisional measures in aid of arbitration is not permissible unless the parties explicitly agree to it. Prior controversy as to whether national provisional measures were permissible in aid of ICSID arbitration was resolved by a 1984 amendment to the Arbitration Rules, clarifying that resort to national courts in this instance was permitted if the parties agreed.*⁴⁸

61. In their reply of 28 February 2017, **the Respondents** also quote from Professor Schreuer’s book concerning the scope of the powers under Arbitration Rule 34:

⁴⁵ C. Schreuer *et al.*, op. cit., Article 43, at 670, paragraph 121.

⁴⁶ Letter of 15 February 2017, p. 3.

⁴⁷ C. Schreuer *et al.*, op. cit., Article 43, at 653-654, paragraph 52., referenced in the Claimant’s letter of 15 February 2017, p. 3.

⁴⁸ Letter of 15 February 2017, pp. 2 – 3.

Under the Arbitration Rules ..., the word ‘or’ indicates that visits by the tribunal and inquiries are alternatives. There is no good reason why a tribunal should not entrust an inquiry to a competent individual or to some body or organisation in analogy to witness testimony under Arbitration Rule 36.⁴⁹

62. The Respondents refer to a case where an ICSID tribunal directed an enquiry to a non-Party government and then relied on some of the information so received.⁵⁰ They also rely on the “gap-filling function of Article 44” which provides *inter alia*:

If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

63. The Respondents contest that the “self-contained nature of the ICSID system” would be jeopardised by a request such as they seek in their Application:

Such a request would not subject the Tribunals’ decision to the review of national courts, but would instead assist the Tribunals in carrying out their duties within that self-contained system. The Canadian courts will simply grant or deny the Tribunals’ request, and will have no authority to challenge the Tribunals’ competence to decide the issues before them or review their decisions.⁵¹

64. The Respondents also submit that, when deciding the Application, “the Tribunals should be guided by the International Bar Association’s Rules on the Taking of Evidence in International Arbitration” (the IBA Evidence Rules) and point out that the Claimant had invoked these rules in the proceedings on jurisdiction. The Respondents specifically quote Article 3.9 of the IBA Evidence Rules as follows:

If a Party wishes to obtain the production of Documents from a person or organisation who is not a Party to the arbitration and from whom the Party

⁴⁹ C. Schreuer *et al.*, op. cit., paragraph 121, pp. 670-671 quoted in Letter of 28 February 2017, p. 4, emphasis in the quotation by the Respondents.

⁵⁰ *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction (21 Oct. 2005) (Caron, Alberro-Semerena, Alvarez), ¶ 47 (CLA-40), referred to by the Respondents’ submission of 28 February 2017, p. 4.

⁵¹ Letter of 28 February 2017, pp. 7 – 8, emphasis in the original.

*cannot obtain the Documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such steps itself [...]. The Arbitral Tribunal shall decide on this request and shall take, authorize the requesting Party to take, or order any other Party to take, such steps as the Arbitral Tribunal considers appropriate if ... [certain conditions are met].*⁵²

65. The Tribunals have considered the Parties’ arguments with respect to the question whether they have the power to address the Court in Alberta in the manner requested by the Respondents, or in a modified form, with the objective of securing evidence through its assistance.
66. There is no dispute between the Parties that, in commercial arbitration, tribunals may seek assistance from national courts in the manner described by Professor Born. Such intervention may be seen as inherent in a tribunal’s function if and to the extent to which this is necessary to a fair examination of the parties’ cases.
67. Nevertheless the Tribunals are mindful of the fact that the system of arbitration created by the Contracting States to the ICSID Convention was particularly designed to operate without the involvement of national courts. Consent to arbitration under the Convention is, unless otherwise stated, ‘deemed consent to such arbitration to the exclusion of any other remedy’.⁵³ The ability to seek provisional measures from national courts in aid of arbitration, which is a common feature of commercial arbitration, is excluded from ICSID arbitration unless the parties have stipulated otherwise in their instrument of consent.⁵⁴
68. Article 43 of the ICSID Convention, which deals with evidence, specifically empowers an ICSID tribunal, under paragraph (a) to call upon the parties to produce documents or other evidence. In this regard the Convention lays the primary responsibility on the parties to assist the Tribunal by bringing forward the evidence necessary to the fair disposition of the dispute.
69. The Contracting States also permit the ICSID tribunal to visit the scene “and conduct such inquiries there as it may deem appropriate”. It contains no general power upon tribunals to

⁵² Quoted in the Letter of 28 February 2017, p. 5; emphasis in the quotation by the Respondents.

