

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 21

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 21

(Procedure on further document production, privilege claims and related matters)

Following the Hearing in Paris, completed on 29 April 2017, and Procedural Order No 20 of 17 May 2017, the Parties made a number of submissions which the Tribunals now address:

As a preliminary observation the Tribunals point out that they seek to fix deadlines for procedural steps that are reasonable in the circumstances in the interest of efficient proceedings. If the Parties face difficulties in meeting these deadlines, they are invited to inform the Tribunals immediately so that the Tribunals may consider whether an extension is justified. In the absence of an extension, the deadlines must be respected, subject to the Tribunals discretion to accept late submissions in exceptional circumstances.

1. The Tribunals recall that during ██████████’s testimony at the April 2017 Hearing on the Corruption Claim, he made reference to an audit conducted by Deloitte in the context of the investigation against Niko Canada. Specifically, ██████████ mentioned a PowerPoint presentation accounting for the results of the audit. Counsel for the Claimant confirmed their understanding that such a presentation existed. The Respondents requested production of this presentation and any related documents. The Claimant observed that there might be valid grounds for the assertion of privilege. Following discussions during the hearing, the Claimant was given the opportunity to examine the matter and inform the Tribunals by no later than 8 May 2017 which documents existed and whether the Claimant asserted privilege in respect to any of these documents. No such submission on privilege was received by the Claimant by 8 May 2017. By letter of 11 May 2017, the Respondents requested that “the Tribunals order the Claimant to immediately produce the PowerPoint, the full Deloitte report, and a list of all the documents related to the Deloitte audit.”
2. In Procedural Order No. 20 the Tribunals ordered the Claimant to:
 - 1.1 *produce to the Tribunals and the Respondents a list of*

Procedural Order No 21

- (a) *all documents which were produced by Deloitte as part of the audit of the corruption issue, to which ██████████ referred in his oral testimony (the Deloitte Audit List) and*
- (b) *documents derived from these documents, such as the PowerPoint presentation mentioned by ██████████ and the minutes of Board Meetings at which the Deloitte report was discussed*
- 1.2 *identify on the Deloitte Audit List those documents for which Niko claims privilege, and state the reasons for the privilege claim (submission on privilege); and*
- 1.3 *produce to the Tribunal and the Respondents those documents for which no privilege is claimed.*
3. The Tribunals ordered the Claimant to produce these documents within three days following receipt of the Procedural Order. Paragraph 2 of Procedural Order No. 20 granted the Respondents an opportunity to respond to the Claimant’s submission on privilege within five days of receipt of such submission.
4. By letter of 22 May 2017, the Respondents stated that the Claimant had failed to comply with the previous deadlines established at the hearing and in Procedural Order No. 20, requesting “the Tribunals to declare that they will disregard any untimely filing on privilege and order Claimant immediately to produce to the Tribunals and the Respondents” the documents identified in Procedural Order No. 20.
5. On 22 and 23 May 2017, the Claimant filed Exhibits C-237 to C-251, which included the Deloitte Retainer Agreement, Audit Committee Minutes and Board Meeting Minutes of Niko Canada (in redacted and unredacted form). The Claimant also provided a Schedule listing the documents that existed and in relation to some of which the Claimant asserted privilege in whole or in part. In its 22 May 2017 covering letter (filed in redacted form on 23 May 2017), the Claimant explained the context of Deloitte’s work, stated its view as to the applicable law on privilege and made submissions as to privilege with respect to certain documents/parts of documents. The Claimant claimed privilege for the PowerPoint slides mentioned in Mr ██████████’s oral testimony and did not produce them. On 23 May 2017, the Claimant produced additional Board and Audit Committee Minutes and provided an updated version of the Schedule listing the relevant documents on 26 May 2017.
6. By letter of 26 May 2017, the Respondents objected to the Claimant’s submission on privilege, noting specifically that the Claimant failed to comply with the applicable deadline for its submission and requesting an opportunity to respond by Tuesday 6 June 2017. Specifically, the Respondents requested:

Procedural Order No 21

that the Tribunals, to the extent that they decide to consider Niko’s claims of privilege:

- 1) *Grant Respondents two weeks to respond to Claimant’s submission on privilege; and*
- 2) *Order Claimant to forthwith provide the following information mentioned above that it omitted from its submission on privilege:*
 - *A privilege log identifying for each withheld document: 1) the date, 2) the document type, 3) the author, 4) the addressee and all other recipients of the document, 5) a description of the document that states the subject matter and any other features relevant to privilege, including, for interview summaries, the identity of the interviewee and relationship of that person, if any, to Niko; and 6) the specific basis of the privilege asserted;*
 - *Indication of which redactions in the materials it submitted conceal allegedly irrelevant information and which conceal relevant but allegedly privileged information;*
 - *Information sufficient to identify the nature of KPMG’s work for Niko Canada, all documents and communications sent to KPMG concerning the Deloitte investigation, and the date and purpose of such disclosures;*
 - *Information sufficient to identify all documents and communications sent to or shared with the Canadian government or its officials concerning Niko’s corruption in Bangladesh;*
 - *Copies of all reports provided to the Canadian government pursuant to the Probation Order in Canada; and*
 - *Information sufficient to identify all documents and communications sent by Niko Canada to Claimant or its counsel concerning the Deloitte investigation, the date and purpose of such disclosures, and any further dissemination of such document by Claimant or its counsel.*
7. *By letter of 29 May 2017, the Claimant responded to the Respondents’ 26 May 2017 submission, objecting to it in substance and opposing the Respondents’ request for additional time to file their observations beyond the five days envisioned in Procedural Order No. 20 given that the Respondents are not required to produce any further documents. The Claimant also attached updated versions of Exhibits C-241, C-242, C-244, C-253, and C-254.*