⁵³ ICSID Convention, Article 26.

⁵⁴ ICSID Arbitration Rule 39(6).

compel the appearance of witnesses. A proposal to include such a power was defeated during the Convention’s framing.⁵⁵ The Convention does not confer an express power upon tribunals to seek the assistance of national courts in this regard and consequently creates no international obligation on the part of Contracting States to render assistance to an ICSID tribunal in evidence gathering.

70. For the purpose of this decision, the Tribunals are content to assume, without finally deciding, that, despite the absence of such an express power, an ICSID tribunal may, in an appropriate case where it is satisfied that a request under Article 43(a) of the Convention would be unavailing, be entitled to issue a request for assistance in the collection of evidence to a national court or (in what would likely be the more suitable step) to permit a party to pursue such a request directly. Although no such power is expressly included in the Convention and Rules, neither is it expressly excluded. It might be said that such a request for assistance, when issued under the control of the tribunal, supports its exclusive jurisdiction and does not undermine it, since it submits no part of that jurisdiction to the national court. Article 44 does confer upon tribunals broad powers to decide any question of procedure not covered by the Convention and the Rules.
71. Although the present Tribunals have for the purposes of their analysis assumed in favour of the Respondents the existence of such a power, they nevertheless, for reasons that follow, do not consider that the Respondents have made out a sufficient case for its exercise in the present case.

1.4.2 The conditions for a request to a domestic court

72. The initiative of an ICSID tribunal as that requested by the Respondents would be a very unusual step; indeed the Respondents have not found any precedent. Such a request would be an exception to the general principle according to which the production of evidence is the responsibility of the parties to an arbitration. The Respondents accept that an intervention by these Tribunals with the Alberta Court is conditional on a number of requirements being met. They have identified the requirements under the Canadian Evidence Acts; and they have referred to Article 3.9 of the IBA Evidence Rules. The conditions which must be met under this provision correspond to a large extent to those of the requirements in Canada. Article 3.9 provides that the tribunal makes the order

⁵⁵ C. Schreuer *et al.*, *op. cit.*, paragraph 51, p. 653.

... if, in its discretion, it determines that (i) the Documents would be relevant to the case and material to its outcome, (ii) the requirements of Article 3.3, as applicable, have been satisfied and (iii) none of the reasons for objection set forth in Article 9.2 applies.

73. The requirements of Article 3.3 of the IBA Evidence Rules include specificity in the description of the requested documents, and

a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce the Documents.

74. Article 9.2 of the IBA Evidence Rules includes among the reasons for excluding from document production:

(c) *unreasonable burden to produce the requested evidence,*

[...]

(g) *considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.*

75. The Respondents themselves have defined that an intervention as that which they request the Tribunals to make, must concern evidence which *inter alia* must be:

- (i) not otherwise obtainable;
- (ii) relevant and necessary;
- (iii) identified with reasonable precision
and the order must not be unduly burdensome.

76. More generally, the Tribunals will be guided by considerations of economy, proportionality, fairness and equality when considering whether they should submit to the Court in Alberta the requests in question.

1.4.3 Is the requested evidence available to the Respondents?

77. The evidence which the Respondents wish the Tribunals to request from the Court in Alberta is part of an investigation, which, in the words of the Respondents, was “of a breadth and depth which is not possible in the context of ICSID proceedings”. As it has become clear from the explanations presented to the Tribunals, this investigation was conducted jointly by the authorities in Bangladesh, in Canada and in the United States.
78. It has now been revealed by Mr Khan in his second witness statement of 17 February 2017, that
- The vast majority of that evidence was gathered in Bangladesh in joint efforts between Canadian and Bangladeshi officials.*
79. This evidence was given to the RCMP, through mutual legal assistance between Bangladesh and Canada, “processed, indexed and scanned to create a common source for the use of both countries and U.S. enforcement agencies” and “returned to Bangladesh through the mutual legal assistance process ...”.⁵⁶
80. For almost a year the Respondents have sought through various initiatives to involve the Claimant and the Tribunals in gathering evidence of which “the vast majority” is in the possession of the authorities in Bangladesh. In their Memorial on Damages of 25 March 2016, the Respondents state that “the ACC provided them with some of the evidence that it recently submitted to the Bangladesh court”.⁵⁷ But the Respondents also assert that they had no access to the ACC evidence until September 2016 when they received some of it through Mr Khan. Some of this evidence then was produced with the Respondents’ Memorial on Corruption on 23 November 2016, further evidence only with their Reply on Corruption of 22 February 2017.
81. The Respondents have asserted that “other than the court orders available [they] had no information on the content of the ACC investigation or what evidence was being gathered”. They have also asserted that the “Government has no control over the activities of the ACC and, for obvious reasons, the ACC has no obligation to share information with the Government, much less a company like BAPEX or Petrobangla”.⁵⁸

⁵⁶ WS Khan II, paragraph 10.

⁵⁷ Memorial on Damages, pp. 20 and 21, quoted above in paragraph 22.

⁵⁸ Memorial on Damages, p. 20.

82. In March 2016, the Respondents stated that they “have requested documentation from the ACC on the Niko corruption case”;⁵⁹ but the Respondents have not provided any evidence of or even explanations about circumstances of these requests and basis on which they were made and replies received from the ACC. In August 2016, when they sought the assistance of the Tribunals in the proceedings brought by Professor Alam and his application for access to Mr Khan’s evidence, the Respondents explained: “Because this evidence is part of the ACC investigation, without authorisation from the ACC or a Bangladeshi court order, such evidence is not available to Respondents or these Tribunals”.⁶⁰ Once again, the Respondents failed to provide any evidence or explanations about any steps they themselves have taken towards the ACC, or in relation to a possible Bangladeshi court order for the release of the “shared evidence” to which they referred in their letter of 8 August 2016.
83. The Respondents explained that “the ACC provided them with some of the evidence that it recently submitted to the Bangladesh court”;⁶¹ but they did not specify the evidence so released. When the Respondents later produced evidence from the investigation, which they say they had received from Mr Khan, they did not provide explanations about what they had received from him and what was still missing.
84. In his second witness statement, Mr Khan explained that he understood “that providing this evidence to the Arbitral Tribunal is appropriate, and the information was given to the Tribunals with the consent of the Government”.⁶²
85. In these circumstances, the Tribunals do not accept that the Respondents do not have access to the evidence from the joint Bangladeshi/Canadian investigation. The Respondents have not alleged that any of the items of evidence they seek to obtain through the Alberta Court were not included in the “vast majority” of the evidence gathered and exchanged in this investigation. The Tribunals see no justification to intervene with a court in Canada in order to obtain evidence which is available in Bangladesh and of which the Respondents have not shown that it is not accessible to them there.

1.4.4 Relevance and materiality of the requested evidence

⁵⁹ Ibid.

⁶⁰ Letter of 8 August 2016, p. 2.

⁶¹ Memorial on Damages, pp. 20-21.

⁶² WS Khan II, paragraph 10.

86. The Parties differ with respect to the question whether the nature of the items of evidence requested by the Respondents and their description justify an intervention by the Tribunals. The Tribunals therefore have considered the alleged usefulness and relevance of specific items of evidence which the Respondents seek to obtain in Canada with the assistance of the Tribunals.