Procedural Order No 21

8. On 2 June 2017, the Claimant requested a clarification “as to how the Tribunals’ orders imposing deadlines are to be construed.” The Respondents stated that they “object to Claimant’s mischaracterization of these events and reiterate their request that the Tribunals disregard Claimant’s late submission and, to the extent they do not, set a new deadline for Respondents’ response, at 6 June at the earliest.”
9. The Tribunals have noted the Parties’ communications concerning the Claimant’s submissions on privilege, and with respect to the timeliness of its submission. The Tribunals have noted the Claimant’s explanation concerning the collection of the information and documents requested in paragraph 1 of Procedural Order No 20 which was broader than what had been envisaged at the hearing. They concluded that the task was more difficult than they expected when they fixed the short time limit in that paragraph. Having considered the Respondents’ request and the Claimant’s explanations in the letters of 22 and 29 May 2017 and using the discretion available in respect to failures of a Party to meet deadlines, the Tribunals accept those explanations.
10. The Tribunals have considered the additional information requested by the Respondents in their letter of 26 May 2017 and summarised under paragraph 2 at page 4 of that letter.
 - 10.1 Concerning the first and second bullet point of paragraph 2: the Tribunals understand the Claimant’s assertion of privilege to concern all documents and information generated in the course of the Deloitte investigation commissioned by Gowlings. Depending on the decision which the Tribunals may take concerning this assertion, all interview summaries, the reports listed as items 14 and 18 and the PowerPoint slides listed as item 29 may have to be released and in the minutes of the Board and Audit Committee meetings the redactions concerning the findings of the Deloitte investigation may have to be removed. The Tribunals note the additional information provided by the Claimant in their letter of 29 May 2017 concerning the redactions in the minutes. In addition, those parts of these minutes which do not relate to the Deloitte investigation fall outside the Tribunals’ request and may remain redacted, irrespective of the reason for the redaction.

In these circumstances the Tribunals see no justification for ordering that the Claimant provide the additional details requested by the Respondents in the first and second bullet point.
 - 10.2 Concerning the information provided to KPMG, referenced in the Minutes of the Audit Committee on 22 June and 11 November 2009, the Tribunals, having regard to the Claimant’s letter of 29 May 2017, conclude that disclosure to KPMG as Niko’s auditor did not affect the right of Niko to claim privilege, and that the Respondents’ request is unfounded.

Procedural Order No 21

- 10.3 The questions in the fourth and fifth bullet points concern information provided by Niko to the “Canadian government or its officials concerning Niko’s corruption in Bangladesh” and “pursuant to the Probation Order in Canada”. These questions are outside the scope of the Tribunals instructions in Procedural Order No 20. The Respondents have long known of the Canadian investigations and could have sought this information much earlier. Procedural Order No 20 closed the evidentiary record with respect to the proceedings on the Corruption Claim. The Tribunals see no justification for opening the factual enquiry beyond the scope of the evidence that was specifically within the scope of that Order.
- 10.4 The Claimant has explained in its letter of 22 May 2017 that the information and documents about the Deloitte investigation was provided by Niko Canada to the Claimant further to the Tribunals’ request. The Tribunals saw no response to the Respondents’ question in the sixth bullet point concerning the communication between the Claimant and its parent company with respect to the Deloitte investigation. Given the Claimant’s insistence on the distinction between the Claimant and its parent company, the Tribunals invite the Claimant to comment on this question by no later than 7 June 2017.
11. The Respondents have requested to be given two weeks to respond to the Claimant’s submission on privilege. That period, starting with the Claimant’s submission on 22 May 2017, would end at 6 June 2017. In view of the time limit fixed for the response fixed above in paragraph 10.4, the time limit for the Respondents is fixed at five days after receipt of the Claimant’s response to the question in paragraph 10.4 above.
12. The Tribunals have considered the Respondents’ 15 May 2017 email, attaching a document identified as Annex E to the January 2003 draft of the JVA, which was referenced by Mr Elahi in his testimony during the April 2017 Hearing on the Corruption Claim. The Tribunals noted the Claimant’s observations of 25 May 2017, contesting that the document produced is indeed the correct version of Annex E. The Respondents may comment on these observations by 7 June 2017.
13. At the April 2017 Hearing on the Corruption Claim, the Tribunals invited the Respondents to produce all texts relevant to the asserted requirement of a competitive procedure concerning the conclusion of the JVA by Monday, 8 May 2017, failing which the Tribunals had to assume that no such texts existed. On 12 May 2017, the Respondents informed the Tribunals that they had undertaken a search for procurement regulations in force leading up to the signing of the JVA, and found two documents: Manual of Office Procedure (Purchase) (1978); and The

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 21

Public Procurement Regulations (2003). These documents have been introduced into these arbitrations as R-408 and R-409.

14. The Tribunals further note that by letter of 22 May 2017, the Respondents answered paragraph 3 and 4 of the Tribunals’ Procedural Order No. 20. The Tribunals have taken note of the Respondents’ statement that they have been “unable to find any 1996 regulations on the award of exploration and production sharing contracts”, and of the exhibits attached to the Respondents’ letter, which are admitted into the record as Exhibits R-410, R-411 and R-412.
15. The Tribunals have noted the Parties’ agreement to limit the size of the first round of post-hearing briefs to 40,000 words (incl. footnotes), which is said to amount to approximately 150 pages. The Tribunals approve of this agreement. It is the Tribunals’ understanding that the Parties are yet to reach agreement on the word count for the second round of the post-hearing briefs.

On behalf of the two Arbitral Tribunals

[signed]

Michael E. Schneider
President
4 June 2017