87. The Claimant objected to the Application by stating:

The Respondents have not identified in the proposed request a single piece of direct evidence as missing from the material they already have available, or even any suggestion or basis to think that such additional direct evidence exists. Instead, they are seeking further hearsay evidence together with testimony of someone with no direct knowledge of the circumstances from whom they seek to elicit opinions about the hearsay evidence. Indeed, the Respondents now even go so far as to submit in their 10 February letter that the Tribunals should hear from Corporal Duggan because he heard the individuals interviewed and can provide his views as to their credibility and the credibility of their unsworn statements. To accede to such an approach would make a mockery of the concepts of fairness and due process, and would discredit the arbitral process.⁶³

88. The Tribunals noted that five of the identified items of evidence are video recordings of interviews with persons named or identified by reference to the Duggan affidavit; in most cases the transcript of the video recordings is also requested. The Claimant objects to this request, arguing:

Again, any such materials are not properly evidence and, for the reasons previously articulated (including the inability of the Tribunals or the Claimant to hear the witnesses under oath and test their evidence and credibility), there is no benefit to be obtained by undertaking what even the Respondents now admit would be a complex and time consuming application process.⁶⁴

⁶³ Letter of 15 February 2017, pp. 6 – 7.

⁶⁴ Letter of 15 February 2017, p. 6.

89. The Tribunals are of the view that interviews and transcripts as those which the Respondents seek to obtain with the assistance of the Alberta Court are not as such excluded as evidence. The Claimant does not cite any rule applicable in ICSID arbitration which would require their exclusion from the record of the arbitration. The Tribunals accept, however, that statements on a video recording in circumstances prevailing here have to be considered with great caution. Neither the Claimant nor the Tribunals were involved in determining the circumstances of the interview, in the choice of questions that were put to the persons interviewed or had any other possibility to question these persons. The evidentiary value of such statements, therefore, is at best very limited.
90. A sixth item of evidence in the list of the Respondents’ application concerns again video interviews and transcripts; but their identification is only in general terms: “conducted in the Niko investigation”. In addition to the limited evidentiary value just described, this request therefore is deficient also by its lack of specificity.
91. This sixth item of requested evidence also includes “other evidence of corruption in obtaining the JVA and GPSA referenced by Corporal Duggan in his affidavit”. Such a request surely is likely to fail in the Alberta Court for lack of specificity.
92. Finally, the request which the Respondents wish the Tribunals to address to the Alberta Court concerns the appearance of Corporal Duggan before the Tribunals to be “examined under oath before the ICSID Tribunals and counsel for BAPEX and Petrobangla and then cross examined by counsel for Niko in relation to his investigation of Niko that led to its conviction on June 24, 2011”. The Respondents explained that the evidence which they have produced “can best be evaluated if the Tribunals benefit from the testimony of the RCMP’s lead investigator, Corporal Kevin Duggan”. They state that Corporal Duggan “can provide key information on how the evidence was gathered and the context in which it is to be understood”; and “he can help the Tribunals assess the demeanour of the witnesses and the conditions under which they were interviewed”.⁶⁵
93. In order to decide whether the JVA and the GPSA were obtained by corruption, the Tribunals require evidence. The Respondents have produced an important amount of evidence, which in their opinion establishes that these agreements were indeed obtained by corruption. The Tribunals will examine this evidence. In the absence of any alleged illegality in the gathering of this evidence, the manner in which the evidence was gathered is at best of limited relevance. As to the usefulness of the work carried out by Corporal

⁶⁵ Letter of 10 February 2017, p. 1.

Duggan to the Tribunals in their evaluation of the evidence, the Tribunals expect that this will be debated by counsel as part of their argument.

94. In these circumstances, the Tribunals conclude that the evidence which the Respondents seek to obtain through the Tribunals’ intervention with the Alberta Court is of limited probative value at best. Even if this evidence were not already in the possession of the Respondents or accessible to them, the Tribunals would have to examine whether this limited probative value could justify the complex procedure of a request to the Court in Alberta with an unpredictable duration and an uncertain outcome.
95. **In conclusion:** By their letter of 10 May 2016, the Respondents expressed their belief that no “further evidence is needed for the Tribunal to grant [their] requests for relief”. Since then they have produced additional documents and witness statements. They have described the very broad investigation of Niko’s corruption conducted jointly by the Bangladeshi, Canadian and U.S. authorities and provided evidence gathered during the course of this investigation. They have failed to demonstrate that the evidence for which they now request the Tribunals’ assistance is not available to them and, if it were not available to them, what steps they have taken to obtain it in Bangladesh. In any event the limited probative value of the requested evidence does not justify the intervention of the Tribunals in a complex and most unusual procedure.
96. Consequently, the Respondents’ application that the Tribunals make the request to the Court in Alberta as presented in the Respondents’ draft of 10 February 2017 is dismissed.

II. Mr Khan and Ms LaPrevotte Griffith as Witnesses and the Weight of Statements by Persons not Appearing as Witnesses

97. With their Memorial on Corruption of 23 November 2016, the Respondents had produced witness statements *inter alia* of Mr Khan and Ms LaPrevotte, describing the joint investigation. The Respondent declared that both persons are available for examination at the Hearing on Corruption, scheduled for 24 to 28 April 2017 (with 29 April in reserve). In its letter of 11 January 2017, the Claimant raised the question “[w]hether it will be useful for ‘witnesses’ with no personal knowledge of the facts they address, such as Mr. F. Khan and Ms. LaPrevotte Griffith, to testify at the Evidentiary Hearing and for Niko to prepare to cross-examine such ‘witnesses’”. The Respondents replied on 17 January 2017, insisting that these persons be heard, arguing that they are “entitled to marshal the evidence and make arguments without a referee making calls mid-play”.

98. At the Status Conference the Claimant clarified that it does not seek the exclusion of the evidence in question; rather the Claimant argued that no or very little weight should be given to any such evidence. According to the Claimant, advance clarification of this aspect could be of assistance to the Claimant when deciding whether to call Mr Khan and Ms LaPrevotte Griffith to testify at the evidentiary hearing, or otherwise assist in the preparation of its forthcoming submission. The Respondents announced during the Status Conference their intention of calling Mr Khan and Ms LaPrevotte Griffith to appear for testimony at the April 2017 hearing.
99. Concerning the witness statements of these two persons, the Tribunals noted that their testimony concerns aspects of the joint investigations of the Niko corruption allegations. The statements include assessment of the evidence gathered about corruption in Bangladesh in general and against Niko specifically. The testimony of these two persons is similar to that of Corporal Duggan, except that, according to the Respondents, no legal assistance intervention by the Tribunals with the Court in Alberta is required.
100. The Tribunals are aware of the Claimant’s objections concerning the hearsay nature of much of the two witness statements. The Tribunals note that they are not bound by strict rules on the admissibility of evidence. The Tribunals will take the Claimant’s observations into consideration when it comes to the assessment of the testimony.
101. The Tribunals admit the appearance of Mr Khan and Ms LaPrevotte Griffith as witnesses. Following the procedure previously adopted for other witnesses, witness statements are accepted as direct testimony if the witnesses appear for examination when called upon to testify.

III. The Target Period

102. In their letter of 26 January 2017 the Respondents requested that the Target Period be extended beyond the time fixed in Procedural Order No 15. In support of this request the Respondents argued that, prior to the BNP government, Niko laid the grounds for corruption and for making payments with the objective of corruption. While confirming that the corrupt system within the Government was limited to the period under the BNP Government between 2001 and 2006, the Respondents stated that the Sheikh Hasina Government was not corrupted but individual actors may have been. The Respondents continue to hold that the FoU was tainted by corruption and request that the Target Period be extended to the time prior to the BNP Government. The Respondents state that after the

end of the BNP Government in early 2007, no corrupt payments were received by the Government from Niko.⁶⁶

103. The Tribunals repeat here what they have pointed out at previous occasions: they are not a criminal investigator or court charged with punishing acts of corruption. Their mandate at this stage of these arbitrations is to determine whether the JVA and the GPSA were obtained by corruption. Acts of corruption which were not causal for the conclusion of the two agreements do not appear to be decisive for this determination.
104. It is the Respondents’ case that BAPEX and Petrobangla themselves were not corrupted but were instructed by corrupted members of the Government to execute the JVA and the GPSA. No such corrupted Government instructions are alleged for the period prior to the BNP government. The Tribunals, therefore, see no justification for extending their examination beyond the Target Period, as defined in Procedural Order No 15. They do not exclude, however, evidence outside the Target Period and will consider it.

IV. Appointment of a Forensic Expert to Review Niko’s Records

105. In a draft for Procedural Order No 15, which they submitted to the Parties for comment, the Tribunals had noted that the Niko Group produces consolidated accounts for the fiscal years ending on 31 March. They concluded that any payment from a company of the Niko Group to third parties in Bangladesh must be reflected in these consolidated accounts. At 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 accepted this production as possibly sufficient measure in the production of financial records; but they reserved 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 reserved the right to order a statement of the auditor of the Niko Group.
106. The Claimant did produce financial records. The Respondents are of the view that the production is insufficient. They produced with their letter of 23 November 2016 the opinion of Duff & Phelps, “a global financial firm with expertise in complex valuation,

⁶⁶ The Claimant disagrees with the Respondents’ suggestion that the BNP coalition remained in power until 2007. In fact, BNP left office in October 2006 with a caretaker government in control to organize elections that were disrupted, followed by a military caretaker government and new elections in 2008.

disputes, compliance, and regulatory consulting, among other topics”.⁶⁷ In this opinion, the firm stated:

The documents provided by Niko were unorganised, incomplete, and do not meet the level of documentation needed to conduct a proper corruption examination....

107. In the correspondence leading up to the Status Conference on 30 January 2017, the Respondents made an application concerning the appointment of a financial expert by the Tribunals. In their letter of 26 January 2017 they wrote:

Specifically, Respondents maintain that the Tribunals should reconsider, as envisaged in Procedural Order No. 15, [...] ordering Claimant to open its financial records for the entire relevant period (2001-2006) to review by an independent financial expert.

108. The Claimant stated that the Respondents produced extensive financial records of third Parties but did not tender any report from a forensic expert. The Claimant added that it does not see any justification why it should commission such a forensic expert concerning its own records. Concerning the Respondents’ complaint about the insufficiency of the records on Niko’s payments which it produced, the Claimant asserted that the Respondents did not argue that channels of payment other than those indicated by the Claimant were used; rather they questioned the Claimant’s explanations concerning the use of the funds transferred to Bangladesh. The Respondents confirmed that, other than the note by Duff & Phelps, their experts had not produced any opinion on the documents disclosed by the Claimant.
109. The Respondents stated that the Claimant has not provided the necessary information that experts would need to conduct an analysis of possible corruption emanating from Niko’s accounts. In their application of 14 March 2017, the Respondents request that the Tribunals order the following groups of documents:
- (i) complete records of all payments to Bangladesh, including to third parties made by any of the companies of the Niko Group, pursuant to the Claimant’s commitment which had been recorded in Procedural Order No 15;

⁶⁷ Respondents’ letter of 23 November 2016, FN3.

- (ii) relying on the opinion of Duff & Phelps, “complete records” should include: “copies of checks, deposit slips, records of electronic transfers, invoices to support payments, receipts, and general ledgers to understand the payments between Niko, Stratum, Mr Sharif, Mr Bhuiyan, Mr Mamoon and others, including payments through intermediaries and foreign accounts;”
 - (iii) all reports by Mr Sharif or Stratum “on the use of the funds” received from Niko;
 - (iv) correspondence and other documents, pertaining to payment negotiations or received by Five Feathers for any service provided.
110. The Tribunals have considered, as they now have learned from the witness statements of Mr Khan and Ms LaPrevotte Griffith, that the joint investigation included extensive examination of the financial transactions of the Niko Group. On the basis of the evidence and considerations set out above, the Tribunals have concluded that the Respondents have access to the results of this investigation or, at least, have failed to demonstrate that they made diligent efforts to gain such access. They have indeed shown by some of the evidence produced with their submissions on the Corruption Issue that at least some of the evidence now requested from the Claimant was in their possession.
111. In these circumstances, the Tribunals see no justification to order the Claimant to produce documents of a type that had been made available already by the Niko Group and others during the course of the joint investigation and of which at least the “vast majority” is in the possession of the Bangladesh authorities and available to the Respondents. The request is denied.

V. Documents from the Criminal Investigation

112. In their letter of 10 May 2016 the Respondents made reference to a statement which the former counsel of the Claimant had made during the course of the hearing on jurisdiction. At that occasion the Claimant disclosed the agreed statement of facts with Niko’s conviction in Canada, referred to previously and the charge sheet of the ACC. Counsel explained that their law firm, having represented Niko in the criminal proceedings had “additional information relating to the ACC and the Canadian investigation and possibly the US investigation”.⁶⁸

⁶⁸ Transcript of the Hearing on Jurisdiction of 14 October 2011, p. 38.

113. In their letter of 14 March 2017 the Respondents request that the Claimant produce “records in any format held by or available to Claimant or its former counsel pertaining to the ACC, Canadian, or U.S. investigations of Niko’s activities in Bangladesh”.
114. The Tribunals note that the vast majority of these records or copies thereof are in Bangladesh. Important documents from this record have been produced by the Respondents in these arbitrations. The Respondents have not made any effort to identify with any specificity documents which are relevant and material for the Tribunals’ decision and to which they do not have access.
115. In these circumstances, the Tribunals see no justification for ordering the Claimant to produce the requested records.

VI. Niko Correspondence

116. In their letter of 14 March 2017 the Respondents request documents under the heading of “Relevant and material correspondence key to Niko’s corrupt scheme in Bangladesh”. The requested documents are described as follows:
- (i) Correspondence, including but not limited to email messages, not⁶⁹ sent to or by Respondents, and other documents concerning
 - (a) the possibility of, prospects for, or possible means of convincing the relevant government entities to hear and consider Niko’s proposals;
 - (b) the possibility of, prospects for, or possible means of securing a JVA without a competitive bid process (*i.e.*, the Swiss Challenge process);
 - (c) the possibility of, prospects for, or possible means of including Chattak East in the JVA;
 - (d) Claimant’s contracts with Stratum, including preparatory drafts;

⁶⁹ The Tribunals presume that the word “not” is an error.

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- (e) any opinion drafted by Claimant’s counsel, Moudud Ahmed & Associates, in relation to Claimant’s alleged investment;
 - (f) Niko’s efforts to propose or support a proposal for the Ministry of Energy to seek a legal opinion from the Law Ministry at the time Moudud Ahmed was Law Minister;
 - (g) the rationale behind Niko’s decision to hire Senator Harb;
 - (h) Claimant’s contracts with Mr. Bhuiyan’s company, Nationwide, including preparatory drafts, and anything pertaining to the payment negotiated or received by Mr. Bhuiyan or Nationwide for any service provided and any discussion of Mr. Bhuiyan’s role in assisting Niko to procure the JVA and GPSA.
- (ii) As Claimant already consented to provide, all “records in its possession relating to payments (if any) made to or communications with” Barrister Moudud Ahmed, Mr. AKM Mosharraf Hossain, Mr. Khandker Shahidul Islam, Mr. Selim Bhuiyan, former Prime Minister Khaleda Zia, Tareq Rahman, and Giasuddin Al Mamun; and
 - (iii) Communications, including but not limited to email messages, regarding the negotiation and finalization of the FoU, the JVA, or the GPSA, between any company in the Niko group or their officers and/or agents and Mr. Qasim Sharif.⁷⁰

117. This is a request with a very broad scope. Some of the items of the request have been made previously and the Claimant had accepted production (e.g. item (ii)). The Tribunals would have expected from the Respondents, beyond the general complaint that has been discussed above in the context of the financial statements and the request for the appointment of a forensic expert, an indication of what, in compliance with this commitment, had been received with respect to each of the persons identified, and what remained outstanding.

118. Most of the items of the request do not identify documents with specificity but describe subjects of enquiry; many of these subjects may or may not imply corruption. For instance, correspondence concerning “possible means of convincing the relevant government

⁷⁰ The numbering of these paragraphs has been added; footnotes omitted.

entities to hear and consider Niko’s proposals” (item (i)(a)), would appear to have a legitimate purpose. Perusing this correspondence may or may not reveal an intention of Niko to use corrupt means. Even if it does, it may not provide information on whether such an intention was implemented; and even if it turned out that Niko used corrupt means to convince a relevant government entity to consider its proposals, it would have to be examined whether, in this manner, the JVA and the GPSA were procured by corruption. Similar considerations apply to other items of the request, e.g. (i)(b) and (c).

119. Similarly, in item (i)(g) the Respondents request correspondence and other documents concerning the “rationale behind Niko’s decision to hire Senator Harb”. The Respondents accept that “Niko’s hiring of the Senator alone does not prove corruption. But in the circumstances it is additional evidence that Niko was concerned that the GPSA would never be concluded and would pay whatever was needed to get it signed”.⁷¹ The Tribunals are not persuaded that evidence about Niko’s rationale for engaging the services of Senator Harb would be necessary to determine whether the GPSA was obtained by corruption; and, according to the evidence produced, only the conclusion of the GPSA was outstanding when Senator Harb intervened.
120. Some of the requested evidence would seem to be available in Bangladesh, irrespective of the results of the joint investigation. For instance, in (i)(e) the Respondents request legal opinions prepared by the law firm Moudud Ahmed & Associates and which, as the Respondents state in their Memorial on Corruption, “had been forwarded to the Ministry of Energy”. In that memorial the Respondents also assert that the opinions were submitted to the Law Minister whose “opinion essentially repeats the opinions that Niko had obtained from his private law firm and submitted to the Ministry of Energy [...]”. The Respondents do not explain how they could make these assertions about the content of these opinions without having seen the opinions; nor do they explain why they could not obtain the opinions from the relevant Ministries, assuming they were not also included in the evidence collected by the ACC.
121. Having considered the Parties’ submissions and the evidence produced about the joint investigation, the Tribunals conclude that the subject areas identified in the Respondents’ list of the production request must also have been considered by the joint investigation. The Tribunals conclude that all relevant evidence, or the vast majority thereof, that could be obtained from the ACC, RCMP and the FBI is in the possession of the authorities in Bangladesh and accessible to the Respondents. They see no justification to initiate now,

⁷¹ Respondents’ Memorial on Corruption, paragraph 140.

one year after the Corruption Issue had been raised by the Respondents, such measures which, at best, would be duplicative of the joint investigation performed by organisations of incomparably greater means of investigation.

122. This being said, the Tribunals must point out that some of the documents in this list, as explained by the Respondents, had indeed been requested previously by the Respondents and the production of some of the requested documents had been ordered by the Tribunals. **The Tribunals therefore order:**

- (i) **the Claimant** forthwith to comply with any orders for the production of documents made by the Tribunals that have not yet been complied with;
- (ii) **the Respondents** to produce within one week of receipt of this Procedural Order and by reference to each of the document production orders made by the Tribunals or accepted by the Claimant, a list identifying documents that have been received and those that remain outstanding;
- (iii) **the Claimant** to produce within one week of the receipt of the list as per the previous paragraph the documents so identified as outstanding or, for those documents which it does not produce, the reasons why this is so.

123. The Tribunals may draw **adverse inferences** if it appears to them that the documents so produced by the Claimant are incomplete and without convincing explanations for missing documents.

VII. Treatment of Confidential Documents

124. Following a request by the Respondents in their letter of 29 January 2017, the issue of the treatment of confidential documents was addressed again during the Status Conference on 30 January 2017. The Parties stated their respective positions.

125. Contrary to what had been envisaged at that occasion, no proposal for a modification of the arrangements concerning confidential documents was proposed or agreed.

126. The Tribunals conclude that no change is required. The Tribunals’ instructions remain in force.

VIII. Pre-Hearing Organizational Meeting

127. Further to the consultation with the Parties during the Status Conference, the pre-hearing conference envisioned in Procedural Order No. 15 will be held by telephone on Monday 10 April 2017 and commence at the same hours as the 30 January 2017 Status Conference. Unless either Party requests by 6 April 2017 that, due to the important nature of the issues to be dealt with, the pre-hearing conference must be before the full Tribunals, the Parties agree that it will be conducted by the President alone.
128. If during the course of the telephone conference issues of substance arise that require the decision of the Tribunals, such decision will be taken subsequently by the full Tribunals and communicated to the Parties in writing.

IX. Witness Notification

129. The Parties will notify each other and the Tribunals by 7 April 2017 which witness(es) they require to be made available for examination at the hearing scheduled for the week of 24 April 2017.

[signed]

On behalf of the two Arbitral Tribunals

Michael E. Schneider

President

23 March 2017